ALERTS

Bankruptcy Court Preliminary Injunction Held Not Appealable

February 20, 2020

A bankruptcy court's preliminary injunction was "not a final and immediately appealable order," held the U.S. District Court for the District of Delaware on Dec. 10, 2019. *In re Alcor Energy, LLC*, 2019 WL 6716420, *4 (D. Del. Dec. 10, 2019). The court declined to "exercise [its] discretion" under 28 U.S.C. § 158(a)(3) to hear the interlocutory appeal. *Id.*, citing 16 Wright & Miller, Federal Practice and Procedure, § 3926.1 (3d ed. 2017) ("There is no provision for appeal as of right from an injunction order of a bankruptcy judge to the district court.").

A bankruptcy court's injunction is appealable, however, according to the decisions that the *Alcor* court never mentioned. *See*, e.g., *In re GI Holdings, Inc.*, 122 Fed. Appx. 554-55 n.2 (3d Cir. 2004) ("Jurisdiction lies for this appeal pursuant to 28 U.S.C. § 1292(a)(1) because the [district court] refused ... to modify or dissolve a [bankruptcy court] preliminary injunction."); *Reliance Acceptance Corp. v. Levin* (*In re Reliance Acceptance Group*), 235 B.R. 548, 553 (D. Del. 1999) ("the court looks to sections 158(c)(2) and 1292(a) to find the defendants have a right to appeal to this court [from] the Bankruptcy Court's preliminary injunction order."). The *Alcor* court also missed the latest update to the Wright & Miller treatise that cites *In re World Imports Ltd.*, 820 F.3d 576, 582 n.5 (3d Cir. 2016) with the following: "Injunctions as final. An injunction from the district court can be treated as final from the district court as well as on appeal to the district court." In the recent Third Circuit case, reported Wright & Miller, "the bankruptcy court issued an injunction ... . The district court affirmed. The [Third Circuit] noted that the district court had jurisdiction of the appeal from the bankruptcy court both under [28 U.S.C. §] 158(a) and

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under § 1292(a) ..." 16 Wright & Miller, *supra*, § 3926.1, n.28 (2018 Supp.). Unfortunately, the appellants in *Alcor* "provided no argument in support of" the district court's appellate jurisdiction and thus "waived any argument that the appeal" was appropriate. *Alcor*, 2019 WL 6716420 at *4.

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).

A Preliminary Injunction Is Not Final

An interlocutory order such as a preliminary injunction is not final because it does not fix the parties' rights. *Ritzen Group v. Jackson Masonry*, 2020 U.S. LEXIS 526, *12, *19 (Jan. 14, 2020) (denial of "motion for relief from ... automatic stay" is "final" because it disposes of a procedural unit consistent with [28 U.S.C. § 158(a)],... and can have large practical consequences ..."); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (bankruptcy court's order final, appealable if it "alters the status quo and fixes the rights and obligations of the parties"). A preliminary injunction is only temporary in effect and is thus interlocutory, not final. *Pipkin v. JVM Operating, L.C.,* 197 B.R. 47, 52 (E.D. Tex. 1996) (appeal from preliminary injunction interlocutory, but reviewable under 28 U.S.C. § 1292(a)(1)), citing *In re Reserve Production, Inc.*, 190 B.R. 287, 290 (E.D. Tex. 1995) (same).

Relevant Precedent

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District courts have routinely applied § 1292(a)(1) to appeals from bankruptcy court injunctions because § 158(c)(2) makes section 1292(a)(1) applicable to the appellate process covered by § 158(a)(3) (appeals from bankruptcy court to district court). *Prof'l Ins. Mgmt. v. The Ohio Cas. Grp. of Ins. Cos.*, 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)); *In re Patio Indus.*, 220 B.R. 672, 676 (C.D. Cal. 1996) (granting appeal as of right under § 1292 (a)(1) for review of bankruptcy court injunction); *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) (permitting appeal from bankruptcy court injunction); *In re Ocana*, 151 B.R. 670, 671 (S.D.N.Y. 1993) (bankruptcy court preliminary injunction appealable) (Leval, J.). The district court in *Alcor* failed to mention these authorities or any others supporting appellate jurisdiction. In fairness, as noted, the appellant failed to make the case and the district courts, in any event, have not always been consistent.

Rationale for Appellate Review of Preliminary Injunctions

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 can have the same effect as an injunction issued by a district court. *See First Owners' Ass'n of Forty Six Hundred v. Gordon Properties, LLC*, 470 B.R. 354, 372 (E.D. Va. 2012) (recognizing that preliminary injunctions issued by bankruptcy courts are appealable as of right to district court; "[a]pplication of § 1292(a) … to the bankruptcy context is appropriate…."). Consistent with § 158(c)(2), a district court must "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.

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.

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90, 91 n.4 (S.D.N.Y. 1984) (recognizing applicability of section 1292(a)(1) to bankruptcy court appeals from injunctions).

Injunctions issued by bankruptcy courts are no different from injunctions issued by district courts. Both can be equally serious, with irreparable consequences. Moreover, "[a]s a policy matter, the rulings of a non-Article III bankruptcy court should not be more insulated from appellate review than the rulings 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)(1)). 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 mandatory. *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)(1)"; preliminary injunctions "reviewable ... no matter what the rendering judge called them") (Easterbrook, J.); *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 "injunctive order" [under] 28 U.S.C. § 1292(a)(1)). *Contra In re Kassover*,* 343 F.3d 91, 94-96 (2d Cir. 2003) (held, no appellate jurisdiction because § 1291(a)(1) did not apply to district court's denial of leave to appeal from bankruptcy court preliminary injunction; court ignored 28 U.S.C. § 158(c)(2)); *In re First Republic Group Realty, LLC*, 2020 WL 882986, *1 (S.D.N.Y. 2010) (refused to apply § 1292(a)(1) to appeal from preliminary injunction, but applied § 1292(b) instead to deny leave to appeal) (Scheindlin, J.). But *see In re Chateaugay Corp.*, 213 B.R. 633, 636-37 (S.D.N.Y. 1997) (applied § 1292(a)(1) to review bankruptcy court preliminary injunction).

Section 158(a)(3) cannot be read in isolation from the other provisions of Title 28. *Germain*, 503 U.S. at 253-54 ("... 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."); *United Savings Ass'n*

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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 …"). *Accord* 16 Wright & Miller, *supra*, § 3926.1 (3d ed. 2018) ("… § 1292 establishes jurisdiction in a 'proceeding … in bankruptcy' just as in all other cases."), quoting *Germain*. A preliminary injunction, whether issued by the bankruptcy court or by the district court, must therefore be appealable as of right.

Comments

1. *Duty To Review*. Those courts declining to review bankruptcy court preliminary injunctions have simply ignored § 158(c)(2) of the Judiciary Code and contrary decisions. In effect, they have hidden behind the façade of the finality principle to avoid appellate review. But federal courts are 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 *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, Ch. J.) ("we have no … right to decline the exercise of jurisdiction"); *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 *Cohens*, 6 Wheat. at 404.

2. *Appellate Review Is Essential*. No substantive bankruptcy court or district court order should be insulated from appellate review. Because a preliminary injunction ordinarily affects a party's substantive rights, even if only temporarily, Congress mandated review of a district court injunction by the court of appeals. No court has given a credible reason to preclude district court review of these bankruptcy court orders. But many reasons exist for such review, including the text of the Judiciary Code (28 U.S.C. § 158(c)(2)), 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.

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> 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. *See* Richard H. Fallon, Jr., "Of Legislative Courts, Administrative Agencies, and Article III," 101 Harv. L. Rev. 915, 916 (1988))."

Authored by Michael L. Cook.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the author.

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* The author succeeded in losing this appeal.

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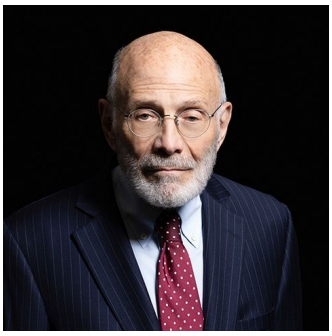

Michael Cook

Of Counsel

New York

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