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When a Creditors' Committee Dies, Does Its Pending Appeal Die Too?

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What happens when a duly appointed bankruptcy committee has perfected an appeal of an erroneous order and the bankruptcy court then confirms a plan that purports to dissolve the committee? Does that kill the appeal? It could, but the committee's death does not necessarily mean it is time for the appeal's funeral. The unsecured creditors' committee in a chapter 11 bankruptcy action appealed an order of the bankruptcy court to the Bankruptcy Appeal Panel (BAP) and lost. After the committee appealed further to the appeals court, the bankruptcy judge approved a reorganization plan that "released and discharged [the committee] from all further authority, duties, responsibilities and obligations arising from or related to the chapter 11 case." Relying on that language, the appellee (the bondholder's committee) moved to dismiss the appeal, arguing that under the plan's terms, there was no appellant left in existence to prosecute the appeal. Everyone agreed that the initial appeal to the BAP was concluded and that the subsequent appeal to the appeals court was perfected before the reorganization plan ended the committee's powers.

The question is this: Is the death of the unsecured creditors' committee also the death knell for its appeal? Should it be? The short answers are "not necessarily" and "no."

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The Answer

A lower court should not make orders that interfere with an appellate court's jurisdiction, but if it does, the real parties in interest should intervene in the appeals court. A reorganization plan that is confirmed by the bankruptcy court is generally binding on all affected parties. 11 U.S.C. §1141(a). Thus, a plan that dissolves the official creditors' committee would arguably moot the committee's pending appeal. *See In re Great Northern Paper Inc.,* 299 B.R. 1, 4-5 (D. Maine 2003) (finding conversion of underlying bankruptcy action from chapter 11 to chapter 7 proceeding during pendency of creditors' committee's appeal effectively dissolved the committee and rendered assignment of rights to the trustee void).

Under federal common law, however, the perfection of an appeal generally divests the lower court of jurisdiction over those aspects of the case that are before the appellate court. *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982). The lower court generally cannot take any action that would alter the case's status before the appellate court, and its action should therefore have no impact on the appeal. *See In re Padilla,* 222 F.3d 1184, 1189-90 (9th Cir. 2000) (holding appeal of BAP order reversing dismissal of chapter 7 action not rendered moot by bankruptcy court's subsequent discharge of debtor during pendency of appeal because lower court lacked jurisdiction to change the status quo on appeal); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.,* 906 F.2d 1059, 1064 (5th Cir. 1990) (holding appeal of dismissal for failure to state a claim was not moot in light of district court's granting leave to amend the pleadings because the district court acted outside its authority).

This rule makes sense because any other rule would allow a lower court, by subsequent orders, to avoid appellate review. The issue is not just a matter of bankruptcy law, but also of statutory construction and sound judicial administration because after the appeal is perfected, the "turf" to be protected is that of the appellate court. Any other holding would mean that Congress's intent to provide a right of appeal would exist only at the sufferance of the lower court.

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However, some courts —most notably the Fifth Circuit in *Matter of Sullivan Central Plaza I Ltd.,* 935 F.2d 723 (5th Cir. 1991)— have read this rule very narrowly in the bankruptcy context. In that case, the court held that the bankruptcy court does not lose jurisdiction unless the matter in question is the very subject of the appeal. *Id.* at 727. In so holding, the Fifth Circuit rejected a line of cases from other jurisdictions and its own precedent outside the bankruptcy context, holding that bankruptcy courts have no jurisdiction to take action that would directly or indirectly impact a pending appeal. *See Dayton Indep. Sch. Dist.,* 906 F.2d at 1964 (holding district court's grant of leave to amend, thus rendering the appeal moot without addressing the issues on appeal, was a nullity and did not deprive the court of appeals of jurisdiction); *In re Kendrick Equip. Corp.,* 60 B.R. 356, 359 (Bankr. W.D. Va. 1986) ("This court should not entertain any request which touches directly or indirectly on the issues presented in the appeal or which might otherwise interfere with the integrity of the appeal process."); *Urban Dev. Ltd. Inc. v. Hernando N.Y. Assocs.,* 42 B.R. 741, 744 (Bankr. M.D. Fla. 1984) (stating that the court should not interfere in the appeal process and entertain a request that directly or indirectly touches upon the issues involved in a pending appeal). The court's reasoning was that any other rule would too severely impair the bankruptcy court's ability to proceed. *Matter of Sullivan,* 935 F.2d at 727.

Due to conflicting precedent, it may be unclear in any particular case whether the bankruptcy court's confirmation of a plan that

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dissolves the committee prosecuting a pending appeal will be considered a nullity insofar as it might impact a pending appeal. Fortunately, however, there is an easy solution.

Options to Resuscitate the Appeal

1. Find a creditor to intervene. The simplest solution to dissolution of the committee is for a party that was previously represented by the committee to intervene and substitute as the appellant. Federal bankruptcy law liberally allows parties in interest the right to appear and be heard on matters affecting their interests. *See* 11 U.S.C. §1109(b). This right generally extends to pending appeals, so it should be a simple matter for a member of the former committee whose interests are affected by the appeal to intervene and maintain the appeal. *See* 7 *Collier on Bankruptcy* §§1109.01[4][c] and 1109.08 (15th ed. 2004); *see, also, In re Sunbeam Corp.,* 287 B.R. 861, 863 (S.D.N.Y. 2003) (recognizing that individual creditor has a right to intervene in an appeal by the creditors' committee under §1109(b)).

2. Amend the confirmed plan to continue the life of the committee. Another option—if taken quickly—would be to ask the bankruptcy court to amend its order confirming the reorganization plan to provide that dissolution of the committee is stayed until after resolution of the appeal. Ideally, such a provision would be included in the order in the first place. However, if it was not, the bankruptcy court retains jurisdiction to modify its order until substantial consummation of the plan, or until distribution under the plan has commenced. 11 U.S.C. §§1127(a) and (b); *In re U.S. Brass Corp.,* 301 F.3d 296, 307 (5th Cir. 2002).

Conclusion

Sounding the song "Taps" for the committee should not mean playing "Taps" for the appeal. Even if the committee was effectively extinguished, the real parties in interest may intervene, or the committee can be resuscitated by quick action in the bankruptcy court. This will protect both the rights of the parties and also the important public policy of keeping a bankruptcy court from being able to insulate itself from appellate review. ■

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