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The Appealability As of Right of Interlocutory Discovery Orders in Bankruptcy

R. Thomas Farrar

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THE APPEALABILITY AS OF RIGHT OF INTERLOCUTORY DISCOVERY ORDERS IN BANKRUPTCY

R. THOMAS FARRAR*

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I. INTRODUCTION

Buried in the arcanum of bankruptcy law is an obscure distinction between "proceedings" and "controversies" in bankruptcy. The jurisdiction of the courts of appeals of the United States occasionally depends upon the application of these two terms, resulting in disparate polemics which Congress in 1938 strove to eliminate. The necessity of distinguishing between the two persists, however, when interlocutory orders are sought to be appealed, and the advent of modern discovery has spawned new complexities. This article will examine the appealability as of right of interlocutory discovery orders in bankruptcy, with emphasis upon the law of the Fifth Circuit.¹

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¹ The initial research for this article was begun in the author's capacity as law clerk to the Honorable David W. Dyer, Judge of the United States Court of Appeals for the
A. The Provisions of Section 24

The jurisdiction of the courts of appeals is set forth in section 24 of the Bankruptcy Act. Under section 24, no order involving less than $500 is appealable except upon allowance by the court of appeals. As to orders involving $500 or more, appeal is as of right if the order is final. If the order is interlocutory, appeal may be as of right or only upon allowance by the court (or not at all). Whether a right of appeal from an interlocutory order exists depends upon the nature of the order and the nature of the proceeding in which it was entered, and it is in this regard that the troublesome distinction between "proceedings" and "controversies" appears.

An interlocutory order or judgment in bankruptcy is appealable as of right if it is entered in a "proceeding in bankruptcy." If the interlocutory order is entered in a "controversy arising in proceedings in bankruptcy," it is not appealable unless the statutes governing appeals generally would permit an appeal from the particular order.

Aside from the jurisdictional amount, certain judicial limitations upon the right of appeal from an interlocutory order in a "proceeding" in bankruptcy have been imposed. "[T]he statutory right to appeal from interlocutory orders of necessity requires that such orders be restricted to those having a definite operative 'finality' . . ." There must also be

Fifth Circuit, during the pendency of Schwarz & Cohen v. Brock, No. 26685 (5th Cir., Nov. 8, 1968). Although that case presented to the Fifth Circuit the jurisdictional question which is the topic of this article, the case was dismissed as moot, and the court consequently did not reach the merits. The views contained in this article are solely those of the author and neither could nor do indicate how that court would decide the question were it properly presented.


3. This is true both of final and of interlocutory orders, although prior to the 1938 amendments to the Bankruptcy Act all final orders in "controversies arising in bankruptcy proceedings" were appealable as of right regardless of the amount in controversy.

4. For purposes of this article, use of the words "proceedings" and "controversies" in quotation marks indicates their use according to the specialized meaning which they have in § 24 of the Bankruptcy Act. Section 24 of the Act, 11 U.S.C.A. § 47 (1969), refers to "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy," and in this regard the words have a meaning different from the ordinary usage of these relatively common words. Perhaps because of the familiar usage of the words, "[T]he distinction between cases which are 'proceedings in bankruptcy' . . . and those which are 'controversies arising in bankruptcy proceedings' . . . is not always clear nor easily stated." In re McMahon, 147 F. 684, 689 (6th Cir. 1906).

Confusion also results from the use of the same words, with different meanings, in different portions of the act itself. The phrases have different meanings in §§ 23(a) and 24(a) of the Act. See 2 COLLIER ON BANKRUPTCY ¶ 24.08 (1968). But see Liddon & Bros. v. Smith, 135 F. 43, 45 (5th Cir. 1905).

5. See 2 COLLIER ON BANKRUPTCY ¶ 24.04 (1968).

6. Id. See also id. at ¶ 24.27.

a "substantial interest" in the order,\(^8\) and whether multiple appeals would result must also be considered.\(^9\) Additionally, the order must be dispositive of something and not "trivial" in its effect upon the proceeding.\(^10\)

**B. "Proceedings" and "Controversies"**

The statute investing jurisdiction in the courts of appeals, section 24, reads in pertinent part as follows:

The United States courts of appeals . . . are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact . . . .\(^11\)

This section is the culmination of attempts by Congress to cure what had by 1938 become a troublesome area. In some regards the Chandler Act of 1938,\(^12\) the present section 24, did eliminate problems in appellate jurisdiction in bankruptcy. The jurisdiction of the courts of appeals was extended to review of both matters of law and matters of fact, whereas formerly review of factual matters had been possible only in "controversies," with review in "proceedings" restricted solely to matters of law.\(^13\) The act also virtually eliminated problems of whether appeal had to be by permission or whether it was of right.\(^14\) The Chandler Act did not, however, entirely eliminate the vexatious distinction between "proceedings" and "controversies," and the distinction still remains with regard to appeals from interlocutory orders.\(^15\)

Courts have offered a variety of general definitions of "proceedings" and "controversies," none of which is particularly useful in determining whether a particular set of facts fits within either term. The most common general definition of "proceedings in bankruptcy" is that they "are those matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate."\(^16\) "Controversies" are considered to include those matters arising in the course of a bankruptcy proceeding, which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise, distinct and separable issues between the trustee and ad-

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\(^8\) Berl v. Crutcher, 60 F.2d 440, 443 (5th Cir. 1932).
\(^9\) Theard v. Fidelity & Deposit Co., 202 F.2d 880, 882 (5th Cir. 1953).
\(^10\) City of Fort Lauderdale v. Freeman, 197 F.2d 122, 124 (5th Cir. 1952).
\(^12\) Act of June 22, 1938, ch. 575, § 1, 52 Stat. 854.
\(^13\) See 2 Coller on Bankruptcy § 24.41 (1968).
\(^14\) See id. at ¶ 24.04.
\(^15\) See id. at ¶ 24.37.
verse claimants concerning the right and title to the bankrupt's estate.\textsuperscript{17}

As any number of doubtful cases would quickly illustrate, the above generalizations are useful only as generalizations. It is only through a categorization of particular fact patterns that any deeper meaning can begin to attach. The definitions are useful, however, in establishing the vague, general distinction between the two: "proceedings" arise in the administration of the bankrupt's estate and deal with questions between the trustee and the general creditors, while "controversies" are more than merely administrative of the bankrupt's estate and give rise to distinct and separable issues between the trustee and adverse claimants affecting the extent of the estate to be distributed.\textsuperscript{18}

II. "PROCEEDINGS IN BANKRUPTCY"\textsuperscript{19}

A. Selection and Accounting of Trustee

The appointment or removal of bankruptcy officials such as the trustee or receiver and referees is considered an administrative step in the course of the bankruptcy action which constitutes a "proceeding."\textsuperscript{20} Not only is the discharge of such an official as a receiver a "proceeding,"\textsuperscript{21} but the orders settling the accounts of such officers are also. Even though such orders may be interlocutory, appeal will lie as of right once given the jurisdictional amount.

B. Fees and Administrative Expenses

There seems to be little question regarding the classification of orders relating to fees and administrative expenses as "proceedings," as these rather clearly fall within the general definition. An order relating to fees for the trustee or receiver and the attorney for the receiver is a "proceeding."\textsuperscript{22}

C. Exemptions

An order holding property claimed by the bankrupt as exempt due to homestead laws\textsuperscript{23} or other statutes\textsuperscript{24} arises in a "proceeding." This

\textsuperscript{17} Id. at 180-81.
\textsuperscript{19} The outline for this section is taken from 2 COLLIER ON BANKRUPTCY §§ 24.13-24.26 (1968).
\textsuperscript{20} See 2 COLLIER ON BANKRUPTCY § 24.13 (1968). See also Georgia Jewelers, Inc. v. Bulova Watch Co., 302 F.2d 362 (5th Cir. 1968).
\textsuperscript{21} Shoreland Oil Co. v. Conklin, 30 F.2d 489 (5th Cir. 1929).
\textsuperscript{23} Gulbransen Co. v. Couch, 61 F.2d 932 (5th Cir. 1932).
\textsuperscript{24} Southern Engine & Pump Co. v. Pagel Elec. & Ice Co., 16 F.2d 268 (5th Cir. 1926).
question clearly constitutes one between the bankrupt and the general creditors, as often it will be the bankrupt himself who asserts the exemption.  

D. Sales and Distribution of Property

Probably one of the most important categories of “proceedings,” and one in which the advisability of interlocutory appeal most clearly appears, is the class of orders directing that certain property be sold or distributed from the bankrupt’s estate. Rather than delay an appeal from such an order until a time when the property may have been removed from the jurisdiction of the court or may have been irretrievably lost or sold, an interlocutory appeal regarding the particular property is desirable. Such an appeal also has the advantage of enabling the continuation of the rest of the proceedings without causing a disruption of orderly administration.  

“Proceedings” are generally considered to constitute the ordinary administrative matters of the processes of the bankruptcy court, and “the sale and disposition of the bankrupt’s effects, are regular steps or proceedings in bankruptcy . . .” Thus, payment to a creditor out of the proceeds of a sale by the trustee and questions regarding rights upon a sale or purported sale will also be termed “proceedings.” The same is true of questions regarding the return of surplus assets to the bankrupt.  

E. Claims and Liens

In most instances, an order allowing or rejecting a debt or claim is a “proceeding,” although where a lien is incidental to or combined with the debt, the dispute may constitute a “controversy.” Prior to 1938, the Bankruptcy Act provided that a “judgment allowing or rejecting a debt or claim of five hundred dollars or over” was a “proceeding” within a class of three exceptions which were appealable as of right. Claims and debts have the same status under the present section 24.

Where the allowance or rejection of a debt or claim combined with

25. See generally 2 COLLIER ON BANKRUPTCY ¶ 24.17 (1968). See also Adams v. Walicek, 9 F.2d 26 (5th Cir. 1925); Duncan v. Ferguson-McKinney Dry Goods Co., 150 F. 269 (5th Cir. 1917).
26. Unnecessary delays have been sharply criticized. See Georgia Jewelers, Inc. v. Bulova Watch Co., 302 F.2d 362, 364-370 (5th Cir. 1962) (appeal from order allowing amendment to involuntary bankruptcy petition and denying motion to vacate receiver).
27. Schuler v. Hassinger, 177 F. 119, 123 (5th Cir. 1910).
30. Berl v. Crutcher, 60 F.2d 440 passim (5th Cir. 1932).
32. See id. at ¶ 24.33.
the assertion of a lien is sought to be appealed, the appeal constitutes a "proceeding." This status results from the allowance of the claim being a "proceeding," with the assertion of the lien merely incidental to the primary claim of the debt. If the claim or debt is undisputed, however, and the assertion is that of a lien, then the matter is a "controversy," an appeal from which requires a final order. That the distinction is at times difficult to make is apparent from a group of Fifth Circuit decisions which evidently are in conflict.

F. Stays and Injunctions

A stay or injunction issued by the bankruptcy court is a "proceeding." The injunctions may require a variety of acts or forebearances, relating both to the bankrupt's property or to the proceedings themselves. Whether the injunction or an order dissolving an injunction is appealed, all are considered administrative in nature and hence "proceedings."
G. Turnover Orders

Depending primarily upon whom the order directs, an order requiring property to be surrendered to the estate may be either a “proceeding” or a “controversy.” Orders directed against the bankrupt or his agent are considered “proceedings,” while orders against third persons constitute “controversies.”

H. Civil Contempts

An order finding a person in civil contempt or discharging a rule to show cause why contempt should not be adjudged is considered a “proceeding.” An order adjudging a person guilty of criminal contempt, however, is considered neither a “proceeding” nor a “controversy” but rather a criminal proceeding. The criminal contempt proceeding is not related to the bankrupt’s estate but to the court’s power to preserve order in proceedings before it.

Whether a civil contempt constitutes a “proceeding” will rarely be important, as such orders generally are final. Even where an interlocutory fine is assessed, appeal could only be by allowance should the amount involved be less than $500.

I. Miscellaneous “Proceedings”

A number of orders which are primarily administrative of the bankrupt’s estate also are considered “proceedings.” An order approving a plan for reorganization denying a creditor voting rights regarding a plan of reorganization, granting or refusing to grant leave to amend a petition in bankruptcy, relating to a dispute over a compromise between the trustee and creditors, or a host of others may constitute a “proceeding.”

41. Moore v. Lane, 84 F.2d 553, 554 (8th Cir. 1936); cf. In re Purvine, 96 F. 192, 193-94 (5th Cir. 1899). See generally 2 COLIER ON BANKRUPTCY ¶ 24.21 (1968).

42. In re Christ’s Church of the Golden Rule, 172 F.2d 523 (9th Cir. 1949). See generally 2 COLIER ON BANKRUPTCY ¶ 24.22 (1968).

43. City of Clearwater, Fla. v. Beers, 90 F.2d 80, 82 (5th Cir. 1937). See generally 2 COLIER ON BANKRUPTCY ¶ 24.22 (1968).


45. Morehouse v. Pacific Hardware & Steel Co., 177 F. 337, 339-40 (9th Cir. 1910).

46. See 2 COLIER ON BANKRUPTCY ¶ 24.22 (1968).

47. Texas Hotel Sec. Corp. v. Waco Dev. Co., 87 F.2d 395, 397 (5th Cir. 1936), cert. denied, 300 U.S. 679 (1937).

48. Id.


III. "Controversies Arising in Proceedings in Bankruptcy"\textsuperscript{52}

A. Disputes over Title to Property

Proceedings involving a dispute over title to property between the trustee of the bankrupt's estate and adverse third party claimants constitute a "controversy," appeals from which require a final order.\textsuperscript{58} It matters not who has possession of the property, nor how possession was obtained, nor how the dispute arose.\textsuperscript{64} Thus, an injunction against an action in another court which affects the title to property claimed to be in the bankrupt's estate could be appealed as a "controversy."\textsuperscript{55} However, where the parties agree to allow the sale of the property on the understanding that the proceeds will go to the one in whom title to the property is found to exist by the court, the cases are divided as to whether this is a 'controversy' or a 'proceeding.'\textsuperscript{56} The Fifth Circuit has taken the view, criticized as inconsistent,\textsuperscript{57} that the matter is transformed into a "proceeding" even though title to the property remains the central issue.\textsuperscript{58} Additionally, where a partnership is involved in the bankruptcy, a dispute may be a "controversy" even where the bankrupt's estate is not primarily involved.\textsuperscript{59}

B. Reclamation Proceedings

Reclamation proceedings by an intervening third party constitute a "controversy" according to the majority view,\textsuperscript{60} and judging by its latest statement this also is the view of the Fifth Circuit. That court, however, has some decisions in conflict.

In \textit{Marion Machine Foundry \& Supply Company v. Girand}\textsuperscript{61} a creditor sold goods on credit to the bankrupt, provided that the bankrupt would first pay a prior debt. The bankrupt generously paid the prior debt with a check which was later dishonored. The creditor filed a petition for the proceeds of the sale of the goods by the bankrupt's receivers, and on appeal from its denial the Fifth Circuit held that the question presented was a "purely legal one, and arose in an ordinary administra-

\textsuperscript{52} The outline for this section is taken from 2 \textsc{Collier on Bankruptcy} §§ 24.29-24.36 (1968).
\textsuperscript{53} Bank of Ragland v. Hudson, 247 F. 241, 245 (5th Cir. 1918); McCarty v. Coffin, 150 F. 307, 309 (5th Cir. 1907); Liddon \& Bros. v. Smith, 135 F. 43, 46 (5th Cir. 1905).
\textsuperscript{54} See 2 \textsc{Collier on Bankruptcy} § 24.29 (1968).
\textsuperscript{55} Cf. Leco Properties, Inc. v. R.E. Crummer \& Co., 128 F.2d 110, 112 (5th Cir. 1942), criticized as neither necessary nor responsive to arguments, Universal Oil Prod. Co. v. Cosden Petroleum Corp., 178 F.2d 495, 497 (5th Cir. 1949).
\textsuperscript{56} 2 \textsc{Collier on Bankruptcy} § 24.29, at 771 (1968).
\textsuperscript{57} \textit{Id}.
\textsuperscript{58} Marion Mach. Foundry \& Supply Co. v. Girand, 285 F. 160, 161 (5th Cir. 1922).
\textsuperscript{59} See 2 \textsc{Collier on Bankruptcy} § 24.29 (1968).
\textsuperscript{60} See \textit{id} at § 24.31 n.1 and cases cited therein.
\textsuperscript{61} 285 F. 160 (5th Cir. 1922).
tive proceeding in bankruptcy. 2 In several later cases, however, the Fifth Circuit has adamantly treated reclamation proceedings as presenting separable issues and hence being “controversies.” 6 Each of those decisions studiously avoided mention of the Marion Machine Foundry decision, and perhaps the case should be considered as overruled sub silentio. This is probably a fitting treatment of the case in view of its otherwise rather sordid history. It has been obliquely criticized by another circuit, 64 has been termed inconsistent by a leading authority, 65 and has been followed only as to a peripheral point dealing with fraud. 66 Even as to the question on fraud the case has not fared well: in lauding it, the Second Circuit claimed it as its own. 67 Undoubtedly the Fifth Circuit would be quite willing to let the Second Circuit keep it.

C. Suits Against Trustees and Receivers

“A suit against a trustee or receiver in the bankruptcy court for personal negligence constitutes a ‘controversy arising in proceedings in bankruptcy.’ 68 However, a suit against a trustee seeking to charge him with property which came into his possession and was not accounted for has been held to be a “proceeding.” 69 From the fact that the latter suit is separable from the remainder of the proceedings and does present a dispute over title to property claimed to be in the bankrupt’s estate, it would appear that the better view would be that such a suit presents a “controversy.”

D. Miscellaneous “Controversies”

A number of various other suits have been held to be “controversies.” In certain instances disputes over liens have been held to be “controversies,”70 and criminal contempt suits fall within the same category. 71 Plenary suits to set aside preferential or fraudulent transfers have been held to constitute “controversies,” 72 although there is today some question whether they are at all appealable under section 24 of the Bankruptcy Act as either “proceedings” or “controversies.” 73 Additionally,

62. Id. at 161.
63. See City of Fort Lauderdale v. Freeman, 197 F.2d 122, 123 (5th Cir. 1952); Hopkins v. Nat’l Shawmut Bank, 293 F. 884, 885 (5th Cir. 1923), cert. denied, 263 U.S. 722 (1924).
64. See In re Smith-Flynn Comm’n Co., 292 F. 465, 467 (8th Cir. 1923).
65. See note 60 supra.
67. See In re Independent Coal Corp., 18 F.2d 1, 3 (2d Cir. 1927).
68. 2 COLLIER ON BANKRUPTCY ¶ 24.34, at 782 (1968).
69. In re Moore & Bridgeman, 166 F. 689, 692 (5th Cir. 1909).
70. See text at 373 supra.
71. See text at 372 supra.
72. See 2 COLLIER ON BANKRUPTCY ¶ 24.32 (1968).
73. Id. See also Diaz v. Crom, 195 F.2d 517 (5th Cir. 1952), cert. denied, 344 U.S. 841 (1952).
orders approving a compromise have been held to be reviewable as “con-
troversies.”

IV. INTERLOCUTORY DISCOVERY ORDERS

As the preceding examples of “proceedings” and “controversies” amply illustrate, whether a particular order is appealable as one or the other is not always clear. Further muddling the issue is the fact that some orders constitute neither, despite the initial “either-or” impression given by section 24. While interlocutory orders in “controversies” are generally not appealable and such orders in “proceedings” generally are, these generalities, like those which attempt to define the two classifications of orders, are not absolutes. Even in a “proceeding,” no one could seriously contend that an order recessing the proceedings for five minutes is appealable.

Thus there have evolved judicial limitations upon the appealability of orders in “proceedings.” Appealable orders must have a degree of “finality,” be at least marginally dispositive of some issue, or involve some “substantial interest” of the parties involved. The class of orders which does not so qualify as appealable orders in “proceedings” is generally termed the “trivial matter” exception. Such at least is the categorization by courts, but it is the primary thesis of this article that a slightly different approach to this class of non-appealable interlocutory orders in “proceedings” would more accurately reflect the purpose behind establishing the class. Discovery orders are a good example, and the remainder of this article will seek to glean from the cases dealing with such orders a thread in common with other interlocutory orders in “proceedings.”

A. The Amount in Controversy

It is a requisite of appeal as of right under section 24 that the order appealed from involve $500 or more, whether the order is entered in a “proceeding” or a “controversy.” Thus in order not to obviate the appealability of a discovery order altogether, that amount must be present, as otherwise appeal would lie only upon allowance by the court of appeals.

In interpreting the $500 amount provision, the courts have

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75. The exceptions are those orders in which other statutes, e.g., 28 U.S.C.A. § 1292(b) (1969), provide for interlocutory appeal.
76. See text at 367-68 supra.
77. See Henry Ansbacher & Co. v. Klebanow, 362 F.2d 569 (2d Cir. 1966). In City of Fort Lauderdale v. Freeman, 197 F.2d 122 (5th Cir. 1952), the court stated at 124:
[I]t is a wise and salutary rule that appeals from interlocutory orders in bankruptcy, which . . . are trivial in their effect on the proceedings, which are dispositive of nothing, are not reviewable, and appeals therefrom should be dismissed.
79. Id.
stressed the necessity that the order "involve" $500 or more. Although an order holding a person involved in the bankruptcy proceedings in contempt does not literally "involve" $500, it obviously "involves" something of greater importance. Because of this the words of the statute have not been construed literally, and instead the courts have construed the limitation as one "designed to exclude trifling disputes." The requirement has come to mean that the non-appealable order must involve money alone and less than $500, and this reasoning would appear to bring discovery orders within the class of orders "involving" $500 or more.

B. Section 1292(b)

Section 1292(b) of Title 28 of the United States Code provides the normal method of interlocutory appeal. Under section 1292(b) appeals from specified interlocutory orders are permitted, and occasionally this will occur in a "controversy" in bankruptcy. A discovery order is not one of those specified in that section, however, and therefore interlocutory appeal of such orders in bankruptcy must occur only if they are within the class of appealable orders in "proceedings."

C. Discovery as a "Proceeding"

1. THE CASES

Various circuits of the courts of appeals are generating their own controversy over the applicability of appeal as of right under section 24 to interlocutory discovery orders. In Henry Ansbacher & Co. v. Klebanow the Second Circuit culminated a line of decisions, primarily from that circuit, by accepting jurisdiction of an appeal from an order reversing a referee's order which had suppressed interrogatories, holding that the order, although interlocutory, is appealable under 24(a) of the Bankruptcy Act . . . as an order entered in a "proceeding in bankruptcy" as distinguished from "a controversy arising in proceedings in bankruptcy . . . ." Discovery matters are of an administrative character. They are not actions within the bankruptcy action affecting title to a bankrupt's estate, appealable only when a final order has been entered. They are "proceedings" in bankruptcy, and in the case at bar the order is of sufficient significance to avoid the "trivial matter" exception judicially engrafted on the statute. . . .

80. Robertson v. Berger, 102 F.2d 530, 531 (2d Cir. 1939). See also In re Winton Shirt Corp., 104 F.2d 777, 779-80 (3d Cir. 1939).
81. Id.
82. See text at 375 supra.
83. 362 F.2d 569 (2d Cir. 1966).
84. Id. at 570.
The Second Circuit in 1922 was one of the first to classify a form of discovery order, relating to an examination under section 21(a) of the Bankruptcy Act, as an order entered in a "proceeding." In *In re A. & W. Nesbitt*, that court reversed an order eliminating an individual from a section 21(a) examination. The following year it did the opposite, reversing an order compelling a foreign resident to submit to such an examination. Thereafter that circuit considered an order denying a motion to limit the issues in a 21(a) examination, an order limiting a 21(a) examination, and an order denying a motion to quash a subpoena as arising in "proceedings in bankruptcy." The Third Circuit followed the Second's lead regarding an order compelling a section 21(a) examination.

In 1952 the Sixth Circuit took issue with this line of cases in *In re Manufacturers Trading Corporation.* In its decision the court held that an order denying a motion to quash a subpoena duces tecum, even though admittedly arising in a "proceeding," was not an appealable order under section 24. The court noted that "[d]ue regard for the efficiency and dispatch of the proceedings necessitates a common-sense interpretation of [section 24] in order that the right to appeal be limited within reasonable bounds..." The court went on to state:

The action before us is not one that arises with respect to the administration of the debtor's estate. The issuance of a subpoena duces tecum does not peculiarly partake of the nature of a bankruptcy proceeding, and is not a part of the administration of the estate. An order denying a motion to quash such a subpoena is not an order in a bankruptcy proceeding proper. Such an order could not remotely be considered as an administrative order made in the course of the bankruptcy proceedings. The order denying the motion to quash is, therefore, not of the class of proceedings which is reviewable on appeal. Even though it might affect some substantial right of appellant, it is not a proceeding in bankruptcy from which an appeal can be taken as in the case of the usual interlocutory order made in the administration of the estate. For the order denying the motion to quash does not substantially determine any issue in the proceeding; and an interlocutory order which determines nothing is not appealable...
The weight of the case as authority may not be crushing. Its forcefulness must stem more from the validity of its reasoning than from unanimity. Of the three judges on the panel, one vigorously dissented and another merely concurred in the result, noting that it was "not essential that the court should resolve all the technical differences developed in the respective opinions of [his] respected colleagues."95

2. THE NORMATIVE AND SUBSTANTIVE ASPECTS

An assessment of the validity of the differing views upon the appealability of interlocutory discovery orders in bankruptcy, requires the consideration of a number of factors. A natural starting point would be an interpretation of the intent of Congress in passing section 24, for after all, it is a statute. Other factors are the judicial approach to interpreting and limiting section 24, the general desirability of interlocutory appeals from discovery orders, and the usefulness of other available methods of interlocutory appeal.

With regard to discovery being a "proceeding," the intent of Congress is not very obvious. Although it realized the impact of providing for appeal as of right when it was considering the Chandler Act in 1938, it also realized that whether a particular set of facts would constitute a "proceeding" was a question best left to case by case determination in the courts. Perhaps in the occasionally used "condonation" approach there could be some support for the proposition that, at least as to section 21 (a) examinations, Congress intended orders granting or limiting discovery to be appealable as of right. If, however, Congress by knowing that appeals from such orders had been allowed prior to 1938 intended their appealability as of right thereafter, it was strangely silent. Academic honesty would seem to preclude the conclusion that Congress approved such appeals by its silence, even assuming that in its omniscience Congress knew of the cases, comprehended their impact, and somehow intended its silence to have meaning.

Neither is an examination of the judicial approach to interpreting section 24 particularly illuminating. The definitions of "proceedings" and "controversies" are quite vague, in keeping with the vagueness of the terms they purport to elucidate. However, the courts have at times limited the applicability of the provisions of section 24, and they have in doing so made general statements as to why. Thus, in a general way the statements may be of value.

Normative considerations regarding the desirability of interlocutory appeal of discovery orders should also be considered. It is important to analyze the effects of providing for such appeals, as the judiciary often must make a determination based on long range effects. In creating or changing this particular right, the courts must consider not only the

95. Id. at 959 (concurring opinion of Martin, J.).
costs of judicial administration stemming from an expansion of appellate
jurisdiction, but also how equitably to resolve the conflicting economic
and personal rights of the litigants and how properly to protect the pub-
ic at large. "Congress enacted the bankruptcy statute in the exercise of
public policy, for the benefit, not of debtors, but of society at large," and "it was thought best by Congress to prescribe general rules, which
would usually promote satisfactory results, notwithstanding the fact that
in isolated instances it would be difficult, if not impossible, to attain the
standards of exact justice." While society is concerned about justice for
the litigants, it must also be concerned about the costs of the administra-
tion of justice and swift determination of litigation. The judiciary must
decipher and apply societal concern.

To allow an appeal as of right from an interlocutory discovery order
conflicts with the general rule that only final judgments are appealable as
of right. Federal law has required a final judgment for appellate review
since the Judiciary Act of 1789, and today it remains a precondition of
jurisdiction in the United States courts of appeals. For various reasons
and in different manners, however, interlocutory orders are occasionally
reviewable. The most common method of interlocutory review is pursuant
to section 1292, although immediate review of a protested order
may also be possible through dismissal and default, the use of extraor-
dinary writs by the appellate court, contempt proceedings, or the
collateral orders doctrine.

3. ORDERS GRANTING DISCOVERY

Problems regarding orders improperly granting discovery are essen-
tially dual: the improperly discovered material may be improperly
admitted at trial or the rights of a litigant or other individual, particu-
larly with regard to the work product of an attorney or privilege, may
be violated. When the former occurs, it is usually necessary to object to the
introduction of the evidence at trial in order to preserve error on
appeal. While the Federal Rules of Civil Procedure provide a measure of pro-
tection for procedural irregularities in securing discovery, as by a pro-
tective order, review seems desirable when the trial court erroneously
orders discovery in violation of a privilege. To submit to discovery
renders the problem moot, eliminating consideration of the error by an
appellate court, while refusal necessitates a review which is less than

100. See supra.
101. See generally Note, Developments in the Law—Discovery, 74 HARV. L. REV. 940,
likely to succeed because the test on review is whether the trial court abused its discretion.\textsuperscript{104}

4. ORDERS DENYING DISCOVERY

Where a denial of discovery is erroneous, it seems desirable to allow interlocutory appeal, for the reason that it is quite difficult to show prejudice following the trial if what is sought to be discovered is not known to some degree.\textsuperscript{105} However, there remains the possibility that despite a denial of access to rightfully discoverable information the affected party may win, thus rendering the problem moot. Additionally, the denial is reviewable on appeal and under proper circumstances may result in reversal for abuse of discretion.\textsuperscript{106}

5. THE PECULIARITIES

Problems regarding the grant or denial of discovery are somewhat the same in bankruptcy as in other areas, although because of the nature of section 21(a) examinations and the possible availability of contempt proceedings as a “proceeding” there may be some differences. It is as true in bankruptcy as elsewhere that persons whose rights or privileges may be violated by discovery of certain information must be protected, and it is also true that persons may be subjected to injustice should needed information be sheltered. Both such classes are better protected through the use of interlocutory appeals, but to provide for them is to furnish a ready vehicle for delaying or harassing tactics by an opponent, in turn resulting in economic waste both to the parties and to the courts and public. Present procedure attempts to strike an equitable equilibrium in the former area by allowing the trial judge an extensive latitude of power and discretion designed to permit all but the most sacrosanct information to be discovered. In keeping with the intent to broaden the availability of information through wider discovery procedures, it is necessary to cause those who would refuse to submit to discovery to be hesitant to do so. One aspect of lessening desire to refuse discovery is to deny immediate review. This in turn speeds up trials and lessens the costs of the administration of justice.

Unfortunately, trial courts make errors. As a remedy, some form of appellate review must be provided. The question is whether immediate interlocutory appeal is the answer, and this question has been answered in the negative in other areas of the law.

Where discovery is denied, the costs of discovery must be weighed against the necessity of obtaining information. Even to allow an appeal

\textsuperscript{104} See Whiteman \textit{v.} Pitrie, 220 F.2d 914, 918 (5th Cir. 1955) (dictum); \textit{In re Mfrs. Trading Corp.}, 194 F.2d 948, 960 (6th Cir. 1952).

\textsuperscript{105} See \textit{Note, Developments in the Law—Discovery}, 74 Harv. L. Rev. 940, 993 (1961).

\textsuperscript{106} Roth \textit{v. Bird}, 239 F.2d 257 (5th Cir. 1956).
may not be attractive to the conscientious attorney, as he must also weigh
the costs and time of an appeal against his chances of winning absent the
information sought. However, to the delaying or harassing party the
concern for economy may not be so acute, nor the denial of discovery so
prejudicial to legal rights.

The section 21(a) examination is a bankruptcy aberration which
merits some attention in this area. These examinations are authorized by
a section of the act which, when printed in the statute books, constitutes
a congressional fishing license for all manner of existent and nonexistent
game. The trustee may delve and probe in a virtually unrestricted quest
to obtain information regarding the possible assets of the bankrupt's
estate. Although the normal rules of civil procedure regarding bank-
ruptcy are available in bankruptcy actions, it is arguable that an order
granting or denying a section 21(a) examination is a "proceeding" in
bankruptcy due to its peculiarity to bankruptcy actions.

It is possible to argue that an order denying discovery in bank-
ruptcy has a sufficient degree of finality to be classified as a "proceeding."
Once the process of discovering information is curtailed, as to matters
yet undiscovered the process is to a degree "final." There is in this
regard some "degree of finality." Additionally, it is probable that the
action could otherwise continue unaffected by an interlocutory appeal.

It is important also to note that it may at times be possible for a
party to secure review of a civil contempt order. In most instances civil
contempt orders will be unquestionably appealable under section 24 of
the Bankruptcy Act, since they are usually final orders. Under section 24
any final order meeting the jurisdictional amount is appealable as of
right whether it is entered in a "proceeding" or a "controversy." Of
course, if the contempt is punished by a simple compensatory fine, the
order is interlocutory and appealability remains an issue. As to this
issue there have been differences of opinion, but it seems that the con-
tempt is considered as arising in a "proceeding."

V. ADJUDICATION VERSUS ADMINISTRATION

It is the thesis of this article that to allow appeal from an interlocu-
tory discovery order is to misplace the emphasis in the generally accepted
definitions of "proceedings," thereby transforming an ordinary adjudica-
tory proceeding into an extraordinary administrative "proceeding." To

107. Gen. Order 37, General Orders in Bankruptcy Adopted by the Supreme Court
108. See Georgia Jewelers, Inc. v. Bulova Watch Co., 302 F.2d 362, 364 (5th Cir. 1962)
("definite operative finality").
v. Beers, 90 F.2d 80, 82 (5th Cir. 1937).
110. Compare City of Clearwater, Fla. v. Beers, 90 F.2d 80, 82 (5th Cir. 1937) with
Kirsner v. Taliaferro, 202 F. 51, 54-56 (4th Cir. 1912).
111. As will appear later in this article, it is the writer's view that contempt orders are
not within the usual class of "proceedings." See page 384 infra.
classify discovery as a “proceeding in bankruptcy” is to ignore the fact that discovery is a part of the process of adjudication of bankruptcy, rather than a step in the administration of the bankrupt's estate.

The process of adjudicating bankruptcy is from beginning to end a legal process utilizing legal procedures. Though in some respects bankruptcy litigation is atypical, for the most part it utilizes judicial procedure and judicial processes common to all civil litigation. In recent years an even greater uniformity and interchangeability of procedures have been developing, resulting in an increasing similarity between bankruptcy and other litigation, a result evidenced, for example, by discovery procedures and by appellate procedure.

Discovery in bankruptcy has its own peculiar history, overborne by the section 21(a) examination. That examination is a creature of statute designed to allow the whereabouts of the assets of the bankrupt to be ascertained in order to recover them for distribution. Although it is itself and by case law somewhat limited, its scope is broad.112 Section 21(a) provides that:

The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt ... 113

While not strictly an ancestor of modern discovery, which primarily developed from equity,114 section 21(a) certainly is a forerunner.115 With the advent and refinements of modern discovery occurring since the promulgation of the Federal Rules of Civil Procedure in 1938 and thereafter, it has become desirable to fully incorporate the federal discovery procedures of the Federal Rules of Civil Procedure into bankruptcy practice.116 Insofar as was possible by procedural changes, the Supreme Court accomplished this with the promulgation of General Order 37, which states:

In proceedings under the [Bankruptcy] Act the Rules of

112. Section 21(a) limits examination of the bankrupt's spouse by providing that: *Provided,* That the spouse may be examined only touching business transacted by such spouse or to which such spouse is a party and to determine the fact whether such spouse has transacted or been a party to any business of the bankrupt; *And provided further,* That the spouse may be so examined, any law of the United States or of any State to the contrary notwithstanding. 11 U.S.C.A. § 44(a) (1969).


115. See Georgia Jewelers, Inc. v. Bulova Watch Co., 302 F.2d 362, 368 (5th Cir. 1962).

116. Prior to the adoption of the Federal Rules certain federal statutes allowing various forms of discovery had been held to be incorporated into section 21(a). See 2 COLLIER ON BANKRUPTCY ¶ 21.25[1] (1968).
Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. . . .\textsuperscript{117}

Not only are discovery procedures in federal practice, including bankruptcy, essentially uniform, but appellate procedure is as well. The new Federal Rules of Appellate Procedure, effective July 1, 1968, apply to bankruptcy appeals as well as to appeals from other types of litigation in providing for appeals by allowance,\textsuperscript{118} by permission under section 1292(b),\textsuperscript{119} and as of right.\textsuperscript{120} Bankruptcy did retain some differentiation from other appeals by necessitating the provisions for appeals by allowance under Rule 6, which is applicable to such appeals, but because these appeals are limited to those involving less than $500 it is doubtful that this provision will be often used or the appeals often allowed. The purpose behind promulgating the new rules was to make appellate procedure uniform, there having been variations from circuit to circuit prior to them. In bankruptcy the most immediate effect has been the change in appeal time to within thirty days after entry of judgment, although it has been argued that they in effect eliminate interlocutory appeals in “proceedings” except upon allowance.\textsuperscript{121} (The argument is not sound.)\textsuperscript{122}

\textsuperscript{117} Gen. Order No. 37, General Orders in Bankruptcy Adopted by the Supreme Court of the United States. \textit{See also} Gen. Order No. 22 (taking of testimony).
\textsuperscript{119} Fed. R. App. P. 5.
\textsuperscript{120} Fed. R. App. P. 3, 4.
\textsuperscript{121} \textit{See} Brief of Appellee, Schwarz \& Cohen v. Brock, No. 26685 (5th Cir., Nov. 8, 1968).
\textsuperscript{122} The argument is faulty because if there was prior to the new rules a right of appeal, the new rules, affecting only procedure, could not alter it. It would remain substantive law unaffected by the rules. Additionally, it would be a right affecting the jurisdiction of the courts of appeals and could not be affected under the terms of the rules themselves.

The new rules are derived in pertinent part from the authority vested in the Supreme Court under 28 U.S.C.A. § 2075 (Bankruptcy Rules). \textit{See} Advisory Committee’s Notes to Fed. R. App. P. 1. Section 2075 states:

\textit{Such rules shall not abridge, enlarge, or modify any substantive right.}

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Emphasis added.)

As the Advisory Committee noted, Notes to Rule 1, \textit{supra}, “[b]y the terms of the statutes, after the [new] rules have taken effect all laws in conflict with them are of no further force or effect.” This, however, also by the terms of the statutes, does not mean that any law conferring a substantive right is of no further force or effect. Insofar as bankruptcy is concerned the primary effect seems to have been to have made appeal time uniform. \textit{See} Advisory Committee’s Notes to Fed. R. App. P. 6. Admittedly, Rule 4, which covers appeals as of right in bankruptcy, omits the phrase “either interlocutory or final.” That phrase, however, would be superfluous, as both are in bankruptcy. In view of the express statutory limitations and the limitations of Rule 1(b), which states that the “rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law,” the argument has scant merit.
In interpreting section 24 and attempting to apply its terms, the emphasis should be placed on property rather than on process. It is from administration of the bankrupt’s estate, rather than from judicial procedures, that use of the term “proceedings in bankruptcy” should be prompted. The term “proceedings in bankruptcy” is a term of art and it should be used as such.

Unfortunately, the word “proceeding” is commonly used to describe judicial processes, and the same could be said of “controversy.” Virtually all litigation at one time or another is referred to as a proceeding. Indeed, in the Act itself and in General Order 37, the word at times is accorded its common usage. Common parlance, however, is inapplicable and dangerous in attempting to interpret and apply section 24. In section 24 the word should be used, according to its general definitions, as being applicable to normal steps in the administration of the bankrupt’s estate.

It is through this approach to use of the term that distinctions between actions which should, and actions which should not, be held to be “proceedings” begin to achieve a measure of consistency. A distinction should be made between discovery orders, for example, and other steps which administer assets, as for example orders appointing or removing a trustee, orders that property be sold or distributed, orders allowing or rejecting claims and liens, and turnover orders. The former are common to virtually all courts; the latter are peculiar to bankruptcy administration.

It is through this vantage that consistencies and inconsistencies appear. It is suggested that discovery orders in bankruptcy should be appealable to the same extent and in the same manner as discovery orders elsewhere. The same holds true for orders holding a party in civil contempt. Such orders are no more than procedural orders, in the case of the former, or orders and process issuing to preserve the dignity and jurisdiction of the court in the case of the latter. They are not peculiar to bankruptcy; neither do they administer, except peripherally through the judicial process itself, the assets of the bankrupt’s estate.

It seems anomalous to apply procedural devices to bankruptcy with the result of effectually extending the jurisdiction of the courts of appeals. To do so in effect seems to constitute legislation. There is no apparent reason for allowing interlocutory appeals in bankruptcy but not elsewhere, except in circumstances where the peculiarities of bankruptcy should require them. The purpose of enacting section 24 to allow interlocutory appeals was to provide an exception to the normal rule requiring finality, and the extension of jurisdiction should be narrowly construed. By a return to the general definitions of “proceedings” and an analysis of the effect of a particular order on the administration of the estate, rather than its peripheral effect upon judicial supervision of the administration, it is suggested that courts will better be able to classify particular proceedings as “proceedings.”