IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3174
Summary Calendar

IN RE: TAXABLE MUNICIPAL BOND SECURITIES LITIGATION)) MDL 863

CITIZENS BANK OF PIKEVILLE, et al.,

Plaintiffs,

VERSUS

LOUISIANA AGRICULTURAL FINANCE AUTHORITY, et al.,

Defendants.

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LOUISIANA HOUSING FINANCE AUTHORITY, et al.,

Defendants-Appellants
Cross-Appellees,

VERSUS

FIRST TENNESSEE BANK NATIONAL ASSOCIATION, et al.,
and
HOWARD, WEIL, LABOUISSE, FRIEDRICHS INC., et al.,

Defendants-Appellees,

VINING-SPARKS SECURITIES, INC., et al.,

Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
(MDL# 863(G))

(December 22, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

The appellants challenge what all parties agree is an interlocutory order. They also agree that our jurisdiction, if any, rests on the collateral order doctrine enunciated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Concluding that the requirements of Cohen have not been satisfied, we grant the appellees' motion to dismiss the appeal for want of jurisdiction.

I.

The instant matter consists of forty-one cases temporarily transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Eastern District of Louisiana for consolidated pretrial proceedings. The present dispute has arisen among the defendants regarding the allocation of responsibility for payment of lead counsel fees. In response to lead counsel's motion, the district court, on February 11, 1993, entered an order to pay lead counsel fees and directing that each of the four defendant interest groups of defendants pay 25% of the outstanding fees. The appellants challenge this order, asserting, in the main, that it is reversible error for the court

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

to require the underwriters group, constituting 63% of all defendants, to pay only 25% of the lead counsel fees.

II.

Under Cohen, this court has recognized three requirements for an order to be appealable: It "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Shipes v. Trinity Indus., 883 F.2d 339, 342 (5th Cir. 1989) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)). The appellees do not dispute that the second condition is met here, so we address only the other two conditions.

We conclude that pretrial cost-sharing orders are not conclusive and thus)) at least under the circumstances of this case)) do not satisfy the first Cohen requirement. The First Circuit, in In re Recticel Foam Corp., 859 F.2d 1000, 1002-04 (1st Cir. 1988), recently decided that cost-sharing orders do not qualify because they do not definitively resolve the rights of any party:

> . . . Given the district court's continued exercise of jurisdiction, the orders remain subject to modification . . . . The district court can reassess their content, and make adjustments as it thinks best . . . . [N]o irreversible legal consequences flow from them, as they presently stand.
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> . . . .
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> . . . [T]he issue of how to defray aggregate costs in not finished business: the costs are ongoing, the district court retains jurisdiction, and further orders

can (and doubtless will) be forthcoming.

Id. at 1003-04. In a different context, we have held that "[i]n this circuit, [the question of fees] remains open until the end of the lawsuit." Dardar v. Lafourche Realty Co., 849 F.2d 955, 959 n.12 (5th Cir. 1988).

The failure of the order in question to meet the first Cohen test is sufficient to defeat our jurisdiction, for the three factors are listed in the conjunctive. See Campanioni v. Barr, 962 F.2d 461, 463 (5th Cir. 1992). We observe, though, that the order here also does not qualify under the third Cohen prerequisite. In Campanioni, id., we held that the collateral order doctrine does not apply to a district court's interim award of attorneys' fees because it is effectively reviewable on appeal after final judgment. So, a fee award cannot satisfy Cohen at least where no "irrevocable harm" would occur if the appeal is delayed." Id. at 464.

The appellants argue, however, that the fee order is effectively unreviewable because of the likelihood that the transferred cases will be sent back to their respective districts, where no one court will have jurisdiction over all cases and all parties. This argument proves too much, for by its logic every interlocutory order in a multidistrict proceeding would expose the parties to irrevocable harm because of the possibility of transfer. This would eviscerate the requirement of irrevocable harm.

Moreover, review still can take place in the respective

courts of appeals, if fees have been paid erroneously. The fact that such review might not be as expeditious is insufficient to confer jurisdiction now under Cohen. In Campanioni, for example, we held that Cohen is not satisfied merely because the recipient of the fees might be deported, thus mooting the underlying controversy. 962 F.2d at 464.

In summary, the fee-allocation order that is challenged here is not of the sort that is appropriate for appeal under Cohen, particularly given this circuit's distaste for piecemeal review. See Marler v. Adonis Health Prods., 997 F.2d 1141, 1142 (5th Cir. 1993). We are without jurisdiction, and the appeal, accordingly, is DISMISSED.