UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. MW 98-087

In re: MICHAEL D. SHADDUCK and ANDREA D. SHADDUCK,
Debtors.

UNITED STATES OF AMERICA,
Appellant,

v.

MICHAEL D. SHADDUCK,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. James F. Queenan, U.S. Bankruptcy Judge)

Before

Goodman, deJesùs and Carlo, U.S. Bankruptcy Judges

Peter Sklarew and Carina J. Campobasso for the appellant.

Michael D. Shadduck, appearing pro se for the appellee.

May 21, 1999

PER CURIAM

SUMMARY

The I.R.S.[1] appeals from an order of the United States Bankruptcy Court directing it to pay damages to the debtor, Michael Shadduck, for its willful violation of the automatic stay. The debtor cross-appeals seeking review of the damages award. For the reasons set forth below, we transfer the appeal, cross-appeal and pending motion to dismiss to the United States District Court for the District of Massachusetts.

PROCEDURAL BACKGROUND

The bankruptcy court denied the debtor’s contempt motion on the grounds that the I.R.S. did not willfully violate the automatic stay imposed by 11 U.S.C. § 362. The debtor appealed and the United States District Court for the District of Massachusetts, (Young, J.), reversed the bankruptcy court,[2] and determined that the I.R.S. willfully violated the stay. Judge Young remanded the matter to the bankruptcy court for a determination of debtor’s damages. Pursuant to the mandate from the United States District Court, the bankruptcy court conducted a hearing and imposed damages against the I.R.S. by order entered October 27, 1998.[3] The I.R.S. filed its notice of appeal on November 5, 1998 expressly limiting

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[1] The appeal was filed by the Tax Division of the U.S. Dept. of Justice on behalf of the Internal Revenue Service (“I.R.S.”).

[2] Shadduck v. Rodolakis, 221 B.R. 573 (D.Mass. 1998)(“Shadduck I”).

[3] Herein referred to as “Shadduck II.”

its appeal to "reconsideration and rejection of the District Court's interlocutory judgment that the violation was willful." Appellant's Brief at p.1. The I.R.S. expressly waives appellate review of the damages award. Id. On November 10, 1998 and within 10 days of I.R.S.'s notice of appeal, the debtor timely cross-appealed. The docket from the United States Bankruptcy Court for the District of Massachusetts,[4] reflects the following relevant entries:

> **October 26, 1998 Docket #296-1 EOD 10/27/98**
> Queenan, J. Order regarding [283-1] Order dated 9/22/98 to Determine Debtor's Reasonable Costs in bringing Motion for Order for Contempt (Remand). Findings and Conclusions Dictated at close of Hearing Incorporated by Reference. I allow as damages for the Government's violation of automatic stay the sum of $639.11, composed of an attorney's fee of $400. AND miscellaneous pre-appeal costs totaling $239.11. Entered on 10/26/98
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> **November 5, 1998 Docket, Doc. # 297-1 EOD 11/05/98**
> Notice of Appeal to Bankruptcy Appellate Panel by United States of America Appeal Designation Due: 11/16/98 Appellant Designation Due: 11/16/98; Compiled Records Due: 11/30/98 Transmission Due: 12/7/98 RE: [296-1] Queenan, J. order dated 10/26/98."
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> **November 5, 1998 Doc. # 298-1 EOD 11/05/98**
> Notice of Filing of Appeal to Bankruptcy Appellate Panel Re: [297-1] Notice of Appeal by United States of America
>
> **November 5, 1998 Doc.#299-1 EOD 11/05/98**
> Transmission of Record on Appeal to Bankruptcy Appellate Panel Re: [297-1] Notice of Appeal by United States of America
>
> **November 6, 1998 Doc#300-1 EOD 11/10/98**
> Receipt of Notice of Appeal by Bankruptcy Appellate Panel re: [297-1] Notice Appeal by United States of America BAP Dkt.#: MW 98-087

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[4] A copy of the docket is incorporated as Exhibit A of the I.R.S.'s appendix.

November 10, 1998 Doc#301-1 EOD 11/10/98
Notice of Appeal by Michael D. Shadduck Appeal Designation Due: 11/20/98 Appellant Designation Due: 11/20/98; Compiled Records Due: 12/7/98 Transmission Due: 12/10/98 RE: [296-1] QUEENAN J. Order dated 10/26/98 Re: Evidentiary Hearing to Determine Debtor's Reasonable Costs in Bringing Motion for Order for Contempt.

November 10, 1998 Doc#302-1 EOD 11/10/98
Notice of Filing of Appeal to District Court re: [301-1] Notice of Appeal by Michael D. Shadduck.

The I.R.S. argues that since it did not file a statement of election to have its own appeal heard by the district court as required by 28 U.S.C. § 158(c)(1) and Fed.R.Bankr.P. 8001(e),[5] and the debtor did not file a statement of election to proceed in district court with respect to the I.R.S.'s appeal, the I.R.S.'s appeal must be heard by this Court. As to the debtor's cross-appeal, the I.R.S. claims that it should not be bound by the debtor's election to proceed in district court because the procedure for electing to have an appeal heard by the district court in lieu of the Bankruptcy Appellate Panel requires affirmative action. The I.R.S. argues that since the debtor took

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[5] Fed.R.Bankr.P. 8001(e) provides, in relevant part, as follows: "[A]n election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C.§ 158(c)(1)."
28 U.S.C. § 158(c)(1) provides as follows:

> Subject to subsection (b), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate service established under subsection (b)(1) unless-
> (A) the appellant elects at the time of filing the appeal; or
> (B) any other party elects, not later than 30 days after service of notice of the appeal;to have such appeal heard by the district court.

no affirmative action, his appeal should also be heard by the Bankruptcy Appellate Panel. We disagree with that analysis. The procedure that the I.R.S. cites was adopted as part of Bankruptcy Reform Act of 1994, Pub.L. No. 103-394, 108 Stat. 4106 (1994) (the "Act"), and is not effective for this appeal and cross-appeal because it has an effective date of October 22, 1994 and does not apply to cases commenced prior to October 22, 1994. This case commenced in 1993. The Act substantially modified the procedure regarding bankruptcy appeals. Under the prior procedure, the district court automatically heard bankruptcy appeals unless all parties consented to the Bankruptcy Appellate Panel. With the amendments, the Bankruptcy Appellate Panel is the default court, i.e., in the absence of an express election to district court, the appeal is heard by the Bankruptcy Appellate Panel.

The operative statute for this case provides as follows:

> The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) this section.

28 U.S.C. § 158(b)(1) (repealed 1994).

The bankruptcy rules implemented this consent procedure as follows:

> Consent to Appeal to Bankruptcy Appellate Panel. Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b), or within 30 days of the filing of the notice of appeal, whichever is later.

Fed.R.Bankr.P. 8001(e) (prior to 1997 amendments). The debtor's November 10, 1998 notice of appeal to district court is a sufficient election to put the I.R.S.'s appeal and the debtor's cross-appeal before the district court, not this Bankruptcy Appellate Panel.

As to the merits of the I.R.S.'s appeal, an appellate court of equal authority, the district court has already reviewed the substantive merits finding that there was a willful violation of the stay in Shadduck I. At best, it appears that the district court, in its discretion, could reconsider its prior ruling. There is no basis for this Bankruptcy Appellate Panel to review the decision of the district court, a coordinate court of equal stature for purposes of bankruptcy appeals. See, e.g., United States v. Fernandez, 171 B.R. 135, 138 (D.Fla. 1994). (On appeal after remand, one district court would not disturb determination of another district court that the I.R.S. willfully violated the stay.) This Appellate Panel declines to review that which the district court, sitting as an appellate court, has already determined.

The I.R.S. argues that the current procedural rules allow its appeal to go forward here at the same time the debtor's appeal on damages proceeds before the district court. The I.R.S. concedes that its position "does not serve judicial economy and probably calls for statutory amendment." Appellant's Brief p. 3. The I.R.S. cites no case law to support its argument that a liability appeal can proceed on a different track, in a different court, from

a damages award arising from the same final judgment. Even if there were some circumstances under which liability could be appealed independently from a cross-appeal on damages, no such circumstances exist in this case and such bifurcation, by the I.R.S.'s own admission, is without merit. In the interests of conserving judicial resources and to ease administration, the appeal and cross-appeal should travel together through the appellate system.

CONCLUSION

For the reasons set forth, we transfer the appeal, cross-appeal and pending motion to dismiss to the United States District Court for the District of Massachusetts.