

Ninth Circuit Finds that Orders Denying Removal of a Trustee Are Not Subject to Appeal

February 16, 2012 by [Kathryn M. Borgeson](#)

On February 9, 2012, the Ninth Circuit held that an order denying a motion to remove a trustee was not a final appealable order under 28 U.S.C. § 158(d)(1) because it did not substantively affect the parties' rights and permanently determine the trustee's status, rather it merely maintained the status quo. [SS Farms, LLC v. Sharp \(In re SK Foods, L.P.\)](#), — F.3d —, 2012 WL 400421 (9th Cir. Feb. 9, 2012). This contrasts with a prior Ninth Circuit holding that an order denying a motion to remove a trustee was a final order. [See Dye v. Brown \(In re AFI Holding\)](#), 530 F.3d 832 (9th Cir. 2008).

In [SK Foods](#), affiliates of the debtor brought a motion to remove the trustee on the grounds that the trustee's seizure and refusal to return documents belonging to the appellants, but stored at the debtors' facilities, violated the Fourth Amendment and state law. The bankruptcy court denied the affiliates' motion, the district court affirmed, and the affiliates appealed to the Ninth Circuit. Before reaching the merits of the disagreement, the Ninth Circuit was required to determine if it had jurisdiction to hear the appeal.

While 28 U.S.C. § 158(a) permits district courts to hear certain interlocutory appeals, 28 U.S.C. § 158(d)(1) limits the jurisdiction of the Circuit Courts to appeals of "final decisions" entered by district courts or bankruptcy appellate panels reviewing bankruptcy court decisions. To determine whether a district court or bankruptcy appellate panel decision is final, the Circuit Court must look to the nature of the underlying bankruptcy court order. Thus, "[i]f the underlying bankruptcy court order is interlocutory, so is the district court order affirming or reversing it." [SK Foods](#), 2012 WL 400421 at *1 (citing [In re Westwood Shake & Shingle, Inc.](#), 971 F.2d 387, 389 (9th Cir. 1992)). A bankruptcy court order is final "where it (1) resolves and seriously affects substantive rights and (2) finally determines the discrete issues to which it is addressed." [In re Lazar](#), 237 F.3d 967, 985 (9th Cir. 2001) (internal citations omitted).

The Ninth Circuit ultimately held that the bankruptcy court's order denying the affiliates' motion to remove the trustee was not final because (1) it did not resolve or seriously affect substantive rights, since the order's effect was to preserve the existing state of affairs; and (2) it did not finally determine the discrete issue to which it was addressed, since the trustee could be removed by a future bankruptcy court order.

The Ninth Circuit distinguished its earlier decision in [AFI Holding](#), in which it held that a bankruptcy court's order granting the removal of a trustee was a final order. The Court explained that "[s]o long as a trustee remains in office, the status quo ante continues and his actions may be reviewed throughout the bankruptcy proceeding. However, when a trustee is removed for cause, such an order alters the status ante because the trustee can no longer act in the continued bankruptcy proceeding." [SK Foods](#), 2012 WL 40021 at *2.

The Ninth Circuit's [SK Foods](#) decision protects chapter 11 trustees from the harassment and delay of multiple appeals, and promotes efficient judicial administration by limiting the number of appeals to the Circuit Courts. As the Ninth Circuit stated, "if a party could file an interlocutory appeal every time he tried unsuccessfully to remove a trustee, he could bring the litigation to a never-ending standstill." [Id.](#)