20-1-bk(L)

In The 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 RETIRED BANKRUPTCY JUDGES WILLIAM H. BROWN, KEITH M. LUNDIN, AND EUGENE R. WEDOFF IN SUPPORT OF TRUSTEE-APPELLEE'S PETITION FOR REHEARING

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INTEREST OF AMICI CURIAE[1]

Retired bankruptcy judges William H. Brown, Keith M. Lundin, and Eugene R. Wedoff respectfully submit this brief in the hope that it may assist the Court in evaluating the Trustee's petition for rehearing. In amici's view, the panel's decision has far-reaching implications for the authority of bankruptcy judges and the proper functioning of bankruptcy courts. For that reason and others, the Trustee's petition presents questions of exceptional importance warranting en banc review. Fed. R. App. P. 35(b)(1)(B).

Judge William H. Brown served as a bankruptcy judge in the Western District of Tennessee from 1987 until 2006, and he served on the Sixth Circuit's Bankruptcy Appellate Panel. Judge Brown is a member of the American Bankruptcy Institute, having served on its Board and Executive Committee, and recently as co-chair of its Commission on Consumer Bankruptcy. He is also a Fellow in the American College of

[1] Appellee Jan M. Sensenich has consented to the filing of this brief. Appellant PHH Mortgage Corporation refused to consent to the filing of this brief. The brief was not authored in whole or in part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amici curiae or its counsel contributed money intended to fund the brief's preparation or submission.

Bankruptcy. Judge Brown is the author, co-author or editor of numerous bankruptcy books and publications.

Judge Keith M. Lundin served as a bankruptcy judge from 1982 to 2016 in the Middle District of Tennessee. He is a member of the National Bankruptcy Conference. Judge Lundin has authored and edited a wide range of bankruptcy books and treatises. In 2002, Judge Lundin received the Award for Educational Excellence from the National Conference of Bankruptcy Judges.

Judge Eugene R. Wedoff served as a bankruptcy judge in the Northern District of Illinois from 1987 until 2015. Judge Wedoff has served with the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, the Advisory Committee on Bankruptcy Rules, the American College of Bankruptcy, and the National Bankruptcy Conference.

Amici have deep and hard-won experience with our bankruptcy courts. They submit this brief to express concern that the panel's opinion in this case will unduly restrict bankruptcy courts' authority to enforce the Bankruptcy Code and Bankruptcy Rules and deter repeated and willful violations of creditors' obligations. Relatedly, amici file this brief

to share their concern that the panel's decision will likely undermine well settled practice in bankruptcy courts. These concerns extend far beyond this case; they address the proper functioning of our bankruptcy courts as a whole and as adjuncts of the district courts. For these reasons, amici submit this brief urging the Court to grant the Trustee's petition for rehearing.

ARGUMENT

I. THE TRUSTEE'S PETITION FOR REHEARING SHOULD BE GRANTED TO ADDRESS ISSUES OF EXCEPTIONAL IMPORTANCE AFFECTING THE PROPER FUNCTIONING OF THE BANKRUPTCY COURTS.

Bankruptcy laws are designed to "give[ ] . . . the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). But our bankruptcy system is not self-executing. To function properly, it relies on the good-faith participation of debtors, creditors, trustees, and judges. Trustees, in particular, act as fiduciaries who "owe estate beneficiaries the duties of loyalty and care." *In re Hunter*, 553 B.R. 866, 872 (Bankr. D.N.M. 2016). And bankruptcy judges, in turn, have the "power and duty to assure that injustice or unfairness is not done in the administration of

the bankrupt estate." *In re Linc Capital, Inc.*, 296 B.R. 474, 476 (Bankr. N.D. Ill. 2003).

This case concerns a longstanding and persistent problem in our bankruptcy system. Some creditors—particularly creditors in the mortgage-servicing industry—have frequently ignored the bankruptcy court's orders and persisted in trying to collect discharged or non-collectable debts. This problem was a foundational justification for the adoption of Bankruptcy Rule 3002.1 in 2011, which aids in implementation of a debtor's opportunity to properly maintain payments on a home mortgage under 11 U.S.C. § 1322(b)(5). *See generally* Fed. R. Bankr. P. 3002.1 advisory committee's note to 2011 amendment.

This case illustrates the problem. The debtors filed for Chapter 13 bankruptcy relief. Under Chapter 13, the bankruptcy court confirms a plan to repay the debtor's debts. 11 U.S.C. §§ 1325–26. Once the payments contemplated by the plan are complete, the debtor receives a discharge. 11 U.S.C. § 1328(a). Because mortgage debt is so common, special notice and repayment rules govern a debtor's repayment to mortgage creditors. *See* Fed. R. Bankr. P. 3002.1. PHH, the creditor in this case, repeatedly violated these rules by including in its monthly

statements a series of fine-print charges that could not lawfully be collected under the debtors' Chapter 13 repayment plans. Worse, PHH ignored the Trustee's numerous attempts to resolve the charges without litigation. And even worse, PHH had already acknowledged its error to the bankruptcy court, with commitment to correct its procedures, but then persisted in listing the improper charges. Although it may appear that PHH was being punished for relatively minor paperwork mistakes, bankruptcy judges see this type of pattern repeatedly in mortgage and other bankruptcy contexts. This experience informs a judge's decision whether or when to exercise sound discretion to address misconduct by a particular creditor, including, when appropriate, with some form of sanction. And our experience aligns with the bankruptcy judge's conclusion in this case: that PHH chose to "violate court orders with impunity" because, in the aggregate, the financial rewards of doing so outweighed the legal and financial risks of failure to comply with the applicable Rule and the bankruptcy court's orders. *In re Gravel*, 556 B.R. 561, 580 (Bankr. D. Vt. 2016). It is against this backdrop that the bankruptcy judge chose to sanction PHH.

The panel majority's holdings, which severely limit a bankruptcy judge's proper exercise of discretion to award sanctions for repeated Code and Rule violations, "will undoubtedly hamper the ability of bankruptcy courts" to deter serial violations and protect innocent debtors. *In re Gravel*, 6 F.4th 503, 518 (2d Cir. 2021) (Bianco, J., dissenting).

The panel majority characterized the sanctions order as "punitive" and held that bankruptcy courts' authority to "award other appropriate relief" for imposing impermissible fees, *see* Fed. R. Bankr. P. 3002.1(i)(2), excludes punitive sanctions. This interpretation of the rule has no basis in its language or its purpose. The sanctions order fell comfortably within the ambit of "other appropriate relief" necessary to deter serious misconduct. Such relief must be construed in view of "traditional principles of equity practice." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019). And "once invoked, the scope of a . . . court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 493, 538 (2011). If allowed to stand, the panel majority's unduly narrow interpretation of Fed. R. Bankr. P. 3002.1(i)(2) will impair bankruptcy courts in their mission to maintain the integrity of the bankruptcy system.

In addition to its rule interpretation, the panel majority cast substantial doubt on the bankruptcy court's authority to address misconduct through its inherent power. Bankruptcy courts have "inherent power to maintain order in the courts [and] punish inappropriate behavior." *In re Ambotiene*, 316 B.R. 25, 35 (Bankr. E.D.N.Y. 2004). Inhibiting bankruptcy courts in the exercise of this power will facilitate serious and repeated misconduct.

Last, we are concerned about the limitations imposed by the panel on bankruptcy courts' contempt power. *Taggart* should not require that an order contain explicit language prohibiting affirmative actions by a creditor. PHH had notice, had appeared before the bankruptcy court, and had committed to change its bookkeeping procedures. The order declaring the mortgage current ("current order") in this case was quite specific that no fees, costs or other charges remained unpaid by the debtors. PHH violated that specific provision of the order by charging fees and costs that were prohibited by the order. To satisfy the specificity requirement of *Taggart*, the bankruptcy court order did not have to also enjoin PHH from charging fees and costs that had been declared to not exist, because the manifest effect of the order was that all had been paid.

It was more than sufficiently explicit for notice to PHH that the order recited that no additional fees or charges existed.

Although the panel correctly pointed out that such orders could always set out the prohibited conduct with greater particularity, the panel's decision will likely have serious consequences for untold numbers of cases already decided. Requiring inclusion of explicit injunctive language in this type of order will have systemic effects for other enforcement-type orders entered by bankruptcy and district courts. As the record in this case makes clear, J. App'x 705, the bankruptcy court's current order follows a highly standardized template used in nearly every Chapter 13 case treating a home mortgage. Until this case, bankruptcy judges and creditors alike shared a commonsense understanding that the standard order setting out the debtor's completion of plan payments signified the debtor's completion of the mortgage-payment element of her Chapter 13 plan. And, thus, the order necessarily prohibited creditors from claiming unpaid charges or fees arising before entry of the order. The panel's decision, if it stands, will remove the most direct means of enforcing these orders: civil contempt.

Collectively and individually, the panel's holdings implicate issues of exceptional importance warranting en banc review. Fed. R. App. P. 35(b)(1)(B). The issues presented in this case play out in our bankruptcy courts thousands of times over each year. In 2020, bankruptcy courts saw 764,282 petitions filed—a number greater than all cases filed in the United States district courts and courts of appeals combined. *See* https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.

Without adequate deterrence, some mortgage servicers may continue to exhibit indifference and obduracy to their obligations under the Bankruptcy Code and Bankruptcy Rules as long as they do not incur meaningful cost in doing so. And if that pattern continues, the purpose and integrity of the bankruptcy system—with its promise of a fresh start to debtors—will continue to be thwarted.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the Trustee's petition for en banc rehearing.

Date: September 22, 2021

Respectfully submitted,

s/Adam W. Hansen

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

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) and Second Circuit Local Rule 29.1(c) because the brief contains 1,725 words, as determined by the word-count function of Microsoft Word 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Date: September 22, 2021

s/ Adam W. Hansen
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