POST-WESTWOOD ELEVENTH CIRCUIT BANKRUPTCY APPELLATE STANDING CASES

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Before a losing party forges ahead with an appeal of an order or judgment from a bankruptcy court located in the Eleventh Circuit (or any other circuit for that matter), such party would do well to consider whether it has standing to prosecute an appeal in the first instance. Many parties have had their appeals of bankruptcy court orders or judgments dismissed for lack of appellate standing, that is, for not being what the law describes as a "person aggrieved." We briefly discuss herein the lead Eleventh Circuit case adopting the "person aggrieved" standard, and then subsequent decisions from the Eleventh Circuit applying it to different fact patterns. The threshold issue of standing is important for prevailing parties, too, because they can and, if the facts warrant it, should promptly move to dismiss an appeal based on a losing party's lack of standing (and to abate the briefing schedule pending a decision on that motion), a result a District Court or Eleventh Circuit judge would find as an easy way to dispose of a case without having to consider the merits.

Approximately fourteen years ago, in Westwood Community Two Ass'n, Inc. v. Barbee (In re Westwood Community Two Ass'n, Inc.), 293 F.3d 1332 (11th Cir. 2002),the Eleventh Circuit formally adopted the "person aggrieved" standard to determine whether a litigant possessed standing to appeal an order of a bankruptcy court, and the Eleventh Circuit held that, to have such standing, the putative appellant must be "directly, adversely, and pecuniarily affected." Id. at 1335 (quoting In re Troutman Enter., Inc., 286 F.3d 359, 364 (6th Cir. 2002)). The Eleventh Circuit explained that the "person aggrieved" standard "restricts standing more than Article IIII standing," that the standard "limits standing to appeal bankruptcy court order to those individuals who have a financial stake in the order being appealed," and that a financial stake is one that, as a result of the order, "diminishes th[e putative appellant's] property, increases their burdens or impairs their rights." Id.

The rule enunciated in Westwood has been faithfully followed and applied in subsequent Eleventh Circuit cases. As an aside, the "person aggrieved" standard, which applies to appellate standing in bankruptcy appeals, is different from the party-in-interest standing which applies to the right of a person to be heard on a matter before the bankruptcy court. Thus, a person may possess party-in-interest standing to be heard at the bankruptcy court level but not be a "person aggrieved" for purpose of challenging an order of the bankruptcy court on appeal. As explained by the Third Circuit, courts "apply a 'person aggrieved' standard, not a 'party in interest' standard, to determine bankruptcy appellate standing." In re Combustion Eng'g, Inc., 391 F.3d 190, 217 (3d Cir. 2004); In re PWS Holding Corp., 228 F.3d 224, 248-49 (3d Cir. 2000) (party-in-interest standards in Code section 1109(b) "confers broad standing at the trial level" but "courts do not extend that provision to appellate standing"); Westwood, 293 F.3d at 1336 ("In our view, the district court erred by applying a 'real party in interest' standard to determine whether the Unofficial Committee had standing toappeal the Reconsideration Order.").

In Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.), 764 F.3d 1321 (11th Cir. 2015),the Eleventh Circuit held that the putative appellant, a defendant in multiple adversary proceedings and former creditor (who had withdrawn the claim he had filed against the debtor's estate), lacked standing to appeal the bankruptcy court's order granting the debtor's motion to modify a previously confirmed chapter 11 plan enabling it to

prosecute otherwise time-barred actions against the appellant. The Eleventh Circuit reasoned that, because the only interest of the putative appellant was his status as a defendant in adversary proceedings seeking to avoid liability, and the order would not impair his ability to defend those actions, he lacked appellate standing. Following cases from other circuit courts, the Eleventh Circuit stated that it "agree[d] that a party is not aggrieved, for the purposes of appealing from a bankruptcy court order, when the only interest allegedly harmed by that order is the interest in avoiding liability from an adversary proceeding."Id. at 1325-26. Continuing in its analysis, the Eleventh Circuit stated that several circuit courts have held that "a person is not 'aggrieved' when the interests harmed by a court order are not interests the Bankruptcy Code seeks to protect or regulate," further holding that "for a person to be aggrieved, the interest they seek to vindicate on appeal must be one that is protected or regulated by the Bankruptcy Code." Id. at 1326. The Eleventh Circuit stated that, assuming the putative appellant suffered a direct harm as a result of the order—taking away his right to seek injunctive relief—he was still not an aggrieved person because the interest in avoiding liability "is antithetical to the goals of bankruptcy," Id. at 1327, i.e., it was not an interest protected by the Bankruptcy Code.

In Tucker v. Mukamal, 616 Fed. App'x 969 (11th Cir. 2015),the Eleventh Circuit held that a chapter 7 debtor lacked standing to appeal an order granting the trustee's motion seeking authority to close the chapter 7 case, reasoning that because there was no chance of a surplus after payment of creditor claims which would have been distributed to the chapter 7 debtor, the debtor was not directly pecuniarily affected by the order. Relying upon Ernie Haire Ford, supra, and its holding that a person is not aggrieved when his sole interest is avoiding liability in an adversary proceeding, the Eleventh Circuit rejected the debtor's contention that he possessed standing because his pending adversary proceeding ultimately might affect his financial stake in the outcome of the chapter 7 case. Id. at 972. Finally, the Eleventh Circuit rejected the debtor's contention that other pending issues, i.e., whether the bankruptcy court might impose sanctions, gave the debtor a financial stake in the proceedings sufficient for standing purposes, because the debtor's interest in those issues were not ones the Bankruptcy Code sought to protect or regulate. Id. at 973.

In Heatherwood Holdings, LLC v. HGC, Inc. (In re Heatherwood Holdings, LLC), 746 F.3d 1206 (11th Cir. 2014), the Eleventh Circuit held that a bankruptcy court order determining that there was an implied restrictive covenant limiting the use of certain real property to a golf course and country club such that the holders of first and second mortgages on the property were persons aggrieved with standing to appeal. The chapter 11 debtor owned a piece of real property that had been used exclusively as a golf course and club since the property was developed. The debtor filed an adversary proceeding against holders of first and second mortgage holders seeking a determination of the validity, priority and extent of their liens and to sell the property free and clear of liens and encumbrances. The bankruptcy court rejected the attempt to sell the property free and clear of liens and encumbrances. Appellees asserted that the appellant lacked standing to challenge the bankruptcy court's determination. The Eleventh Circuit rejected that contention, explaining that

there is no question that the bankruptcy court's order burdens [the appellants] and impairs its rights. [The Appellant] holds title to the real property as mortgagee and the bankruptcy court's order restricts that property to use as a golf course. That restriction clearly impacts the resale value of the property. Because [the Appellant] satisfies the person-aggrieved person doctrine, [it] also meets Article III standing requirements.

Id. at 1216-17.

In Helmer v. Pogue (In re Pogue), 567 Fed. App'x 894 (11th Cir. 2014) (Mem),the Eleventh Circuit held that a law firm whose contingency fee claim based on its prior representation of the debtor in a qui tam (a civil proceeding brought under a statute which imposes a penalty for an act or omission, and gives that penalty in part to the plaintiff, and the other part to a governmental entity) action was denied, the firm lacked standing to challenge an award of contingency fees to other law firms. While the putative appellant received substantial statutory attorney's fees arising from the trustee's settlement of the underlying qui tam action, it was denied additional fees in the form of a contingency fee. The firm challenged the award of contingency fees to several other law firms. However, once the putative appellant's contingency fee claim was denied, the Eleventh Circuit found that it lacked appellate standing to challenge the fees awarded to the other law firms that had represented the debtor, reasoning that, "[w]ithout a claim, [the putative appellant] does not have a pecuniary

interest in the bankruptcy estate. Indeed, even if the bankruptcy court erred in compensating the other lawyers, [the putative appellant] would not stand to gain in any way." Id. at 896.

In Fisher Island Ltd. v. Fisher Island Investments, Inc., 518 Fed. App'x 663 (11th Cir. 2013), the Eleventh Circuit held that an entity (Fisher Island Limited) that owned part of another entity (Fisher Island Investments) which was one of several entities against which involuntary petitions in bankruptcy were filed, lacked standing to challenge a bankruptcy court order requiring the posting of a bond as potential indemnification for attorney's fees under Code section 303(e). While there was no issue with the right of the petitioning creditors to appeal the bond ruling, as they challenged the assignment of the underlying promissory note which potentially gave rise to an award of attorney's fees, the Eleventh Circuit explained that

[h]ere, the bankruptcy court ordered the petitioning creditors, not Fisher Island Limited, to post a bond. The creditors appealed the bond order, claiming to have insufficient funds available to pay the bond. The creditors did not express in that appeal any intention to collect monies from Fisher Island Limited, nor has Fisher Island Limited presented any evidence of such an attempt. The promissory note at issue in the bankruptcy court requires indemnification of attorney's fees "in collection upon this Note" and not in the case of an attempt at collection. Because collection has yet to occur, the bond is a provisional, not a final, security for those fees. If collection does not occur, the fees will not be due. Furthermore, the note itself is the subject of litigation and may not ultimately be binding.

Fisher Island Limited presents no evidence that the creditors have looked, anticipate looking, or could look to it to satisfy the creditors' attorney's fees. … Therefore, Fisher Island Limited does not satisfy the requisite test for standing under the person aggrieved doctrine and has no standing to appeal the district court's order.

Id. at 666.

In McNeal v. Equinamics Corp., 308 Fed. App'x 311 (11th Cir. 2009), the Eleventh Circuit held that the chapter 7 debtor, in whose shoes the chapter 7 trustee stepped upon conversion of the debtor's prior chapter 13 case, lacked standing to challenge a bankruptcy court order dismissing an adversary proceeding the trustee succeeded to upon conversion. The debtor had sued his mortgage lender asserting Truth in Lending Act and Florida usury law claims regarding a loan the mortgage lender made to the debtor which was secured by the debtor's home. Subsequent to conversion of the debtor's chapter 13 bankruptcy case to a case under chapter 7, the court-appointed trustee succeeded to the debtor's position as the proper party plaintiff, and then proceeded to reach a settlement with the mortgage lender which consisted of a sale of the debtor's claims. The bankruptcy court approved the sale after notice and a hearing after which the trustee stipulated to voluntary dismissal of the adversary proceeding. The bankruptcy court then dismissed the adversary proceeding with prejudice, with the parties to bear their own fees and costs. The Eleventh Circuit affirmed the dismissal of the appeal (on mootness grounds), reasoning that the debtor "was not a 'person aggrieved' because he has not direct financial stake in the resolution of the claims that belonged to the bankruptcy estate after the bankruptcy trustee was substituted as the proper party plaintiff." Id. at 316.

In Vick v. Vick (In re Vick), 233 Fed. App'x 897 (11th Cir. 2007), the Eleventh Circuit held that the ex-wife of the debtor lacked standing to appeal dismissal of the husband's individual bankruptcy case, including adversary proceedings the ex-wife filed against the debtor because her claim, based on a prior divorce proceeding, had not been discharged and she could enforce her rights in state court. Given that the debt owed to the ex-wife under the prior divorce settlement had not been discharged, and she could enforce her rights in state court, the Eleventh Circuit could not say that the bankruptcy court's orders diminished her property, increased her burdens, or impaired her rights. Consequently, the ex-wife was not a "person aggrieved" with standing to appeal.

Fourteen years after Westwood, the Eleventh Circuit's analysis on appellate standing in bankruptcy cases is alive and well. Practitioners involved in appeals of bankruptcy court orders should be familiar with the foregoing standing cases from the Eleventh Circuit and should take heed that a pecuniary interest in the order on appeal is a prerequisite for appellate standing and proceed accordingly.

For more information about this topic, please contact the authors Paul Avron and Ilyse Homer, on the firm's Business Reorganization Team.

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