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Appellate Standing: The Ninth Circuit Shakes Things Up

Standing in federal controversies is governed by Article III of the U.S. Constitution.² However, standing to appeal a decision of a bankruptcy court is narrower than Article III standing. This is based on the nature of bankruptcy proceedings, which typically involve myriad parties with at least some interest in the resolution of a particular matter. Thus, courts generally agree that a party appealing a bankruptcy court's order must be a "person aggrieved" (*i.e.*, directly and adversely affected in a pecuniary way by that order).³ Since the person aggrieved standing requirement is designed to limit appellate standing to those key parties affected by an order and thereby serve the interests of judicial efficiency in bankruptcy cases, many courts have held that to be a person aggrieved on appeal, a party must have attended the underlying bankruptcy proceedings at issue and opposed the relief sought.

However, the U.S. Court of Appeals for the Ninth Circuit recently issued two decisions that appear to substantially relax the person aggrieved standing requirement for bankruptcy appeals and that might signal the beginning of a trend toward a more expansive view of bankruptcy appellate standing in general. This article examines these two decisions and their repercussions.

Point Center Financial and Wrightwood Guest Ranch

The Ninth Circuit published the *Point Center Financial*⁴ and *Wrightwood Guest Ranch*⁵ decisions approximately two months apart on May 29, 2018, and July 25, 2018, respectively.⁶ In *Point Center*, the chapter 7 trustee filed a motion for authorization to exercise the debtor's management rights in a nondebtor limited liability company (LLC), to retroactively extend the deadline to assume executory contracts, and to assume the

LLC's operating agreement pursuant to 11 U.S.C. § 365. The trustee provided notice of the motion to all parties-in-interest, including the counterparties to the operating agreement.

No party objected in writing or appeared at the hearing on the motion, and the bankruptcy court granted the motion. However, several days after the hearing, a group of individuals filed an emergency motion for reconsideration. The bankruptcy court denied the motion for reconsideration, and the individuals appealed the order granting the trustee's motion to the district court.

The trustee moved to dismiss the appeal in the district court, arguing that the appellants lacked standing to appeal the bankruptcy court's order because they failed to appear at the hearing or object to the trustee's motion. The district court agreed and dismissed the appeal, citing the "attendance and objection" requirement announced in *Brady v. Andrew (In re Commercial Western Finance Corp.)*.⁷ The individual appellants appealed the dismissal of their appeal to the Ninth Circuit.

The Ninth Circuit reversed the district court's dismissal of the appeal and expressly dispensed with the attendance and objection requirement in *Commercial* by characterizing it as *dicta*.⁸ The *Point Center* court acknowledged a split among the circuits and agreed with the Fourth Circuit in rejecting an attendance and objection requirement for bankruptcy appellate standing.⁹ The *Point Center* court further acknowledged that while the appellants' failure to appear and object did not deprive them of standing to appeal the bankruptcy court's order, their inaction could amount to waiver or forfeiture of certain arguments on appeal.¹⁰

In *Wrightwood*, the chapter 11 trustee sought approval of a settlement. The creditors' committee and the debtor's principals filed objections to the proposed settlement that were ultimately overruled. At the hearing, counsel for the committee and the debtor appeared on behalf of their respective clients and opposed the settlement. Notwithstanding this opposition, the bankruptcy court approved the settlement. Then the law firms representing the committee and the debtor appealed the bankruptcy court's order on their own behalf, asserting that



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² *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

³ See, e.g., *Heatherwood Holdings LLC v. HGC Inc. (In re Heatherwood Holdings LLC)*, 746 F.3d 1206, 1216 (11th Cir. 2014) ("Bankruptcy's person aggrieved doctrine restricts standing more than Article III standing, as it allows a person to appeal only when they are 'directly and adversely affected pecuniarily by the order.'") (quoting *Westwood Cmty. Two Ass'n Inc. v. Barbee (In re Westwood Cmty. Two Ass'n Inc.)*, 293 F.3d 1332, 1335 (11th Cir. 2002)).

⁴ *Harkey v. Grobstein (In re Point Ctr. Fin. Inc.)*, 890 F.3d 1188 (9th Cir. 2018).

⁵ *Reid & Hellyer APC v. Laski (In re Wrightwood Guest Ranch LLC)*, 896 F.3d 1109 (9th Cir. 2018).

⁶ Interestingly, oral argument in *Wrightwood* occurred before the *Point Center* decision was issued, and there was no significant discussion regarding forfeiture at oral argument in the *Wrightwood* case.

⁷ 761 F.2d 1329, 1335 (9th Cir. 1985).

⁸ *Point Ctr. Fin.*, 890 F.3d at 1192.

⁹ *Id.*

¹⁰ *Id.* at 1193-94.

the settlement adversely impacted the firms' administrative claims in the case.

The trustee moved to dismiss the law firms' appeal, arguing that, among other things, the firms lacked standing to appeal the settlement order because they failed to appear or object at the bankruptcy court level on their own behalf. The district court agreed and dismissed the consolidated appeal. The law firms appealed this dismissal to the Ninth Circuit.

In contrast to the result in *Point Center*, the *Wrightwood* court affirmed the dismissal of the appeal. In doing so, the *Wrightwood* court agreed with *Point Center* in that "attendance and objection are not prudential standing requirements in bankruptcy cases," but noted that attendance and objection remained relevant to determining "whether a party has waived or forfeited its right to appeal a given order of the bankruptcy court."¹¹ The court concluded that the law firms' failure to appear and object on their own behalf in this situation resulted in a forfeiture of their appellate rights, even though they technically still had appellate standing under the rule articulated in *Point Center*.¹² The court reasoned that "[w]hether we refer to the attendance and objection requirement as one of 'standing,' or now as one of 'forfeiture,' it serves the same interests of economy, efficiency, and notice that are crucial to the orderly functioning of the bankruptcy system."¹³

The *Point Center* decision was surprising in that it expressly rejected what had been perceived as settled precedent for more than three decades. In *Commercial*, the Ninth Circuit first announced that "attendance and objection should usually be prerequisites to fulfilling the 'person aggrieved' standard," except where the appellant's "grievance is a lack of proper notice."¹⁴

The issue in *Commercial* was whether the appellants in that case had standing to appeal a bankruptcy court's order confirming a plan even though they failed to appear and object to plan confirmation at the hearing. Noting that a "leading commentator ... supports a requirement of attendance and objection as a limitation on the number of people who have standing to appeal" except where "the objecting party did not receive proper notice of the proceedings below and of his opportunity to object to the action proposed to be taken," the court concluded that "even though we agree that attendance and objection should usually be prerequisites to fulfilling the 'person aggrieved' standard, the Trustee's failure to give the investors proper notice ... excuses them from fulfilling these prerequisites in the instant case."¹⁵

Since 1985, unpublished memoranda of the Ninth Circuit and lower courts have cited *Commercial* for the rule that attendance and objection at the bankruptcy court is required to appeal a bankruptcy court's order.¹⁶ Other circuit courts have also relied on *Commercial* for the same proposition.¹⁷

Prior to *Point Center*, the Fourth Circuit was the only court of appeals that declined to follow the *Commercial* rule of appellate standing. The Fourth Circuit explained that bankruptcy appellate standing hinged on one simple ques-

tion: whether the appellant "has been directly and adversely affected pecuniarily by the bankruptcy order."¹⁸ Rejecting the decisions that had applied the *Commercial* rule, the Fourth Circuit explained that defining "standing" by whether the appellant appeared or objected "conflates basic notions of standing with notions of waiver and forfeiture."¹⁹ Now, after the *Point Center* decision, it appears there might be a trend at the circuit level toward a more expanded view of bankruptcy standing and a recognition that what earlier courts had described as standing is, in fact, better described as a waiver or forfeiture of one's appellate rights.²⁰

Practical Ramifications

In a vacuum, *Point Center* appeared to be a major development with far-reaching ramifications. The decision appears to permit any creditor in the Ninth Circuit to appeal an order affecting assets of the estate without appearing or opposing the relief in the bankruptcy court. In large cases, this could potentially open the door to hundreds — if not thousands — of parties that had never participated at the bankruptcy court level.

However, when the *Point Center* decision is read together with *Wrightwood* decision, the practical fears of practitioners should be at least somewhat assuaged. As the *Wrightwood* panel put it, "[w]hether we refer to the attendance and objection requirement as one of 'standing,' or now as one of 'forfeiture,' it serves the same interests of economy, efficiency, and notice that are crucial to the orderly functioning of the bankruptcy system."²¹ Stated differently, a party's failure to appear at the hearing and object to the relief in the bankruptcy court might not deprive that party of appellate standing, but it can result in the forfeiture of that party's ability to challenge the propriety of the relief granted by the bankruptcy court. Thus, practitioners should still ensure that they appear and object on behalf of their clients at the bankruptcy court level if they want to preserve the right to later appeal or otherwise challenge the bankruptcy court's order.

In addition, *Point Center* and *Wrightwood* have certainly made it more difficult for practitioners representing appellees in bankruptcy appeals within the Ninth Circuit to successfully seek dismissal of an appeal filed by a creditor that did not appear and object at the bankruptcy court level. Because an appellant has the burden of demonstrat-

16 See, e.g., *Norrie v. Mallen* (In re *Norrie*), 698 F. App'x 432, 433 (9th Cir. 2017); *French Auto. LLC v. Gill* (In re *W. Covina Motors Inc.*), 691 F. App'x 362, 363 (9th Cir. 2017); *Benham v. Hagen* (In re *Benham*), 678 F. App'x 474, 476 (9th Cir. 2017); *Wathen v. Yarnall* (In re *Wathen*), 412 F. App'x 13, 14 (9th Cir. 2011); *Marin v. Sanders* (In re *Marinkovic*), 295 F. App'x 153, 154 (9th Cir. 2008); *Renter v. City of San Bernardino* (In re *City of San Bernardino*), Case No. 5:17-cv-345-ODW, 2018 WL 317798, at *2 n.1 (C.D. Cal. Jan. 4, 2018); *In re Wrightwood Guest Ranch LLC*, Case No. EDCV 16-1768-MWF, 2016 WL 7156450 at *2-4 (C.D. Cal. Dec. 7, 2016); *In re Hassan Imps. P'ship*, Case No. 2:15-cv-04091-CAS, 2015 WL 4572842 at *4 (C.D. Cal. July 27, 2015); *Benham v. First Am. Title Co.* (In re *Benham*), No. LA CV 13-00205-VBF, 2014 WL 4543268 at *2-3 (C.D. Cal. Sept. 12, 2014); *Lenders Prot. Grp. v. USA Commercial Mortg. Co.* (In re *USA Commercial Mortg. Co.*), 369 B.R. 587, 593 (D. Nev. 2007); *Lynch v. Cal. Pub. Utils. Comm'n*, 311 B.R. 798, 803 (N.D. Cal. 2004), *vacated as moot*, 171 F. App'x 581 (9th Cir. 2006).

17 See *In re Ray*, 597 F.3d 871, 874 (7th Cir. 2010); *Weston v. Mann* (In re *Weston*), 18 F.3d 860, 864 (10th Cir. 1994); *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1992).

18 *White v. Univision of Va. Inc.* (In re *Urban Broad. Corp.*), 401 F.3d 236, 244 (4th Cir. 2005) (emphasis omitted).

19 *Id.*

20 See, e.g., *In re Urban Broad. Corp.*, 401 F.3d 236, 244 (4th Cir. 2005) ("[D]efining standing by whether an appellant has objected to an order or attended a hearing conflates basic notions of standing with notions of waiver and forfeiture.")

21 *Reid & Hellyer APC v. Laski* (In re *Wrightwood Guest Ranch LLC*), 896 F.3d at 1117.

11 *Reid & Hellyer APC v. Laski* (In re *Wrightwood Guest Ranch LLC*), 896 F.3d 1109, 1113 (9th Cir. 2018).

12 *Id.* at 1113-14.

13 *Id.* at 1117.

14 *Brady v. Andrew* (In re *Commercial W. Fin. Corp.*), 761 F.2d 1329, 1335 (9th Cir. 1985).

15 *Id.*

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ing that it has appellate standing, framing the attendance and objection requirement as one of appellate standing places the burden on appellants; unless an appellant could successfully justify its failure to appear and object at the bankruptcy court, its appeal would have been dismissed. Now, after *Point Center*, where one must frame the issue as one of waiver and/or forfeiture, the burden of proof has shifted, because the party alleging waiver and forfeiture (most likely, the appellee) now has the burden of proof on that issue as the moving party.

Finally, while there seems to be some authority that an appellee may raise a waiver or forfeiture of appellate rights in a motion to dismiss,²² appellate courts likely will prefer to consider arguments based on waiver and/or forfeiture among other arguments on the merits of an appeal as opposed to a motion to dismiss the appeal. This would, in turn, increase the time and expense of an appeal filed by an appellant that failed to appear and object at the bankruptcy court. **abi**

²² See, e.g., *U.S. v. Buchanan*, 131 F.3d 1005, 1108-09 (11th Cir. 1997) (holding that in criminal context, express waiver of appellate rights was enforceable through motion to dismiss).

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