

BANKRUPTCY LAW

Is Rule 8002(a) a Jurisdictional Requirement? Or a Waivable Claim-Processing Rule?

By Henry M. Karwowski

For years, the United States Court of Appeals for the Third Circuit, and courts in the District of New Jersey, regarded Bankruptcy Rule 8002(a)'s deadline for filing a notice of appeal as mandatory and jurisdictional, meaning that a failure to timely appeal creates a jurisdictional defect barring appellate review. In the mid-2000s, however, the issuance of certain Supreme Court opinions caused the Third Circuit to question this interpretation. In fact, in one case, the Third Circuit changed course and found that Rule 8002(a) is only a "claim-processing" rule, meaning that the appellee can waive or forfeit the right to invoke the rule if the appellee fails to timely raise it. Recently, though, the Third Circuit, citing subsequent Supreme Court authority, re-established the principle that the deadline for filing a bankruptcy appeal is

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in fact jurisdictional, and hence, nonwaivable. This article briefly examines these developments.

Background

Section 158 of Title 28 governs the appealability of orders issued by a bankruptcy court. Section 158(a) authorizes a district court to hear appeals from final judgments, orders and decrees, and with leave of the district court, from interlocutory orders and decrees, of a bankruptcy court. 28 U.S.C. § 158(a).

Section 158(c) provides that a bankruptcy appeal shall be taken in the same manner as appeals in civil proceedings generally and in the time provided by Bankruptcy Rule 8002.

Rule 8002(a), in turn, provides that a notice of appeal in a bankruptcy case or proceeding must be filed within 14 days of the date of entry of the judgment, order or decree at issue. Rule 8002(c) allows a bankruptcy court to extend the time for filing an appeal, but only under certain circumstances.

Until recently, the Third Circuit consistently deemed the time limit in Rule 8002 jurisdictional. See, e.g., *Shareholders*

v. Sound Radio, 109 F.3d 873, 879 (3d Cir. 1997); *Whitemere Dev. Corp. v. Cherry Hill Twp.*, 786 F.2d 185, 187 (3d Cir. 1986); *In re Universal Minerals*, 755 F.2d 309, 311 (3d Cir. 1985).

Third Circuit Re-examines Rule 8002(a)

In the mid-2000s, the Supreme Court issued two opinions holding that certain time limits in rules are actually merely nonjurisdictional "claim-processing rules," rather than mandatory, jurisdictional requirements. In *Kontrick v. Ryan*, the court, noting that Congress's grant of jurisdiction to courts to adjudicate discharges in bankruptcy contains no reference to a time condition, held that time limits for objecting to a discharge in Bankruptcy Rule 4004 are claim-processing rules. 540 U.S. 443, 452-53 (2004). Then, in *Eberhart v. United States*, the court held that certain time provisions in the Federal Rules of Criminal Procedure were likewise nonjurisdictional. 546 U.S. 12, 16, 21 (2005).

Thereafter, the Third Circuit grappled in several unpublished opinions with the effect of these Supreme Court opinions on Rule 8002(a). Initially, the Third Circuit found that Rule 8002(a), under *Eberhart*, is in fact a claim-processing rule. In *Ezekoye v. Ocwen Loan Servicing (In re Ezekoye)*, the Third Circuit observed that whereas before *Eberhart* the failure to file a timely notice of appeal from bankruptcy court created a jurisdictional defect barring appellate review, now, under *Eberhart*, the time limits of Rule 8002 only assure relief to a party that

properly raises them. Because the appellee in *Ezekoye* had initially raised the untimeliness of the appeal in the district court, the appellee had not forfeited the right to raise the issue, and dismissal was appropriate. 2006 WL 1683483 at **1-2 n.2 (3d Cir. June 20, 2006).

In two subsequent cases, the Third Circuit questioned whether Rule 8002 still imposes a jurisdictional requirement. In *McMillian v. Trans World Airlines*, (*In re Trans World Airlines*), the Third Circuit, in addressing whether a district court properly dismissed an untimely appeal from bankruptcy court, observed that *Eberhart* and *Kontrick* might be read to call into question the characterization of Rule 8002(a) as jurisdictional. In any event, the court found that the appellee had moved in the district court to dismiss the appeal as untimely, and thus, had not forfeited the right to raise the issue. Therefore, the court concluded, whether the Rule 8002(a) time limitation is jurisdictional or not, the district court had properly applied it. 2007 WL 1585276 at *1 n.2 (3d Cir. June 4, 2007).

Likewise, in *Enterprise Bank v. Young* (*In re Fryer*), the Third Circuit, in addressing the same issue, recognized that in light of *Eberhart* and *Kontrick*, Rule 8002 might now qualify as a nonjurisdictional claim-processing rule that is mandatory when invoked by a party, but subject to waiver if no timeliness objection is raised. The court held, however, that it need not resolve the issue, because even if Rule 8002(a) prescribes only claim-processing rules, the appellee had moved in the district court to dismiss the appeal on timeliness grounds, and thus, had properly invoked the rule. The Third Circuit ultimately dismissed the appeal on that basis. 2007 WL 1667198 at *2 (3d Cir. June 11, 2007).

The Third Circuit reached the opposite conclusion in *Taylor v. Taylor* (*In re Taylor*). In holding in a footnote that the creditors-appellees could raise, for the first time on appeal to the Third Circuit, the timeliness of the debtors-appellants' initial

notice of appeal to the district court, and ultimately dismissing the appeal on that basis, the Third Circuit found that unlike the limitations in the rules in *Kontrick* and *Eberhart*, the time limit in Rule 8002(a) has its roots in a statute, and thus, the limit is jurisdictional. 2009 WL 2768985 at *1 n.1 (3d Cir. Sept. 2, 2009).

Third Circuit Returns to Original Interpretation of Rule 8002(a)

More recently, the Third Circuit finally resolved the controversy and held in a precedential opinion that notwithstanding *Kontrick* and *Eberhart*, the time limitation in Rule 8002(a) remains jurisdictional. *In re Caterbone*, 640 F.3d 108, 111-14 (3d Cir. 2011).

In *Caterbone*, the bankruptcy court granted the United States trustee's motion to dismiss the debtor's Chapter 11 case for various procedural and substantive deficiencies under Bankruptcy Code section 1112(b). The debtor filed a notice of appeal, but not until after the deadline under Rule 8002(a). The debtor did not file a request for an extension of time under Rule 8002(c).

Despite its untimely filing, the debtor's appeal was docketed in the district court, and the trustee did not raise untimeliness as a basis for dismissal. In any event, the district court ultimately dismissed the appeal on another basis: failure to file a designation of record. After the debtor appealed to the Third Circuit, the trustee, citing for the first time the untimeliness of the debtor's initial appeal, moved to dismiss for lack of subject matter jurisdiction.

The Third Circuit held that under section 158(c) and Rule 8002(a), the debtor's untimely filing deprived the district court, and concomitantly the circuit court, of jurisdiction over the appeal. The Third Circuit noted that the Supreme Court had recently clarified in *Bowles v. Russell* that in the context of a civil case, the filing of an appeal within the statutorily

prescribed time is mandatory and jurisdictional, and thus, failure to file a timely notice of appeal in accordance with the statute deprives the court of jurisdiction and bars the appealing party from relying on waiver or forfeiture to excuse the failure to comply with the statute. In reaching its determination, the Supreme Court found that context, including historical interpretation, is relevant to whether a requirement qualifies as jurisdictional. *Caterbone*, 640 F.3d at 112-14 (citing *Bowles*, 551 U.S. 205, 209, 213 (2007)).

Applying this principle, the Third Circuit found that section 158 not only provides the statutory basis for courts' jurisdiction over bankruptcy appeals, it specifies the time in which the appeal must be taken, i.e., in the time provided by Rule 8002. Thus, unlike the requirements in the rules in *Kontrick* and *Eberhart*, the time limit in Rule 8002(a) is rooted in a statute. Therefore, the Third Circuit concluded, even though it is Rule 8002(a) that specifies the time to appeal, the incorporation of the Rule in section 158 renders the time requirement statutory, and hence, the requirement is jurisdictional and nonwaivable.

The Third Circuit found, further, that historical context supported its holding. The court noted that it had long held that the appeal deadline "spoke in jurisdictional terms," even absent a jurisdictional label, and that nothing about the deadline's text or context, or its historical treatment, justified a departure from this view.

Conclusion

It is now clear that the deadline for filing a bankruptcy appeal is a jurisdictional, and thus, nonwaivable requirement. But perhaps not so clear is whether time limitations in *other* rules are likewise jurisdictional. An attorney for a party that missed a rule deadline should investigate whether it can be argued, based on the law set forth above, that the deadline is only a waivable claim-processing rule. ■