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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	SC-07-1453-KPaJu
7	PAUL HUPP,)	Bk. No.	06-00198
8)	Adv. No.	06-90127
9	Debtor.)		
10	_____)		
11	PAUL HUPP,)		
12	Appellant,)		
13	v.)	OPINION	
14	EDUCATIONAL CREDIT MANAGEMENT)		
15	CORPORATION,)		
16)		
17	Appellee.)		
18	_____)		

20 Before: KLEIN, PAPPAS and JURY, Bankruptcy Judges.

23 KLEIN, Bankruptcy Judge:

25 Federal Rule of Bankruptcy Procedure 8001(e) requires that a
26 "separate writing" be used to make an election under 28 U.S.C.
27 § 158(c)(1) to have a bankruptcy appeal heard by the district
28 court instead of the bankruptcy appellate panel. The question is

1 whether that "separate writing" may include anything other than
2 an election to have the district court hear the appeal.
3 Consistent with the analysis in our decisions beginning with Ark.
4 Teachers Ret. Sys. v. Official Inv. Pool Participants Comm. (In
5 re County of Orange), 183 B.R. 593 (9th Cir. BAP 1995) ("Orange
6 County"), we hold that a statement of election is not effective
7 if, as here, the writing in which it is made contains anything
8 other than such an election. Hence, this appeal will be resolved
9 by the bankruptcy appellate panel.

10 Since the notice of appeal is from an interlocutory order
11 denying summary judgment and requiring a trial, which requires
12 leave to appeal, and was not accompanied by a the motion for
13 leave to appeal required by Rule 8003(a), we exercise our
14 discretionary authority under Rule 8003(c) to consider the notice
15 of appeal as a motion for leave to appeal. We deny leave to
16 appeal and, accordingly, dismiss the appeal.

17 18 Facts

19 Paul Hupp commenced an adversary proceeding against United
20 Student Aid Funds, Inc., seeking a determination that his student
21 loan debt is not excepted from discharge under 11 U.S.C.
22 § 523(a) (8) in his chapter 7 bankruptcy case pending in the
23 Southern District of California. Educational Credit Management
24 Corporation was substituted as real party in interest.

25 The United States intervened after notice was given that
26 Hupp was calling into question the constitutionality of
27 § 523(a) (8) as applied to him.

28 The bankruptcy court, on November 29, 2007, denied Hupp's

1 summary judgment motion focused on constitutional issues, granted
2 the motion to strike a brief, and set a trial for January 17,
3 2008, which trial was to be limited to the question whether
4 repaying the student loan debt would constitute an undue hardship
5 within the meaning of § 523(a)(8).

6 Hupp filed a notice of appeal on December 3, 2007, from the
7 November 29 rulings, which order was not actually entered until
8 January 9, 2008. Hupp did not make a motion for leave to appeal
9 an interlocutory order.

10 Accompanying the notice of appeal were two other documents:
11 "Plaintiff Paul Hupp's Request for Certification for Direct
12 Appeal to the 9th Circuit Court of Appeals"; and "Plaintiff Paul
13 Hupp's Separate Statement of Election for Direct Appeal to the
14 9th Circuit Court of Appeals under 28 U.S.C. § 158."

15 The first thirteen lines of the "Separate Statement of
16 Election for Direct Appeal" explain why there should be a direct
17 appeal to the court of appeals, as authorized by 28 U.S.C.
18 § 158(d)(2)(A). The final two lines of the document include the
19 statement: "Alternatively, if the 9th Circuit Court of Appeals
20 refuses to hear this matter, plaintiff seeks review in the United
21 States District Court, Southern District of California."

22 The item was docketed as "Separate Statement of Election for
23 Appeal to be Heard by the 9th Circuit Court of Appeals."

24 The bankruptcy clerk forwarded the papers to this Panel.
25

26 Jurisdiction

27 We have jurisdiction to determine our jurisdiction. Benny
28 v. England (In re Benny), 812 F.2d 1133, 1136 (9th Cir. 1987);

1 Appeal of Hessinger & Assocs. (In re Eleccion), 178 B.R. 807, 808
2 (9th Cir. BAP 1995).

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4 Issues

- 5 1. Whether the "separate writing" required by Rule 8001(e)
6 as the means for making an election to have an appeal
7 heard by the district court pursuant to 28 U.S.C.
8 § 158(c)(1) may include anything other than the
9 requisite statement of election.
- 10 2. Whether leave to appeal the bankruptcy court's
11 interlocutory order should be granted.

12
13 Discussion

14 We address the question of our jurisdiction before turning
15 to the question whether to entertain the interlocutory appeal.

16
17 I

18 Congress provided that appeals from decisions of bankruptcy
19 judges be heard by a bankruptcy appellate panel, if available,
20 unless a party elects to have the appeal heard by the district
21 court:

22 (c)(1) Subject to subsections (b) and (d)(2), each appeal
23 under subsection (a) shall be heard by a 3-judge panel of
the bankruptcy appellate panel service established under
subsection (b)(1) unless -

- 24 (A) the appellant elects at the time of filing the
appeal; or
25 (B) any other party elects, not later than 30 days
after service of notice of the appeal;
26 to have such appeal heard by the district court.

27 28 U.S.C. § 158(c)(1).

1 The statute is implemented by Rule 8001(e), which mandates
2 that a § 158(c)(1) election be made in a separate writing:

3 (e) Election to Have Appeal Heard by District Court Instead
4 of Bankruptcy Appellate Panel. An election to have an
5 appeal heard by the district court under 28 U.S.C.
6 § 158(c)(1) may be made only by a statement of election
7 contained in a separate writing filed within the time
8 prescribed by 28 U.S.C. § 158(c)(1).

9 Fed. R. Bankr. P. 8001(e).

10 These provisions of § 158(c)(1) and Rule 8001(e) are
11 construed strictly in accordance with their literal terms. Iaone
12 v. Collins (In re Iaone), 227 B.R. 181, 183 (9th Cir. BAP 1998);
13 Orange County, 183 B.R. at 594.

14 As applied to appellants, the combination of the statute and
15 the rule means that there must be a separate written statement
16 filed simultaneously with the notice of appeal. Orange County,
17 183 B.R. at 594. Specifically, § 158(c)(1) requires that an
18 appellant make an election "at the time of filing the appeal,"
19 28 U.S.C. § 158(c)(1)(A), and Rule 8001(e) requires that the
20 election be in a "separate writing." Fed. R. Bankr. P. 8001(e).

21 The requirement of a separate writing relieves the clerk of
22 difficulties of divining the appellant's intentions and relieves
23 the BAP and district court of unnecessary, expensive, and time-
24 consuming jurisdictional determinations that impede merits
25 resolutions of disputes. Iaone, 227 B.R. at 183; accord, In re
26 Linder, 215 B.R. 826, 830 (6th Cir. BAP 1998). This matters
27 because confusion about jurisdiction over an appeal in a world in
28 which there are alternative appellate routes to follow can lead
to horrid problems of conflicting appellate orders; the workable
solution requires literal application of the carefully-drafted

1 rule of procedure that requires a "separate writing."

2 Moreover, as a matter of plain English, the adjective
3 "separate" connotes independence. The American Heritage
4 dictionary defines separate as an adjective as: "Set apart from
5 the rest; not connected; disjointed; detached." AM. HERITAGE
6 DICTIONARY OF ENGLISH LANGUAGE 1181 (New College Ed. 1976). The Oxford
7 English Dictionary is to the same effect: "Parted, divided, or
8 withdrawn from others; disjointed, disconnected, detached, set or
9 kept apart" and "Withdrawn or divided from something else so as
10 to have an independent existence by itself." 14 OXFORD ENGLISH
11 DICTIONARY 997-98 (2d ed. 1989).

12 It follows that the "separate writing" required by Rule
13 8001(e) cannot be joined with any other material.

14 In this instance, the document titled "Plaintiff Paul Hupp's
15 Separate Statement of Election for Direct Appeal to the 9th
16 Circuit Court of Appeals under 28 U.S.C. § 158" exemplifies the
17 problem. The majority of the document focuses on the question
18 whether the court of appeals should entertain a direct appeal
19 under 28 U.S.C. § 158(d)(2), which statute requires that there
20 first be a certification that the appeal is appropriate for
21 direct appeal. The question of certification in the present
22 procedural posture is for the bankruptcy court to resolve. 28
23 U.S.C. § 158(d)(2)(A), Fed. R. Bankr. P. 8001(f) (interim rule).
24 If the document were to be construed generously according to its
25 primary aim, it would be regarded as a request for certification
26 under Rule 8001(f)(3); whether to do so we leave to the
27 bankruptcy court.

28 Only the last two lines of the document arguably implicate

1 an attempt to make a § 158(c)(1) election. In a contingent voice
2 (“if the 9th Circuit Court of Appeals refuses to hear this
3 matter,”) it is said that Hupp “seeks review” in the district
4 court. It does not purport to be the definitive election that is
5 required by § 158(c)(1) and Rule 8001(e).

6 The mere need to construe such a document offends the
7 overriding policy articulated in Ioane regarding the need for
8 bright-line clarity as to whether the bankruptcy appellate panel
9 or the district court is responsible for making the various
10 intermediate determinations, such as stay pending appeal or
11 policing timely prosecution of the appeal, that may be necessary
12 immediately following the filing of a notice of appeal. Ioane,
13 227 B.R. at 183.

14 Hence, we hold that the inclusion in the putative “election”
15 document of anything other than a definitive election to have the
16 appeal heard by the district court disqualifies the document from
17 status as an election made in the manner required by Rule
18 8001(e). As there is not an effective election to have the
19 appeal heard by the district court, we shall exercise
20 jurisdiction.

21 II

22 An order denying a motion for summary judgment and requiring
23 trial of the adversary proceeding on the question whether not
24 discharging the debtor-appellant’s student loan would constitute
25 an “undue hardship” within the meaning of § 523(a)(8) is an
26 interlocutory order that requires leave of court to appeal. 28
27 U.S.C. § 158(a)(3).

1 The procedure for obtaining leave to appeal is prescribed by
2 Rule 8003(a), which requires a motion containing: (1) a statement
3 of facts necessary to an understanding of the questions to be
4 presented by the appeal; (2) a statement of the questions and the
5 relief sought; (3) a statement of reasons why an interlocutory
6 appeal should be entertained; and (4) copies of the questioned
7 order and any opinion or memorandum relating to it. Fed. R.
8 Bankr. P. 8003(a).

9 If the required motion for leave to appeal is not made, Rule
10 8003(c) authorizes us either to grant leave to appeal, or to
11 direct that a motion for leave to appeal be filed, or to deny
12 leave to appeal after considering the notice of appeal as a
13 motion for leave to appeal. Fed. R. Bankr. P. 8003(c).

14 We elect to exercise our discretion by applying the third
15 alternative afforded by Rule 8003(c). We consider the notice of
16 appeal, and the related papers, as a motion for leave to appeal.

17 Hupp's summary judgment motion was addressed to issues
18 regarding the constitutional validity of § 523(a)(8) and related
19 regulations as applied to him.* The bankruptcy court, by denying
20

21 * Hupp describes the issues as follows:

22 Plaintiff is challenging Title 11 U.S.C. § 523(a)(8) and
23 Title 34 Code of Federal [R]egulations § 1091a for, inter
24 alia, violations of substantive and procedural due process,
25 equal protection, vague, ambiguous and overbroad, loan
26 holder and government misconduct and the 8th Amendment's ban
27 on excessive fines clause. Plaintiff seeks to have Title 11
28 U.S.C. § 523(a)(8) declared in violation of the above listed
constitutional protections and struck down under a strict
scrutiny standard of review for interfering with, inter
alia, basic necessities of life - food, clothing, housing

(continued...)

1 the motion for summary judgment, declined to terminate the
2 litigation on that basis and required a trial focused on the
3 undue hardship requirement of § 523(a)(8).

4 If a final judgment is entered determining that the debt is
5 not excepted from discharge, Hupp will be able to assert on
6 appeal the issues he attempts to raise on an interlocutory basis,
7 together with any additional issues arising from trial of the
8 undue hardship question. Conversely, if the trial results in a
9 determination that the debt is discharged, then the balance of
10 the controversy will be moot.

11 Accordingly, the prudent course is to deny leave to appeal
12 and to dismiss the appeal for lack of jurisdiction as an
13 interlocutory appeal for which leave to appeal has not been
14 granted.

15 16 Conclusion

17 The document titled "Plaintiff Paul Hupp's Separate
18 Statement of Election for Direct Appeal to the 9th Circuit Court
19 of Appeals under 28 U.S.C. § 158," is not an effective election
20 to have the appeal heard by the district court because it
21 contains matters other than a straightforward election to have
22 the appeal heard by the district court pursuant to § 158(c)(1) in
23 violation of the "separate writing" requirement of Rule 8001(e).

24
25

* (...continued)
26 and medical/dental care. Basic necessities of life,
requires the highest level of review, strict scrutiny.

27 Plaintiff Paul Hupp's Separate Statement of Election for Direct
28 Appeal to the 9th Circuit Court of Appeals under 28 U.S.C. § 158,
at 1-2.

1 Accordingly, the bankruptcy appellate panel will exercise
2 jurisdiction over this appeal. Exercising our discretion to
3 consider the notice of appeal as a motion for leave to appeal an
4 interlocutory order, such leave is denied and the appeal is
5 dismissed.

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