# Lawyer Insights

## Ch. 13 Ruling Issues Warning To Mortgage Servicers

By Justin Paget and Jennifer Wuebker
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On April 14, the U.S. Bankruptcy Appellate Panel of the Ninth Circuit issued an opinion in Orlansky v. Quicken Loans LLC, holding that a mortgage servicer violated the automatic stay by sending mortgage statements to the debtors that included post-petition attorney fees the servicer had incurred filing a proof of claim against the debtors and reviewing their Chapter 13 plan.

Although the monthly statements included a standard disclaimer that they were being provided for informational purposes only, the mortgage servicer listed the attorney fees as part of the current balance due, instead of including them in a separate section with the prepetition arrears.

As a result, the BAP concluded the mortgage servicer had sought to recover the attorney fees in a manner that pressured or coerced the debtors to immediately make the payment.

Thus, the BAP determined that the monthly statements violated the automatic stay of the U.S. Bankruptcy Code, Section 362(a).

Of particular note, the BAP stated that the mortgage servicer "could have easily averted the violation by listing the fees with prepetition arrears in the section which indicated those amounts were not part of ongoing payments."

It further warned that it is "incumbent upon creditors who send post-petition communications to clarify they are not attempting to collect prepetition debts."

**Key Considerations**

The main defense of the mortgage servicer was that because Bankruptcy Rule 3002.1(c) mandates the disclosure of post-petition fees, charges and expenses, such as the attorney fees in question, listing the attorney fees in the monthly statement could not have violated the automatic stay.

While the U.S. Bankruptcy Court for the District of Nevada accepted this argument, the BAP rejected it on appeal. This is noteworthy because Rule 3002.1 was enacted to, among other things, require mortgage servicers to provide notice of such fees and monthly payment changes without fear of violating the automatic stay.

While the BAP's decision in Orlansky was fact-intensive and nonprecedential, it suggests that bankruptcy courts in the Ninth Circuit may closely scrutinize post-petition communications with debtors as to how certain fees, expenses and other charges are presented.

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Mortgage servicers should not assume that they are insulated from automatic stay violations through compliance with Rule 3002.1 or the common informational-purposes-only disclaimers set forth on monthly statements.

As the BAP in Orlansky cautioned, any confusion as to whether a communication to a debtor is an attempt to coerce payment of a prepetition debt — in violation of the automatic stay — is likely to be resolved in favor the debtor.

We note below some best practices for mortgage servicers with respect to Rule 3002.1 notices and post-petition communications with debtors.

**Factual Background**

David and Sharon Lynn Orlansky filed their Chapter 13 bankruptcy petition in October 2020.

At the time of filing, they had a first mortgage on their primary residence serviced by Rocket Mortgage LLC. Rocket filed a proof of claim in the amount of $160,855.88, secured by the debtors' primary residence.

On Dec. 10, 2020, pursuant to Rule 3002.1(c), Rocket also filed a notice of post-petition mortgage fees, expenses and charges, in which it asserted a claim for attorney fees consisting of $500 for filing the proof of claim and $450 for reviewing the debtors' Chapter 13 plan.

After the petition date, Rocket continued sending monthly mortgage statements to the debtors. The statements included the following disclaimer:

> Our records show that either you are a debtor in bankruptcy or you discharged personal liability for your mortgage loan in bankruptcy. We are sending this statement to you for information and compliance purposes only. It is not an attempt to collect a debt against you. If you want to stop receiving statements, write to us.

The statements also listed the prepetition arrears in a section entitled "Amounts Past Due Before Bankruptcy Filing," which contained the following additional informational statement:

> This box shows amounts that were past due when you filed for bankruptcy. It may also include other amounts on your mortgage loan. The Trustee is sending us the payments shown here. These are separate from your regular monthly mortgage payment.

In December 2020, around the time Rocket filed the fee notice, it began listing the $950 in attorney fees on the debtors' monthly statements as "advances on your behalf" under the section entitled "Next Payment Breakdown (Post-Petition Payment)."

Unlike the prepetition arrears, the amounts in the post-petition payment section were included in the total payment amount, which showed the amount due on the statement due date.

The debtors paid the $950 in fees by June 2021, without filing a motion pursuant to Rule 3002.1(e) challenging the fees.

Thereafter, Rocket continued sending monthly statements listing $950 as advances, but also listing $950 as partial payment unapplied, which caused the total payment amount listed on the statements to return to the normal monthly payment amount due.

In November 2021, nearly a year after Rocket filed the fee notice, the debtors objected to Rocket's proof of claim, arguing, among other things, that the $950 in fees was unnecessary and unwarranted under the loan agreement. In response, on Jan. 18, 2022, Rocket voluntarily withdrew its fee notice, thereby withdrawing its request for reimbursement of the $950 in fees.

In February 2022, the debtors filed a motion for contempt asserting that Rocket willfully violated the automatic stay by including the $950 attorney fees claim on their monthly statements. They further contended that Rocket violated the automatic stay by wrongfully taking possession of, and retaining, the debtors' $950 payment.

In opposing the motion for contempt, Rocket argued that it did not violate the automatic stay because Rule 3002.1(c) specifically authorizes a creditor to provide notice of fees incurred after the petition date in connection with a claim secured by the debtors' principal residence.

It maintained that the attorney fees were not subject to the automatic stay because they arose from post-petition actions, and there was no coercion or harassment involved in its monthly statements, which were provided for informational purposes, and stated so.

**The Bankruptcy Court's Decision**

The bankruptcy court held that Rocket did not violate the automatic stay by including the $950 in fees in the monthly statements because the statements were permitted communications, and the debtors had an interest in receiving information about the status of their mortgage to formulate their proposed bankruptcy plan.

The bankruptcy court reasoned that the debtors had notice of the fees in November 2020, pursuant to the fee notice, but did not dispute the fees by filing a motion under Rule 3002.1(e).

The bankruptcy court concluded that the debtors paid the fees voluntarily, not because of undue pressure caused by the billing statements. The court also concluded that the billing statements were permitted informational communications that did not violate the stay.

The debtors timely appealed the bankruptcy court's ruling.

**The BAP's Reversal**

In an unpublished, nonprecedential opinion,[1] the BAP reversed the bankruptcy court. The BAP held that Rocket violated Section 362(a)(6) by sending a communication that constituted an act to collect a

 

prepetition debt.

Specifically, the BAP noted that:

> Although the billing statements included a standard disclaimer that they were for informational purposes, the substance and context show they were geared toward collecting the attorney's fees. Had Rocket listed the attorney's fees in the section with prepetition arrears—which clearly indicated the fees were separate from ongoing payments and would be paid through the plan—we would conclude that the statements were merely informational. But, by separating the fees from the other amounts to be paid through the plan, and instead listing the fees as part of regular monthly payments, we are left with only one reasonable interpretation: unlike the asserted prepetition arrears, Rocket sought immediate payment of the attorney's fees, to be paid with ongoing post-petition mortgage payments.

The BAP reasoned that debtors expect negative consequences if they fail to make ongoing mortgage payments. Here, the BAP concluded the debtors expected that payment of the total monthly amount shown was necessary to keep their mortgage current.

As a result, inclusion of the fees in the total monthly amount due "operated in a manner to pressure or coerce payment."

Moreover, the BAP noted that because Rocket separated the fees from the other prepetition claims listed in the monthly statements, it was reasonable for the debtors to believe that the fees were different from other prepetition claims. Thus, the BAP reversed.

The BAP further posited that any "informational purpose served by including the fees on Debtors' monthly statements was undercut by the official procedure for providing notice of the fees."

This is because, once Rocket filed the fee notice, the debtors were required to either dispute the fees under Rule 3002.1(e) or pay the claim through their plan, so "in other words, Debtors had to address the asserted fees as part of the bankruptcy process."

**Best Practices for Mortgage Servicers**

The purpose of a Rule 3002.1(c) notice, which is required to be filed using an official form, is to inform debtors of any fees, expenses and charges that are required to cure a mortgage default.

In Orlansky, Rocket timely filed its fee notice. This triggered an obligation of the debtors to either pay the fees through their Chapter 13 plan or challenge the fees by filing a motion pursuant Rule 3002.1(e) within one year of service of the fee notice.

Although the BAP did not address it, the Chapter 13 trustee had objected to the debtors' Chapter 13 plan for not proposing to pay Rocket's arrearage claim through the plan.

The debtors then amended their Chapter 13 plan to provide for payment of the $950 in fees through the plan, but then added a footnote that provided, "Debtor is filing an objection to these amounts and fees.

Thus, this plan seeks to stay payment of the amount."

Curiously, the BAP found that the Rule 3002.1(c) requirements undercut Rocket's argument that the information-only disclaimer on the monthly statements showed that Rocket did not intend to coerce payment from the debtors.

This view appears to be at odds with the intent behind Rule 3002.1(c) and the first time a court has adopted this position. The filing of the fee notice, as well as the Chapter 13 Trustee's plan objection, should have alerted the debtors that the $950 in fees should be paid through the debtors' Chapter 13 plan or objected to in accordance with Rule 3002.1(e).

After paying the $950 in fees to Rocket — which Rocket held and did not apply — the debtors even amended their Chapter 13 plan to include payment of the $950 and sought to stay payment of the fees until the bankruptcy court ruled on their objection.

Objectively, the Rule 3002.1(c) process appears to have worked correctly in communicating to the debtors that there were post-petition fees advanced by Rocket that needed to be paid through the Chapter 13 plan.

Based on these additional facts not mentioned in the Orlansky decision, it is difficult to reconcile the BAP's holding with the intent of Rule 3002.1(c) and Rocket's compliance.

It is possible, if not likely, that the Orlansky decision is an outlier for the reasons outlined above. Nonetheless, mortgage servicers should exclude fees, charges and expenses that are required to be noticed under Rule 3002.1(c) from post-petition statements.

Particularly, as here, where there is a mandatory judicial process for filing a notice of such amounts with the bankruptcy court, there is no value in including them in a post-petition communication to the debtor. Doing so only creates a risk that a court could find an automatic stay violation.

Alternatively, mortgage servicers should clearly separate such amounts on monthly statements from the amounts required to maintain the mortgage post-petition, such as payments of pensions and investments, and any escrow obligations.

Listing post-petition fees, charges and expenses as part of the amount due by the next statement date is what led to the alleged confusion in Orlansky, and should be avoided.

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**Notes**

1. Pursuant to Ninth Circuit Rule 36-4 and BAP Rule 8024-1, the Debtors have requested that the BAP publish its opinion because it involves a rule of law "which appears to have been generally overlooked" and involves issues of "substantial public importance." In the request, the Debtors state that there are no published opinions on the issues addressed in the BAP's opinion and that, based on its holding, many mortgage servicers are not complying with applicable law and the Bankruptcy Code in the way in which they file proofs of claims and Rule 3002.1 notices.

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