■ BUSINESS REORGANIZATIONS

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A Dozen Important Points About Bankruptcy Appeals

By David B. Goroff

Every appeal requires an appellate advocate to understand and follow a series of rules. When an appeal is from a decision by a federal bankruptcy court, there is yet another layer of rules and complexity to consider. This article briefly identifies 12 important points about bankruptcy appeals.

The Time for Filing a Notice of Appeal in a Bankruptcy Appeal Is Generally Shorter Than in Other Appeals

Under 28 U.S.C. § 158(c)(2) and Federal Rule of Bankruptcy Procedure (Bankruptcy Rules) 8002(a), a party seeking to appeal a decision by a bankruptcy court has 10 days to file its appeal.[1] This is 20 days less than the 30 days a party generally is given under the Federal Rules of Appellate Procedure (FRAP) to appeal from the district court to a federal appellate court. *See* FRAP4(a). As with FRAP4(a)(5), the Bankruptcy Rules permit some leeway if an appellant misses its deadline. Under the Bankruptcy Rules, a bankruptcy court may allow an appellant who fails to timely file up to 20 additional days to file where that appellant can demonstrate "excusable neglect."[2] Bankruptcy Rule 8002(c)(2); Bankruptcy Rule 9006(b). After 30 days, however, a bankruptcy appellant loses its right to appeal even if there is excusable neglect. *See Shareholders v. Sound Radio, Inc.*, 109 F.3d 873, 879 (3d Cir. 1997).[3]

Factors to be considered in determining whether there is excusable neglect include the danger of prejudice to the appellee; the length of delay and its impact on the judicial p roceeding; the reason for the delay; whether the delay was in the movant's control; and the movant'sgood faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380, 395 (1993).

An Appellant May Waive an Issue Not Raised at the Outset of Its Bankruptcy Appeal

Under Bankruptcy Rule 8006, within 10 days of filing its Notice of Appeal, an appellant must file and serve a designation of the items to be included in the record on appeal and a statement of issues to be presented on appeal. If an appellant fails to include an issue in this statement, the issue is waived even if this had been raised and/or decided by the bankruptcy court. *See In re GGM, P.C.*, 165 F.3d 1026, 1032 (5th Cir. 1999).[4]

[1] Certain types of motions toll this time for filing until the last such motion is disposed of. See Bankruptcy Rule 8002(b).
[2] Of course, where an appeal is from a district court to a federal circuit court on a bankruptcy issue, FRAP 4's 30-day rule applies.
[3] The law is unsettled as to whether bankruptcy appellate deadlines are "jurisdictional," such that objections to untimeliness may be waived if not promptly made. *See In re Fryer,* 2007 WL 1667198 (3d Cir. June 11, 2007) (citing *Kontrick v. Ryan* 540 U.S. 443 (2004), and *Eberhart v United States,* 546 U.S. 12 (2005)).
[4] Of course, one may not first raise new issues on appeal that were not presented before the bankruptcy court . *See In re Ginther Trusts,* 238 F.3d 686, 689 & n.3. (5th Cir. 2001).

Those Who Ignore Deadlines and Procedural Rules May Forfeit Their Appeal

Bankruptcy Rule 8001(a) authorizes dismissal of a bankruptcy appeal when a party fails to take any required step other than filing its Notice of Appeal. Courts adjudicating bankruptcy appeals may dismiss appeals when a party fails to take a necessary step such as filing its record designations, statement of issues, or its brief. *See, e.g., In re Lynch,* 430 F.3d 600, 603-04 (2d Cir. 2005); *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 n.6 (5th Cir. 1985).

While the Bankruptcy Rules permit dismissal, however, certain circuits require the appellate court to weigh a series of factors before dismissing a case in its entirety. For example, the Third Circuit requires the balancing of six factors before a case is dismissed. These are:

- The extent of the party's personal responsibility
- The prejudice to the adversary caused by the failure to meet scheduling orders
- A history of dilatoriness
- Whether the conduct of the party or the attorney was willful or in bad faith
- The effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions
- The meritoriousness of the claim or defense

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d. Cir. 1984). *See also In re Harris,* 464 F.3d 263, 272-73 (2d Cir. 2006) (failure to include required transcript of oral argument did not warrant dismissal of appeal where lesser sanctions were available); *In re Beverly Mfg. Corp.,* 778 F.2d 666, 667 (11th Cir. 1985) ("Dismissal typically occurs in cases showing consistently dilatory conduct or the complete failure to take any steps other than the mere filing of a notice of appeal.")

In Five Circuits, Bankruptcy Appeals May Be Heard in the First Instance by Two Different Types of Courts

Under 28 U.S.C. § 158(c)(1), an appellant in an appeal from bankruptcy court may choose in the first instance to appeal either to a district court acting as an appellate court or, if the relevant circuit provides for one, to a Bankruptcy Appellate Panel (BAP). Even if the appellant chooses a BAP, however, any other party to the appeal may, no later than 30 days after service of the notice of appeal, ask to have the appeal heard by the relevant district court. The First, Sixth, Eighth, Ninth, and Tenth Circuits each have a BAP. If an appeal is to a BAP, then the bankruptcy court's decision will be reviewed by fellow sitting bankruptcy judges. Usually a BAP consists of three sitting bankruptcy judges in the circuit who are assembled for a particular day of argument. By their very nature, BAPs will consist of judges who have special expertise regarding bankruptcy issues, while district courts may not. The BAP may sit in different places in the circuit. For example, the Eighth Circuit BAP conducts hearings in Omaha, St. Louis, Kansas City, and other locations where its bankruptcy courts sit.

BAP Rules Vary by Circuit

Just like the individual federal circuit courts of appeal, the various BAPs each have their own rules. These vary between each circuit. Any party in a BAP appeal, therefore, should know the particularities of the specific BAP's rules and should follow these.

Among these specialized rules, for example, are that, in the Eighth Circuit BAP, parties are limited to opening briefs of 6,500 words (8th Cir. BAP Rule 8010A). The Ninth Circuit BAP Rules provide that only those portions of transcripts included in the excerpts of the record will be considered in an appeal, and that these must include excerpts necessary for the BAP to apply the required standard of review to a matter (9th Cir. BAP Rule 8006-1). The First Circuit BAP Rules generally limit argument to 15 minutes per side (1st Cir. BAP Rule 8012-1). The Tenth Circuit BAP requires that a brief include a statement of related cases — that is, one that includes the same litigants and substantially the same fact pattern or legal issues — pending in any other federal court (10th Cir. BAP Rule 8010-1). The Sixth Circuit BAP Rules provide for a possible pre-argument conference and mediation (6th Cir. BAP Rule 8080-2).

The Bankruptcy Rules Generally Govern Appeals to the District Court

As noted in the prior section, BAPs have elaborate rules that govern all aspects of appeals before them. By the terms of the Bankruptcy Rules, these specific rules can supersede conflicting terms in the Bankruptcy Rules. However, when an appeal is to the district court, the Bankruptcy Rules generally apply in the absence of a local rule or district court rule specifically addressing bankruptcy appeals, which are much less common. While not as comprehensive as the FRAP, the Bankruptcy

Rules have 20 provisions governing all aspects of appeals (Bankruptcy Rules 8001-8020). These rules address appellate issues, including, among others, the filing and service of appellate papers (Bankruptcy Rule 8008); the filing and service of briefs and appendices (Bankruptcy Rule 8009); the form of briefs and their length (Bankruptcy Rule 8010); motions (Bankruptcy Rule 8011); oral argument (Bankruptcy Rule 8012); disposition of the appeal (Bankruptcy Rule 8013); costs (Bankruptcy Rule 8014); and rehearing (Bankruptcy Rule 8015). (These rules also provide for the accelerated filing of district court appeals, as an appellant is to serve and file its brief within 15 days after entry of the appeal on the docket; the appellant is to serve its brief within 15 days after service of the appellant's brief and the appellant is to serve its reply within 10 days after service of the appellee's brief) (Bankruptcy Rule 8009)). In the absence of rules to the contrary, opening briefs may be up to 50 pages and reply briefs up to 25 pages. Under Bankruptcy Rule 8012, oral argument is to be allowed generally in all cases. In practice, however, oral argument is much less common before district courts. When an appeal is before a district court, there is some question about whether its decision has precedential effect. *See In re Shattuck Cable Corp.,* 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992).

Bankruptcy Appeals Often Include an Extra Tier of Review

Generally, before an appeal reaches a federal circuit court of appeals, it is adjudicated by either a BAP or a district court. The findings of these first-tier courts are not binding on the circuit court of appeals, and the appellate court owes no deference to the decisions by the BAP or district court. Review by the circuit court of appeals is plenary. *See In re Best Prods. Co.*, 68 F.3d 26, 30 (2d Cir. 1995). Nonetheless, some circuit courts have noted that the first-tier of appeal acts as a helpful filter. *See Weber v. United States Trustee*, 484 F.3d 154 (2d Cir. 2007) ("In many cases involving unsettled areas of bankruptcy law, review by the District Court would be most helpful. Courts of appeal benefit immensely from reviewing the efforts of the District Court to resolve such questions").

A circuit court may reach issues brought up before but not decided by the district court or BAP. *See Hartford Courant Co. v. Pellegrino,* 380 F.3d 83, 90 (2d Cir. 2004).

Direct Appeal to the Circuit Court of Appeals Is Allowed in Limited Instances

Pursuant to Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), a circuit court of appeals has discretion to permit a direct appeal from bankruptcy court where there is uncertainty in the bankruptcy court, either due to the absence of a controlling legal decision or a conflicting decision on the issue and the issue is of great importance, or where the court finds it is patently obvious that the bankruptcy court's decision either was correct or incorrect, such that the first-tier of review in the district court or BAP is less efficient and helpful. *See Weber,* 484 F.3d at 157 (*citing* BAPCPA § 1233, 28 U.S.C. § 158(d)(2)(a)(i)-(iii)).

At Each Tier of the Appeal, the Bankruptcy Court Is Given the Same Level of Deference and Same Form of Scrutiny

Courts in bankruptcy appeals review issues of law de novo and findings of fact for clear error. *See In re ABC-Naco, Inc.,* 483 F.3d 470, 472 (7th Cir. 2007). Courts of appeal apply the same standard of review as do BAPs and district courts. *See In re Senior Cottages of Am.*, 482 F.3d 997, 1000-1001 (8th Cir. 2002). Courts of appeal generally review issues of procedure under an abuse of discretion standard. These include motions to compromise or to lift a stay. For example, *see In re Martin,* 222 Fed. Appx. 360, 362 (5th Cir. 2007).

There Is a Greater Threat of Mootness in Bankruptcy Appeals Than in Other Federal Appeals

A bankruptcy appeal may become constitutionally moot where events may occur that make it impossible for the appellate court to fashion effective relief. *See In re Focus Media Inc.,* 378 F.3d 916, 922 (9th Cir. 2004). Thus, for example, if, while an appeal is pending, a plan is confirmed pursuant to which all assets are distributed, all creditors with allowed claims are paid in full, and the bankruptcy case is closed such that the debtor no longer exists, an appeal against that debtor is moot because there is no meaningful relief that may be granted. *See In re State Line Hotel, Inc.*, 2007 WL 1961935 (9th Cir. July 5, 2007); *see also Gardens of Cortez v. John Hancock Mut. Life Ins. Co.,* 585 F.2d 975, 978 (10th Cir. 1978) (dismissal of bankruptcy petition moots appeal to lift stay). An appeal may also be considered "equitably moot" where a change in circumstances makes it inequitable for a court to consider the merits of an appeal. *See Ederel Sport v. Gotcha, Int'l, L.P.,* 311 B.R. 250, 254 (9th Cir. BAP 2004).

However, if there remains any possibility that an appeal may result in a tangible benefit to the appellant, it is not moot. *See In re Howard's Express, Inc.,* 151 Fed. Appx. 46 (2d Cir. Oct. 5, 2005) (conversion from Chapter 11 to Chapter 7 did not moot appeal because liquidation was not complete and preference actions remained to be tried, which could generate assets to satisfy claims of appellants).

Only Those Persons Aggrieved Have Standing to Bring a Bankruptcy Appeal

Only those whose rights or interests are directly and adversely affected pecuniarily by an order of the bankruptcy court have standing to bring an appeal. *See In re PWS Holding Corp.,* 228 F.3d 224, 249 (3d Cir. 2000).

Appellate Courts Take a Broader Notion of "Finality" in Bankruptcy Appeals Than in Other Appeals

Because of the length of many bankruptcy proceedings and the waste of time and resources that may result if the court denied immediate appeals, federal courts of appeal apply a broader concept of "finality" when considering bankruptcy appeals under 28 U.S.C. § 1291 than in considering non-bankruptcy appeals. *See In re Owens Corning,* 419 F.3d 196, 203 (3d Cir. 2005). Courts apply a number of factors in determining whether to assert appellate jurisdiction. These include 1) the impact on the assets of the bankruptcy estate; 2) the necessity for further fact-finding on remand; 3) the preclusive effect of the court's decision on the merits in further litigation; and 4) the interest of judicial economy. *Id.*

Each of these issues, of course, could justify an article in itself. The purpose of this article is to provide helpful thoughts and issues to consider when participating in a bankruptcy appeal.

Prepayment Penalty Provision Upheld in Commercial Real Estate Mortgages — *River East Plaza, LLC v. Variable Annuity Life Ins. Co.*, 498 F.3d 718 (7th Cir. 2007)

In a victory for commercial lenders, the Seventh Circuit Court of Appeals has upheld the enforceability of prepayment penalties in the commercial loan context when the borrower opts to voluntarily prepay the loan.

Real estate developer River East Plaza, LLC (River East) borrowed approximately $12 million from Variable Annuity Life Insurance Company (VALIC) to finance the purchase of a portion of a large retail store on the north side of Chicago. Although the loan was structured as a 20-year mortgage, River East elected to pay off the loan after just four years when it sold its interest in the property.

The loan included a prepayment penalty clause that utilized the prevailing rate of U.S. Department of Treasury securities having the same maturity date as the loan agreement, determined at the time of the prepayment, or what is called a "treasury-flat" yield maintenance clause.

Upon prepayment, VALIC required River East to pay the prepayment fee. River East paid the fee under protest and then filed a lawsuit in Illinois state court to recover the payment. River East argued that the prepayment fee was an unenforceable penalty that overcompensated the lender because it was calculated using a reinvestment rate taken from virtually risk-free treasury securities without any additional "spread" of basis points. VALIC removed the case to federal district court and argued, inter alia, that the prepayment fee was a valid contractual form of alternative performance, not a penalty.

The district court ruled in favor of River East, finding that the prepayment fee was an unenforceable penalty under Illinois law. VALIC appealed the ruling to the United States Court of Appeals for the Seventh Circuit.

Seventh Circuit's Holding

The court of appeals reversed the decision of the district court, holding that the prepayment fee is not an unenforceable penalty. The court reached this conclusion by first examining the legal definition of a penalty, which is "a clause whose sole purpose is to secure the performance of the contract." The court found no evidence that the prepayment clause was designed to punish the borrower for prepayment.

Instead, it found that the prepayment provision actually was beneficial to each of the parties. The court reasoned that since a commercial real estate loan contract could legally prohibit any prepayment whatsoever, the yield maintenance prepayment provision in the *River East* case provided a valuable benefit to the borrower. That is, rather than requiring River East to pay $13 million in interest over the next 17 years under the ordinary terms of the note, River East was allowed to pay only $3.8 million at the time of its optional prepayment of the loan. VALIC also benefited by receiving an early payout sufficient to guarantee the same level of yield it had bargained for in the loan transaction by reinvesting the payout in treasury securities. Of course, VALIC also was free to reinvest the payout proceeds in other non-treasury investments according to its own business judgment.

The Seventh Circuit also rejected River East's argument that the prepayment penalty should be scrutinized according to the law of liquidated damages. Note that a liquidated damages clause is a contractual agreement that spells out in advance the damages one party must pay the other in the event of a *breach*. Liquidated damages must be deemed "reasonable" to be enforceable The court rejected River East's argument, noting that: (1) prepayment of the real estate loan was not a breach since the prepayment was voluntary and (2) even if prepayment penalties were examined under the same rubric as liquidated damages, it is not clear that a prepayment fee calculated according to the rates of treasury securities is unreasonable. Instead, the court suggested that prepayment penalty clauses are part of a normal functioning market in which lenders compete for the business of borrowers by offering different loan terms according to their own various assessments of risk and opportunity.

In addition to its legal exposition, the court recognized the practical repercussions of denying VALIC's right to the prepayment penalty. Perhaps most telling were the court's comments regarding the significant impact a contrary decision would have, noting that the failure to uphold prepayment penalties would "have broad implications for both lenders and borrowers of mortgage-secured loans in Illinois and might inadvertently effect a wide-ranging alteration of the law of real estate financing in Illinois."

Second Circuit Denies a Creditors' Committee Standing to Pursue an Equitable Subordination Claim in Bankruptcy

Official Committee of Unsecured Creditors v. Halifax Fund, L.P. (In re Applied Theory Corp.), 493 F.3d 82 (2d Cir. 2007)

Relevant Background and Summary of Issues

In *Applied Theory,* the official committee of unsecured creditors (the Committee) asserted an equitable subordination claim pursuant to Section 510(c) of the Bankruptcy Code. The Committee sought to set aside a transaction in which the lenders, as insiders of the debtor, were said to have used their control over the debtor to transform $30 million in convertible unsecured debt obligations into secured debt to the detriment of other creditors. This, the Committee contended, was done at a time the debtor was insolvent, undercapitalized, and experiencing large losses. *Id.* at 84.

The United States Bankruptcy Court for the Southern District of New York refused to allow the Committee to commence a proceeding for equitable subordination of the lenders' claims because (1) the equitable subordination claim did not seek to redress any particularized injury to any specific creditor; and therefore could not constitute property of the estate; and (2) the Chapter 11 trustee, who had the exclusive authority to assert such a claim, had already investigated the claim and concluded it lacked merit. *Id.* at 85.

The Committee appealed to the District Court for the Southern District of New York, which affirmed the bankruptcy court's decision. *Id.* The district courtconcluded that, while the powers granted to creditors' committees under the Bankruptcy Code have been read to support a qualified right for such committees to sue, this right is contingent upon the Committee obtaining the approval of the bankruptcy court. *Id.* (citing *In re STN Enterprises,* 779 F.2d 901, 904 (2d Cir.1985)). The district court further noted that in addition to court approval, a committee's right to sue is limited to a narrow set of situations, such as where the trustee or debtor-in-possession unreasonably failed to bring suit or where the trustee or debtor-in possession consents. *Id.* The district court concluded that the bankruptcy court had properly applied the factors set forth by the Second Circuit in *In re STN Enterprises,* looking to whether the claim is colorable and whether it is likely to benefit the estate. *See* 493 F.3d at 85. The district court further affirmed the bankruptcy court's finding that the Committee's proposed claim would not be directed toward a particularized injury suffered by any specific creditor. *Id.*

The Committee further appealed to the Second Circuit, arguing, among other things, that it did not need to seek the bankruptcy court's approval to bring its equitable subordination claim because *STN* was not applicable. *Id.* at 86. The Second Circuit disagreed that *STN* was inapplicable and refused to adopt a bright-line rule as the Committee had urged, under which equitable subordination claims "may be brought directly by a creditor, creditors, or a creditors' committee, without Bankruptcy Court approval." *Id.* at 86-87.

Second Circuit Analysis and Holding
Derivative Versus Direct Claims

Creditor claims in bankruptcy litigation are typically placed into one of two categories: derivative claims brought on behalf of and for the benefit of the bankruptcy estate, and direct claims brought on behalf of individual creditors for the benefit of those specific creditors. The Second Circuit in *Applied Theory* rejected the Committee's argument that two previous Second Circuit opinions, *STN* and *Commodore*, were inapplicable because the Committee's equitable subordination action was a direct and not a derivative action. *Id* at 87. Rather, like the bankruptcy court and the district court before it, the *Applied Theory* court found that the equitable subordination claim that the Committee wanted to pursue was in fact derivative, as it "would not be directed toward any particularized injury suffered by any creditor." 493 F.3d at 87 (quoting *Commodore*, 262 F.3d at 99) (quoting *Liberty Mutual Ins. Co. v. Official Unsecured Creditor's Comm. of Spaulding Composites Co. (In re Spaulding Composites Co.)*, 207 B.R. 899, 904 (B.A.P. 9th Cir. 1997)).

According to the Committee, Section 510(c) of the Bankruptcy Code indicates that an equitable subordination claim is a direct claim that can be commenced by parties in interest other than the trustee without first seeking court approval. *Id.* at 86. Unlike other sections of the Bankruptcy Code, the Committee argued that Section 510(c) does not provide that only the trustee may bring equitable subordination claims. The *Applied Theory* court, however, was not persuaded by the Committee's arguments and was unwilling to adopt a bright-line rule where the Committee's arguments were based solely upon the Seventh Circuit *Vitreous Steel* decision. *Id.* Instead, the Second Circuit ruled that where the purpose of a creditors' committee claim is to preserve the interests of the estate as a whole, allowing the Committee to pursue the claim would improperly usurp the trustee's role as a representative of the estate. In light of the fact that the trustee properly declined to pursue the equitable subordination claim, the Second Circuit concluded that the bankruptcy court properly prohibited the Committee from bringing that same claim. *Id.*

The Second Circuit in *Applied Theory* found that the Committee was unable to demonstrate any interest of its own in subordination separate and apart from the interest of the estate as a whole, and therefore failed to demonstrate why it should be permitted to step into the shoes of the trustee. *Id.* at 87 (citing *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700-03 (2d Cir.1989). The court noted that, no matter how the Committee tried to characterize it, the Committee's equitable subordination claim would allege harm to the debtor generally and would seek to subordinate the lenders to other creditors. *Id.* Since the Committee itself is not a creditor, it does not have any rights to assert such a claim against another creditor. In other words, the Second Circuit concluded that the "Committee has not sustained an injury for which a 'direct' claim might otherwise be available." *Id.*

Standing of Creditors or Creditors' Committees to Pursue a Claim in Bankruptcy

The Second Circuit revisited its previous rulings in *STN* and *Commodore* with respect to creditors' committee standing and concluded that the Committee advanced no reasons for the Court to disturb the conclusions it reached in past cases. Further, the Second Circuit re-examined the plain language of the Bankruptcy Code and concluded again that it "contains no explicit authority for creditors' committees to initiate adversary proceedings." 493 F.3d at 85.

The Court did note, however, that in addition to the circumstance where a debtor or trustee, without justification, fails to pursue a claim on behalf of the bankruptcy estate, a creditors' committee also can pursue the claim if it can obtain the debtor's consent. *Id.* at 86 (citing *Commodore*, 262 F.3d at 100). However, even when the debtor consents, a creditors' committee's standing is still conditioned upon bankruptcy court approval, where the court finds that the suit is "(a) in the best interest of the bankruptcy estate, and (b) is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." *Id.*

The Court concluded that both *STN* and *Commodore* doomed the Committee's appeal because they make clear that claims such as those the Committee wished to pursue depended upon a judicial determination that they were likely to benefit the estate. In the *Applied Theory* case, however, both the trustee and the bankruptcy court concluded that they were not. *Id.*

Implications of the Decision

The issue of standing remains a critical threshold issue for defendants in bankruptcy litigation. The *Applied Theory* decision arguably limits the right of creditors' committees to seek subordination of creditors' claims, and may limit the ability of committees to commence certain other causes of action as well. As the Second Circuit noted, an unsecured creditors' committee serves in a representative capacity, with an obligation to further the interest of the estate as a whole. Because a creditors' committee acts on behalf of creditors generally, it derives its authority from the trustee or debtor-in-possession to act on behalf of the debtor's estate.

After *Applied Theory*, creditors' committees in the Second Circuit that wish to commence certain causes of action, will likely need to follow the requirements set forth in *STN* and *Commodore* closely in hopes of gaining standing, including obtaining court approval prior to commencing any action. Arguing that an equitable subordination claim is "direct" instead of derivative clearly will not work in the Second Circuit.

Organization of Parishes of the San Diego Catholic Diocese

Foley Business Reorganizations Partners Victor A. Vilaplana and Keith C. Owens represented the Organization of Parishes of the San Diego Catholic Diocese (OPSD) in the Chapter 11 case of the San Diego Catholic Diocese.

The OPSD consisted of over 98 parishes in schools located in San Diego and Imperial Counties in Southern California. The OPSD sought bankruptcy protection as a result of over 140 lawsuits filed against it by individuals claiming to be victims of clergy abuse, and was the fifth and largest diocese to file for Chapter 11 protection. The assets of the schools and parishes were threatened by the claims of clergy abuse victims, and Foley undertook a vigorous defense of the parishes' position that the real and personal property of the parishes belonged to the parishes and not the OPSD. The litigation against four "test" parishes (also represented by Foley) proceeded with very tight time constraints, and called on Foley's considerable human and technological resources and experience.

Due in part to Foley's efforts (in conjunction with counsel for the Creditors' Committee, diocese, and plaintiffs), a settlement was reached between the OPSD and the alleged abuse victims after months of negotiations and weeks of intense effort under the auspices of both the bankruptcy judge and a federal magistrate judge to whom settlement negotiations had been assigned. Under the terms of the settlement, which have been publicly disclosed, the parishes will not be required to sell or otherwise dispose of any of the property in dispute. As a result, the abuse victims, who will be compensated by the OPSD, will finally get closure, and the parishes will continue to be able to serve the spiritual, educational, and charitable needs of their respective communities.

Metabolife

Foley Business Reorganizations Partners Victor A. Vilaplana and Keith Owens represented the shareholders of Metabolife International, Inc. (Metabolife) in Metabolife's Chapter 11 case filed in the bankruptcy court for the Southern District of California.

Metabolife was a leading manufacturer and seller of brand-name nutritional and dietary supplements containing ephedra. Its leading product was Metabolife 356. At the time the Chapter 11 case was filed, there were more than 360 personal injury or wrongful death cases pending against Metabolife, with most of those cases consolidated by order of the Federal Judicial Panel on Multidistrict Litigation in the Southern District of New York.

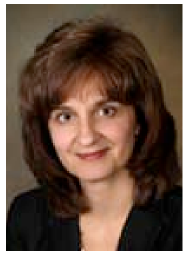
Soon after the Chapter 11 petition was filed, the shareholders were sued by the Official Creditors Committee on a variety of theories including fraudulent transfer, breach of fiduciary duty, and breach of contract. Foley vigorously represented the shareholders, developing creative defenses, and collaborating closely with the shareholders' financial advisors. After liquidating the non-ephedra-related assets of Metabolife through a bankruptcy court auction, the debtor and its shareholders, insurers, and retail distributors engaged in mediation of the over 360 lawsuits totaling over $1 billion in claims. The negotiations were successful culminating in a plan of reorganization proposed by the shareholders, both official committees, and the debtor, which the court ruled on September 10, 2007 would be confirmed with the confirmation order in the process of being entered. Under the plan, all claims will be channeled to a litigation trust, and claimants will be enjoined from pursuing their claims against the plan proponents including the shareholders.

Los Angeles County Bar Association Bankruptcy Executive Committee

Foley hosted the Los Angeles County Bar Association Bankruptcy Executive Committee meeting in our Century City office on Tuesday November 13, 2007. Keith C. Owens, a Partner in the Business Reorganizations Practice, currently serves on the committee.

At Judge Bluebond's request, Keith agreed to serve as the committee liaison to work with a bankruptcy judge on updating the Judicial Variance Survey to be completed by all of the Bankruptcy Judges in the Central District of California. The current survey is more than 10 years old, and many, if not most, of the Bankruptcy Judges who completed the old survey are retired. Because the Central District of California has 21 Bankruptcy Judges, the idea behind the survey is to help practitioners better understand the preferences (or local local rules) of each of the Judges on major issues to make the bankruptcy practice more predictable.

Judy A. O'Neill Partner Profile



Judy A. O'Neill is a Partner in Foley's Detroit office and serves as Vice Chair and leader of strategic development of the firm's national Business Reorganizations Practice. Judy also is a member of the firm's Private Equity & Venture Capital Practice. She joined Foley in 2003 after spending over 20 years at another national law firm, where she served as managing director of its Business Department and as assistant leader of the Bankruptcy and Creditor's Right/Reorganization Practice Group.

Judy has taken an active role in professional organizations in Detroit and across the nation. She is a member of the Detroit Metropolitan Bar Association, the Michigan Bar Association, and the American Bar Association. Judy also has assumed leadership roles as past regional membership director of the American Bankruptcy Institute and its Unsecured Trade Creditors Committee, advisory board member of the American Bankruptcy Institute Central States Conference, a past advisory committee member of the Eastern District of Michigan Bankruptcy Court, and a past Debtor/Creditor Committee chairperson of the Detroit Metropolitan Bar Association.

Judy's accomplishments and qualifications have been noted by peers. She was inducted into the American College of Bankruptcy Fellows in 2002; is a life member of the National Registry of Who's Who, 2001 edition; and has been listed in *The Best Lawyers in America®*,* for more than the past decade. She is also listed in *Who's Who Legal USA: Insolvency & Restructuring 2006*, and *Who's Who in American Law*, 2000 edition. She was selected by *Crain's Detroit Business* as one of the "100 Most Influential Women in Michigan," March 2002. She is included in the *Guide to the World's Insolvency and Restructuring Lawyers*, 2003 and 2006. Judy was recognized in the list of 2006 "Super Lawyers" by *Law & Politics Media, Inc.* for her work in bankruptcy, creditor, and debtor rights, and will appear in the Top 100 Michigan Lawyers and the Top 50 Female Michigan "Super Lawyers" list.

Judy also is a frequent speaker on the topics of bankruptcy and trial advocacy:

■ Name of Conference: *Speaker (subject):* Date: March 8, 2007	NDI – National Directors Institute *Directors' Duties in the Zone of Insolvency* Chicago, Illinois
■ Name of Conference: *Speaker (subject):* Date: April 25, 2007	ACCA – Second Annual State of the Law Update *Managing Troubled Contractual Relationships in and out of Bankruptcy* Novi, Michigan
■ Name of Conference: *Speaker (subject):* Date: June 27, 2007	OESA *Strategies for Today's Automotive Industry: Managing Contractual Relationships and Supply Chain Distress* Troy, Michigan
■ Name of Conference: *Speaker (subject):* Date: August 9 – 10, 2007	19th Annual Midwest Regional Bankruptcy Seminar *Chapter 11 – BAPCPA Hot Topics* Cincinnati, Ohio

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