

## **Assorted 3002.1 Issues**

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### **3002.1(e) Objecting to notice of post-petition fees, expenses, and charges**

Code Sections –

- (c) Notice of fees, expenses, and charges. The holder of the claim must file and serve debtor, debtor's counsel, and trustee a notice itemizing all fees, expenses, or charges that were incurred after the bankruptcy was filed and the holder asserts are recoverable. Notice shall be served within 180 days after incurred.
- (e) Determination of fees, expenses, or charges: An interested party has one year after service to object to notice under (c).
- (i) Failure to notify: If the holder fails to provide information under (b), (c), or (g) the Court at a hearing can: preclude the holder from presenting omitted information or *award appropriate relief*.

Common areas debtor/trustee may object to –

- Was notice served within 180 days after the incurred?
  - If no, object to untimeliness of the proposed costs.
  - If yes, move on to other items to review.
- Are the fees Recoverable? Review the mortgage documents. Most mortgages have language that the Lender may pay *reasonable* attorney if there is a legal proceeding (such as bankruptcy) that might significantly affect Lender's interest in the Property.
  - If no, object to the recoverability of the proposed costs.
  - If yes, move on to reasonableness of the costs.
- Are the fees reasonable?
  - Burden of proof on the requesting party.
  - Is there itemization to conduct a lodestar analysis? If not, consider asking mortgage counsel for additional details.

Possible outcomes –

- Nothing changes. Mortgage company's fees remain valid.
- Reduction in amount owed (and...)
- Possible attorney fees awarded under 3002.1(i)

**Practice Considerations –**

- How much are the fees? Is it cost effective to object?

- Will email to mortgage counsel provide details needed to determine if objection is needed?

Recent-ish cases to review on the topic:

- WDMI: *In re Brumley*, 570 B.R. 287 (Bankr. W.D. Mich. 2017); *In re Norbeck*, Case No. GG 18-03365-jtg (Bankr. W.D. Mich. Jun. 15, 2021)
- Other jurisdictions: *In re Moore*, 619 B.R. 35 (Bankr. W.D.N.Y. 2020), *In re Ezell*, Case No. 6:20-bk-03564-GER (Bankr. M.D.F.L. Jan. 7, 2022), *In re Morris*, 603 BR 127 (Bankr. W.D. Okla. 2019)

### **3002.1(i) – Are punitive sanctions allowed? – 🔥HOT ISSUE🔥**

Code –

- 3002.1(i)(2) The Court may *award other appropriate relief*, including reasonable expenses and attorney’s fees because of the failure to provide information required under (b), (c), or (g) by holder of mortgage claim

**Practice Considerations** – Debtor/Trustee should try to obtain alternate grounds for a punitive sanction other than 3002.1(i)(2). A finding of bad faith and sanctions under the Court’s inherent powers is more likely to stand.

*Cases that do not allow punitive sanctions:*

### **PHH Mortg. Corp. v. Sensenich (In re Gravel), 6 F.4th 503 (2nd Cir. 2021) Cert Denied 6/13/22**

**Facts:** The bankruptcy court had already ordered mortgage current. Mortgage co sent out mortgage statements with post-petition fees (not noticed under 3002.1(c)). Chapter 13 trustee asked Mortgage Co to update statements, was ignored. Trustee brings contempt and sanction motions. Bankruptcy court awards \$225,000 contempt sanction and \$75,000 sanction under 3002.1(i)/inherent powers.

**Decision:** Second Circuit Court of Appeals 2-1 panel decision found (dissenting judge had a spirited dissent)–

- \$225,000 in contempt sanctions didn’t give sufficient notice to the mortgage creditor that the language violated in the prior bankruptcy orders. Prior orders “declared that the debtors were current, [but] did not enjoin the recording of expired fees on the statements”.
- \$75,000 sanction under 3002.1(i) were found to only allow compensatory relief, not punitive relief.

- Acknowledged bankruptcy courts have inherent power to sanction bad faith under 105 but the court in this case did not make a bad faith finding. (There is a split in the circuits on this issue.<sup>1</sup>)

**In re Tollstrup, No. 15-33924, 2018 Bankr. LEXIS 767, at \*11–14 (Bankr. D. Or. Mar. 16, 2018)**

**Facts:** Debtor gets mortgage loan mod and elects to pay escrow shortage over 60 months as part of mod. Mortgage co doesn't update claim so debtor objects. Mortgage co corrects claim. A year later, mortgage co filed a notice of mortgage payment change and messes up the escrow portion. Debtor objects, mortgage co fixes it but debtor requests attorney fees and punitive sanctions.

**Decision:** Rule 3002.1 does not permit punitive fines. The Court did allow for request of attorney fees.

*Cases that allow (or may allow) punitive sanctions:*

**Blanco v. Bayview Loan Servicing LLC (In re Blanco), 633 B.R. 714 (Bankr. S.D. Tex. 2021)**

**Facts:** Debtors were in Chapter 13 and exited with discharge. Debtors filed new bk case and adversary proceeding alleged issues relating to violations of rule 3002.1 from previous case amongst other issues.

**Decision:** Adopting much of the reasoning from the dissenting *Gravel* judge, found punitive damages may be assessed under Rule 3002.1(i)(2). T

**In re Legare-Doctor, 634 B.R. 453 (Bankr. S.C. 2021)**

**Facts:** Debtor has a reverse mortgage and debtor didn't pay required property taxes. Debtor filed Chapter 13 before mortgage co foreclosed. Debtor's plan proposes to cure arrearage/advances. Mortgage Co advances other taxes and insurance (incorrectly at times) without proper notice under 3002.1(c) and motion to determine mortgage is filed to get the record straight.

**Decision:** Rule 3002.1(i)(2) grants authority to frame a remedy—including punitive damages—for a lender's non-compliance". The decision also says Rule 3002.1 applies to reverse mortgages.

**In re Bivens, 625 B.R. 843 (Bankr. M.D.N.C. 2021)**

**Facts:** Debtor received Chapter 13 discharge and case close. Debtor reopened bankruptcy case to file adversary against past and present mortgage holders alleging problems with mortgage records. Amongst the debtor's allegations was an allegation of violation of 3002.1(c) and a request for sanctions under 3002.1(i).

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<sup>1</sup> Sixth Circuit: "In this Circuit, 'bad faith' is a requirement for the use of the district court's inherent authority . . . ." First Bank of Marietta v. Hartford Underwriters Ins. Co., 307 F.3d 501, 519 (6th Cir. 2002) (citation omitted).

**Decision:** The Court allowed the claim for sanctions under Rule 3002.1 to survive a motion to dismiss filed by Mortgage Co.

**In re Owens, 2014 Bankr. LEXIS 163**

**Facts:** Mortgage Co sends notices of fees to debtors' address. Fees were not noticed as required under 3002.1(c). Over 180 days passes, debtors file motion seeking to disallow fees and requesting attorney fees. Mortgage Co says we don't plan to assert fees are recoverable against debtors at this time so we didn't need to notice out under 3002.1(c).

**Decision:** The Court granted debtors' motion for determination of fees and denied attorney fees. The court further stated it would consider awarding costs or fines against mortgage co under Rule 3002.1(i) should it come up in future.

**Catchall-Information related to mortgage issues**

**Plan completion: Debtor is not current on direct pay post-petition mortgage payments<sup>2</sup>**

**Majority position:** Post-petition mortgage payments are payments made pursuant to the plan and the failure to maintain such payments will result in dismissal, conversion, or denial of discharge.

**Minority Position:** Post-petition mortgage payments paid directly by debtor are not payments under the plan and a debtor's failure to make such payments standing alone does not merit the dismissal of a debtor's bankruptcy case or the denial of their discharge.

**In re Adams, Case No. GG 20-00645-swd (Bankr. W.D. Mich. Jun. 9, 2022)**

**Facts:** Debtors converted their case from Chapter 13 to Chapter 7. Debtors want to keep their house. Debtors house had appreciated since the case filing. Trustee wants to sell property. Debtors claim appreciation for themselves, Trustee intends to use it to pay creditors. A motion to value and abandon the property was filed by debtors.

**Decision:** Appreciation inures to the benefit of the Estate. The debtor is entitled to their exemption and post-petition appreciation attributable to post-petition earnings included in the proceeds per 11 U.S.C. § 541(a)(6). Further, the Court agreed that the best way to determine valuation is when Trustee has a purchase offer in hand. The Court's decision was highly persuaded by the Sixth Circuit Court of Appeals unpublished decision *Coslow v. Reisz*, 811 F. App'x 980, 984 (6th Cir. 2020).

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<sup>2</sup> In re Simmons, 608 B.R. 602 (Bankr. S.D. Ga. 2019) – Case contains a breakdown of case cites on the majority and minority position on this issue.

**Practice Considerations:** Debtor needs to consider asset valuations, exemptions, mortgage balance, mortgage payments made post-petition, and delinquency at the time of conversion. It may be wise to document post-petition services rendered by the debtor to prepare for Chapter 7 trustee questions. In appropriate cases, a hardship discharge may warrant consideration.