

06-3722-mb
In re: Weber

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2006

(Submitted: September 29, 2006 Decided: April 13, 2007)

Docket No. 06-3722-mb

-----x

TODD M. WEBER, SR., TAMMY J. WEBER,

Debtors,

-- v. --

UNITED STATES TRUSTEE,

Appellant.

-----x

B e f o r e : WALKER, LEVAL AND CALABRESI, Circuit Judges.

Motion for leave to take a direct appeal from a decision of the United States Bankruptcy Court for the Northern District of New York (Stephen D. Gerling, Chief Judge) denying a request by creditor CFCU Community Credit Union that the bankruptcy court limit debtors-appellees' homestead exemption to \$20,000.

DENIED.

GUY A. VANBAALEN, Assistant United States Trustee, Utica, New York, for United States Trustee.

RALPH W. NASH, The Crossmore Law Office, Ithaca, New York, for Creditor-Appellant.

LAURA M. HARRIS, Harris Law Office PLLC, Syracuse, New York, for Debtors-Appellees.

1 JOHN M. WALKER, JR., Circuit Judge:

2 In this motion for leave to take a direct appeal to the
3 United States Court of Appeals from the order of the United
4 States Bankruptcy Court for the Northern District of New York
5 (Gerling, Chief Judge), creditor-appellant CFCU Community Credit
6 Union ("CFCU") invokes § 1233 of the Bankruptcy Abuse Prevention
7 and Consumer Protection Act of 2005 ("BAPCPA"). 28 U.S.C. §
8 158(d)(2). CFCU contests the bankruptcy court's retroactive
9 application of New York's homestead exemption to debtors-
10 appellees' property. See In re Weber, No. 06-60457 (Bankr.
11 N.D.N.Y. July 10, 2006). The scope of § 1233, which authorizes
12 direct appeals under certain defined circumstances, is a matter
13 of first impression. Cf. In re Bayless, No. 06-31517, 2006 WL
14 2982101, at *1 n.2 (Bankr. E.D. Tenn. Oct. 18, 2006) (noting
15 Sixth Circuit's decision to accept a direct appeal). We deny the
16 motion for a direct appeal in this case.

17 **BACKGROUND**

18 In March 2006, Todd M. Weber, Sr. and Tammy J. Weber filed
19 for bankruptcy pursuant to Chapter 7 of Title 11 of the United
20 States Code. In their petition for release, the debtors claimed
21 a combined homestead exemption in the amount of \$100,000 with
22 respect to real property located in Richford, New York.
23 Creditor-appellant CFCU, holder of an unsecured claim dating from
24 2002, objected, see Opp'n to Objection to Homestead Exemption at

1 1; CFCU argued that a 2005 amendment to the New York Civil
2 Practice Law and Rules, see L. 2005, c. 623, § 1 (eff. Aug. 30,
3 2005), amending N.Y. C.P.L.R. § 5206(a), which raised the
4 homestead exemption from \$10,000 to \$50,000 per person, should
5 not be applied retroactively, Aff. in Supp. of Mot. at 2.
6 Relying on In re Little, No. 05-68281 (Bankr. N.D.N.Y. 2006), the
7 bankruptcy court denied CFCU's motion to limit the exemption to
8 \$10,000 per person. CFCU, wishing to bypass appeal to the
9 district court, then sought leave from the bankruptcy court to
10 appeal directly to this court. The bankruptcy court granted
11 leave. See Certification to the U.S. Ct. of Appeals from the
12 U.S. Bankruptcy Ct. for the Northern District of New York
13 Pursuant to 28 U.S.C. § 158(d)(2)(A). Section 1233 of the BAPCPA
14 confers jurisdiction on the Courts of Appeals in such
15 circumstances, but grants them discretion to accept or decline
16 the direct appeal. We now must decide whether to exercise our
17 discretionary jurisdiction.

18 ANALYSIS

19 I. 28 U.S.C. § 158(d)(2)(A)

20 Section 1233 of the BAPCPA, see P.L. 109-8, 119 Stat. 23
21 (2005), amends 28 U.S.C. § 158(d) in pertinent part to provide
22 that this court "shall have jurisdiction of appeals" from a
23 bankruptcy court if the bankruptcy court certifies that either
24 "(i) the judgment, order, or decree involves a question of law as

1 to which there is no controlling decision . . . or involves a
2 matter of public importance; (ii) the judgment, order, or decree
3 involves a question of law requiring resolution of conflicting
4 decisions; or (iii) an immediate appeal from the judgment, order,
5 or decree may materially advance the progress of the case.” 28
6 U.S.C. § 158(d)(2)(A)(i)-(iii). This court may in its discretion
7 exercise, or decline to exercise, that jurisdiction. 28 U.S.C. §
8 158(d)(2)(A) (“and if the court of appeals authorizes the direct
9 appeal of the judgment, order, or decree”) (emphasis added).

10 We find guidance for when we should exercise jurisdiction in
11 the text of § 1233, the reasons why Congress passed the statute,
12 and in jurisprudential considerations. The focus of the statute
13 is explicit: on appeals that raise controlling questions of law,
14 concern matters of public importance, and arise under
15 circumstances where a prompt, determinative ruling might avoid
16 needless litigation.

17 Legislative history confirms that Congress intended § 1233
18 to facilitate our provision of guidance on pure questions of law.
19 Among the reasons for the direct appeal amendment was widespread
20 unhappiness at the paucity of settled bankruptcy-law precedent.¹

1 ¹ For instance, one bankruptcy court apparently felt
2 unconstrained even by the decisions of the district courts within
3 its district. See In re Shattuc Cable Corp., 138 B.R. 557, 565
4 (Bankr. N.D. Ill. 1992) (“[I]t is not clear whether a bankruptcy
5 court is bound by decisions of the district courts in that
6 district.”). This has long been a matter of concern to
7 bankruptcy-law practitioners. Prior to passage of an earlier

1 The House Report that accompanied the BAPCPA emphasized that
2 "decisions rendered by a district court as well as a bankruptcy
3 appellate panel are generally not binding and lack stare decisis
4 value." See H.R. Rep. No. 109-31, at 148 (2005); see also H.R.
5 Rep. No. 107-3, Part. 1, at 112 (2001) (same). Indeed, Congress
6 believed direct appeal would be most appropriate where we are
7 called upon to resolve a question of law not heavily dependent on
8 the particular facts of a case, because such questions can often
9 be decided based on an incomplete or ambiguous record. See H.R.
10 Rep. No. 109-31, at 148-49 (noting that Congress did not expect
11 that § 1233 would be used to facilitate direct appeal of
12 "fact-intensive issues," but rather "anticipated that . . . [for
13 such issues] district court judges or bankruptcy appellate
14 panels" would suffice). When a discrete, controlling question of
15 law is at stake, we may be able to settle the matter relatively
16 promptly.

1 amendment to the bankruptcy code, Senator Howell Heflin noted the
2 importance of "establish[ing] a dependable body of case law."
3 140 Cong. Rec. S14463 (daily ed. Oct. 6, 1994).

4 For a discussion of Congress's concern at the lack of
5 bankruptcy precedent, see Paul M. Baisier & David G. Epstein,
6 Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or
7 an Ambulance, 69 Am. Bankr. L.J. 525 (1995); Judith A. McKenna &
8 Elizabeth C. Wiggins, Alternative Structures for Bankruptcy
9 Appeals, 76 Am. Bankr. L.J. 625, 627 (2002) ("The bankruptcy
10 appellate system is not well structured to produce binding
11 precedent."); Long Range Plan for the Fed. Cts., Dec. 1995,
12 Judicial Conference of the U.S., p. 47 (recommending changes to
13 bankruptcy law to "foster coherent, consistent development of
14 bankruptcy precedents").

1 Legislative history also confirms that direct appeal may be
2 appropriate where a judgment of this court would "materially
3 advance the progress of the case."² For instance, where a
4 bankruptcy court has made a ruling which, if correct, will
5 essentially determine the result of future litigation, the
6 parties adversely affected by the ruling might very well fold up
7 their tents if convinced that the ruling has the approval of the
8 court of appeals, but will not give up until that becomes clear.
9 Where that ruling is manifestly correct or manifestly erroneous,
10 the parties would profit from its immediate review in this court.

11 In parsing the text and legislative history of § 1233, we
12 are also assisted by our prior analysis of other grants of
13 "discretionary jurisdiction," both in Title 28, see 28 U.S.C. §
14 1292(b), and the Federal Rules of Civil Procedure, see Fed. R.
15 Civ. P. 23(f). For instance, § 1292(b) provides that this court
16 may assume jurisdiction of an interlocutory appeal if the
17 district court certifies that the "order involves a controlling
18 question of law as to which there is substantial ground for
19 difference of opinion and that an immediate appeal from the order
20 may materially advance the ultimate termination of the
21 litigation." As we have explained, Congress passed 28 U.S.C. §
22 1292(b) primarily to ensure that the courts of appeals would be

1 ² See McKenna & Wiggins, supra, at 635; Long Range Plan,
2 supra, at 48 (discussing cases "when the stakes are sufficiently
3 high").

1 able to "rule on . . . ephemeral question[s] of law that m[ight]
2 disappear in the light of a complete and final record." Koehler
3 v. Bank of Bermuda Ltd., 101 F.3d 863, 864 (2d Cir. 1996); see
4 also id. at 865-66 (Congress passed § 1292(b) to "avoid
5 protracted litigation") (citing Milbert v. Bison Labs., 260 F.2d
6 431, 433-35 (3d Cir. 1958) (discussing legislative history of §
7 1292(b))). Congress also sought to assure the prompt resolution
8 of knotty legal problems. See Note, Interlocutory Appeals in the
9 Federal Courts Under 28 U.S.C. § 1292(b), 88 Harv. L. Rev. 607,
10 609 (1975); see, e.g., Klinghoffer v. S.N.C. Achille Lauro, 921
11 F.2d 21, 23-24 (2d Cir. 1990) (resolution of complicated legal
12 questions, while perhaps not essential to litigation of
13 particular case, might ease court congestion); Brown v. Bullock,
14 294 F.2d 415, 417 (2d Cir. 1961) (en banc); Gottesman v. Gen.
15 Motors Corp., 268 F.2d 194, 197 (2d Cir. 1959); cf. Schlagenhaut
16 v. Holder, 379 U.S. 104, 110-12 (1964) (use of mandamus proper to
17 settle "new and important problems").³ Similarly, Congress hoped
18 that § 1233 would permit us to resolve controlling legal
19 questions expeditiously and might foster the development of

1 ³ Congress did not intend 28 U.S.C. § 1292(b) to serve an
2 error-correction function. See Note, Interlocutory Appeals in
3 the Federal Courts Under 28 U.S.C. § 1292(b), supra, at 631 ("The
4 statutory history of the Act plainly shows that . . . supervision
5 . . . [is not] a proper justification for a section 1292(b)
6 appeal.").

1 coherent bankruptcy-law precedent.⁴

2 Federal Rule of Civil Procedure 23(f) also permits us to
3 exercise discretion in accepting an interlocutory appeal from a
4 district court's decision to grant or deny class certification.
5 We have pointed to several purposes underlying Rule 23(f) that
6 are similar to those underlying § 1113. See generally In re
7 Sumitomo Copper Litig., 262 F.3d 134 (2d Cir. 2001). First, it
8 ensures that courts of appeals may review district court
9 decisions that, although not "final" within the meaning of 28
10 U.S.C. § 1291, see Coopers & Lybrand v. Livesay, 437 U.S. 463,
11 468 (1978), overruling Eisen v. Carlisle & Jacquelin, 370 F.2d
12 119 (2d Cir. 1966), sound a "death-knell," see Sumitomo, 262 F.3d
13 at 139 (permitting direct appeal if "the certification order will
14 effectively terminate the litigation"); Blair v. Equifax Check
15 Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). Second, Rule
16 23(f) affords the courts of appeals an opportunity to intervene
17 early to correct lower-court errors in class certification,
18 which, if not corrected at that stage, would result in wasteful
19 proceedings, often requiring re-litigation. See Sumitomo, 262

1 ⁴ Unlike § 1292(b), § 1233 expressly provides that the lower
2 court may certify that a decision is susceptible of direct appeal
3 solely because there is no governing legal precedent. Cf. Flor
4 v. Bot Fin. Corp., 79 F.3d 281, 284 (2d Cir. 1996) (per curiam);
5 Williston v. Eggleston, 410 F. Supp. 2d 274, 277 (S.D.N.Y. 2006)
6 ("Simply because a question of law has not been authoritatively
7 addressed . . . does not make the question grounds for a
8 substantial difference of opinion [under 28 U.S.C. § 1292(b)].").
9

1 F.3d at 139 (permitting direct appeal if “the certification order
2 implicates a legal question about which there is a compelling
3 need for immediate resolution”); see also In re Lorazepam &
4 Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002)
5 (concluding that “[w]here a district court class certification
6 decision is manifestly erroneous . . . that error . . . should
7 not entirely be ignored”); Lienhart v. Dryvit Sys., Inc., 255
8 F.3d 138, 144 (4th Cir. 2001) (“[r]ecognizing that Rule 23(f) was
9 explicitly promulgated to replace the use of mandamus in
10 reviewing manifestly erroneous class certifications”); Newton v.
11 Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164
12 (3d Cir. 2001).⁵ Like our construction of § 1292(b), our
13 discussion in the Rule 23(f) context of the need to correct
14 errors that sound a “death-knell” is relevant here.

15 Nevertheless, although Congress emphasized the importance of
16 our expeditious resolution of bankruptcy cases, it did not wish
17 us to privilege speed over other goals; indeed, speed is not
18 necessarily compatible with our ultimate objective -- answering
19 questions wisely and well. In many cases involving unsettled
20 areas of bankruptcy law, review by the district court would be

1 ⁵ Although some circuit courts have suggested that Rule 23(f)
2 may also serve a precedent-creation function, we disagree.
3 Compare Equifax, 181 F.3d at 835, with Sumitomo, 262 F.3d at 140
4 (permitting direct appeal to review a “novel legal question” only
5 if it is “likely to escape effective review after entry of final
6 judgment”).

1 most helpful. Courts of appeals benefit immensely from reviewing
2 the efforts of the district court to resolve such questions.
3 Permitting direct appeal too readily might impede the development
4 of a coherent body of bankruptcy case-law. See Ohio v. Roberts,
5 448 U.S. 56, 64 (1980) (explaining that "the common-law
6 tradition" is a "process [that is] gradual, building on past
7 decisions, drawing on new experience, and responding to changing
8 conditions"), abrogated on other grounds by Crawford v.
9 Washington, 541 U.S. 36 (2004); Benjamin N. Cardozo, The Nature
10 of the Judicial Process 24 (1921) (explaining that the common law
11 process "goes on inch by inch"). Moreover, since district courts
12 tend to resolve bankruptcy appeals faster than the courts of
13 appeals, see Judith A. McKenna & Elizabeth C. Wiggins,
14 Alternative Structures for Bankruptcy Appeals, 76 Am. Bankr. L.J.
15 625, 629 (2002) ("District courts are, on the whole, faster at
16 deciding bankruptcy appeals than are the courts of appeals.");
17 Long Range Plan for the Fed. Cts., Dec. 1995, Judicial Conference
18 of the U.S., at 47-48 (same), and because this court has relaxed
19 the meaning of "finality" in bankruptcy cases, see, e.g., Flor,
20 79 F.3d at 283 ("[T]he concept of 'finality' is more flexible in
21 the bankruptcy context than in ordinary civil litigation."), the
22 cost in speed of permitting district court review will likely be
23 small.

24 We believe that Congress was aware of the dangers of

1 leapfrogging the district court in the appeals process.
2 Initially divided over whether to make direct appeals mandatory
3 in certain circumstances, or to grant discretion to the courts of
4 appeals to accept or decline such direct appeals, Congress wisely
5 adopted the latter path, probably in recognition of the salutary
6 effects of allowing some cases to percolate through the normal
7 channels. See H.R. Rep. No. 107-617, at 297 (2002) ("Section
8 1233 reflects a compromise between the House and Senate
9 conferees. The House provision [would have] . . . deem[ed] a
10 judgment, decision, order, or decree of a bankruptcy judge to be
11 a judgment, decision, order, or decree of the district court
12 entered 31 days after an appeal . . . [wa]s filed with the
13 district court."); see also Randolph J. Haines & William L.
14 Norton III, Norton Bankruptcy Reform Act Newsletter: Bankruptcy
15 Reform Legislation of 2001, Summary of the Bankruptcy Reform Act
16 of 2001, 2001 WL 533346, at *18-19 (2001).

17 We must also bear in mind that in most cases, even without
18 certification, the parties will have an opportunity to appeal
19 both to the district court and to this court before the
20 termination of the entire bankruptcy proceeding, thereby
21 satisfying many of the objectives here that also underlie §
22 1292(b) and Rule 23(f). Moreover, Congress has explicitly
23 granted us plenary authority to grant or deny leave to file a
24 direct appeal, notwithstanding the presence of one, two, or all

1 three of the threshold conditions, see H.R. Rep. No. 109-31, at
2 148 (“Jurisdiction for the direct appeal would exist in the
3 circuit court of appeals only if the court of appeals authorizes
4 the direct appeal.”); cf. Koehler, 101 F.3d at 866.

5 With the statute’s text and history as well as these
6 jurisprudential considerations in mind, and recognizing that
7 broad varieties of cases may be eligible for direct appeal, we
8 will be most likely to exercise our discretion to permit a direct
9 appeal where there is uncertainty in the bankruptcy courts
10 (either due to the absence of a controlling legal decision or
11 because conflicting decisions have created confusion) or where we
12 find it patently obvious that the bankruptcy court’s decision is
13 either manifestly correct or incorrect, as in such cases we
14 benefit less from the case’s prior consideration in the district
15 court and we are more likely to render a decision expeditiously,
16 thereby advancing the progress of the case. On the other hand,
17 we will be reluctant to accept cases for direct appeal when we
18 think that percolation through the district court would cast more
19 light on the issue and facilitate a wise and well-informed
20 decision. Bearing the foregoing guidance in mind, some of it
21 dicta to be sure, future panels remain free to authorize a direct
22 appeal if they believe it would be consonant with Congress’s
23 goals in passing § 1233 to do so.

24 **II. Application of the 28 U.S.C. § 158(d) (2) (A) Standard**

1 While it was not improper for the bankruptcy court to permit
2 the parties to request leave to file a direct appeal and to
3 certify the appeal, we decline to exercise our discretion to hear
4 this appeal. We do not perceive a conflict of such a nature that
5 creates uncertainty in the bankruptcy courts, as all three of the
6 courts within this circuit to have considered the question have
7 held that New York's homestead exemption applies retroactively.
8 See Certification at 2 n.1; cf. In re Pappas, 207 B.R. 379, 381-
9 82 (2d Cir. BAP 1997) (discussing disputed question of bankruptcy
10 law suitable for interlocutory review). There is no showing,
11 furthermore, that evaluation of the bankruptcy court's decision
12 at this time would lead to a more rapid resolution of the case,
13 in part because the decision does not appear to be either
14 manifestly correct or manifestly incorrect. The 2005 amendment
15 to the C.P.L.R. is plausibly remedial within the meaning of
16 McKinney's Statutes § 54. See In re Little, No. 05-68281, at
17 *21-22. Moreover, it is unlikely that the retroactive
18 application of New York's homestead exemption would violate the
19 Contracts Clause. Cf. In re Seltzer, 104 F.3d 234, 235-37 (9th
20 Cir. 1996) (holding that the retroactive application of a Nevada
21 exemption did not violate the Contracts Clause).

22 In sum, we think that prior consideration by the district
23 court would be beneficial and there is no compelling reason for
24 this court to address the issue in the first instance.

1 **CONCLUSION**

2 For the reasons set forth above, we DENY the motion for
3 leave to take a direct appeal and remand the case to the
4 bankruptcy court for further proceedings consistent with this
5 opinion.

6