BANKRUPTCY APPEALS: THE BASICS

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FAST FACTS

- Although only "final" orders are appealable as a matter of right, the concept of finality is more flexible in the bankruptcy setting; orders concluding a particular adversarial matter within the larger case can be appealed immediately.
- Only "aggrieved" parties are entitled to appeal bankruptcy orders, although determining whether a party is aggrieved can depend on the nature of the order being appealed.
- The timing and process for pursuing appeals in bankruptcy proceedings are largely rule-driven, so practitioners must carefully review the applicable bankruptcy rules and case law construing them.

Introduction

Many practitioners will find themselves at some point in the position of appealing from an adverse bankruptcy court decision. Becoming familiar with some of the more common issues arising in bankruptcy appeals is the key to ensuring that the appeal process flows as smoothly as possible.

Is the Order Immediately Appealable?

One of the initial and potentially more difficult issues arising in any bankruptcy appeal is whether the judgment, order or decision at issue is immediately appealable as a matter of right. Congress has essentially created three categories of orders in bankruptcy proceedings for appeal purposes. The first category consists of "final judgments, orders, and decrees," which are always immediately appealable.[1] The second category consists of interlocutory orders increasing or reducing the exclusive time periods for a debtor to file, and have accepted, a plan for reorganization under Chapter 11. These orders are also immediately appealable.[2] All other orders fall within the third, "catch-all," category of "interlocutory orders and decrees" that are appealable only "with leave of the court."[3]

So how does one determine whether a judgment or order is "final"? It is often said that a "final order" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[4] However, "[c]ourts view the concept of finality in a more pragmatic and flexible way in bankruptcy proceedings than in other civil proceedings, 'to avoid the waste of time and resources that might result from reviewing discrete portions of the action only after [a bankruptcy case concludes or] a plan of reorganization is approved.'"[5] Thus, "'[a]n order that concludes a particular adversarial matter within the larger case should be deemed final and reviewable in a bankruptcy setting.'"[6]

Although this is by no means an exclusive list, orders that have been recognized as immediately appealable include: (1) a "bankruptcy court's judgment determining dischargeability";[7] (2) an "order denying a debtor's request to convert from [C]hapter 7 to [C]hapter 13";[8] (3) an "order sustaining or overruling an objection to a debtor's claim of exemption";[9] (4) an "order dismissing a Chapter 13 case";[10] (5) an order overruling a creditor's objections and confirming a Chapter 11 plan[11] or a Chapter 13 plan;[12] and (6) orders granting or denying relief from the automatic stay.[13]

Standing to Appeal

Another common issue in bankruptcy appeals involves whether the appellant has standing to appeal. It is well-established that a party must be "aggrieved" in order to have standing to appeal a bankruptcy court order. This generally means that an appellant must be "'directly and adversely affected pecuniarily by the order.'"[14] Thus, "[p]arties may not appeal a bankruptcy order unless they have a direct financial stake in the order such that it 'diminishes [their] property, increases [their] burdens, or impairs [their] rights.'"[15]

Timing and Process for Appeal

The time period for taking an appeal in the bankruptcy setting is shorter than in general civil appeals. Rule 8002(a) provides that a notice of appeal must be filed "within 14 days of the date of the entry of the judgment, order, or decree appealed from." Pursuant to Fed. R. Bankr. P. 9006, this period includes intermediate Saturdays, Sundays and legal holidays.

Certain motions will toll the time for filing the notice of appeal, including motions (1) "to amend or make additional findings of fact under Rule 7052"; (2) "to alter or amend the judgment under Rule 9023"; (3) "for a new trial under Rule 9023"; or (4) "for relief under Rule 9024."[16] If such a motion is timely filed, a subsequent notice of appeal will be considered timely if it is filed within 14 days after the entry of the order disposing of the motion.[17]

Moreover, the bankruptcy court has discretion to extend the time for filing a notice of appeal as long as the request is made before the time for filing a notice of appeal has expired. If the request is made beyond the 14-day appeal period, but not later than 21 days after the expiration of that period, a request for an extension may be granted on a showing of "excusable neglect."[18] However, such an extension "may not exceed 21 days from the expiration of the time for filing a notice of appeal… or 14 days from the date of entry of the order granting the motion, whichever is later."[19]

The time for filing a notice of appeal may not be extended if the appeal is from a judgment, order, or decree (a) granting relief from an automatic stay under § 362, § 922, § 1201, or § 1301; (b) authorizing the sale or lease of property or the use of cash collateral under § 363; (c) authorizing the obtaining of credit under § 364; (d) authorizing the assumption or assignment of an executory contract or unexpired lease under § 365; (e) approving a disclosure statement under § 1125; or (f) confirming a plan under § 943, § 1129, § 1255, or § 1325 of the Code.[20]

The process for filing an appeal is fairly straightforward. Notices

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of appeal are always filed in the bankruptcy court. Rule 8001(a) governs appeals as a matter of right, providing that the notice of appeal "shall (1) conform substantially to the appropriate Official Form [which usually can be located on the bankruptcy court's website], (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee [currently $455]."

The process is essentially the same for appeals from interlocutory orders, except that the notice of appeal must be "accompanied by a motion for leave to appeal prepared in accordance with Rule 8003."[21]

District Court or Bankruptcy Appellate Panel

The Bankruptcy Reform Act of 1978 introduced a statutory framework which authorized the establishment of a bankruptcy appellate panel ("BAP") in each Circuit as an alternative forum to a district court for the resolution of appeals from bankruptcy court decisions.[22] Each of the following Circuits have since established this alternate appellate forum: First, Sixth, Eighth, and Tenth.

When a party intends to file an appeal from a bankruptcy court order in a circuit that has created a BAP and from a district that has authorized the BAP to hear appeals, that party faces a choice. On the one hand, the party can pursue its appeal before the BAP; on the other hand, the party may elect at the time of filing to have the appeal heard by the district court.[23] The appellee also faces a choice: assuming that the appellant does not elect to have an appeal decided by the district court, the appellee (or any other party) may elect to have the appeal heard by the district court within 30 days after the appellant serves the appellee with the notice of appeal.[24]

Record and Issues on Appeal

Within 14 days of filing the notice of appeal, and regardless of whether the appeal proceeds before the district court or the BAP, the appellant must file a designation of the items that will comprise the record on appeal and a statement of issues to be presented. The appellant must also order any pertinent transcripts at that time. The appellee can designate additional items for the record on appeal within 14 days after service of the appellant's designation.[25]

The record on appeal must include "the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court."[26] The party filing the designation of items has two options regarding the transmittal of the record: the party may provide copies of the designated items to the clerk, or the party can have the clerk of court prepare copies of designated items at the party's expense. If the transcript is part of the record to be transmitted, the appellant must file a written request for the transcript with the clerk immediately after filing the designation. The court reporter then has 30 days to complete the requested transcript.[27]

When the record is complete, the bankruptcy court clerk transmits the record to the district court or the BAP, which then dockets the appeal and sends a notice to the parties.[28]

Filing the Brief on Appeal

Unless adjusted by the district court or BAP in its discretion, the appellant's brief is due 14 days after the appeal is docketed, and the appellee's brief is due 14 days after service of the appellant's brief.[29] Both briefs are limited to 50 pages.[30] The appellant may file a reply brief limited to 25 pages within 14 days of service of the appellee's brief.[31] If the appeal is before the BAP, the appellant is also required to file an appendix containing certain excerpts from the record.[32]

Motions

Motions brought during the course of an appeal are governed by Fed. R. Bankr. P. 8011. A motion must "contain or be accompanied by any matter required by a specific provision" of the rules, must "state with particularity the grounds on which it is based," and must "set forth the order or relief sought."[33] Briefs are not required, but "[i]f a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion."[34] The nonmoving party may file a response within seven days after service of the motion, but this time period can either be shortened or extended in the discretion of the district court or the bankruptcy appellate panel.[35]

Rule 8011 also sets forth a procedure for filing emergency motions, which are considered to be those requiring "expedited action . . . on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court or bankruptcy appellate panel to receive and consider a response[.]"[36]

Stays on Appeal

Stays on appeal are governed by Rules 7062 and 8005. For appeals arising in adversary proceedings (e.g., from a money judgment), there is, pursuant to Rule 7062 and Fed. R. Civ. P. 62, an automatic 14-day stay of proceedings following the entry of a bankruptcy court order, judgment or decree, except in the case of an interlocutory or final judgment in an action for an injunction, an interlocutory or final judgment in a receivership action, and a judgment or order directing an accounting in an action for patent infringement.[37] The purpose of this initial period is to allow the appellant to make arrangements for a stay pending appeal, which, in adversary proceedings, is generally available upon the posting of an appropriate supersedeas bond.[38]

It is important to keep in mind that Rule 7062 does not apply to contested matters (per Rule 9014) unless ordered by the court.[39] But certain contested matters such as requests for relief from the automatic stay contain their own provisions relating to preliminary 14-day "automatic" stays on appeal. These include orders under "Rules 3020 (plan confirmation in chapters 9 and 11), 4001 (automatic stay), 6004 (use, sale, or lease of property) and 6006 (assignments of executory contracts), unless the court orders otherwise."[40]

Other than a situation in which a supersedeas bond is posted to stay a judgment, order or decree in an adversary proceeding, a continued stay pending appeal is usually discretionary and governed by Rule 8005. Such requests must "ordinarily be presented to the bankruptcy judge in the first instance."[41] Under Rule 8005, the bankruptcy court has discretion "to suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest."[42] Rule 8005 also provides the district court or bankruptcy appellate panel with independent authority to entertain a request for a stay pending appeal.[43]

In determining whether to grant a discretionary stay with or without a bond, courts consider the same four factors that apply for obtaining a preliminary injunction: (1) the movant's likelihood of success on appeal; (2) whether the movant will incur irreparable harm if the court denies the motion to stay; (3) the

likelihood that others will be harmed if the court grants the motion to stay; and (4) the public interest in granting a stay.[44]

Conclusion

Pursuing any bankruptcy appeal requires careful evaluation of various procedural issues. In addition to consulting the Federal Rules of Bankruptcy Procedure and relevant caselaw, one might also consider consulting with an appellate specialist. Finally, there are often various practical considerations, including whether to appeal or not, which are beyond the scope of this article, but which must be considered by any appellant. 🏛

Footnotes:

1 28 U.S.C. § 158(a)(1).

2 28 U.S.C. § 158(a)(2).

3 28 U.S.C. § 158(a)(3). Motions for leave to appeal are governed by Fed. R. Bankr. P. 8003.

4 *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc. (In re Level Propane Gases Inc)*, 422 B.R. 93, 97 (B.A.P. 6th Cir., 2010) (quoting *Midland Asphalt Corp v. United States*, 489 U.S. 794, 798 (1989)). *See also Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 875 (11th Cir. 2010) (same); *Strong v. Western United Life Assur. Co. (In re Tri-Valley Distributing, Inc.)*, 533 F.3d 1209, 1213 (10th Cir. 2008) (same).

5 *Geberegeorgis v. Gammarino (In re Geberegeorgis)*, 310 B.R. 61, 63 (B.A.P. 6th Cir. 2004) (citation omitted). *See also United States v. Fowler (In re Fowler)*, 394 F.3d 1208, 1211 (9th Cir. 2005) ("Because of the unique nature of bankruptcy proceedings, this court applies a pragmatic approach to determining finality."); *In re Marvel Entertainment Group*, 140 F.3d 463, 470 (3rd Cir. 1998) ("We apply a broader concept of 'finality' when considering bankruptcy appeals . . . than we do when considering other civil orders.").

6 *Olson v. Anderson (In re Anderson)*, 377 B.R. 865, 868 (B.A.P. 6th Cir. 2007) (citation omitted). *See also Professional Ins. Mgt. v. Ohio Cas. Group of Ins. Cos. (In re Professional Ins. Mgt.)*, 285 F.3d 268, 280 (3rd Cir. 2002) ("We note that Congress had previously provided that orders in bankruptcy cases finally disposing of discrete disputes within the larger case may be immediately appealed, and that 'a bankruptcy court order ending a separate adversary proceeding is appealable as a final order even though that order does not conclude the entire bankruptcy case.'") (quoting *In re Moody*, 817 F.2d 365, 367-68 (5th Cir. 1987)).

7 *Hertzel v. Ed Credit Mgmt Corp. (In re Hertzel)*, 329 B.R. 221, 224-25 (B.A.P. 6th Cir. 2005); *Staffer v. Predovich (In re Staffer)*, 306 F.3d 967, 970-71 (9th Cir. 2002).

8 *Condon v. Smith (In re Condon)*, 358 B.R. 317, 320 (B.A.P. 6th Cir. 2007). *See also Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 770 (9th Cir. 2008) ("An order converting a case under another chapter to one under Chapter 7 determines finally the discrete issue to which it is addressed, i.e., whether or not the case will be converted.").

9 *Menninger v. Schramm (In re Schramm)*, 431 B.R. 397, 399 (B.A.P. 6th Cir. 2010). *See also Preblich v. Battley*, 181 F.3d 1048, 1056 (9th Cir. 1999) ("[A]n order denying a claim of exemption is a 'final' order under 28 U.S.C. § 158(a).").

10 *Raynard v. Rogers (In re Raynard)* 354 B.R. 834, 836 (B.A.P. 6th Cir. 2006). *See also DeVito v. Pees (In re DeVito)*, 2010 Bankr. LEXIS 3459, *2 (B.A.P. 6th Cir. 2010) ("Orders denying confirmation and dismissing a chapter 13 bankruptcy case are final for the purposes of appeal."); *Shafer v. Heartspring, Inc.*, 415 B.R. 705, 707 (Bankr. W.D. Wisc. 2009) (same).

11 *Gen. Electric Credit Equities, Inc. v. Brice Road Developments, LLC (In re Brice Road Developments, LLC)*, 392 B.R. 274, 278 (B.A.P. 6th Cir. 2008); *G.E. Cattle Co. v. United Producers, Inc. (In re United Producers, Inc.)*, 353 B.R. 507, 508 (B.A.P. 6th Cir. 2006); *F.C.C. v. Airadigm Communs. (In re Airadigm Communs.)*, 396 B.R. 747, 750 (Bankr. W.D. Wisc. 2007).12 *Tidewater Finance Co v. Curry (In re Curry)*, 347 B.R. 596, 598 (B.A.P. 6th Cir. 2006). *See also Cohen v. Lopez (In re Lopez)*, 550 F.3d 1202 (9th Cir. 2008).

13 *In re Sun Valley Foods Co*, 801 F.2d 186, 189-90 (6th Cir. 1986); *In re Schaffrath*, 214 B.R. 153, 154 (B.A.P. 6th Cir. 1997); *In re Shultz*, 347 B.R. 115 (Table), 2006 Bankr. LEXIS 814, *1 (B.A.P. 6th Cir. 2006); *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 864 (4th Cir. 2001) ("[T]he denial of relief from the automatic stay is a final, appealable order."); *Tringali v. Hathaway Machinery Co.*, 796 F.2d 553, 558 (1st Cir. 1986) ("[T]he circuits that have addressed the issue have specifically held that an order lifting an automatic stay is an order disposing of a discrete dispute, and it is therefore final and appealable.").

14 *Moran v. LTV Steel Co. (In re LTV Steel Co.)*, 560 F.3d 449, 452 (6th Cir. 2009) (citation omitted); *White v. Univision of Va., Inc. (In re Urban Broadcasting Corp.)*, 304 B.R. 263, 268 (Bankr. E.D. Va. 2004) ("[A]n individual has standing to appeal if his rights or interests are directly and adversely affected pecuniarily by the order of the bankruptcy court.").

15 *Moran*, 560 F.3d at 452. (citation omitted).

16 Fed. R. Bankr. P. 8002(b).

17 *Id*.

18 Fed. R. Bankr. P. 8002(c)(2).

19 *Id*.

20 Fed. R. Bankr. P. 8002(c)(1).

21 Fed. R. Bankr. P. 8001(b).

22 Pub. L. 95-598, 92 Stat. 2549 (1978).

23 28 U.S.C. § 158(c).

24 28 U.S.C. § 158(c)(1)(B).

25 Fed. R. Bankr. P. 8006.

26 *Id.*

27 Fed. R. Bankr. P. 8007(a).

28 Fed. R. Bankr. P. 8007(b).

29 Fed. R. Bankr. P. 8009(a).

30 Fed. R. Bankr. P. 8010(c).

31 *Id*.; Fed. R. Bankr. P. 8009(a)(3).

32 Fed. R. Bankr. P. 8009(b).

33 Fed. R. Bankr. P. 8011(a).

34 *Id*.

35 *Id*.

36 Fed. R. Bankr. P. 8011(d).

37 See Fed. R. Civ. P. 62(a).

38 *See, e.g.*, *Adell v. John Richards Homes Building Co. (In re John Richards Homes Building Co.),* 320 B.R. 139, 141 (E.D. Mich. 2005); *Silverman v. Nat'l Union Fire Ins. Co. (In re Supreme Specialties, Inc.)*, 330 B.R. 93, 96 (Bankr. S.D. N.Y. 2005).

39 *See In re Anderson*, 390 B.R. 812, 814 (Bankr. D. S.C., 2007). *See also* Collier on Bankruptcy ¶ 7062.03 (Alan N. Resnick & Henry J. Sommer eds. , 16th ed.).

40 Collier on Bankruptcy ¶ 8005.3 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

41 Fed. R. Bankr. P. 8005.

42 *Id*.

43 See 10 Collier on Bankruptcy ¶ 8005.10 (15th ed. rev. 2007).

44 *In re Cybernetic Services, Inc.*, 94 B.R. 951, 954-55 (Bankr. W.D. Mich 1989). *See also In re Forty-Eight Insulations*, 115 F.3d 1294, 1300-01 (7th Cir. 1997) (discussing four factors).