Benchnotes

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When Are Orders Final? Sixth Circuit Clarifies the Standard for Finality

In *Jackson Masonry*,[1] the Sixth Circuit addressed whether the appellant had timely appealed an order denying a motion for relief from the automatic stay. Before the bankruptcy filing, the movant, Ritzen Group, had contracted with the debtor to purchase the debtor's property. Litigation was brought over on whether the debtor breached the purchase contract, but the litigation was stayed by the debtor's bankruptcy filing.

Ritzen moved for relief from stay to liquidate its claims in state court, but the bankruptcy court denied the motion. Ritzen then brought a lawsuit against the debtor for breach of contract, but the debtor counterclaimed that Ritzen (not the debtor) breached the contract by failing to close on time.[2] The bankruptcy court entered judgment in the debtor's favor.

Only then, after the bankruptcy court adjudicated the underlying contract dispute, did Ritzen file two appeals: one appealing the order denying stay relief, and the other appealing the bankruptcy court's contract ruling. The Sixth Circuit affirmed the merits of the breach-of-contract ruling, but dismissed the stay relief appeal as untimely. The dismissal for untimeliness warrants discussion.

In addressing whether Ritzen's appeal of the stay relief order was timely, the court of appeals noted that "courts have taken the loose finality in bankruptcy as a license for judicial intervention," resulting in tests that are vague and impossible to consistently apply. The Sixth Circuit explained that the source of the problem was the failure of these courts to start with the text of the bankruptcy appeals statute: 28 U.S.C. § 158(a). Under that statute, district courts have appellate jurisdiction over final judgment, orders or decrees from all "cases and proceedings." In other words, finality is determined as a two-step process: (1) identify the "judicial unit" that constitutes the case or proceeding; and (2) determine whether the order, judgment or decree disposes of all issues in that discrete case or proceeding.

Applied to the stay-relief order, the court of appeals recognized that a motion for relief from stay commenced a discrete "proceeding" (*i.e.*, "there is a discrete claim for relief, a series of procedural steps, and a concluding decision based on the application of a legal standard"). An order denying stay relief is final because "there are no more 'rights and obligations' at issue in the stay relief proceeding" once the motion has been granted or denied. As such, the order denying Ritzen's stay-relief motion was final upon entry, and its appeal several months later at the conclusion of the adversary proceeding was deemed untimely.[3]

May the Best Expert Win

Burdens are tricky. In this case, the bankruptcy court ruled in favor of two defendants in a fraudulent-transfer case, concluding that the trustee, despite having presented an expert, failed to carry its burden in proving that the debtor was insolvent at the time of the alleged fraudulent transfer. The court of appeals noted that this case represented a classic "battle of the experts."

The bankruptcy court found the defendants' expert to be more credible on the issue and denied the trustee's *Daubert* motion. Even though the defendants' expert offered no specific business values in his testimony, the bankruptcy court concluded that the defendants' expert called the trustee's solvency analysis into question, and further concluded that the trustee failed to prove the debtor's insolvency.

On appeal in *In re Teltronics Inc.*,[4] the Eleventh Circuit held that the bankruptcy court did not commit clear error, and was well within its discretion, in denying the trustee's *Daubert* motion and considering the defendants' expert opinions. The court also explained that the trustee's *Daubert* motion was limited to excluding the expert's solvency analysis, but was not broad enough to exclude testimony over the specific issue of whether the debtor's service contracts should be valued independently from other balance-sheet assets and considered separately for solvency purposes.

The defendants' expert testified that the trustee's expert failed to consider the value of those contracts or the possibility that the contracts could have rendered the debtor solvent at the time. The bankruptcy court found this evidence more credible than the trustee's expert testimony. Since the trustee's expert conceded that those contracts could have had independent value and presented no opinion of value for those contracts, the bankruptcy court concluded that the trustee did not carry its burden of proving the debtor's insolvency. Accordingly, the court of appeals affirmed the judgment in favor of the defendants.

Miscellaneous

• *In re HJH Consulting Grp. Inc.*, 2018 WL 4090594 (Bankr. W.D. Tex. Aug. 24, 2018) (court

1 *Ritzen Grp. Inc. v. Jackson Masonry LLC (In re Jackson Masonry LLC)*, --- F.3d ---, 2018 U.S. App. LEXIS 29009, 2018 WL 4997779 (6th Cir. Oct. 16, 2018).

2 As the court explained in its introductory paragraph, "Deadlines matter. Ritzen Group missed two of them: the closing deadline in a contract and the appellate deadline for bankruptcy orders."

3 The court recognized a possible exception for orders denying stay relief without prejudice, because the movant may have had the opportunity to refile upon a change in circumstances. However, because the order entered in this case was not "without prejudice," the Sixth Circuit concluded that the 14-day period for appeal under Bankruptcy Rule 8002(a) began to run upon entry.

4 *In re Teltronics Inc.*, --- F.3d ---, 2018 U.S. App. LEXIS 27869, 2018 WL 4700578 (11th Cir. Oct. 2, 2018).

held that former executive of debtor could invoke his Fifth Amendment privilege in response to motion to compel, pursuant to Bankruptcy Rule 2004, by refusing to answer questions and produce documents relevant to debtor's financial affairs, which he believed might be self-incriminating; "The Court finds the Fifth Amendment protections to be extensive, the exceptions to be few, and the invocation here to be both proper and effective"; court warned that asserting privilege comes with price because civil courts are permitted to draw negative inference from assertion);

• *In re OGA Charters LLC*, 2018 WL 4057525 (5th Cir. Aug. 24, 2018) (following bus accident that killed nine passengers and injured more than 40 others, numerous personal-injury and wrongful-death claims were asserted against bus owner/operator; small group of victims quickly entered into settlements with debtor's insurer that, collectively, exceeded the $5 million policy limits; before insurer could make any payments pursuant to settlement, group of non-settling claimants commenced involuntary bankruptcy case against debtor; bankruptcy trustee sought to block payments to settling creditors, arguing that insurance proceeds were property of estate; on appeal, Fifth Circuit confirmed that proceeds of insurance policy are estate property when claims against policy exceed policy limits; apparent insufficiency of policy limits gave debtor equitable interest in having insurance proceeds applied to satisfy as many claims as possible);

• *Simon v. Finley (In re Finley)*, 2018 WL 4172599 (Bankr. S.D. Ill. Aug. 28, 2018) (in chapter 13 case, bankruptcy court rejected minority position that direct payments to mortgage creditor were not "payments under the plan" for purposes of § 1328(a) of Bankruptcy Code; court warned that debtors who fail to make direct payments are generally not entitled to discharge at conclusion of case; nevertheless, because chapter 13 trustee had notice of debtors' failure to make direct payments in ample time to file objection to their motion for discharge, he was barred from seeking to revoke discharge once granted);

• *In re Sino Clean Energy Inc.*, 2018 WL 4055651 (9th Cir. Aug. 27, 2018) (Ninth Circuit held that bankruptcy court did not err in dismissing a chapter 11 case filed by former board members of debtor who had previously been removed by receiver due to their lack of standing; appellate court rejected argument that dismissal violated public policy against restraints on filing bankruptcy; "No matter the equitable considerations, state law dictates which persons may file a bankruptcy petition on behalf of a debtor corporation");

• *U.S. v. Daley (In re Daley)*, 315 F. Supp. 3d 679 (D. Mass. 2018) (chapter 13 debtors objected to priority claim filed by IRS for 10 percent penalty imposed on early withdrawal of funds from qualified retirement plan; noting that lower courts should not place any weight on "tax" label in statute in ruling on priority of claims, district court held that purpose of penalty was to deter unwanted conduct, not generate revenue or compensate government for pecuniary loss; thus, claim was not tax claim entitled to priority under § 508(a)(8));

• *Viegelahn v. Lopez (In re Lopez)*, 897 F.3d 663 (5th Cir. 2018) (after trustee moved to modify debtors' confirmed chapter 13 plan to compel debtors to turn over proceeds from post-petition sale of their exempt homestead (which proceeds were not promptly reinvested in another home), debtors moved to voluntarily dismiss their chapter 13 case; Fifth Circuit held that homestead proceeds lost their exempt nature but nevertheless must be returned to debtors upon dismissal of their bankruptcy case; noting that chapter 13 is voluntary, court rejected trustee's argument that cause existed under § 349(b) to modify effect of dismissal by allowing her to distribute funds to unsecured creditors); and

• *United States v. Copley*, --- B.R. ---, 2018 U.S. Dist. LEXIS 154383, 2018 WL 4326810 (E.D. Va. Sept. 10, 2018) (in lengthy and thoughtful analysis of wide-ranging issues such as exemptions, setoff, turnover and congressional abrogation of sovereign immunity, district court affirmed bankruptcy court's judgment in favor of debtors, requiring IRS to return $3,208 tax refund that IRS had tried to apply toward debtors' pre-petition tax obligations; since tax refund had not been applied pre-petition, court held that the refund became property of estate; as a result, "the Debtors' authority to exempt the $3,208.00 pursuant to § 522 and Virginia Code § 34-4 overrides the IRS's authority to offset the overpayment with preexisting tax liability pursuant to § 553 and § 6402"). abi