

Appellate Review of a Bankruptcy Court's Preliminary Injunction

By Michael L. Cook

Should a bankruptcy court's preliminary injunction be subject to appellate review? Taking the negative position, the U.S. District Court for the Eastern District of New York recently held that it had the "discretion ... to decline to hear" an appeal from a bankruptcy court's preliminary injunction. *Navient Solutions, LLC et al. v. Homaidan et al.*, 2022 WL 17252459, *4 (E.D.N.Y. Nov. 28, 2022), quoting *In re Kassover*, 343 F.3d 91, 95 (2d Cir. 2003) (Note: The author succeeded in losing the appeal in *Kassover*.) The court's unremarkable findings purported to support its position: a) the preliminary injunction was not a final order; b) leave to appeal was not warranted; and c) the appellant failed to show why the "extraordinary remedy" of mandamus was warranted. But the court conceded that district courts are split on the important issue of whether bankruptcy court preliminary in-

junctions, admittedly interlocutory, are appealable to the district court as of right under 28 U.S.C. §1292(a)(1) (courts of appeals have jurisdiction, and appellate review exists as of right over "interlocutory orders ... granting [or] refusing ... injunctions"). In the court's view, 28 U.S.C. §158(a)(1) required the court to review only "final" orders and "does not mention preliminary injunctions." *Id.* at *2. Besides, said the court, the bankruptcy court will eventually "revisit the merits and appropriate parameters of the Preliminary Injunction." *Id.* at *3.

A bankruptcy court preliminary injunction should be reviewable as of right because of Supreme Court precedent, the rulings of other courts and common sense. Sound policy reasons also require appellate review, as explained below, because federal courts have a duty to decide cases. A district court's use of procedural facades to avoid making a decision should not be an option for an Article III court when a preliminary injunction is appealed from a non-Article III bankruptcy court.

RELEVANCE

The Second Circuit's *Kassover* holding bound the district court in *Navient*, but other courts of appeals have later disagreed with the reasoning of *Kassover*. See, *United Airlines, Inc. v. U.S. Bank*, 406 F.3d 918, 923-24 (7th Cir. 2005) (reversed district court's refusal to review bankruptcy court's "interlocutory orders" (injunctions); court stressed need for "review by an Article III judge.") (Easterbrook, J.); *In re World Imports Ltd.*, 820 F.3d 576, 582 n.5 (3d Cir. 2016) ("Pursuant to 28 U.S.C. §§158(a) and 1292(a), the District Court had jurisdiction over the appeal from the Bankruptcy Court's order granting injunctive relief."); *In re Affeldt*, 60 F.3d 1292, 1294 (8th Cir. 1995) ("Under 28 U.S.C. §1292(a)(1) ..., we have jurisdiction over [bankruptcy court] injunctions."), citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254-56 (1992); *In re Prof'l Ins., Mgmt.*, 285 F.3d 268, 282 n.16 (3d Cir. 2002) (Ambro, J.) (district court, as appellate court, authorized to hear appeal from bankruptcy court as appealable "injunctive order" under 28 U.S.C. §1292(a)(1)).

THE DISTRICT COURT SPLIT

Other district courts have also agreed on the need for appellate review of a bankruptcy court preliminary injunction. *See, e.g., Clark v. Sanders (In re Reserve Prod. Inc.)*, 190 B.R. 283, 290 (E.D. Tex. 1995) (reviewing bankruptcy court's preliminary injunction because "ruling of a non-Article III bankruptcy court should not be more insulated from appellate review than the rulings an Article III district court."); *In re Reliance Acceptance Grp, Inc.*, 235 B.R. 548, 553 (D. Del 1999) (under 28 U.S.C. §§158(c)(2), and 1292 (a) (1), defendants have a "right to appeal to this court [from] bankruptcy court's preliminary injunction."); *Prof'l Ins. Mgmt. v. The Ohio Cas. Grp of Ins.*, 246 B.R. 47, 58 (D.N.J. 2000) (bankruptcy court injunctions are appealable as of right under sections 158(c)(2) and 1292(a)(1)); *La Habra Prods., Inc. v. Patio Indus. (In re Patio Indus.)*, 220 B.R. 672, 676 (C.D. Cal. 1996) (granting appeal as of right under section 1292(a)(1) for review of bankruptcy court injunction).

The court in *Navient*, though, relied on other unconvincing or distinguishable district court decisions. *In re Quigley Co., Inc.*, 323 B.R. 70, 76 (S.D.N.Y. 2005) (**Note:** The author represented the prevailing party in *Quigley* which is distinguishable from *Navient*. The injunction there allowed parties to seek prompt relief from the stay by showing a particular type of claim or by showing "cause" under the less rigorous standard of Bankruptcy Code § 362(d)(1). 323

B.R. at 75 n.3, 76. And parties regularly did. *See, e.g., In re Quigley Co., Inc.*, 676 F.3d 45, 49 (2d Cir. 2012) (construing preliminary injunction.); *Amusement Indus., Inc. v. Citigroup Group Mkts. Realty Corp. (In re First Republic Grp. Realty, LLC)*, 2010 WL 882986, at *1 (S.D.N.Y. Mar. 2, 2010); *Carter v. Travelers Indem. Co. (In re Johns Manville Corp.)*, 2004 WL 385118, at *1 (S.D.N.Y. Mar. 2, 2004) ("[Section 158] does not vest the district courts with jurisdiction to entertain appeals from preliminary injunctions issued by bankruptcy courts, except when the appellant first obtains leave from the appropriate district court."); *MF Glob. Holdings Ltd. v. Allied World Assurance Co.*, 2017 WL 2819870, *4 (S.D.N.Y. June 29, 2017) (preliminary injunction analyzed as interlocutory order requiring leave); *In re Alco Energy, LLC*, 2019 WL 6716420, *4 (D. Del. Dec. 10, 2019) (enjoined defendant-appellant failed to "make any argument" as to why district court should "exercise discretion" to hear interlocutory appeal; preliminary injunction "not a final and immediately appealable order."), citing 28 U.S.C. §§ 158(a), 1292(b) and 16 Wright & Miller, *Federal Practice and Procedure* §3926.1 (3d ed. 2017) (no appeal as of right from an injunction issued by bankruptcy court) (also cited in *Navient*). *But see*, 16 Wright & Miller, §3926.1 at 1,5 n. 28 (3d ed. 2022)) ("... [A]vowedly interlocutory appeals are available under 28 U.S.C.A. §1292 There is no provision [in 28 U.S.C. §1292] for appeal as of right ... to the district

court, although some injunction orders may come to be appealable as final decisions," adding in a footnote that "[an] injunction can be treated as final on appeal ... to the district court," and citing the Third Circuit's 2016 *World Imports* decision, *supra*, 820 F.3d at 582 n. 5.

RELEVANT STATUTES

Appeals from the bankruptcy court to the district court are governed by three provisions of the Judiciary Code. §§158(a); 158(c) (2); and §1292(a)(1). 28 U.S.C. Section 158(a) reads in relevant part as follows:

"The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders and decrees ... and (3) with leave of the court, from interlocutory orders and decrees"

Section 158(c)(2) further provides that "[a]n appeal under ... this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts" Finally, "the courts of appeals shall have jurisdiction of appeals from... [i]nterlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving *injunctions* or refusing to dissolve or modify injunctions" 28 U.S.C. §1292(a) (1) (emphasis added).

RELEVANT PRECEDENT

U.S. Supreme Court

Section 158, governing bankruptcy appeals, cannot be read in isolation from the other provisions of Title 28, held the U.S. Supreme

Court in *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“... so long as there is no ‘positive repugnancy’ between two laws ... a court must give effect to both. ... [G]iving effect to both §§1291 and 158(d) would not render one or the other superfluous. ... [N]o reason to infer from either §1292 or §158(d) that Congress meant to limit appellate review of interlocutory orders in bankruptcy proceedings. So long as a party to a proceeding ... in bankruptcy meets the conditions imposed by §1292, a court of appeals may rely on that statute as a basis for jurisdiction.”). In *Germain*, the Court rejected the trustee’s argument “that §1292 does not apply [to an appeal from an interlocutory bankruptcy court order] because Congress limited § 1292 through §158(d), which deals with bankruptcy jurisdiction [and] precludes jurisdiction under §1292 by negative implication” *Id.* at 251-52. “Nowhere ... has Congress indicated that the unadorned words of § 1292 are in some way limited by implication.” *Id.* at 254. *See also, Carson v. American Brands, Inc.*, 450 U.S. 79 (1984) (“practical effect” of injunction denial order could have “serious, perhaps irreparable consequence[s]”; order can be “effectively challenged” only by immediate appeal); *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (“statutory construction ... is a holistic endeavor. A provision that may seem ambiguous is often clarified by the remainder of the statutory scheme ...”). A preliminary

injunction, whether issued by the bankruptcy court or by the district court, should therefore be appealable as of right under *Germain*’s reasoning.

District Courts

District courts applying §1292(a) (1) to appeals from bankruptcy court injunctions reason that, as a policy matter, §158(c)(2) also makes section 1292(a)(1) applicable to the appellate process. *First Owners Ass’n of Forty Six Hundred v. Gordon Properties, LLC*, 470 B.R. 364, 371-73 (E.D. Va. 2012) (injunction not final order; but “[a]pplication of §1292(a) ... to the bankruptcy context is appropriate” because of need for Article III review); *In re Midstate Mortg. Investors Group, L.P.*, 2006 WL 3308585, *4 (D. N.J. 2006) (district court authorized under §1292(a) to hear appeal from bankruptcy court injunction “without the need to resort to discretion to grant leave to appeal.”); *Internal Revenue Service v. Ernest & Young, Inc.*, 135 B.R. 517, 520-21 (S.D. Ohio 1991) (“the application of Section 1292(a) to bankruptcy [cases] makes bankruptcy injunctions appealable” as of right); *In re Neuman*, 81 B.R. 796, 801-02 and n.5 (S.D.N.Y. 1998) (same); *In re Ocana*, 151 B.R. 670, 671 (S.D.N.Y. 1993) (same) (Leval, J.).

The *Navient* court rejected this “policy argument” [*i.e.*, that appeals to the district court from preliminary injunctions are governed by §§158 and 1292] as “contorting the statute to correct [a] perceived oversight” or “drafting error ...” 2022 WL 17252459, at *5 n. 5. The

Supreme Court in *Germain*, however, noted only a statutory “overlap” and a “redundancy”, but no “positive repugnancy,” holding that “a court must give effect to both” §§158 and 1292. *Germain*, 503 U.S. at 253 (emphasis added).

RATIONALE FOR APPELLATE

REVIEW OF PRELIMINARY

INJUNCTIONS

Injunctions Are

Substantially Unique

Congress adopted 28 U.S.C. §1292(a)(1) “to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence and because ‘rigid application of the [final judgment] principle was found to create undue hardship in some cases’.” *Feit v. Drexler*, 760 F.2d 406, 411 (2d Cir. 1995). An injunction issued by a bankruptcy court has the same effect as an injunction issued by a district court. The *Navient* court’s argument that the preliminary injunction will be revisited is meaningless, for that is usually what happens in most cases. Consistent with §158(c)(2), a district court must therefore “review a bankruptcy court order in exactly the same way as a court of appeals reviews a district court order.” *Ernst & Young, supra*, 135 B.R. at 520.

Injunctions issued by bankruptcy courts are no different from injunctions issued by district courts. Both can be equally serious, with irreparable consequences.

The Judicial Code

Requires Appellate Review

Sections of Title 28 must also be read together. *Connecticut Nat’l*

Bank v. Germain, 503 U.S. 249, 253 (1992). See, *In re 48th Street Steakhouse, Inc.*, 46 B.R. 227, 229 (S.D.N.Y. 1985) (“[i]t is well settled that the standards embodied in 28 U.S.C. §1292(a) are applicable” to an appeal of a bankruptcy court order to the district court); *In re Brentano's, Inc.*, 36 B.R. 90, 91 n.4 (S.D.N.Y. 1984) (recognizing applicability of section 1292(a)(1) to appeals from bankruptcy court injunctions).

No Reason to Insulate

Bankruptcy Court Injunctions

“[A]s a policy matter,” a non-Article III bankruptcy court’s injunction should be subject to the same mandatory review as that of an Article III district court. *In re Reserve Production, Inc.*, 190 B.R. 287, 290 (E.D. Tex. 1995) (reviewing bankruptcy court’s preliminary injunction under 28 U.S.C. §1292(a)(i)), quoted approvingly in *First Owners, supra* (E.D. Va. 2012). Indeed, the Seventh Circuit reversed a district court’s refusal to hear an appeal from bankruptcy court injunctions that the district court had deemed to be “interlocutory orders”, reasoning that “review by an Article III judge” was necessary. *United Airlines, Inc. v. U.S. Bank*, 406 F.3d 918, 923-24 (7th Cir. 2005) (“district court and court of appeals had jurisdiction under 28 U.S.C. §1292(a)(i)”; preliminary injunctions “reviewable ... no matter what the rendering judge called them.”) (Easterbrook, J.)

Duty to Review

Courts declining to review bankruptcy court preliminary injunctions have either ignored or

misconstrued §158(c)(2) of the Judiciary Code and *Germain*. In effect, they have used the façade of the finality principle to avoid appellate review. But district courts should be duty-bound to review these appeals. See, *In re One2One Communications, LLC*, 805 F.3d 428, 439-40 (3d Cir. 2015) (Krause, J.) (concurring) (“The mandate that federal courts hear cases within their statutory jurisdiction is a bedrock principle of our judiciary.”), citing *Cobens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, Ch. J.) (“we have no ... right to decline the exercise of jurisdiction”); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (“virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“... the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”), quoting *Cobens*, 6 Wheat. at 404.

Article III Court Appellate

Review Is Essential

No substantive bankruptcy court order should be insulated from any appellate review. Because a preliminary injunction ordinarily affects a party’s substantive rights, even if only temporarily, Congress mandated appellate review of a district court injunction. But no district court has given a credible reason to preclude its review of a bankruptcy court injunction. Many reasons exist for such review, however, including prudence and common sense. See, *One2One*

Communications, 805 F.3d at 444-45 and n. 10 (“Adjudication by ... non-Article III tribunals, including bankruptcy courts, raises two distinct constitutional concerns. The first is the infringement on a litigant’s ‘entitlement to an Article III adjudicator,’ a personal right ... reaffirmed in *Wellness International Network, Ltd. v. Sharif* ... 135 S. Ct. 1932, 1944 ... (2015) Moreover, because they lack an alternative forum in which to pursue their claims against a debtor, most creditors do not truly consent to bankruptcy adjudication in the first place, ... let alone adjudication without any appellate review Appellate review by an Article III judge is crucial One prominent commentator has argued that review by an Article III judge is both necessary and sufficient to uphold adjudication by any non-Article III judge.”), citing Richard H. Fallon, Jr., “Of Legislative Courts, Administrative Agencies, and Article III,” 101 Harv. L. Rev. 915, 916 (1988).

