20-1, 20-2, 20-3

United States Court of Appeals

for the

Second Circuit

In re: NICHOLAS GRAVEL, AMANDA GRAVEL,

Debtors.

PHH MORTGAGE CORPORATION,

Creditor-Appellant,

– v. –

JAN M. SENSENICH,

Trustee-Appellee.

CONSOLIDATED DIRECT APPEALS UNDER 28 U.S.C. § 158(D)(2)(A) FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF VERMONT, CH. 13 BANKRUPTCY CASE NOS. 11-10112, 11-10281, & 12-10512

BRIEF OF *AMICI CURIAE* THE HONORABLE JUDITH FITZGERALD (RET.), THE HONORABLE BRUCE A. MARKELL (RET.), THE HONORABLE MELANIE CYGANOWSKI (RET.) AND A GROUP OF LAW PROFESSORS IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

In accordance with the requirements of Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amici curiae have no parent corporation or shareholders who are subject to disclosure.

Respectfully submitted,

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE PETITION FOR REHEARING SHOULD BE GRANTED. THE PANEL INCORRECTLY HELD THAT PUNITIVE DAMAGES MAY NOT BE AWARDED FOR VIOLATIONS OF RULE 3002.1. 4

A. Rule 3002.1 permits a court to award "other appropriate relief," which includes punitive damages. 4

B. The phrase "expenses and attorney's fees" reverses the American Rule on fee shifting but does not limit the meaning of "appropriate relief." 5

C. The Panel incorrectly applied the principle of *ejusdem generis*: the reference to "expenses and attorney's fees" is not properly read as a limit on the phrase "other appropriate relief." 6

D. The "Franklin presumption" announced by the Supreme Court pertains here; the phrase "all appropriate remedies" may include punitive damages 9

II. PHH'S PERSISTENT RULE VIOLATIONS AMPLY JUSTIFIED THE AWARD OF PUNITIVE DAMAGES. 11

CONCLUSION 13

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

CERTIFICTE OF SERVICE

TABLE OF AUTHORITIES

Cases

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240 (1975) 6

American Surety Co. v. Marotta,
287 U.S. 513 (1933). 4

Baker Botts L.L.P. v. ASARCO LLC,
576 U.S. 121 (2015) 5

Canada Life Assurance Co. v. Converium Ruckversicherung, 3
35 F.3d 52 (2d Cir. 2003) 8, 9

Ditullio v. Boehm,
662 F.3d 1091 (9th Cir. 2011) 10

Franklin v. Gwinnett County Pub. Schs.,
503 U.S. 60 (1992) 9, 10, 11

In re Gravel,
556 B.R. 561(Bankr. D. Vt. 2016) 11

In re McKain,
No. 08-10411, 2009 WL 2848988, (Bankr. E.D. La. May 1, 2009) 12

Peter v. Nantkwest, Inc.,
140 S. Ct. 365 (2019) 5, 6

PHH Mort. Corp. v. Sensenich, (In re Gravel),
6 F.4th 503 (2d Cir. 2021) 1

Robert Taylor v. Ocwen Loan Servicing LLC,
First Amended Class Action Complaint,
Case No. 4:16-cv-04167-SLD-JEH, Dkt. # 9 12

Tanvir v. Fnu Tanzin,
894 F.3d 449 (2nd Cir. 2018), *aff'd* 141 S.Ct. 486 (2020). 10

United States v. Carrozzella,
105 F.3d 796 (2d Cir. 1997) 8

Statutes

11 U.S.C. § 102(3) 4

Other Authorities

DOJ Press Release: "PHH Agrees to Pay Over $74 Million," https://www.justice.gov/opa/pr/phh-agrees-pay-over-74-million-resolve-alleged-false-claims-act-liability-arising-mortgage (last visited on August 23, 2021).....12

Ocwen Financial Completes Acquisition of PHH Corporation." https://shareholders.ocwen.com/news-releases/news-release-details/ocwen-financial-completes-acquisition-phh-corporation-glen.....11

Rules

FED. R. BANKR. P. 3002.....*passim*

Treatises

1 COLLIER PAMPHLET EDITION 2020 (Richard Levin & Henry J. Sommer eds., Matthew Bender) 57.....5

ANTONIA SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 202 (2012) 7

BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 308 (2d ed. 1995) 8

INTEREST OF THE AMICI CURIAE

Your amici are retired bankruptcy judges, listed below, as well as the law professors listed in the attached Motion for Leave to file Amici Curiae Brief.[1]

The Honorable Judith Fitzgerald (ret.), formerly on the Bankruptcy Court for the Western District of Pennsylvania, and currently in private practice and a Professor in the Practice of Law at the University of Pittsburgh School of Law.

The Honorable Bruce A. Markell (ret.) formerly on the Bankruptcy Court for the District of Nevada, a member of the Bankruptcy Appellate Panel for the Ninth Circuit, and currently a Professor of Bankruptcy Law and Practice at the Northwestern University Pritzker School of Law.

The Honorable Melanie L. Cyganowski (ret.), formerly on the Bankruptcy Court for the Eastern District of New York, and currently in private practice and an Adjunct Professor of Law at St. John's University School of Law.

Our interest in submitting this brief is to address an important issue of first impression:[2] whether a bankruptcy court has the power to award punitive damages

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[1] Pursuant to FRAP 29(a)(4)(3), amici represents that no party's counsel authored the brief in whole or in part; nor contributed money that was intended to fund preparing or submitting the brief, nor that any person other than the amici curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

[2] *PHH Mort. Corp. v. Sensenich, (In re Gravel*), 6 F.4th 503 (2d Cir. 2021) ("*Gravel"*).

for violations of Bankruptcy Rule 3002.1(i)(2). The Panel stated, "We hold that Rule 3002.1 does not authorize punitive monetary sanctions. . . ." *Gravel*, *1. We respectfully submit that the ruling was incorrect, and that rehearing is fully warranted.

SUMMARY OF ARGUMENT

Rule 3002.1(i)(2) expressly permits an award of "appropriate relief, including reasonable expenses and attorney's fees" when a lender violates the disclosure requirements of Rule 3002.1. This phrasing embraces punitive damages. The Panels' ruling to the contrary misapplied critical principles of statutory interpretation. First, it disregarded the statutory rule of construction that the word "including" is "not limiting." Second, it held that the phrase "expenses and attorney's fees" limited the phrase "appropriate relief," when instead the phrase merely served to obviate the American Rule on the award of legal fees. Third, the Panel misapplied the statutory rule of construction known as *ejusdem generis*. Fourth, the Panel failed to apply the long-standing federal principle that a court is to "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Because these rules of construction were the basis for the Panel's decision, rehearing is warranted.

Equally consequential, the Panel failed to be sufficiently attentive to the factors which made the award of punitive damages entirely "appropriate." Rule 3002 protects a debtor's fresh start, one of the central goals of modern bankrutpcy law. That fresh start is jeopardized when mortgage lenders seek to collect undisclosed charges against a debtor's home that were incurred after the bankruptcy case was filed.

The Panel's notion that the harm from PHH's persistent violations of Rule 3002 was "overwrought" is hardly accurate. The dissent correctly found that PHH's conduct constituted "flagrant and repeated violations of the Rule," and that PHH was a "serial violator" of the Rules. (*Gravel*, *10, Bianco, J., dissenting).

PHH is one of the country's largest mortgage services, and yet has a nearly unbroken record of disregard for the bankruptcy rules (see § II, below). If its conduct cannot be the basis for punitive sanctions, then the ability of a bankruptcy court to ensure that the Code's fundamental goals are achieved is imperiled.

ARGUMENT

I. THE PETITION FOR REHEARING SHOULD BE GRANTED. THE PANEL INCORRECTLY HELD THAT PUNITIVE DAMAGES MAY NOT BE AWARDED FOR VIOLATIONS OF RULE 3002.1.

A. Rule 3002.1 permits a court to award "other appropriate relief," which includes punitive damages.

Rule 3002.1(i) requires mortgage lenders to file and serve a notice of all fees, expenses, or charges incurred on a home mortgage in a Chapter 13 bankruptcy case after the bankruptcy case is commenced. Rule 3002.1 permits debtors to ensure that they have made full payment on their home mortgage and to avoid collection actions and home foreclosure based on unknown charges by lenders.

Rule 3002.1(i)(2) provides that the failure to provide the required notice may result in the bankruptcy court precluding the lender from presenting the omitted information in any form, or the award of "other appropriate relief, including reasonable expenses and attorney's fees."

The plain meaning of the Rule does not suggest any prohibition on the ability of a bankruptcy court to award punitive damages. The governing rule of construction is found in 11 U.S.C. § 102(3) which defines "including" as meaning "not limiting." The legislative history indicates that paragraph (3) "is a codification of *American*

Surety Co. v. Marotta, 287 U.S. 513 (1933)."[3] "In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *Id*. at 516.

B. The phrase "expenses and attorney's fees" reverses the American Rule on fee shifting but does not limit the meaning of "appropriate relief."

Further, the Panel misconstrued the reference to "expenses and attorney's fees" as somehow limiting the nature of the permitted relief. Instead, the phrase reverses the American rule which otherwise holds that prevailing parties must pay their own legal fees. This language was *required* to effectuate that purpose. Noting that the American Rule has been a "bedrock principle" for over 200 years, the Supreme Court held that "Congress must provide a sufficiently 'specific and explicit' indication of its intent to overcome the American Rule's presumption against fee shifting." *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370, 372 (2019). Even words such as "expense" are not sufficient to shift the fee burden. *Id*. *See also, Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) (denying fee shifting for defending a fee application because of the absence of a "specific and explicit

[3] 1 COLLIER PAMPHLET EDITION 2020 (Richard Levin & Henry J. Sommer eds., Matthew Bender) 57.

provisions for the allowance of attorneys' fees," citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975)).

See also, Nantkwest, Inc. v. Iancu, 898 F.3d 1177, 1182 (Fed. Cir. 2018), *aff'd sub nom. Peter v. Nantkwest, Inc.*, 140 S. Ct. 365 (2019), noting that "[t]he American Rule sets a high bar for shifting attorneys' fees."

This long-standing body of case law demonstrates that an explicit phrase, such as "expenses and attorney's fees" was required in order to satisfy the "high bar" for fee shifting, and was not intended to limit the available sanctions, but to expand them.

C. The Panel incorrectly applied the principle of *ejusdem generis*: the reference to "expenses and attorney's fees" is not properly read as a limit on the phrase "other appropriate relief."

While the phrase "expenses and attorney's fees is properly read as complying with the "high bar" for shifting the fee award, the Panel instead found that these words were meant to "cabin" the meaning of "other appropriate relief." This interpretation was based almost exclusively on a rule of construction known as *ejusdem generis*. This rule of interpretation was not necessary given the plain import of the phrase; and in any event, was seriously misapplied and should not be permitted to stand as the basis for the decision.

The Panel looked to the relationship between the "general language" (e.g., "other appropriate relief") and to the language following the phrase which supposedly "illustrates" it. *Gravel.* *7. "Because 'other appropriate relief' is a general phrase amid specific examples, it is best construed in a fashion that limits the general language to the same class of matters as the things illustrated.'" *Gravel.* *7. "This suggest that "other appropriate relief" is limited to non-punitive sanctions, as that would cabin it to the most general attribute shared with an award of expenses and fees." *Gravel.* *7.

The Panel's application and statement of the rule of construction was *the exact opposite* of the majority rule. *Ejusdem generis* "is a rule of legal construction that general words *following an enumeration* of particulars are to have their generality limited by reference to the preceding enumeration." ANTONIA SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 202 (2012) (emphasis added).

The Panel, however, applied a different rule, and found that the rule of construction applies when a general term is used "*amid* specific examples." But "amid" is wrong; the sequence is key.

Scalia and Garner point out that "the *ejusdem generis* rule only comes into effect when the general rule is *at the end of a list.*" *Id*. at 203 (emphasis added). "Authorities have traditionally agreed that the specific-general sequence is *required,*

and that the rule does not apply to general-specific sequence." *Id*. at 203, (emphasis added.) While they acknowledge that some courts and commentators have held otherwise, they maintain such cases are wrong: "The vast majority of cases dealing with the doctrine—and all the time-honored cases—follow the species-gens pattern." *Id*. at 204. Thus, the "*ejusdem generis* cannon is properly limited to its traditional application: a series of specifics followed by a general." *Id*. at 205.

This court has specifically endorsed the rule advanced by Scalia and Garner. *United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997). In *Carrozzella* the court had to interpret a sentencing guideline which provided an enhancement for the "violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines." *Id.* at 799. The term "process" was narrowly defined because the specific examples *preceded* the general term "process." This Court cited with approval the rule set forth in BRYAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 308 (2d ed. 1995) which follows the same rule as we urge here.

The Panel incorrectly relied upon *Canada Life Assurance Co. v. Converium Ruckversicherung*, 335 F.3d 52 (2d Cir. 2003). *Gravel.* *7. *Canada Life* concerned a statute which vested exclusive jurisdiction in the southern district of New York for "any claim. . . resulting from or relating to the . . . crashes of September 11, 2001." *Id*. at 55. Here, the general term, "any claim" was found to be limited by the specific reference to "crashes of September 11, 2001."

But the *ejusdem generis* rule was not the basis for the Court's decision. While the Court noted the possible application of the doctrine, it relied principally upon the legislative context and history to resolve the statutory meaning. *Id*. at 58.The Court found that a contrary interpretation would lead to "absurd results" (*id.* at 58) because it would create mandatory jurisdiction for cases that had almost no relationship to compensating the victims of the attack.

Nothing in *Canada Life* suggested that this Court was departing from the general rule nor overruling its earlier decision in *Carrozzella*.

D. The "Franklin presumption" announced by the Supreme Court pertains here; the phrase "all appropriate remedies" may include punitive damages.

The Panel's narrow interpretation of "other appropriate relief" is contrary to the Supreme Court's decision in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992). In *Franklin*, the Court held that monetary damages were justified even where a statute was silent on sanctions: "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence." *Id*. at 66 (citations omitted). Further, the Court held "[t]hat a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not authorize execution to issue on a judgment.'" *Id*. at 68 (citations omitted).

This Court has applied the *Franklin* presumption in holding that the phrase "appropriate relief" includes economic and punitive damages. *Tanvir v. Fnu Tanzin,* 894 F.3d 449 (2nd Cir. 2018), *aff'd* 141 S.Ct. 486 (2020). In *Tanvir* the plaintiffs sued federal law enforcement officers for improperly placing their names on the "No Fly List" in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). RFRA created an express private right of action to obtain *appropriate relief* against a government official but did not define the term "appropriate relief."

The plaintiffs sought both compensatory and punitive damages. 894 F. 3d at 452. This Court held that the phrase "appropriate relief" is "open-ended and ambiguous about what types of relief it includes . . . Far from clearly identifying money damages, the word 'appropriate' is inherently context-dependent," but nevertheless may include punitive damages. Notably, the Court cited with approval *Ditullio v. Boehm,* 662 F.3d 1091, 1098 (9th Cir. 2011) holding that the Trafficking Victims Protection Act, which permits the recovery of "damages," should be read as permitting punitive damages based on the *Franklin* presumption.

The Supreme Court unanimously affirmed *Tanzin* holding that the phrase "appropriate relief" included monetary damages, leaving the award of punitive damages intact.

The *Franklin* presumption is pertinent here and should have led the Panel to view the availability of sanctions broadly, as opposed to being limited.

II. PHH'S PERSISTENT RULE VIOLATIONS AMPLY JUSTIFIED THE AWARD OF PUNITIVE DAMAGES.

The Panel characterized the concerns of the harm caused by PHH as "hyperventilation" and "overwrought." *Gravel. at* * 9-10. The Panel failed to give appropriate weight to the deterrent purposes of the Rule and should have more fully considered the repeated indifference of PHH to the bankruptcy rules, and its callous disregard for the integrity of the court system.

It is well documented that PHH (and its corporate affiliates) are serial violators of both Rule 3002 and the bankrutpcy process in general. PHH is a wholly owned subsidiary of Ocwen Financial Corp;[4] both PHH and Ocwen (and its' affiliates) and has been the subject of challenges because of their repeated disregard of the bankruptcy process. *See e.g., In re Gravel,* 556 B.R. 561, 567 (Bankr. D. Vt. 2016)[5]

[4] "Ocwen Financial Completes Acquisition of PHH Corporation." https://shareholders.ocwen.com/news-releases/news-release-details/ocwen-financial-completes-acquisition-phh-corporation-glen.

[5] The Trustee stated: "PHH had been chastised by another bankruptcy court [for] violating Rule 3002.1," that "PHH had assessed improper charges in other cases in this District," and PHH had been previously sanctioned for misapplication of mortgage payments and the "issuance of dozens of erroneous monthly mortgage statements." 556 B.R. at 567.

and their multi-year improper mortgage lending practices.[6] Likewise, Ocwen's affiliate, (Ocwen Loan Servicing LLC) was the subject of a class action for persistent failure to comply with Chapter 13's rules.[7] As one court noted, Ocwen Servicer has displayed a "continuing disregard for bankruptcy law and procedure," and has "consistently shown an inability or refusal to comply with [] basic statutory tenets." *In re McKain*, No. 08-10411, 2009 WL 2848988, at *5 (Bankr. E.D. La. May 1, 2009). Further, "This is not the first time Ocwen has appeared before the Court for improperly administering a loan or attempting to collect fees and costs to which it was not entitled." *Id*. at *2.

PHH's disregard for the law is hardly without harm—both to the debtors who lack the resources to call it out, and to the integrity of the bankruptcy system. Absent punitive damages, it is unlikely its profitable strategy of disregarding the law will cease.

[6] "PHH Agrees to Pay Over $74 Million," https://www.justice.gov/opa/pr/phh-agrees-pay-over-74-million-resolve-alleged-false-claims-act-liability-arising-mortgage (last visited on August 23, 2021).

[7] *Robert Taylor v. Ocwen Loan Servicing LLC,* First Amended Class Action Complaint, Case No. 4:16-cv-04167-SLD-JEH, Dkt. # 9.

CONCLUSION

We respectfully request that this Court grant the petition for rehearing or en banc rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Pursuant to Fed. R. App. P. 32(a)(5)(A) and 32(g), I certify the following: This brief complies with the type-volume limitations of Rule 29(b)(4) of the Federal Rules of Appellate Procedure because this motion contains 2,583 words, excluding the parts of the motion exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because the brief has been prepared in a proportionally spaced typeface using the 2021 Microsoft Word for Mac in 14 point Times New Roman font.

Dated: September 16, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2021, I electronically filed the forgoing Amicus Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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