Appellate problem for the Advisory Committee on Bankruptcy Rules

A Benjamin Goldgar to: rules_support 04/06/2016 05:37 PM

History: This message has been forwarded.

I write to bring to the attention of the Bankruptcy Rules Advisory Committee a recurring problem in bankruptcy appeals that I believe deserves study and eventual rule-making. The problem concerns when (and how) jurisdiction revests in the bankruptcy court after a decision on appeal.

There is no such problem with an appeal from a district court to the court of appeals. After the court of appeals issues its decision, Rule 41 of the Appellate Rules calls for the issuance of a "mandate" consisting of a certified copy of the judgement, a copy of the opinion (if any), and any direction about costs. Fed. R. App. P. 41(a). Rule 41 specifies when the mandate issues, Fed. R. App. P. 41(b), and makes clear that the mandate is effective when issued, Fed. R. App. P. 41(c). Once the mandate issues, jurisdiction revests in the district court; until the mandate issues, the district court lacks jurisdiction. *See, e.g., Kusay United States,* 62 F.3d 192, 193-94 (7th Cir. 1995).

For bankruptcy appeals, however, there is nothing comparable to Rule 41, not in the Civil Rules and not in Part VIII of the Bankruptcy Rules. The district court issues no "mandate." (Bankruptcy Rule 8024 comes close, but it requires only the entry of judgment on the docket of the district court and then transmission of a notice of its entry to the clerk of the bankruptcy court. Rule 8024 is not the analogue of Rule 41.) It is unclear, consequently, when jurisdiction revests in the bankruptcy court after an appeal to the district court or for that matter after an appeal that reaches the court of appeals through the district court. The bankruptcy judge is never quite sure when he has the power to resume proceedings post-appeal.

The problem can arise in a variety of circumstances, but here are two illustrations from my own experience:

(1) The bankruptcy court enters a judgment, and the judgment is appealed to the district court. The district court reverses and remands for further proceedings. Does the mere issuance of the district court's judgment revest the bankruptcy court with jurisdiction and entitle that court to resume proceedings? Or must the judgment first be docketed with the bankruptcy court?

(2) The bankruptcy court denies a motion for preliminary injunction, and the order is appealed to the district court which affirms. The losers in the district court appeal again, and the court of appeals vacates the denial, adding that "the case [is] remanded for further proceedings." Does that mean a remand to the district court or directly to the bankruptcy court? When the court of appeals issued its mandate, did its issuance revest jurisdiction in the district court or in the bankruptcy court? If the former, was it necessary for the bankruptcy court to wait until the district court, acting as a kind of jurisdictional way station, had remanded to the bankruptcy court?

(The second example is based on *Caesars Entm't Operating Co. v. BOKF, N.A. (In re Caesars Entm't Operating Co.),* 808 F.3d 1186 (7th Cir. 2015), in which I was the bankruptcy judge. I assumed the Seventh Circuit's issuance of the mandate returned the case to me in accordance with Rule 41, so I began proceedings on remand immediately. But the district court apparently assumed the opposite, because some days later it issued an order remanding the case to the bankruptcy court -- although

proceedings there had already resumed.)

I believe the lack of anything comparable to a mandate creates a problem for bankruptcy appeals, one that has caused and continues to cause confusion. The problem deserves study and, I believe, some form of treatment in the Rules. I raise the problem for the Committee's consideration.

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