Applying the Doctrine of Exclusive Appellate Jurisdiction to Bankruptcy Appeals

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In civil litigation, except in those rare instances in which review of an interlocutory or collateral order is authorized, appeals are prosecuted only after the entry of a final judgment terminating the entire case. Bankruptcy appeals, however, are often of a different species altogether. In bankruptcy cases, courts generally take what has been labeled a "pragmatic" or "flexible" approach to determining which orders are deemed final and immediately appealable. *See, e.g.,In re Lehman Bros. Holdings, Inc.*, 697 F.3d 74, 77 (2d Cir. 2012); *In re McKinney*, 610 F.3d 399, 402 (7th Cir. 2010); *In re Blatstein*, 192 F.3d 88 (3d Cir. 1999). Thus, it is possible to be prosecuting an appeal of one order while the action in the underlying bankruptcy case continues as to other matters.

In substance, this means that the bankruptcy appellate litigator must have eyes in the back of his or her head to maintain a heightened awareness of events transpiring in the bankruptcy case during the pendency of the appeal. To paraphrase a line from the omnipresent ad of a certain insurance company (not the one with the gecko), when pursuing a bankruptcy appeal, "what you don't know [about events in the bankruptcy case] can hurt you."

This article endeavors to help bankruptcy practitioners identify some of the things that can hurt them and their clients when prosecuting an appeal while the underlying bankruptcy case continues. To that end, this article briefly reviews the doctrine of exclusive appellate jurisdiction, before examining some of the ways the pragmatic concept of finality affect the application of the exclusive appellate jurisdiction doctrine in bankruptcy proceedings.

The Doctrine of Exclusive Appellate Jurisdiction

As the United States Supreme Court has explained, the "filing of a notice appeal is an event of jurisdictional significance." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). It confers exclusive jurisdiction on the appellate court while divesting the lower court "of its control over those aspects of the case involved in the appeal." *Id.* The doctrine of exclusive appellate jurisdiction evolved as a judicially created doctrine designed to maintain the integrity of the appellate process. *See, e.g., In re Whispering Pines Estates, Inc.*, 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007). "This rule applies with equal force to bankruptcy cases" as it does to civil litigation. *In re Transtexas Gas Corp.*, 303 F.3d 571, 579 (5th Cir. 2002).

An appeal's ousting of the bankruptcy court's jurisdiction is not total. Rather, "when a notice of appeal has been filed in a bankruptcy case, the bankruptcy court retains jurisdiction to address elements of the bankruptcy proceeding that are not the subject of that appeal." *Id.* at 580 n.2. The concepts underlying the rule against concurrent jurisdiction between trial and appellate courts are simple enough—vesting exclusive jurisdiction in the appellate court over the subject matter of the appeal promotes judicial efficiency and avoids the confusion that would ensue if two courts

were simultaneously addressing the same issues. *See, e.g.*, *Venan v. Sweet*, 758 F.2d 117, 121 (3d Cir. 1985); *Whispering Pines*, 369 B.R. at 757.

It is the application of this rule in bankruptcy proceedings that sometimes gets dodgy. Were concerns about inefficiency and confusion the only policy considerations in play, courts would universally follow a rule that called for bankruptcy courts to be divested of jurisdiction over any matter that might affect a pending appeal. But these are not the only considerations. Indeed, such a "formulation would severely hamper the bankruptcy court's ability to administer its cases in a timely manner." *In re Sullivan Cent. Plaza I, Ltd.*, 935 F.2d 723, 727 (5th Cir. 1991).

Application in Specific Contexts

> **Bankruptcy court's ability to issue a supporting opinion.** Bankruptcy judges are frequently called upon to issue orders under time pressure that does not allow their rulings to be accompanied by written opinions. When a party immediately appeals such an order, the question then arises whether a bankruptcy judge may supplement his or her order with an opinion. Most courts answer in the affirmative that, while a bankruptcy judge may not modify an order as to which a notice of appeal has already been filed, the bankruptcy judge is not constrained from issuing an opinion consistent with the order that has been appealed. *See, e.g.*, *In re Walker*, 515 F.3d 1204, 1211 (11th Cir. 2008); *In re Mosley*, 494 F.3d 1320, 1328 (11th Cir. 2007). Indeed, the Delaware bankruptcy court has formalized this practice pursuant to a local rule that permits the judge up to seven days after the filing of a notice of appeal to issue a written opinion. *See* Del. Bankr. L.R. 8001-1(c). The justification usually offered for this practice is that "[s]uch a subsequent order aids appellate review." *Walker*, 515 F.3d at 1211. *See also In re Silberkraus*, 336 F.3d 864, 869 (9th Cir. 2003).
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> At least one court, however, has declared that there exists an outer limit to a bankruptcy judge's ability to later enter a written opinion supporting his or her ruling after an appeal has been commenced. In *In re Picht*, 403 B.R. 707 (10th Cir. B.A.P. 2009), the bankruptcy judge confirmed the debtor's Chapter 13 plan over the lender's objection without providing any supporting findings or conclusions (written or oral) at the time of the judge's entry of the confirmation order. Three weeks after the lender appealed the confirmation order, the bankruptcy judge issued a written opinion in support of his ruling.
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> Although the judge had expressly reserved on the confirmation hearing record his ability to later issue an opinion in support of the order if appealed, the Bankruptcy Appellate Panel (BAP), apparently perturbed by the bankruptcy judge's total failure to issue findings and conclusions as required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52(a)(1), sua spontestruck the bankruptcy judge's opinion from the appellate record, reversed the confirmation order, and remanded with directions to the bankruptcy judge to issue proper findings and conclusions. Chastising the bankruptcy judge, the panel stated: "Judges are obliged to explain the legal and

factual bases for their decisions. Parties and the public should not be left to speculate as to why a judge ruled the way she or he ruled." *Id.* at 714.

Enforcement of an order that has been appealed. As a general matter, unless the appellant has obtained a stay of the order on appeal, a pending appeal does not preclude a bankruptcy court from granting relief in the nature of "enforcing" the order being appealed. For example, in *In re Washington Mutual, Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), the Delaware bankruptcy court rejected arguments that the plan, which implemented its earlier decision holding that certain purported holders no longer had an interest in the subject securities, could not be confirmed because the earlier decision remained subject to a pending appeal. *Id.* at 219 ("[S]o long as the lower court is not altering the appealed order, the lower court retains jurisdiction to enforce it.").

Once again, implementing a seemingly straightforward rule proves challenging. What constitutes enforcement of an order is not always clear to some courts, as an examination of two Ninth Circuit decisions reveals. In *In re Padilla*, 222 F.3d 1184 (9th Cir. 2000), the court of appeals held that the bankruptcy judge erred in discharging a Chapter 7 debtor after the BAP had reversed the bankruptcy court's original decision dismissing the case as a bad-faith filing. Although the trustee did not obtain a stay of the BAP's judgment, the Ninth Circuit held that the bankruptcy court was without jurisdiction to issue the discharge and close the case because those actions "drastically changed the status quo" and "did not constitute implementation or enforcement of the BAP's judgment. . . ." *Id.* at 1190.

Several years later, in *In re Sherman*, 491 F.3d 948 (9th Cir. 2007), the Ninth Circuit was asked to decide the closely analogous question of whether an appeal of an order*denying* a motion to dismiss a Chapter 7 case as a bad-faith filing divested the bankruptcy court of jurisdiction to grant a discharge. Once again, no stay of proceedings had been obtained. This time, the panel held that the bankruptcy court retained jurisdiction to issue the discharge. *Id.* at 967. To justify this result, the court engaged in some gymnastics in an attempt to distinguish *Padilla* as having involved an order *granting* a motion to dismiss a bankruptcy case, which was a final order. *Id.*at 967 & n.24.

Amendments to and modifications of orders on appeal. While bankruptcy judges have some latitude to issue opinions supporting their rulings after an appeal has been taken, there appears to be little disagreement (with one exception discussed below) that the bankruptcy court may not modify, amend, reconsider, or vacate an order that is the subject of a pending appeal, absent a remand from the appellate court. *See, e.g.*, *Transtexas Gas*, 303 F.3d at 579–80 (holding that bankruptcy court was without authority to enter order in nature of Rule 59(e) relief that restated interest rate provisions of plan on appeal); *In re Bialac*, 694 F.2d 625, 627 (9th Cir. 1982) (bankruptcy court may not vacate or modify an order while an appeal is pending);*Bryant v. Smith (In re Bryant)*, 175 B.R. 9, 12 (W.D. Va. 1994) (reconsideration not permitted).

Although the cases on the subject are not uniform, it appears that some courts have been more willing to allow post-confirmation plan amendments while an appeal is pending so long as the amendments do not bear directly on the issues being appealed. For example, in *State Farm Mutual Automobile Insurance Co. v. Brown (In re Brown)*, 2007 WL 3326684 (M.D. Fla. Nov. 7, 2007), while an appeal of confirmation of the debtor's Chapter 13 plan was pending, the bankruptcy court approved a plan amendment to withhold half of the distribution that the appealing insurer would otherwise receive. The district court was untroubled by this post-confirmation modification because the insurer's original appeal related to its objection to the plan solely on the basis of the unrelated issue of the debtor's bad faith.

Similarly, a debtor has been permitted to attempt to modify its confirmed Chapter 11 plan pursuant to 11 U.S.C. § 1127(b) while an appeal of the confirmation order was pending. *See In re Legend Radio Grp., Inc.*, 248 B.R. 281, 284–85 (W.D. Va. 1999). The distinguishing factor in this case was that the court of appeals had entered an order suspending briefing on the appeal and requiring the filing of status reports on the plan modification motion filed in the bankruptcy court, thereby implicitly recognizing the bankruptcy court's ability to entertain such a motion. *Id.*

When, however, a debtor sought, during the pendency of an appeal of the order confirming its plan, to eliminate a provision that automatically stayed an asset sale until any appeals were concluded, the district court held that the bankruptcy court's approval of the amendment was outside its jurisdiction and, therefore, void. *See In re Southold Dev. Corp.*, 129 B.R. 18 (E.D.N.Y. 1991). In so ruling, the court reasoned that "even if not an express issue on the . . . appeal, [the plan amendment] so impacted the issues on appeal that the Bankruptcy Court was divested of jurisdiction over that issue." *Id.* at 19.

The question of what authority a bankruptcy court may retain to amend, modify, or otherwise grant relief from an order during the pendency of an appeal of the order most commonly arises when one of the litigants files a motion for relief under Federal Rule of Civil Procedure 60(b), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9024. Prior to 2009, most circuits had developed, on an ad hoc basis, procedures that recognized the ability of a trial court to consider and deny a Rule 60(b) motion but that did not allow it to grant such a motion. *See, e.g.*,*Venen v. Sweet*, 758 F.2d 117, 123 (3d Cir. 1985). This practice required the movant to obtain an "indicative ruling" from the trial court in the first instance and then move in the appellate court to remand the appeal to allow the trial court to enter the Rule 60(b) order granting relief. (The Ninth Circuit was the sole outlier, holding that a trial court was without jurisdiction even to deny a Rule 60(b) motion while an appeal was pending.)

Effective December 1, 2009, the practice most federal courts used to address Rule 60(b) motions while an appeal was pending was formalized in Federal Rule of Civil Procedure 62.1. Rule 62.1 applies "[i]f a timely motion is made for relief that the court lacks

authority to grant because of an appeal that has been docketed and is pending. . . .” Fed. R. Civ. P. 62.1(a). Note that Rule 62.1 is not limited *only* to motions made under Rule 59 or 60. The trial court then has three options: “(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” If the trial court elects option (3), the movant must promptly notify the circuit clerk pursuant to Federal Rule of Appellate Procedure 12.1. *See* Fed. R. Civ. P. 62.1(b). Only if the circuit court remands for that purpose may the trial court then proceed to adjudicate the motion. Fed. R. Civ. P. 62.1(c). If the trial court merely certified that the motion raises a substantial issue, it may still deny the motion upon remand. *See* Fed. R. Civ. P. 62.1 advisory committee notes.

To date, Rule 62.1 has not been formally incorporated into the Federal Rules of Bankruptcy Procedure. The Judicial Conference, however, has approved and transmitted to the U.S. Supreme Court for consideration new Federal Rule of Bankruptcy Procedure 8 and amendments to Federal Rules of Bankruptcy Procedure 9023 and 9024, which largely mirror Rule 62.1. These revisions are part of a broader overhaul of the Part VIII Bankruptcy Rules governing bankruptcy appeals, which is designed to bring them into closer alignment with the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure. In any event, as Rule 62.1 and proposed Bankruptcy Rule 8008 reflect the preexisting practice everywhere except (perhaps) the Ninth Circuit, in most instances, parties would be well advised to proceed in accordance with Rule 62.1 and proposed Bankruptcy Rule 8008.

Motions for a stay pending appeal. Does the doctrine of exclusive appellate jurisdiction constrain a bankruptcy court’s ability to grant a stay pending appeal after an appeal is pending? Definitely, maybe. The answer may depend on where you are and what court you are appealing from. The text of Bankruptcy Rule 8005—providing in relevant part that “[a] motion for a stay of the judgment . . . of a bankruptcy judge must ordinarily be presented to the bankruptcy judge in the first instance”—certainly supports the inference that bankruptcy courts retain the power to issue stays after an appeal has been filed. But this seemingly simple question has produced inconsistent rulings. *Compare In re Adams Apple Inc.*, 829 F.2d 1484, 1489 (9th Cir. 1987) (holding without reference to Federal Rule of Bankruptcy Procedure 8005 that notice of appeal divested bankruptcy court of jurisdiction to reconsider its prior denial of stay pending appeal), *with In re Ho*, 265 B.R. 603 (9th Cir. B.A.P. 2001) (holding that bankruptcy court retained jurisdiction to grant stay and attempting to distinguish*Adams Apple* on the basis that it had involved the bankruptcy court’s reconsideration and vacatur of its prior order denying a stay). *See also, e.g.*, *In re Taub*, 470 B.R. 273, 276 (E.D.N.Y. 2012) (holding that district court lacked jurisdiction to grant a stay pending appeal because appellant had not sought a stay from the bankruptcy court).

Proposed Bankruptcy Rule 8007 (the revised version of existing Federal Rule of Bankruptcy Procedure 8005) will resolve this question in favor of recognizing a bankruptcy court's ability to consider a motion for a stay pending appeal whether made before or after a notice of appeal is filed. *See* Proposed Fed. R. Bankr. P. 8007(a)(2). The proposed rule retains the obligation to seek a stay in the bankruptcy court in the first instance, but it recognizes the right of an appellant to re-file the stay motion before the district court or BAP if the bankruptcy court has not acted on the earlier motion. *See* Proposed Fed. R. Bankr. P. 8007(a)(1) & (b). Further, subsection (e) of proposed Bankruptcy Rule 8007 expressly recognizes the ability of the bankruptcy court to stay other proceedings and issue other appropriate orders during the pendency of the appeal to protect the rights of all parties in interest. *See*Proposed Fed. R. Bankr. P. 8007(e).

Courts have also been confounded by whether the filing of a notice of appeal from a judgment of the district court acting in its appellate role or BAP divests the district court or BAP of jurisdiction to grant a stay pending an appeal to a circuit court.*Compare In re AWC Liquidation Corp.*, 292 B.R. 239, 241 (D. Del. 2003) (Sleet, J.) (holding that bankruptcy court lacks jurisdiction to decide motion to stay once the notice of appeal is filed), *with In re W.R. Grace & Co.*, 2008 WL 5978951, at *3 (D. Del. Oct. 28, 2008) (Buckwalter, J., sitting by designation) (collecting cases in support of its conclusion that lower courts retain jurisdiction to hear a motion to stay even after a notice of appeal has been filed). Bankruptcy Rule 8017, which applies to second-tier appeals from district courts and BAPs, does not speak directly to this issue. *See* Fed. R. Bankr. P. 8017. Proposed Bankruptcy Rule 8026 (derived from existing Bankruptcy Rule 8017) largely tracks the existing rule and does not appear to resolve this controversy.

Given the uncertainty that surrounds the question of whether the filing of a notice of appeal ousts the court that issued the order being appealed of jurisdiction to grant a stay, the more prudent path will usually be to present the stay motion to the bankruptcy court before a notice of appeal is filed. Doing so, however, presents its own unique challenges in bankruptcy proceedings because of their often expedited nature. Indeed, parties contemplating the need to appeal an order should consider objecting to requests to waive the 14-day automatic stay that applies to many orders—*see* Fed. R. Bank. P. 4001(a)(3) (lifting automatic stay), 6004(h) (asset sale), 6006(d) (assuming/rejecting contract/lease) & 3020(e) (confirming plan)—and making a motion for a stay pending appeal at or immediately after the hearing that gives rise to such an order. A bankruptcy judge who grants a waiver of the 14-day automatic stay over objections should be willing to promptly adjudicate a motion for a stay pending appeal (most likely by denying it), thereby expediting the ability to seek a stay from the district court before too much time elapses. *See, e.g., In re Los Angeles Dodgers, LLC*, 465 B.R. 18, 28 (D. Del. 2011) (district court agreed to consider appellant's request for stay pending appeal where bankruptcy court had granted waiver of 14-day stay pursuant to Federal Rule of Bankruptcy Procedure 6004(h) over appellant's objection).

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