



**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA**

In re

Charles M. Frye,

Debtor(s).

Excelsior College,

Plaintiff(s),

vs.

Charles M. Frye,

Defendant(s).

BK. No. LA 06-16118 BB

Chapter 7

Adv. No. LA 07-01150

**MEMORANDUM OF DECISION RE PLAINTIFF'S  
PETITION FOR CERTIFICATION OF  
CIRCUMSTANCES FOR DIRECT APPEAL**

(No hearing required)

After plaintiff Excelsior College ("Excelsior") obtained a jury verdict and a final judgment and permanent injunction (the "District Court Judgment") against Charles Mitchell Frye ("Frye") in Excelsior College v. Frye, United States District Court Case no. 04CV0535WQH (the "District Court Action"), Frye filed a chapter 7 bankruptcy case in the above court on November 22, 2006. On February 15, 2007, Excelsior filed a complaint seeking to have Frye's obligations to Excelsior under the District Court Judgment excepted from the discharge under 11 U.S.C. § 523(a)(6), commencing the above-entitled adversary proceeding (the "Dischargeability Action").

On or about March 23, 2007, this Court modified the automatic stay in Frye's bankruptcy case to permit Excelsior and Frye to litigate any post-trial motions and appeals in the District Court Action to a final judgment. Excelsior advises that Frye's appeal of the District

1 Court Judgment (the "First Appeal") has been assigned docket no. 07-55997 and is currently  
2 pending before the United States Court of Appeals for the Ninth Circuit.

3 In the interim, Excelsior moved for summary judgment in the Dischargeability Action.  
4 The Court granted that motion by order entered January 31, 2008. After requesting and  
5 obtaining additional briefing and conducting a separate hearing on the issue of whether final  
6 judgment should be entered in the Dischargeability Action now or stayed pending the outcome  
7 of the First Appeal, the Court entered a final judgment in the Dischargeability Action, excepting  
8 Frye's debts to Excelsior under the District Court Judgment from the discharge in Frye's  
9 bankruptcy under Bankruptcy Code section 523(a)(6) (the "Dischargeability Judgment"). Frye  
10 moved for reconsideration. That motion was denied.

11 Thereafter, on or about February 15, 2008, Frye filed a notice of appeal from the  
12 Dischargeability Judgment. Neither party exercised its right to have that appeal (the "Second  
13 Appeal") heard by the District Court. On or about April 1, 2008, Excelsior petitioned the  
14 Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") for a certification under 28 U.S.C. §  
15 158(d)(2) with regard to the Second Appeal. In response, the BAP ruled that Excelsior's  
16 petition for certification (the "Petition") should have been directed to this Court, rather than the  
17 BAP, because the docketing of the Second Appeal at the BAP had not yet occurred. This  
18 memorandum sets forth the Bankruptcy Court's ruling in response to the Petition.

19 Although the Court understands and appreciates Excelsior's desire to see the final  
20 resolution of its protracted litigation with Frye concluded as expeditiously as possible, the  
21 Court's review of the language of section 158(d)(2) and of the authorities that have interpreted  
22 that language leaves this Court with the firm conviction that the circumstances of this appeal  
23 do not warrant the application of this section. Although a certification under section 158(d)(2)  
24 would materially advance the progress of the Second Appeal, it is *a/ways* the case that  
25 skipping one level of appeal would make the appeals process shorter. If such a showing were  
26 sufficient to entitle an appellant (or an appellee) to a certification under section 158(d)(2), every  
27 appeal would be an appropriate candidate for certification under this section. Clearly, more must  
28 be required, and this Court does not believe that the "economies of scale" argument that  
Excelsior has advanced will suffice for this purpose. Therefore, the Petition must be denied.

1 Section 158(d)(2)(B) provides that, on the request of a party to an appeal, the court  
2 before whom a matter is pending should certify a matter for direct appeal to the Court of  
3 Appeals if the court determines that the circumstances specified in clause (i), (ii) or (iii) of  
4 subparagraph (A) of section 158(d)(2) exist. Thus, if the court finds that one or more of the  
5 following three statements are true, the court should issue the requested certification:

- 6 (i) the judgment, order or decree involves a question of law as to which there is no  
7 controlling decision of the court of appeals for the circuit or of the Supreme Court  
8 of the United States, or involves a matter of public importance;
- 9 (ii) the judgment, order, or decree involves a question of law requiring resolution of  
10 conflicting decisions; or
- 11 (iii) an immediate appeal from the judgment, order, or decree may materially  
12 advance the progress of the case or proceeding in which the appeal is taken.

13 Excelsior's Petition is based entirely on the third of these clauses applies and argues  
14 that an immediate appeal of the Second Appeal to the Ninth Circuit would materially advance  
15 the resolution of these proceedings. However, the Dischargeability Action has been fully  
16 resolved. Nothing is being held in abeyance pending the outcome of the Second Appeal.  
17 No litigation is proceeding forward at the trial court level that might prove unnecessary if the  
18 parties knew now that the Dischargeability Judgment would, or would not, be reversed on  
19 appeal.

20 The crux of Excelsior's argument is simply that there is a related appeal currently  
21 pending before the Ninth Circuit (the First Appeal) and it would be more efficient to have the  
22 Ninth Circuit consider the issues raised by both appeals at the same time than to have the  
23 appeals considered separately by two different courts or at two separate times by the same  
24 court. While this may (or may not) be true,<sup>1</sup> this does not appear to be the kind of fact pattern  
25 that Congress envisioned when it created the prospect of a direct right of appeal of the Circuit.

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26  
27 <sup>1</sup>The issues raised by the two appeals are entirely separate. Only the underlying facts are the same.  
28 To resolve the First Appeal, the Circuit will need to consider whether there were any errors or defects in the  
proceedings that led to the jury verdict and the judgment and injunction that are based upon it. To resolve the  
Second Appeal, the District Court will need to ascertain whether the findings made in the District Court Action  
are sufficient to give rise to nondischargeable liability under section 523(a)(6).

1 As the Second Circuit noted when it rejected an appeal that a bankruptcy court had certified  
2 under section 158(d)(2) in Weber v. United States Trustee, 484 F.3d 154 (2d Cir. 2007),

3 The focus of the statute [section 158(d)(2)] is explicit: on appeals that raise controlling  
4 questions of law, concern matters of public importance, and arise under circumstances  
where a prompt, determinative ruling might avoid needless litigation.

\* \* \* \*

5 [D]irect appeal may be appropriate where a judgment of this court would 'materially  
6 advance the progress of the case.' For instance, where a bankruptcy court has made a  
7 ruling which, if correct, will essentially determine the result of future litigation, the parties  
adversely affected by the ruling might very well fold up their tents if convinced that the ruling has  
the approval of the court of appeals, but will not give up until that becomes clear.

8 484 F.3d at 158.

9 It follows from this reasoning that, where the recognition of a right of direct appeal would  
10 not obviate the need for the parties to engage in what might later prove to have been needless  
11 litigation, the requisite showing has not been made. And that is the case here. The  
12 Dischargeability Action has been fully resolved at the trial court level by the entry of the  
13 Dischargeability Judgment. There is no pending litigation between the parties other than the  
14 existing appeals. Accordingly, the Petition should be denied. The Court will enter an order to  
15 this effect concurrently herewith.

16 # # #

27 DATED: April 22, 2008

28 /s/  
United States Bankruptcy Judge

**SERVICE LIST FOR ENTERED ORDER**

<b>SERVED ELECTRONICALLY</b>	<b>SERVED BY U.S. MAIL</b>
<b>Chapter 7 Trustee</b>	<b>Debtor</b>
<b>Office of the United States Trustee</b> 725 S. Figueroa St., 26 <sup>th</sup> Floor Los Angeles, CA 90017	<b>Attorney for Debtor</b>