20-1, 20-2, 20-3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: NICHOLAS & AMANDA GRAVEL, Debtors. (20-1)
IN RE: ALLEN & LAURIE BEAULIEU, Debtors. (20-2)
IN RE: MATTHEW & EMILIE KNISLEY, Debtors. (20-3)

PHH MORTGAGE CORPORATION,
Creditor-Appellant,
v.
JAN M. SENSENICH,
Trustee-Appellee.

Consolidated Direct Appeals from the United States Bankruptcy Court for the District of Vermont, Case Nos. 11-10112, 11-10281, & 12-10512.

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, NATIONAL CONSUMER LAW CENTER, LEGAL SERVICES VERMONT, INC. AND HOUSING CLINIC OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AT YALE LAW SCHOOL IN SUPPORT OF APPELLEE AND SEEKING REHEARING EN BANC

TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256

On brief: Geoff Walsh
Sept. 22, 2021

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

PHH Mortgage Corp. v. Sensenich, Nos. 20-1, 20-2, 20-3.

Pursuant to 2d Cir. R. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys, the National Consumer Bankruptcy Rights Center, the National Consumer Law Center, Legal Services Vermont, Inc. and the Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School make the following disclosure:

1) Is party/amicus a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party. **NO**

2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list below the identity of the corporation and the nature of the financial interest. **NO**

This day of September 22, 2021.

s/ Tara Twomey

Tara Twomey, Esq.
Attorney for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 3

I. Introduction 3

II. PHH's actions caused concrete, tangible harm to the consumers in this case 3

III. The majority misunderstood the nature of the 2014 contempt proceedings against PHH 9

A. The majority decision allows systemic evasion of Rule 3002.1 ... 10

B. Rule 3002.1 is a needed tool to remedy systemic servicer abuses in chapter 13 cases 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

CERTIFICATE OF COMPLIANCE 14

TABLE OF AUTHORITIES

Cases

Enis v. Bank of America,
2013 WL 840696 (N.D. Tex. Mar. 7, 2013) 8

Gritters v. Ocwen,
2014 WL 7451682 (N.D. Ill. Dec. 31, 2014) 8

In re Jones,
366 B.R. 584 (Bankr. E.D. La. 2007) 11

Marais v. Chase Home Mortgage Finance, LLC,
24 F. Supp. 3d 712 (S.D. Ohio 2014)..... 9

Padgett v. OneWest Bank, FSB,
2010 WL 1539839 (N.D. W.Va. April 19, 2010) 8

PHH Mortgage Corporation v. Sensenich (In re Gravel),
6 F.4th 503 (2d Cir. 2021)..... passim

Smith v. Specialized Loan Servicing, LLC,
2017 WL 1711283 (S.D. Cal. May 3, 2017)..... 8

Rules

Fed. R. Bankr. P. 3002.1 ..... passim

Fed. R. Bankr. P. 3002.1(a)..... 7

Fed. R. Bankr. P. 3002.1(c)..... 7, 8, 9

Legislative History

2011 Rules Committee Notes to Fed. R. Bankr. P. 3002.1 ..... 6, 7

Memorandum of Subcommittee on Consumer Issues to Advisory Committee on Bankruptcy Rules "Mortgage Payments in Chapter 13 Cases," August 27,

2008, contained in Agenda Book of Advisory Committee on Bankruptcy Rules, Denver CO., Oct. 2-3, 2008. https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-books 11

Other Authorities

Black's Law Dictionary (11th ed. 2009) 6

INTEREST OF AMICI CURIAE[1]

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially-distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors often lack the resources to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have an understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is a nonprofit organization of consumer bankruptcy attorneys nationwide. NACBA advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting rights of consumer bankruptcy debtors.

The National Consumer Law Center (NCLC) is a public interest, non-profit legal organization incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed, and elderly consumers.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local Rule 29.1(b), amici curiae affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other amici and their counsel made any monetary contribution toward the preparation or submission of this brief.

Legal Services Vermont, Inc. (LSV) is a nonprofit legal services law firm based in Burlington, Vermont. LSV provides free consultation, advice and community education for low-income Vermonters. LSV may offer free representation in cases where the client is unable to represent him or herself, or where the issue involved is significant to the client community as a whole.

The Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to people who cannot afford private counsel. (Amicus briefs filed by the legal clinic affiliated with Yale Law School do not represent any institutional views of Yale Law School or Yale University.) Many of the Clinic's clients have experienced repeated mishandling of their mortgage accounts from servicers, including PHH and its predecessor Ocwen Loan Servicing, LLC.

Amici have a vital interest in the outcome of this case. PHH's practice of harvesting fees from struggling homeowners violates Bankruptcy Rules which were created specifically to prevent such conduct. The majority's decision was based on the erroneous finding that no real harm to the debtors resulted from this unlawful practice. The majority decision will result in perpetuation of PHH's unlawful conduct and resulting concrete harm to countless debtors.

Amici seek to provide the Court with additional background on the fundamental principles of law at stake in this case.

ARGUMENT

I. Introduction.

Amici urge this Court to review the panel decision *en banc* and to adopt the reasoning of Judge Bianco's dissent, *PHH Mortgage Corporation v. Sensenich (In re Gravel)*, 6 F.4th 503, 517 (2d Cir. 2021). The full court should affirm that the bankruptcy courts have authority to impose punitive sanctions under Fed. R. Bankr. P. 3002.1 and under the bankruptcy courts' inherent powers. This is an issue of first impression in the courts of appeals. Its resolution will have a substantial impact on hundreds of thousands of consumers who file chapter 13 cases annually, primarily to save their homes from foreclosures.

This supplemental Brief will show that the majority misunderstood important aspects of the record and that its factual errors impacted its legal conclusions. In particular, the majority relied on its own erroneous finding that PHH's conduct produced no harm, and then concluded that the bankruptcy court's sanctions were not justified by any concrete prejudice caused by PHH's actions.

II. PHH's actions caused concrete, tangible harm to the consumers in this case.

The majority's "no harm" contention is based on a flawed review of the record. According to the majority, because fees were never listed as "currently due," PHH's failure to follow Rule 3002.1 caused no harm. The majority fails to understand the import of "assessing" fees under a mortgage loan agreement.

The assessment of fees under a security agreement has significant consequences. Immediately upon assessment, the fees become not only the personal liability of the debtor, but also a debt secured by the collateral property. The secured creditor's lien on the property is increased by the amount of the fee, even if the secured creditor does not seek immediate payment of the fee. Conversely, the debtor's equity in the property is decreased by the amount of each fee assessed against the property regardless of whether the fee is considered "due and payable." This is a concrete harm to a property interest of the debtor.

Here, the monthly statement reproduced by the majority at footnote 1 itemized specific charges and amounts under the heading "Loan Information." 6 F.4th at 531 n.1 (referencing JA 675, an account statement sent to the Beaulieus, but see also JA 654 (Gravels) and JA 690 (Knisleys)). These charges included an NSF Fee of $30.00 and Property Inspection fees of $56.25 that PHH had assessed to the Beaulieus' mortgage account. *Id.* Everyone agrees that PHH could not assess these charges against the Beaulieus unless it complied with Fed. R. Bankr. P. 3002.1, which it did not.

The statement at footnote 1 goes on to list a "Breakdown of Contractual Monthly Payment." This refers to the current installment due for principal, interest, and escrow, and totaled $744.40. The "Total Payment Due" at the time in the amount of $744.40 did not include the $30.00 and $56.25 fees described on the

same page under "Loan Information." In characterizing the form statement, the majority emphasizes that "[t]he only payment due was the principal/interest and escrow." *Id*. at 508. Of critical importance for the majority, the statement did not demand immediate payment of the itemized fees.

Even though the fees were additional debt obligations under the security instrument, the majority found the noncompliant charges "in fact were not even 'charges' in any sense: they were not reflected in the balance due." *Id*. The majority disregards the bankruptcy court's determination that overcharges occurred and instead concludes that:

> PHH never charged the debtors a dime, and never collected a dime. The fees to which no notice was given were never due. The dissent fastidiously avoids acknowledging this little thing: the mortgage statements are said to have been "incorrect"; and they were "showing" fees. . . . . On the final statements, the fees were $86.25 in the Beaulieu case, $371 in the Knisley case, and $258.75 in the Gravel case. Iterations of the same fees were re-listed on monthly statements in each case, none of them reflected in the amount due, and none of them paid. The rest is hyperventilation. It is surely of some matter there was no damage or harm here.

6 F. 4th at 517.

In fact, PHH routinely assessed the charges to all three borrowers' accounts in violation of Rule 3002.1. In the bankruptcy court proceedings PHH filed affidavits from its Assistant Vice President that included print-outs of its "Fee Activity Ledger" for each of the three debtors. The excerpt for the Gravels shows that PHH assessed property inspection fees to their account on five occasions from

July 26, 2013, through January 28, 2014. (JA 614). PHH assessed similar fees against the Beaulieus' account five times between September 10, 2012, and March 22, 2013, (JA 630), and four times against the Knisley's account between October 19, 2015, and April 1, 2016, (JA 647). These excerpts from PHH's account ledgers show that PHH was routinely assessing fees against each of the debtors without disclosing them as required by Rule 3002.1. By focusing solely on the "payment due" language on PHH's monthly statements, the majority ignored what it means to "assess" a fee to a mortgagor's loan account. A primary meaning of "assess" is "to impose (a tax, fine, etc.)." Black's Law Dictionary (11th ed. 2009).

The 2011 Rules Committee Notes to Fed. R. Bankr. P. 3002.1 refer specifically to the requirement to disclose fees assessed to the chapter 13 debtor's mortgage account. Servicers must give notice of the "amount of [the debtor's] postpetition payment obligations" and "[i]f the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the ***assessment of fees, expenses, or other charges***, notice of any change in payment amount needs to be conveyed to the debtor and trustee." 2011 Committee Note Fed. R. Bankr. P. 3002.1 (emphasis added).

Rule 3002.1 pertains to "Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence." The Rule's text begins with the statement that "[t]his rule applies in a chapter 13 case to claims . . . that are secured

by a security interest in the debtor's principal residence . . ." Fed. R. Bankr. P. 3002.1(a). The majority ignores the importance that Rule 3002.1 gives to the secured nature of home mortgage debts and the implications that an inflated lien amount has for "the amount of the postpetition payment obligation." 2011 Committee Note Fed. R. Bankr. P. 3002.1.

The contrast between the edited version of Rule 3002.1(c) appearing in the majority's opinion and the Rule's text is revealing.

The majority's version of Rule 3002.1(c) reads:

> Under the rule, a mortgage creditor "shall file and serve on ... the trustee a notice itemizing all fees, expenses, or charges" that the creditor "asserts are recoverable against the debtor" and serve this notice "within 180 days after the date on which the fees, expenses, or charges are incurred." Fed. R. Bankr. P. 3002.1(c).

6 F. 4th at 509.

The full text of Rule 3002.1(c) states:

> (c) Notice of fees, expenses, and charges
> The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

The majority edited out of Rule 3002.1(c) the reference to fees, expenses, or charges that are recoverable "against the debtor's principal residence." The assessment of fees to a mortgage account fixes these sums as charges against the

property. Whether an assessed fee is labeled currently "due" in a particular monthly statement has no bearing on the status of that charge as a lien imposed on the debtor's property.

In addition to diminishing the debtor's property interest, an improper assessment of fees has long-term effects on the loan account. As the debtor makes ongoing payments, these can be applied to past-due fees instead of to reduction of the loan principal. Courts routinely recognize that assessment of improper fees, such as late fees, to a mortgage borrower's account is a concrete harm, regardless of whether the mortgagor paid the fees. *Smith v. Specialized Loan Servicing, LLC*, 2017 WL 1711283, * 6 (S.D. Cal. May 3, 2017) (assessment of foreclosure costs and fees, property inspection charges, and corporate advances); *Gritters v. Ocwen,* 2014 WL 7451682, * 9 (N.D. Ill. Dec. 31, 2014) ("prolonged and repeated assessment of sums not owed"); *Padgett v. OneWest Bank, FSB*, 2010 WL 1539839 (N.D. W.Va. April 19, 2010) (improper assessment of late fees); *Enis v. Bank of America*, 2013 WL 840696 (N.D. Tex. Mar. 7, 2013) (late fees). Placing the borrower in the position where future payments will be misapplied is a concrete harm. *Marais v. Chase Home Mortgage Finance, LLC*, 24 F. Supp. 3d 712 (S.D. Ohio 2014).

The PHH Fee Activity Ledgers indicate that PHH removed the assessed fees from the three borrowers' ledgers on June 14, 2016. (JA 614, 630, 647). This was

the day after the trustee filed his motion for contempt in each case. Some of these fees had remained assessed against the properties for over three years without the disclosures required by Rule 3002.1(c). (JA 630).

III. The majority misunderstood the nature of the 2014 contempt proceedings against PHH.

The long-term and persistent nature of PHH's mishandling of the Gravel's loan account was a critical factor in the bankruptcy court's imposition of sanctions in 2016. The majority minimizes PHH's misconduct in a manner that is factually incorrect. According to the majority, the trustee filed his first contempt motion against PHH in February, 2014, only because a local court rule had led PHH to mistakenly believe the Gravels's payments were two months in arrears. 6 F. 4th at 508.

In fact, the trustee filed the February, 2014, contempt motion because PHH claimed the Gravels were $4,164.17 in arrears. (JA 760). At the time, the Gravels' monthly payment was $741.48. *Id*. It was mathematically impossible that PHH's mistake was over only two monthly installments. The Gravels were current in payments at the time. (JA 752). The local rule governing treatment of a debtor's first two monthly post-bankruptcy payments had nothing to do with PHH's totally unsubstantiated claim that the Gravels were *six months* in arrears.

In response to the trustee's February, 2014, contempt motion PHH assured the bankruptcy court: "Respondent has implemented a manual process to provide quality control and oversight over its automated payment processing of Vermont mortgage loans in Chapter 13. This has been done in an attempt to assure proper application of payments for this and all other Vermont loans serviced by respondent and which are in Chapter 13." (PHH Reply March 13, 2014, JA 739).

It was in the context of this prior representation by PHH that the trustee filed the series of contempt motions against PHH in June, 2016.

A. The majority decision allows systemic evasion of Rule 3002.1.

PHH's strategy for manipulating Rule 3002.1 was obvious. PHH was continuing to run a fee harvesting program during chapter 13 cases without making Rule 3002.1 disclosures. When trustees or debtors discovered that PHH assessed a fee in violation of the Rule, PHH would waive them. (JA 608, 610).

PHH knows that trustees and debtors will rarely pursue litigation over a $15 or $20 fee. Fee harvesting generates millions of dollars in annual revenue for a company like PHH that services 1.5 million mortgages. When PHH waived a few $11 inspection fees in the Gravel, Beaulieu, and Knisley cases in June, 2016, this had no impact on PHH's bottom line. Absent meaningful sanctions, PHH has every incentive to keep ignoring Rule 3002.1.

B. Rule 3002.1 is a needed tool to remedy systemic servicer abuses in chapter 13 cases.

The Subcommittee on Consumer Issues to the Advisory Committee on Bankruptcy Rules that drafted and recommended adoption of Rule 3002.1 identified the problem the Rule was designed to address: "The problem that has arisen in chapter 13 cases throughout the country was well described by Judge Magner in a recent decision," referencing *In re Jones,* 366 B.R. 584, 596 (Bankr. E.D. La. 2007).[2] The *Jones* court found that servicers routinely used automated systems designed to maximize assessment of fees. These fees were often inflated or incomprehensible. The servicers' practices seriously impeded the efforts of chapter 13 debtors to save their homes. The drafters of Rule 3002.1 intended that the rule be used to control these abuses.[3]

CONCLUSION

For the foregoing reasons, Amici urge this court to grant a rehearing *en banc*.

---

[2] Memorandum of Subcommittee on Consumer Issues to Advisory Committee on Bankruptcy Rules "Mortgage Payments in Chapter 13 Cases," August 27, 2008, p. 2, contained in Agenda Book of Advisory Committee on Bankruptcy Rules, Denver CO., Oct. 2-3, 2008. https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-books

[3] *Id.* at pp. 2, 8-10.

Respectfully submitted,

_/s/ Tara A. Twomey
TARA A. TWOMEY
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
tara.twomey@comast.net
(831) 229-0256

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 22, 2021. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system.

s/ Tara Twomey

Tara Twomey

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,544 words, excluding parts exempted by Fed. R. App. P. 32(f).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman 14-point font.

s/ Tara Twomey

Tara Twomey

Attorney for Amici Curiae