

Legislative Update – “Indicative Rulings” Under New Bankruptcy Rule 8008

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In April 2014, the Supreme Court adopted various amendments to the Federal Rules of Bankruptcy Procedure, which took effect on December 1, 2014, for all subsequently filed bankruptcy cases and, to the extent “just and practicable,” for all pending cases. As with the other federal rules of procedure and evidence, the Supreme Court has the authority to promulgate general rules for practice and procedure in cases under the Bankruptcy Code pursuant to 28 U.S.C. § 2075.¹ Among the comprehensive changes made to Part VIII of the rules governing bankruptcy appeals was the adoption of new Bankruptcy Rule 8008, titled Indicative Rulings.

The new rule addresses the effect of an appeal on the bankruptcy court’s continuing jurisdiction over matters related to the appeal. Generally, an appeal from a final order confers exclusive jurisdiction in the appellate court over the issues that are the subject of the appeal. The bankruptcy court is thus deprived of any further authority to determine motions that would affect the status quo of the issues on appeal. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”). This doctrine is designed to minimize the confusion that might arise if two courts simultaneously acted on the same matter.

Bankruptcy Rule 8008 now permits the bankruptcy court, under certain circumstances, to entertain a motion that the court would otherwise lack authority to determine because it has been divested of jurisdiction due to an appeal. The new rule is patterned on existing procedures applicable in the civil context. See Fed. R. Civ. Proc. 62.1 (adopted in 2009); *Crateo, Inc. v. Intermark Inc.*, 536 F.2d 862 (9th Cir. 1976). Essentially, the rule permits the bankruptcy court and the appellate court to share jurisdiction over the matters subject to appeal. This shared jurisdiction may enable the bankruptcy court to dispose of an appeal despite the shift of jurisdiction to the appellate forum, thereby promoting the “just, speedy and inexpensive determination of every case and proceeding.” See Fed. R. Bankr. Proc. 1001.

Under the new rule, the bankruptcy court retains the authority to address a timely motion for relief, that the court might otherwise be unable to consider because of a pending appeal, in one of three ways: (a) defer consideration of the motion, (b) deny the motion, or (c) indicate either that it would grant the motion if the appellate court remanded for that purpose, or that the motion “raises a substantial issue.” Bankruptcy Rule 8008(a). If the bankruptcy court issues an indicative ruling under the third option, it must promptly notify the clerk of the court where the appeal is pending (i.e., the district court, the bankruptcy appellate panel—BAP—or the court of appeals). Bankruptcy Rule 8008(b). The “substantial issue” indication, while not elaborated upon by the Advisory Committee notes to the new rule, is modeled on existing Civil Rule 62.1. There, the committee notes reveal that a “motion may present complex issues that require extensive litigation.... In such circumstances, the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeal agrees that it would be useful to decide the motion before decision of the pending appeal.” But the court is not bound to grant the motion if it indicates that the motion raises a substantial issue, rather, “further proceedings on remand may show that the motion ought not to be granted.”

Once notified of the bankruptcy court’s indicative ruling, the district court or the BAP has the ability to partially remand the appeal for further proceedings in the bankruptcy court yet retain continuing jurisdiction over the appeal. (If the indicative ruling affects an appeal pending before the court of appeals then Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure following notification of an indicative ruling.) Alternatively, the appellate court may determine to effectively remand all proceedings by expressly dismissing the appeal. The Advisory Committee notes to the new rule suggest, however, that the appellate court should only dismiss the appeal “when the appellant has clearly stated its intention to abandon the appeal” (perhaps, for instance, if a post-appeal settlement among the parties has been reached). If the appeal is partially remanded, the parties must notify the clerk of the appellate court once the bankruptcy court has decided the underlying motion for relief that triggered the indicative ruling. Bankruptcy Rule 8008(c).

The Advisory Committee notes clarify that the new rule is not intended to “define the circumstances in which an appeal limits or defeats the bankruptcy court’s authority to act in the face of a pending appeal.” Indeed, the ouster of the bankruptcy court’s jurisdiction following an appeal is not all-encompassing. A bankruptcy court retains the authority to stay or enforce a final order and, naturally, retains authority over all aspects of the case that are not related to the appeal. Appeals from interlocutory orders, moreover, do not deprive the bankruptcy court from modifying the order until leave to appeal has been granted. Other attributes of the appealed order, such as the correction of clerical mistakes or the award of costs or sanctions, may also proceed in the bankruptcy court despite the pendency of the appeal. The court may not, however, alter, expand or supplement a final ruling that is on appeal.

Moreover, existing Bankruptcy Rule 8002(c) already identifies various motions that, if timely filed, “suspend the effect of a notice of appeal filed before the last such motion is resolved.” In these instances, the bankruptcy court has the ability to resolve such motions “without resorting to the indicative ruling procedure.” Thus, for example, if a party files a Civil Rule 60(b) motion for relief from a final judgment (due to mistake or newly discovered evidence), within 14 days after the judgment is entered (the same deadline for filing a notice of appeal), Bankruptcy Rule 8002(b)(2) preserves jurisdiction in the bankruptcy court to determine the motion despite the timely docketing of an appeal. The appeal only becomes effective, and jurisdiction is divested, when the order disposing of such Civil Rule 60(b) motion is entered. But if a Civil Rule 60(b) motion is filed after the 14-day deadline under Bankruptcy Rule 8002(b)(1)(D), which is possible under the separate, longer deadlines for a Civil Rule 60(b) motion, the indicative ruling procedure may nonetheless permit the bankruptcy court to entertain the motion. In fact, a 2014 amendment to Bankruptcy Rule 9024, which incorporates Civil Rule 60 in cases under the Bankruptcy Code, states that in “some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.”

A similar change was made to Bankruptcy Rule 9023, which incorporates Civil Rule 59, addressing a motion for a new trial or to alter or amend a judgment. But, Bankruptcy Rule 9023 expressly requires that a Civil Rule 59 motion be filed within 14 days after entry of judgment (the same deadline for filing the notice of appeal). If timely filed, thus, the bankruptcy court would not need to use the indicative procedure in order to consider the Civil Rule 59 motion. This is because, as noted above, Bankruptcy Rule 8002(b)(2) tolls the effectiveness of the appeal until such Civil Rule 59 motion is disposed of. Oddly, thus—despite the 2014 change to Bankruptcy Rule 9023—there would seem to be no circumstances under which the Bankruptcy Rule 8008 indicative ruling procedure could ever be used to address a Civil Rule 59 motion because it would be untimely if filed more than 14 days after entry of judgment. Bankruptcy Rule 8008(a) only permits the indicative ruling procedure to be used if the underlying motion is “timely.” By contrast, Civil Rule 60(b) has much longer deadlines—a “reasonable time” or, for grounds such as mistake or fraud, within one year after entry of judgment.

The use of Bankruptcy Rule 8008 may also gain traction in the context of motions to reconsider orders allowing or disallowing claims under Bankruptcy Rule 3008. The reconsideration of claims requires an underlying motion made pursuant to Civil Rules 59 and 60. Recently, Bankruptcy Judge Dennis Montali of the Northern District of California followed the new Bankruptcy Rule 8008 procedure to address a motion to reconsider the disallowance of claims in the Heller Ehrman chapter 11 case. See Order Denying Request for Indicative Ruling, *In re Heller Ehrman, LLP*, Case No. 08-32514, Docket No. 368, Bankr. N.D. Cal. (May 13, 2015). As noted, under Bankruptcy Rule 8008 the bankruptcy court now retains jurisdiction in order to, among other options, “deny” a timely motion for relief from the order on appeal. Here, Judge Montali determined that certain “newly discovered” evidence did not meet the standard for relief under Civil Rule 60(b)(2).

Aside from the bankruptcy court’s ability to deal with these types of post-judgment motions, new Bankruptcy Rule 8008 may also clarify the procedure to be followed when the parties reach a settlement that requires approval under Bankruptcy Rule 9019. Although this question is open to debate, some bankruptcy courts have expressed reservations about their authority to hear and determine the merits of a settlement when the dispute is subject to a pending appeal. Bankruptcy Rule 8008 now permits the settling appellant to request an indicative ruling that would allow the appellate forum to remand the appeal to permit consideration of a settlement that, if approved, would entail a dismissal. Other bankruptcy courts have not felt constrained from acting on settlement motions despite the absence of a limited remand from the appellate forum. After all, if the appellant is prepared to dismiss the appeal under the compromise, the proposed settlement might be viewed as a matter “in aid of” the disposition of the appeal (another category of actions that many trial courts recognize they retain jurisdiction to decide notwithstanding an appeal).

The clear procedures set forth in new Bankruptcy Rule 8008 will undoubtedly assist the coordination of proceedings in the bankruptcy court and the appellate court. The rule will also help dispel doubts over the scope of the bankruptcy court’s continuing jurisdiction to decide certain post-appeal matters. It will be very interesting to follow the myriad factual patterns that may invoke this new indicative ruling procedure.

¹ The Bankruptcy Rules also include forms prescribed by the Judicial Conference of the United States, known as the Official Bankruptcy Forms, whose use is required pursuant to Bankruptcy Rule 9009. The Bankruptcy Rules also incorporate and adopt, at various rules, selected Federal Rules of Civil Procedure. See Fed. R. Bankr. Proc. 9032. Moreover, pursuant to Bankruptcy Rule 9029, each district court may make and amend (or authorize the bankruptcy judges of the district to make or amend) additional local rules governing practice and procedure in all cases and proceedings within the district court’s bankruptcy jurisdiction.