

# Interlocutory Direct Appeals under BAPCPA: Questionable Role of the Bankruptcy Court

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The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) brought with it many significant changes in the way bankruptcy cases are handled. Prior to its effective date, numerous articles in this and other publications discussed the implications of the legislation on existing practice. While some aspects of the new law received a less than enthusiastic response, the provision for permitting direct appeals from the bankruptcy courts to the circuit courts of appeal was generally regarded with favor. The legislative intent behind the new statute, embodied in 28 U.S.C. §158(d)(2), was to facilitate the efficient resolution of bankruptcy appeals and reduce attendant cost and delay.<sup>1</sup> However, a recent opinion from the Delaware Bankruptcy Court has raised practical issues regarding the direct appeal process, at least in the context of interlocutory appeals.



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## Background

In *In re Advanced Marketing Services Inc.*, 2007 WL 603034 (Bankr. D. Del.) (AMSI), a creditor, Simon & Shuster Inc. (SSI), filed a complaint and motion for a

temporary restraining order (TRO) seeking relief with respect to certain reclamation claims. The court denied the TRO. Thereafter, SSI simultaneously filed a Notice of Appeal, a Motion for Leave to Appeal and a Request for Direct Appeal. Because of the interlocutory nature of the order denying the TRO, the Motion for Leave to Appeal was transmitted to the U.S. District Court for the District of Delaware (the District Court) for adjudication. Jurisdiction over the Request for Direct Appeal, however, remained in the bankruptcy court. Given

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the virtually identical standards to be applied by the two courts, the bankruptcy court commented that the appeal was placed in a “bizarre procedural posture”<sup>2</sup> and resulted not only in duplication of effort by the two courts, but also was “contrary to the hierarchy of the [federal] court system.”<sup>3</sup> In refraining from ruling on the Request for Direct Appeal pending the ruling of the district court on the Motion for Leave to Appeal, the bankruptcy court exercised appropriate discretion, and has taken the lead in addressing what will undoubtedly become a much-litigated issue in cases under BAPCPA. This article will discuss

the underlying statutory framework and the issues presented in the context of interlocutory appeals.

## Applicable Law

The district court has jurisdiction to hear, within its discretion, appeals from interlocutory orders and decrees of the bankruptcy court. 28 U.S.C. §158(a)(3). Bankruptcy Rule 8001(b) provides that

an appeal from an interlocutory judgment, order or decree shall be taken by filing a notice of appeal as provided in Bankruptcy Rule 8001(a), accompanied by a motion for leave to appeal prepared in accordance with Bankruptcy Rule 8003. The district court or bankruptcy appellate panel (BAP), as applicable, determine whether leave to appeal should be granted.

BAPCPA added 28 U.S.C. §158(d)(2), which provides that under certain

circumstances an appeal may be taken directly from the bankruptcy court to the circuit court of appeals. A bankruptcy court must certify a direct appeal if a request is made by a “majority of the appellants and a majority of the appellees,” 28 U.S.C. §158(d)(2)(B)(ii), or if the bankruptcy court, acting on its own motion or the request of a party determines that (1) the judgment, order or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or the Supreme Court, or involves a matter of public importance; (2) the judgment, order or decree involves a question of law requiring resolution of conflicting decisions; or (3) an immediate appeal from the judgment, order or decree may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. §158(d)(2)(A)(i)-(iii). In the event a bankruptcy court issues a certification, the court of appeals must authorize the direct appeal in order for it

## Legislative Update

to obtain jurisdiction. 28 U.S.C. §158(d)(2)(A).

Interim Bankruptcy Rules 8001(f) and 8003(d)<sup>4</sup> implement the certification process and prescribe which court makes the required certification. A certification is required to be made “in a court in which the matter is pending.” Interim Rule 8001(f)(2). “A matter is pending in a bankruptcy court until docketing, in accordance with Rule 8007,<sup>5</sup> of an appeal under 28 U.S.C. §158(a)(1) or (2), or the

<sup>4</sup> The Judicial Conference of the United States issued proposed Interim Bankruptcy Rules to accommodate changes in bankruptcy law enacted by BAPCPA. The Interim Rules, which were approved by the Advisory Committee on Bankruptcy Rules and the Committee on Rules of Practice and Procedure, have not been formally promulgated pursuant to the Rules Enabling Act; instead, the courts have been encouraged to implement them by general or standing order. Once implemented, the Interim Rules are to be effective until the final rules are promulgated and effective under the regular Rules Enabling Act process. On Aug. 10, 2006, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for public comment proposed new and amended Federal Rules of Bankruptcy Procedure—based substantially on the Interim Rules modified as appropriate after considering comments from the bench and bar as a result of the use of the Interim Rules—and any additional revisions to the Official Forms. After the public comment period, the Advisory Committees will decide whether to submit the proposed amendments to the Standing Committee on the Rules of Practice and Procedure. At the time of the publication of this article, the Rule 8001 and 8003 Amendments were still pending.

<sup>5</sup> Bankruptcy Rule 8007(b) provides that the clerk of the district court or BAP shall enter the appeal in the docket after receiving transmission of the record from the clerk of the bankruptcy court.

<sup>1</sup> H.R. Rep. No. 109-31, pt. I, at 148, §1233 (2005).

<sup>2</sup> 2007 WL603034 at p. 4.

<sup>3</sup> *Id.* at p. 4 and 5.

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grant of leave to appeal under 28 U.S.C.158(a)(3)” and “[a] matter is pending in a district court or bankruptcy appellate panel after the docketing, in accordance with Rule 8007(b), of an appeal under 28 U.S.C. §158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. §158(a)(3).”<sup>6</sup> Thus, in the case of an interlocutory order, a matter is pending in the bankruptcy court until the district court (or BAP) grants leave to appeal. Interim Rule 8001(f)(2) (A)(i)-(ii) provides similarly that only the bankruptcy court may make a certification while the matter is pending there (*i.e.*, pending a ruling by the district court (or BAP) on a motion for leave to appeal), and only the district court (or BAP) may make a certification while the matter is pending there (*i.e.*, after granting a motion for leave to appeal).

Further, Interim Rule 8003(d) provides that “[i]f leave to appeal is required by 28 U.S.C. §158(a) and has not been granted, the authorization of direct appeal by a court of appeals under 28 U.S.C. §158(d)(2) shall be deemed to satisfy the requirement for leave to appeal.” Finally, Interim Rule 8001(f)(1) provides that a “certification of judgment, order or decree of a bankruptcy court to a court of appeals under 28 U.S.C. §158(d)(2) shall not be treated as a certification entered on the docket within the meaning of §1233(b)(4)(A) [of BAPCPA] until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under rule 8002.”<sup>7</sup>

### Jurisdictional Conflict

In *AMSI*, the bankruptcy court recognized that the standards under 28 U.S.C. §158(d)(2)(A)(i)-(iii) for granting direct appeal certification were essentially

the same as those to be applied by the district court in determining whether to grant leave to appeal under 28 U.S.C. §1292(b). Because the “bright-line test” set forth in Interim Rule 8001(f) required the bankruptcy court to determine whether to grant certification for direct appeal while the Motion for Leave to Appeal was pending, it was faced with the dilemma of potentially usurping the district court’s authority in ruling on the Request for Direct Appeal.

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The bankruptcy court reasoned that the direct appeal statute and Interim Rules created a situation in which there would be duplication of effort by the bankruptcy court, district court and the Third Circuit Court of Appeals and the potential for inconsistent rulings.<sup>8</sup> Moreover, the potential clash was contrary to the hierarchy of the federal court system.<sup>9</sup> Thus, the bankruptcy court determined that the best course of action was to defer to the district court and refrain from ruling on the Request for Direct Appeal

<sup>7</sup> It should be noted that Interim Rule 8001(f)(1) predicates the effectiveness of a certification solely on compliance with Bankruptcy Rule 8002 and makes no reference to Bankruptcy Rule 8003. This is either an oversight that will be corrected in the final version of Bankruptcy Rule 8001 or assumes that for purposes of an interlocutory appeal the notice of appeal filed in conjunction with the motion for leave (as required by 8001(b)) must somehow become effective under Rule 8002. Logically, such notice of appeal should become effective upon the granting of the motion for leave by the district court (or BAP). However, Rule 8002 in does not currently address this issue.

<sup>8</sup> 2007 WL 603034 at p. 4.

<sup>9</sup> *Id.* at p. 4 and 5.

pending a decision of the district court on the Motion for Leave to Appeal.<sup>10</sup>

Presumably, if the district court denies the Motion for Leave to Appeal, the bankruptcy court will be bound by its findings and likewise deny the Request for Direct Appeal. If the district court grants the Motion for Leave to Appeal, the bankruptcy court will no longer retain jurisdiction and the Request for Direct Appeal will be heard by the district court. The obvious question then is when, if ever, in the context of an interlocutory appeal, should a bankruptcy court rule on a request for direct appeal? Arguably, Interim Rule 8003(d) contemplates the bankruptcy court’s ruling on a request for direct appeal while a motion for leave to appeal is pending in the district court (or BAP), or even after denial of such a motion. In the former situation, it is hard to imagine a bankruptcy court proceeding for the reasons discussed in *AMSI*. In the latter situation, it appears that the bankruptcy court would be bound by the appellate court’s findings denying leave to appeal, which are virtually identical to those it is required to make in connection with a request for direct appeal.

Thus, the Delaware Bankruptcy Court’s decision in *AMSI*, to defer to the district court, presents a well-reasoned and practical approach. Other bankruptcy courts may, however, view the issue differently. It would be beneficial for the drafters, in promulgating the final versions of Interim Rules 8001(f) and 8003(d), to consider the nature and extent of the bankruptcy court’s jurisdiction with respect to direct interlocutory appeals and clarify when, if ever, it is appropriate for a bankruptcy court to act on a request for direct appeal. ■

<sup>6</sup> *Id.*

<sup>10</sup> *Id.* at p. 5.