28 U.S.C. § 1334(b)
interlocutory appeal

In re ACS Marketing Services, Inc. #390-31112
1/15/91 Judge Marsh (appeal of Judge Perris ruling)

The debtor sought review of an interim order appointing a trustee in a chapter 11 case. An interlocutory order is subject to review where it: (1) conclusively determines the disputed question; (2) resolves an important issue separate from the merits of the case; and (3) is effectively unreviewable on appeal from a final judgment.

In the instant case, the court's decision to appoint a trustee was reviewable upon appeal from a final judgment. In addition, the decision was a "procedural phase" which did not "implicate an important issue separate from the merits of the case." Accordingly, the district court denied the motion for leave to appeal.

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON

BY _____ LH

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re ACS MARKETING SERVICES, INC., an Oregon corporation, Debtor.	)))))))	Case No. 390-31112-P07 ORDER

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MARSH, Judge.

Appellant moves for leave to file an interlocutory appeal of the bankruptcy court's interim order appointing a trustee in its Chapter 11 case. For the reasons that follow, appellant's motion is denied.

Pursuant to 28 U.S.C. § 1334(b), district courts have discretionary jurisdiction over appeals of interlocutory orders of the bankruptcy court. Review of an interlocutory order is available under the principles of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Fondiller v. Robertson, 707 F.2d 441, 441-2, n.1 (9th Cir. 1983). Under Cohen, three factors must be present. The order must: (1) conclusively determine the disputed question; (2) resolve an important issue separate from the merits of the case; and (3) be effectively unreviewable on appeal from a final judgment. Cohen, 707 F.2d at 442, n.1, citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).

Although the order may be considered to have "conclusively determined" the issue as to the propriety of appointing a trustee, I find that such a determination is a "procedural phase" in the bankruptcy proceedings that does not implicate an important issue separate from the merits of the case. See In Re Delta Services, 782 F.2d 1267, 1271 (5th Cir. 1986). Further, the order appealed from is reviewable on an appeal from a final judgment in the case. See Fondiller, 707 F.2d at 442, n.1 (order appointing law firm as counsel to trustee "likely" reviewable on appeal of final judgment). Circuit courts that have considered similar requests

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for review of bankruptcy court orders have declined to exercise interlocutory review. See In Re Landmark, 872 F.2d 857, 860 (9th Cir. 1989) (interlocutory compensation order not reviewable); Delta, 782 F.2d at 1271-72 (interim appointment of trustee non-reviewable); In Re Cash Currency Exchange, 762 F.2d 542, 546 (7th Cir.) cert. denied 106 S.Ct. 233 (1985) (same).

This finding is further supported by appellant's failure to obtain certification of the appeal pursuant to 28 U.S.C. § 1292(b).[1]

Based on the foregoing, I find that the factors which would justify interlocutory review of the bankruptcy court's interim order appointing a trustee are not present in this case. Accordingly, appellant's motions to file a notice of appeal #78 is DENIED and this appeal is dismissed.

IT IS SO ORDERED.

DATED this 15 day of January, 1991.

Malcolm F. Marsh
United States District Judge

[1] 28 U.S.C. § 158(c) provides that appeals of interlocutory orders of the bankruptcy courts "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts."

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