

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.

1 MARSH, Judge.

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

6 Pursuant to 28 U.S.C. § 1334(b), district courts have
7 discretionary jurisdiction over appeals of interlocutory orders of
8 the bankruptcy court. Review of an interlocutory order is
9 available under the principles of Cohen v. Beneficial Indus. Loan
10 Corp., 337 U.S. 541 (1949). Fondiller v. Robertson, 707 F.2d 441,
11 441-2, n.1 (9th Cir. 1983). Under Cohen, three factors must be
12 present. The order must: (1) conclusively determine the disputed
13 question; (2) resolve an important issue separate from the merits
14 of the case; and (3) be effectively unreviewable on appeal from a
15 final judgment. Cohen, 707 F.2d at 442, n.1, citing Firestone
16 Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).

17 Although the order may be considered to have "conclusively
18 determined" the issue as to the propriety of appointing a trustee,
19 I find that such a determination is a "procedural phase" in the
20 bankruptcy proceedings that does not implicate an important issue
21 separate from the merits of the case. See In Re Delta Services,
22 782 F.2d 1267, 1271 (5th Cir. 1986). Further, the order appealed
23 from is reviewable on an appeal from a final judgment in the case.
24 See Fondiller, 707 F.2d at 442, n.1 (order appointing law firm as
25 counsel to trustee "likely" reviewable on appeal of final
26 judgment). Circuit courts that have considered similar requests

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

7 This finding is further supported by appellant's failure to
8 obtain certification of the appeal pursuant to 28 U.S.C.
9 § 1292(b).¹

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

15 IT IS SO ORDERED.

16 DATED this 15 day of January, 1991.

17 Malcolm F. Marsh
18 Malcolm F. Marsh
19 United States District Judge

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25 ¹ 28 U.S.C. § 158(c) provides that appeals of interlocutory
26 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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