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Eighth Circuit Appears to Mandate Appeal of Interlocutory Orders in Order to Preserve Right of Appellate Review

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The U.S. Court of Appeals for the Eighth Circuit recently handed down an important opinion addressing the doctrine of equitable mootness in bankruptcy appeals. *FishDish, LLP v. VeroBlue Farms USA, Inc.*, Nos. 19-3413, -3487 (8th Cir. Aug. 5, 2021). Although the equitable mootness issue is doubtless the highlight of the case (but is not the focus of this article), the Court also issued another ruling with potentially significant implications for bankruptcy appellate procedure: It held that whether an order is final or interlocutory is irrelevant for purposes of determining whether a notice of appeal was timely filed under Rule 8002 of the Federal Rules of Bankruptcy Procedure. *FishDish*, slip op. at 11. In doing so, the Court promoted a conclusion that would arguably *require* litigants to appeal an interlocutory order from the bankruptcy court to preserve their appellate rights concerning the issues addressed in that order.

The debtor, an Iowa aquaculture business, was involved in a complex and litigious chapter 11 case, culminating in a confirmed plan that was appealed by FishDish, LLP ("FishDish"), one of the debtor's preferred shareholders. *Id.* at 3–7. As relevant here, FishDish also appealed a prior order of the bankruptcy court denying its objection to the claim of one of the debtor's creditors ("Claim Objection Order"). *Id.* at 8. The creditor filed a partial motion to dismiss, arguing that FishDish's appeal of the Claim Objection Order was untimely. *Id.* The district court dismissed the appeal on equitable mootness grounds but also held that the appeal of the Claim Objection Order was timely because the Claim Objection Order was not a final order. *Id.* FishDish appealed the dismissal of its appeal on equitable mootness grounds, and the creditor cross-appealed the timeliness issue. *Id.*

Rule 8002(a)(1) Deadline is "mandatory but not jurisdictional"

The Court first addressed the timeliness of FishDish's appeal from the Claim Objection Order, observing that an untimely appeal could deprive it of subject matter jurisdiction. *Id.* at 9. The issue arose because 28 U.S.C. § 152, which establishes the appellate jurisdiction of district courts, bankruptcy appellate panels, and courts of appeal over bankruptcy matters, expressly incorporates Rule 8002 of the Federal Rules of

Bankruptcy Procedure by reference. ("An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts ***and in the time provided by Rule 8002 of the Bankruptcy Rules.***" 28 U.S.C. § 158(c)(2) (emphasis added)). The Court ultimately agreed with the position taken by the Sixth Circuit in *Tennial v. REI Nation, LLC (In re Tennial)*, 978 F.3d 1022 (6th Cir. 2020), holding that the fourteen-day deadline for filing a notice of appeal in Rule 8002(a)(1) is "*mandatory but not jurisdictional*." *Id.* at 10 (emphasis in original).

Court Avoids Analyzing Whether Claim Objection Order was Interlocutory

Having resolved the jurisdictional issue, it held that the district court committed an error of law in limiting the scope of 28 U.S.C. § 152(c)(2) to final orders because that subsection "applies to appeals 'under subsections (a) and (b),'" of 28 U.S.C. § 152. *Id.* at 11. Because 28 U.S.C. § 152(a)(3) includes appeals from interlocutory orders, the Court reasoned that Rule 8002(a)(1)'s deadline, as incorporated into § 152(c)(2), "is not limited to *final* orders." *Id.* But the Court then took an odd turn, concluding that it "need not decide whether the Claim Objection Order was a 'final judgment, order, or decree' under § 158(a)(1)," because it was "undisputed that FishDish missed the mandatory 14-day time limit." *Id.*[1]

However, this conclusion begs the question because if the Claim Objection Order was interlocutory, FishDish was permitted, *but not required*, to seek immediate appellate review of it under 28 U.S.C. § 158(a)(3). It could also wait until entry of a final order addressing the same issue, for example, an order confirming a chapter 11 plan, and then appeal the Claim Objection Order as part of that final order under 28 U.S.C. § 158(a)(1). Thus, determining whether the Claim Objection Order was interlocutory or final is required because that analysis, in turn, determines the relevant date from which the 14-day deadline runs.

It is axiomatic that while a party *may* seek appellate review of an interlocutory order, the failure to do so is not a waiver of appellate review *en toto*. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) ("Nor is a plaintiff required to seek permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) in order to avoid waiving whatever ultimate appeal right he may have."). Rather, the party may also wait until the case or proceeding in which the interlocutory order was entered results in a final judgment or order, which is appealable as of right. *See, e.g.*, *In re Frontier Props., Inc.*, 979 F.2d 1358, 1364 (9th Cir. 1992) ("Rather, where an issue is determined in an interlocutory order and later incorporated into a final order, the determination of the original issue is appealable upon an appeal of the final order, thereby providing the district court with an 'ultimate review on all the combined issues.'") (quoting *In re Stanton*, 766 F.2d 1283, 1287–88 (9th Cir. 1985)). The Eighth Circuit has confirmed that this concept applies in the bankruptcy context as well. *See O&S Trucking, Inc. v. Mercedes Benz Fin. Servs. USA (In re O&S Trucking, Inc.)*, 811 F.3d 1020 (8th Cir. 2016) ("[I]nterlocutory orders merge into a plan confirmation."). Thus, if the Claim Objection Order were interlocutory and had merged into the order confirming plan, FishDish would have been permitted to appeal it by appealing the order confirming plan, a final order which it had timely appealed as of right. On the contrary, if the Claim Objection Order was a final order in its own right,

then FishDish's appeal of it was untimely.

By declining to engage in this potentially dispositive analysis, the Eighth Circuit invited confusion and potentially unnecessary appeals of interlocutory bankruptcy court orders. If an order must be appealed within 14 days even if it is interlocutory, and even if it will be incorporated into a later final order (which could then be appealed as of right), then an aggrieved party effectively *must* appeal the interlocutory order in order to preserve its appellate rights with respect to the subject matter of the order. This outcome turns the interlocutory order doctrine on its head by mandating appellate pursuit of interlocutory orders when such appellate review is intended to be both discretionary (on the part of the appellant and the reviewing court) and rare. The Supreme Court recognized as much in the analogous context of interlocutory appeals in civil non-bankruptcy matters under 28 U.S.C. § 1292. *See Caterpillar*, 519 U.S. at 74 ("Indeed, if a party had to invoke § 1292(b) in order to preserve an objection to an interlocutory ruling, litigants would be obliged to seek § 1292(b) certifications constantly. Routine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule.").

It is unclear in this case whether the Claim Objection Order was, in fact, interlocutory or not or whether it was merged into the plan confirmation order. Thus, the district court may have erred in opining that Rule 8002(a) applies only to final orders. But by declining to examine whether the Claim Objection Order was interlocutory or final, the Eight Circuit introduced unnecessary confusion into an already opaque landscape.

[1] The Claim Objection Order was entered on April 18, 2019, as a text order, and the order confirming the plan was entered on April 22, 2019. FishDish filed its notice of appeal on May 6, 2019, fourteen (14) days after the plan confirmation order was entered, but eighteen (18) days after the Claim Objection Order was entered. *Id.* at 7.

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