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IN THIS ISSUE

Courts Decide Three Appeal Procedure Cases

This is the month to brush up on appellate procedures. The courts addressed two interlocutory appeals questions and appellate jurisdiction issue.

Interlocutory Review

(A) In FL Receivables Trust, 2002-A v. Gilbertson Restaurants, LLC (In re Gilbertson Restaurants, LLC), No. 04-6026NI (B.A.P. 8th Cir. Oct. 14, 2004), a creditor appealed an order of the bankruptcy court approving the employment of counsel for the debtors in jointly administered bankruptcy cases. Certain of the debtors were landlords and tenants of one another, and there were inter-company claims. The creditor asserted that the attorneys were not disinterested and would represent conflicting, adverse interests. After initially granting leave to file an interlocutory appeal, the BAP determined that leave to appeal was improvidently granted and thus dismissed the appeal.

Stating that it had appellate jurisdiction only if 28 U.S.C. § 158(a)(1) or (a)(3) applied, the BAP first examined whether the bankruptcy court's order was final under subsection (a)(1). Some courts have adopted a per se rule that a bankruptcy court's order granting a motion to employ counsel under § 327(a) is not a final order for subsection (a)(1) purposes. Others have adopted a flexible approach, examining the facts of each case. The Eighth Circuit has not ruled on the issue, but the BAP determined that it would take the more flexible approach. The Eighth Circuit examines three factors to determine whether an order is final for § 158(a)(1) purposes: (i) whether the order leaves the lower court with nothing to do but execute the order; (ii) whether delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (iii) whether later reversal would require the proceeding to recommence.

The bankruptcy court's order expressly stated that it found that no actual conflicts existed at that time, because the debtors had a "unity of interest" or "purpose," but if the potential conflicts later became actual conflicts, the court would resolve the matter at that time. Because the bankruptcy court left open the possibility of future review, the BAP determined that the bankruptcy court's order did not finally dispose of a discrete issue. Next, the BAP held that delay in obtaining appellate review would not deny effective relief to the creditor because: (a) the objection could be renewed if later facts demonstrated an actual conflict; and (b) the creditor could also object when the professionals filed their fee application pursuant to Bankruptcy Code § 330(a). Finally, later reversal of the employment order would not require that the entire proceeding be recommenced.

Turning to § 158(a)(3), the would-be appellant's hurdle is much tougher than under subsection (a)(1) because, the BAP stated, review under subsection (a)(3) is to be used "sparingly and only in exceptional cases." Gilbertson, No. 04-6026NI, at p. 6 (citing General Electric Corp. v. Machinery, Inc., (In re Machinery, Inc.), 275 B.R. 303, 306 (B.A.P. 8th Cir. 2002)). An appellate court should only exercise its discretion to review interlocutory orders under § 158(a)(3) when: (i) the question at issue is one of law; (ii) the legal question is controlling; (iii) there is substantial ground for difference of opinion concerning the bankruptcy court's ruling on that question of law; and (iv) the court finds that review of the legal question would materially advance the ultimate termination of the litigation. Applying these factors, the BAP had little difficulty determining that none were present in this case.

(B) In a per curiam, unpublished decision from the Eighth Circuit Court of Appeals, the court stated that, unlike the jurisdiction of the district court (or the BAP) to hear appeals from interlocutory bankruptcy orders pursuant to 28 U.S.C. § 158(a), the Court of Appeals' appellate jurisdiction extends only to appeals from final decisions, judgments, orders and decrees of the district court pursuant to 28 U.S.C. § 158(d). Thus, the court declined to hear an appeal from the district court's reversal of a bankruptcy court's ruling that a contract was not executory under Bankruptcy Code § 365. The Eighth Circuit held that, because the contract was subject to further bankruptcy court proceedings, it was not final for the purposes of § 158(d).

Jurisdiction To Hear Appeal (Non-Interlocutory)

In Cooperative Supply, Inc., v. Corn-Pro Nonstock Cooperative, Inc., (In re Corn-Pro Nonstock Cooperative, Inc.), No. 04-6031/6032/6036 NE (B.A.P. 8th Cir. Nov. 10, 2004), the bankruptcy court granted Corn-Pro's motion for summary judgment, finding that Corn-Pro was not eligible to be the subject of an involuntary petition, and later denied Corn-Pro's motion for attorney fees and costs under § 303(i). Both parties appealed. However, the bankruptcy court never ruled on Corn-Pro's motion to dismiss the involuntary petition. Attorney fees and costs can only be awarded under § 303 if the court has dismissed an involuntary petition under that section. Thus, the BAP held that the bankruptcy court could not consider the motion for attorney fees and costs, and neither could the BAP, before ruling on the motion to dismiss. The appeal was dismissed for lack of jurisdiction.

Turnover Order of Asset Not "Substantial Administration" Preventing Amendment of Exemptions

In re Melisssa Lynn Ardrey (Ardrey v. Blackwell) No. 04-6027EM

After filing bankruptcy and completing her schedules, Debtor received tax refunds in excess of her scheduled exemptions. Trustee filed an adversary proceeding against Debtor seeking turnover of the tax refunds after allowance of her scheduled exemptions. The bankruptcy court entered summary judgment in the adversary proceeding in favor of Trustee. Debtor subsequently amended her exemptions, to which Trustee objected. The bankruptcy court sustained Trustee's objection on two grounds. First, the earlier procurement of an order for turnover constituted substantial administration of the tax refunds. Second, the Court ruled that allowing the amended claim at that juncture would be unduly prejudicial to the creditors.

The Bankruptcy Appellate Panel for the Eighth Circuit disagreed with both arguments and held that a procurement of a turnover order is not enough to constitute "substantial administration," especially when Trustee did not have possession of the tax refund. The court also expressed concern that "substantial administration" was a valid basis to deny an amended claim of exemption. The court further noted that there was nothing in the record that would indicate that the amendment would cause any greater prejudice to third parties beyond that typically associated with a claimed exemption. Reversed and remanded for a ruling on the merits of Debtor's amended exemption.

Bankruptcy Court Discharges Debtor's Student Loan Debt.

In *Rose v. Educational Credit Management Corporation, et. al. (In re Rose)*, Bankr. No. 02-92748, Adv. Pro. No. 03-3056 (Bankr. D. Minn. 2004), the Bankruptcy Court discharged the Debtor's student loan debt because she had met the "undue hardship" standard. The Debtor was a 42 year-old early childhood teacher for children with special needs (including those who have learning and developmental impairments) earning $26,000.00 annually. At the time of trial, the Debtor owed approximately $90,000.00 to two student loan guarantors (the "Defendants"). The Debtor's student loans were eligible for consolidation and repayment under the William D. Ford Direct Loan Program. The Defendants argued that the Debtor could afford to make repayment of her loans under the Income Contingent Repayment Plan ("ICRP"), which would require a $243.00 monthly payment for 25-years and if any debt remained at the end of 25-years, it would be cancelled.

The Bankruptcy Court found that the Debtor had a net monthly income of $1,676.81 (gross income of $2,197.87), and that her monthly living expenses totaled $1,503.00. Because the Debtor lived with a roommate at the time of trial, the Defendants argued, unsuccessfully, that half of the monthly rent should be attributed to that roommate. By subtracting the Debtor's monthly living expenses from her net income, the Bankruptcy Court determined that the Debtor had a monthly disposable income of $170.00. Additionally, the Defendants argued that Debtor was not maximizing her earning capacity, and could work a part-time job to supplement her income as she has done in the past.

11 U.S.C. § 523(a)(8) provides that an educational loan is not dischargeable unless "excepting such debt from discharge… will impose an undue hardship on the debtor and the debtor's dependants." The various Circuit Court of Appeals have adopted different standards in determining whether a debtor's circumstances constitute an "undue hardship." The Eighth Circuit uses a totality-of-the-circumstances approach in determining whether or not the "undue hardship" standard has been met. *Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981). Under the totality-of-the-circumstances approach, Bankruptcy Courts in the Eighth Circuit consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*

The Bankruptcy Court weighed the three factors of the totality-of-the-circumstances test and concluded that excepting the Debtor's student loan debt from discharge would impose an undue hardship on her. The Court held that despite the Debtor's $170.00 of monthly disposable income, the Debtor would eventually need those funds to purchase a vehicle to replace her current vehicle that was loaned to the Debtor by her mother. Furthermore, the Court was not persuaded by Defendants' argument that the Debtor was not maximizing her earning capacity in using her educational credentials or by not getting a part-time job. The Court stated that "…there is a more intangible reason why the undue-hardship determination should not go against the Debtor…She serves the most vulnerable members of our society, children with profound deficits. The Bankruptcy Court determined that the Debtor had met the "undue hardship" standard under the totality-of-the-circumstances approach used in the Eighth Circuit.

BAP Declines Opportunity to Rule on §521(2)(a) "Fourth Option"

In In re Sanabria, Case Number 04-6041NE (8th Cir. B.A.P 2004), the Bankruptcy Appellate Panel held that the lower court did not abuse its discretion when it granted a secured creditor's motion for relief from the automatic stay, even though the Debtor was current on its payments. The Debtor filed under Chapter 13 on April 11, 2002, and the case was converted to Chapter 7 on March 11, 2004. During the case, the Debtor continued making payments on a vehicle subject to a security interest. However, the Debtor failed to file a Statement of Intention as required by § 521(2)(a) subsequent to the case conversion. As a result, in April 2004, the secured creditor filed a motion for relief from stay with respect to the Debtor's vehicle. The Court found that the Debtor had no equity in the vehicle and that the case was a Chapter 7 proceeding. In addition, the Court found that the Debtor had not redeemed the vehicle or reaffirmed the debt, surrendered the vehicle, or claimed the vehicle as exempt. As a result, the Court granted the creditor relief from the automatic stay. Debtor appealed the decision requesting a ruling from the BAP that in addition to a Chapter 7 Debtor's options with respect to secured debt under §521, there is a "fourth option" which a Debtor statistics by merely staying current on its payments to a secured creditor. The Bankruptcy Appellate panel declined to rule on that issue, simply finding that the lower court did not abuse its discretion in granting the secured creditor's motion for relief from stay. The Court noted that the Debtor would need to file an adversary proceeding seeking a declaratory judgment in order to get a ruling on the "fourth option".

NEWS

News from the Court

The Bankruptcy Judges announced the appoint of **Lori A. Vosejpka** as the Clerk of the Bankruptcy Court. Be sure to congratulate Lori when you see her!

Judge Dreher is back to fulltime after her double lung transplant surgery. Welcome back, Judge!

Technology News From the Court

CM/ECF Update From Margaret Dostal-Fell

The U.S. Bankruptcy Court continues its process of migrating to the Case Management and Electronic Case Filing (CM/ECF) program developed by the Administrative Office of the U.S. Courts. While a definitive conversion date has not been determined, the Court anticipates that it will occur in the second or third quarter of 2005.

The dictionary of filing events is complete and has been internally and externally tested. Certified ERS attorneys will find minimal differences between the two systems, but court staff will undergo a major change in the way their work is performed. Since conversion to the new system will be most dramatic for internal staff, the Court is currently focusing on staff training using computer based training modules and hands-on training.

The attorney training program is currently in development. Various levels of training will be offered, including online,

demonstration/Q&A, and hands-on training at the Minneapolis courthouse. Computer-based training modules will be available online as well. Information about attorney training will be posted on the Court's web site, www.mnb.uscourts.gov as it becomes available.

Conversion of the Court's two million images is underway in Minneapolis office in an area that has been termed "Pooh's Corner." Four computers, appropriately named "Tigger," " Pooh," "Eeyore," and "Piglet" have converted over 13,000 images. With the arrival of two additional computers, "Kanga" and "Roo, it is estimated that the six computers will convert approximately 90,000 images/week.

Mapping of the Court's existing dictionary events to the CM/ECF system is also underway. This involves mapping or linking approximately 36,000 existing events to CM/ECF to ensure that the required information and functionality of the Court's current Bancap/ERS system will be incorporated into the new CM/ECF system.

In preparation for the conversion the Court is also attempting to update its attorney database with current post office and email addresses. Since electronic noticing will be required with CM/ECF, accurate email addresses will be critical. Attorneys are asked to review and update their personal information in ERS using option "4" on the ERS Filing Option menu.

News from the Clerk

Lori Vosejpka reported the following regarding local and national rule changes:

Status of Local Rules: Bill Wassweiler, Chair of the Local Rules Committee, forwarded the Committee's proposed rule revisions to the Judges for their consideration. The revisions focus on aspects of chapter 13 and on conforming the rules to the realities of electronic filing.

Amendments to three Fed. Rules of Bankr. Proc. effective on December 1, 2004:

- Rule 1011 (amended to correct an erroneous cross-reference);
- Rule 2002 (deleting reference to sending notices to the IRS through the District Director);
- Rule 9014 (expressly stating that some of the mandatory disclosure rules of FRCP 26 do not apply in contested matters)

In addition to the rule changes, a minor change to language on the Statement of Social Security Number Form was also implemented. The version of the form on the Court's webpage under the "Privacy" section of "What's New", was updated November 30.

Do You Have News to Report?

Call any of the editors if you have suggestions for news to include in the Bankruptcy Bulletin.