

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	1:12-CV-3261-WSD
	:	
ANGELO A. ALLECA, SUMMIT	:	
WEALTH MANAGEMENT, INC.,	:	
SUMMIT INVESTMENT FUND, LP,	:	
ASSET DIVERSIFICATION FUND, LP,	:	
and PRIVATE CREDIT	:	
OPPORTUNITIES FUND, LLC	:	
	:	
Defendants.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
RECEIVER’S MOTION FOR ENTRY OF JUDGMENT
UNDER FED. R. CIV. P. 54(b)**

I. Introduction

Movant Robert D. Terry, the Receiver, seeks an amendment to the October 15, 2015, Opinion and Order (the “October 15 Order”) (D.E. 113) that, among other things, granted the Receiver’s Motion for Approval of Settlement of Disputed Claim and Settlement Agreement and for Entry of a Bar Order. Specifically, the Receiver seeks an amendment that adds language making the October 15 Order final under

Fed. R. Civ. P. Rule 54(b). As will be demonstrated herein, a practice has emerged among district courts in Receivership cases of using the recitation of finality under Rule 54(b) in orders approving settlement such as the present one, in order to provide protection to the party paying financial consideration as part of the settlement.

The October 15 Order approved the Receiver's settlement with insurer Federal Insurance Company ("Federal"), whereby Federal is released and protected from further liability in consideration of a compromise payment of the \$1,487,500 into the Receivership Estate, and with Federal receiving the protection of a Bar Order that is final and not subject to appeal. Under the terms of the Agreement, the settlement is "effective and binding on the Parties only after entry of a Final Order."

The Settlement Agreement between Federal and the Receiver defines a Final Order, in relevant part, as "an Order (or Orders) that has not been reversed, stayed, modified or amended, and as to which the time to appeal or seek reconsideration or rehearing thereof has expired." (D.E. 103-1 at 8.) The October 15 Order approved the Settlement Agreement, entered a Bar Order, and retained jurisdiction related "to the administration, interpretation, effectuation, or enforcement of [the] Order, the Settlement Agreement, and any related disputes." (D.E. 113.) The Order did not, however, include the recitation from Rule 54(b) establishing it as a final judgment and triggering a mandatory time for appeal. The proposed Bar Order submitted by

the Receiver to the Court, and approved as to form by Federal, contained such a recitation.

Upon reviewing the October 15 Order, counsel for Federal advised counsel for the receiver of Federal's position that Federal's obligation to pay the settlement consideration was not triggered by the October 15 Order. The Receiver agrees that Federal's obligation to pay is not triggered until the Bar Order becomes final and non-appealable. Without expressing an opinion as to whether the October 15 Order is, in fact, final and non-appealable, the Receiver hereby requests an amendment to the October 15 Order adding language that makes the October 15 Order final under Rule 54(b). This request is consistent with the intention of the settling parties as more fully discussed in the immediately following section.

II. Finality is a material condition in the Settlement Agreement.

The Settlement Agreement leaves no doubt that Federal's obligation to pay the settlement amount is contingent upon the expiration of the time to appeal the October 15 Order. Federal is obligated to pay the settlement amount "[w]ithin ten (10) business days of the Effective Date." (D.E. 103-1 at § 3.4.) The Effective Date is defined as "the date that the Final Order . . . becomes final and not subject to further appeal." (*Id.* at § 3.3.) "Final Order" is a defined term under the Settlement

Agreement. (D.E. 103-1 at § 8.) Indeed, obtaining a Final Order is one of the two defined “Settlement Contingencies” in the Settlement Agreement:

3.2 Court Approval. The Parties agree and acknowledge that this Agreement is contingent upon and shall be effective and binding on the Parties only after entry of a Final Order (or Orders) of the Court in the Enforcement Action, and the occurrence of each of the following (the “Settlement Contingencies”):

- a. the approval of the settlement and terms of this Agreement; and
- b. the entry by the Court of a Final Order approving and entering a Bar Order . . .

(D.E. 103-1 at § 3.2.) As stated above, “Final Order” is defined as “an Order (or Orders) that has not been reversed, stayed, modified or amended, and as to which the time to appeal or seek reconsideration or rehearing thereof has expired.” (D.E. 103-1 at 8.)

Other sections of the Settlement Agreement reinforce the contingent nature of Federal’s payment obligation, and demonstrate the parties’ intention to obtain an order that is expressly final for purposes of appeal. For example, Section 1.1 reiterates that, for Federal to pay, a Bar Order must not be subject to further appeal:

1.1 . . . to constitute a Bar Order for purposes of triggering Federal’s payment obligation herein, (i) the order or judgment must be final and not subject to further appeal or any pending collateral challenge... A Bar Order in a form approved by the Parties is attached as Exhibit B.

(D.E. 103-1 at § 1.1.) The Bar Order attached as Exhibit B to the Settlement Agreement stated: “There being no just reason for delay, this Order is, and is intended to be, a final, appealable decision of the Court within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure.”

In a similar fashion, Section 3.7 of the Settlement Agreement reiterates Federal’s payment contingency:

3.7 Approval Process.

...

If the Court enters a Bar Order in accordance with Paragraph 3.2 that becomes a Final Order as defined in this Agreement, then the terms of this Agreement shall become binding on the Parties, and Federal shall transfer the payment to the Receiver . . .

(*Id.* at § 3.7.) Obtaining a Final Order was and remains a material term of the Settlement Agreement as well as a requirement for triggering Federal’s payment obligation.

III. Finality is necessary to avoid substantial delay in the Receiver collecting and distributing the settlement amount.

Federal’s payment obligation triggers when the Bar Order becomes final and not subject to further appeal or any pending collateral challenges. The settling parties clearly contemplated that the right of any appeal would commence upon entry of the approving order, i.e., prior to the ultimate final judgment in the action, and

further that the right of appeal would then be terminated, so that the approving order would be “Final” as defined in the Settlement Agreement, and distribution of the proceeds could then take place prior to the ultimate conclusion of the receivership. The October 15 Order, however, currently does not contain language establishing it as final.

Although the October 15 Order may be challenged with an interlocutory appeal because of its injunctive nature, a “failure to take an authorized appeal from an interlocutory order . . . does not preclude raising the question on appeal from the final judgment.” *Clark v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 924 F.2d 550, 553 (4th Cir. 1991). It is also likely true that the October 15 Order is “collateral,” and therefore immediately appealable. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978).¹ Some courts have held that such collateral orders must be appealed immediately under Fed. R. App. Proc. 4. *See, e.g., SEC v. Capital Consultants LLC*, C.A. 453 F.3d 1166, 1173 (9th Cir. 2006). In the Eleventh Circuit, however, it appears that a collateral order may either be

¹ The order “conclusively determine[d] the disputed question, resolve[d] an important questions completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment.” *See Coopers & Lybrand*, . 437 U.S. at 468.

appealed from within the time specified by Rule 4 or after final judgment is entered in the case. *Singleton v. Apfel*, 231 F.3d 853, 856-57 (11th Cir. 2000).² While the facts here are distinguishable from *Singleton*, it is not apparent that the Eleventh Circuit would prohibit an appeal after final judgment.

Without Rule 54(b) finality, therefore, the October 15 Order likely remains subject to appeal at a later date – the resolution of this receivership action in its entirety. Thus, without the grant of finality under Rule 54(b), the Receiver—and, by extension, claimants—may be forced to wait months, or even years, for the termination of the Enforcement Action and the expiration of any appellate deadlines. Such a result would substantially delay distributions from the Receivership Estate.

IV. Federal courts facing similar circumstances have included Rule 54(b) findings.

The Receiver requests that the Court look to other receivership actions involving similar settlements. Two similar S.E.C. enforcement actions are instructive here. According to Federal’s counsel, the possibility of obtaining a

² For a number of reasons, the Receiver believes that the likelihood of a successful appeal is extremely low. There were no objections to the proposed settlement motion, after notice. The parties that present most risk to the finality of the October 15 Order are not parties to the case, and therefore would have to intervene. Their standing to intervene seems doubtful based upon waiver principles. Further, it is also likely that an appeal taken at a later date will have been rendered moot by subsequent proceedings. Despite all of these factors, Federal reasonably seeks the comfort of a Rule 54(b) determination.

similar framework to the one that the courts sanctioned in those two cases – particularly with respect to predictability and finality – played an important role in Federal’s willingness to settle the present matter. Because these cases suggest that an order including language establishing the order as final under Rule 54(b) will facilitate settlement with, and payment from, settling insurers, the Receiver seeks the inclusion of that language in connection with the present matter.

In *S.E.C. v. Parish*, No. 2:07-cv-00919-DCN (D.S.C. May 12, 2008), the court approved a settlement agreement between the receiver, a non-party, and the non-party’s insurer. In the same order approving the settlement, the court entered a bar order similar to the bar order here. (*See* May 12, 2008, Order, attached as Exhibit A). That settlement agreement conditioned payment on the order becoming “final and not subject to appeal.” (*Parish* Settlement Agreement at Section 2, attached as Exhibit B.) The court’s order approving the settlement agreement and bar order concluded with language establishing the order as final under Rule 54(b):

This court finds that there is no just reason for delay for an entry of a final judgment as to the approval of the settlement and bar order and directs the entry of judgment pursuant to Fed. R. Civ. P. 54(b).

Ex. A at 13-14. That order was issued on May 12, 2008. The court did not terminate the *Parish* receivership until January 8, 2013, nearly five years later. Had the order not contained the Rule 54(b) language, the *Parish* receiver would have been forced

to wait until the conclusion of the entire proceeding before the settlement requirement was met and the payment became payable.

Similarly, the court in *S.E.C. v. Kaleta*, No. 4:09-cv-03674 (S.D. Tex. June 11, 2013), approved a settlement agreement between the receiver and an insurer as well as a bar order. (*See* June 11, 2013, Order attached as Exhibit C.) The *Kaleta* settlement agreement and bar order are substantially similar to those approved here, and in fact were a consideration during the Receiver's and Federal's negotiations. In *Kaleta*, as was negotiated here, the insurer's payment was conditioned upon the entry of a Final Claim Bar Order, defined in part as an order or judgment that is "final and not subject to further appeal or any pending collateral challenge." (*See Kaleta* Settlement Agreement attached as Exhibit D.) In its order approving the settlement and entering the bar order, the *Kaleta* court included Rule 54(b) language:

There being no just cause for delay, this Order is, and is intended to be, a final, appealable decision of the Court within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure.

Ex. C at 6.

In this proceeding, the inclusion of Rule 54(b) language will serve to trigger clearly the time limit for an appeal, and thus will satisfy the finality required as part of the consideration for Federal to pay the settlement amount. Consequently, the

Receiver moves the Court to amend its October 15 Order to include Rule 54(b) language making the October 15 Order final.

V. Conclusion

For the foregoing reasons, the Receiver respectfully requests that an amended order be entered establishing finality under Fed. R. Civ. P. 54(b). The Receiver attaches as Exhibit E to this memorandum a proposed order identical in all respects to the Court's October 15 Order with the exception that it includes the same Rule 54(b) language used in *Kaleta*, above.

Respectfully submitted this 18th day of December, 2015.

/s/ J. Steven Parker

J. Steven Parker

Counsel for Receiver

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CERTIFICATE OF SERVICE

I certify that the foregoing was prepared with one of the font and point selections approved by the Court in LR 5.1B. I further certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of electronic filing to counsel of record.

Respectfully submitted this 18th day of December, 2015.

/s/ J. Steven Parker

J. Steven Parker

Counsel for Receiver

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