One Dozen Important Points About Bankruptcy Appeals

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The author discusses 12 issues that parties should keep in mind when appealing a bankruptcy court decision, or defending such an appeal.

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 a dozen important points about bankruptcy appeals.

1. 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 Rule") 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 ("F.R.A.P.") to appeal from district court to a federal appellate court.[2] As with F.R.A.P. 4(a)(5), the Bankruptcy Rules permit some leeway if an appellant misses its deadline. Under the Bankruptcy

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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."[3] After 30 days, however, a bankruptcy appellant loses its right to appeal even if there is excusable neglect.[4]

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 proceeding; the reason for the delay; whether the delay was in the movant's control; and the movant's good faith.[5]

2. 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.[6]

3. 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.[7]

While the Bankruptcy Rules permit dismissal, however, certain circuits require the appellate court to weigh a series of factors before it dismisses 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;

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- 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.[8]

4. 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 judge'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 hearing in Omaha, St. Louis, Kansas City, and other locations where its bankruptcy courts sit.

5. 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 specifics and 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 6500 words.[9] 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.[10] The First Circuit BAP Rules generally limit argument to 15 minutes per side.[11] The Tenth Circuit BAP requires that a brief include a statement of related cases — i.e., one that includes the same litigants and substantially the same fact pattern or legal issues – that are pending in any other federal court.[12] The Sixth Circuit BAP Rules provide for a possible pre-argument conference and mediation.[13]

6. 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 F.R.A.P., the Bankruptcy Rules have 20 provisions governing all aspects of appeals.[14] These rules addresses appellate issues, including, among others, the filing and service of appellate papers;[15] the filing and service of briefs and appendices;[16] the form of briefs and their length;[17] motions;[18] oral argument;[19] disposition of the appeal;[20] costs;[21] and rehearing,[22] among others. (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.)[23] 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 generally allowed in all cases. In practice, however, oral argument is much less common before district courts. When an appeal is before district court, there is some question about whether its decision has precedential effect.[24]

7. 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.[25] Nonetheless, some circuit courts have noted that the first tier of appeal acts as a helpful filter.[26]

An appellate court may reach issues brought up before but not decided by the district court or BAP.[27]

8. 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.[28]

9. 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.[29] Courts of appeal apply the same standard of review as do BAPs and district courts.[30] 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.[31]

10. This 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 effec-

tive relief.[32] 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.[33] 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.[34]

However, if there remains any possibility that an appeal may result in a tangible benefit to the appellant, it is not moot.[35]

11. 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.[36]

12. 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.[37] 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.[38]

Each of these issues, of course, could justify an article in itself. I hope these provide some helpful thoughts and issues to consider when participating in a bankruptcy appeal.

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NOTES

[1] Certain types of motions toll this time for filing until the last such motion is disposed of. *See* Bankruptcy Rule 8002(b).

[2] *See* F.R.A.P.4(a).

[3] Bankruptcy Rule 8002(c)(2); Bankruptcy Rule 9006(b). Of course where an appeal is from a district court to a federal circuit court on a bankruptcy issue, F.R.A.P. 4's 30-day rule applies.

[4] *See Shareholders v. Sound Radio, Inc.*, 109 F.3d 873, 879 (3d Cir. 1997). 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)).

[5] *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380, 395 (1993).

[6] *See In re GGM, P.C.*, 165 F.3d 1026, 1032 (5th Cir. 1999). 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).

[7] *See, e.g.*, *In re Lynch*, 430 F.3d 600 (Cir. 2005); *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 n.6 (5th Cir. 1985).

[8] *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d. Cir. 1984). *See also In re Harris*, 464 F.3d 263 (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.").

[9] 8th Cir. BAP Rule 8010A.

[10] 9th Cir. BAP Rule 8006-1.

[11] 1st Cir. BAP Rule 8012-1.

[12] 10th Cir. BAP Rule 8010-1.

[13] 6th Cir. BAP Rule 8080-2.

[14] Bankruptcy Rules 8001-8020.

[15] Bankruptcy Rule 8008.

[16] Bankruptcy Rule 8009.

[17] Bankruptcy Rule 8010.
[18] Bankruptcy Rule 8011.
[19] Bankruptcy Rule 8012.
[20] Bankruptcy Rule 8013.
[21] Bankruptcy Rule 8014.
[22] Bankruptcy Rule 8015.
[23] Bankruptcy Rule 8009.
[24] *See In re Shattuck Cable Corp.*, 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992).
[25] *See In re Best Prods. Co.*, 68 F.3d 26, 30 (2d Cir. 1995).
[26] *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").
[27] *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004).
[28] *See Weber*, 484 F.3d at 157 (*citing* BAPCPA § 1233, 28 U.S.C. § 158(d)(2)(a)(i)-(iii)).
[29] *See In re ABC-Naco, Inc.*, 483 F.3d 470, 472 (7th Cir. 2007).
[30] *See In re Senior Cottages of Am.*, 482 F.3d 997, 1000-1001 (8th Cir. 2002)
[31] *See In re Martin*, 222 Fed. Appx. 360, 362 (5th Cir. 2007).
[32] *See In re Focus Media Inc.*, 378 F.3d 916, 922 (9th Cir. 2004).
[33] *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).
[34] *See Ederel Sport v. Gotcha, Int'l, L.P.*, 311 B.R. 250, 254 (9th Cir. BAP 2004).
[35] *See In re Howard's Express, Inc.*, 151 Fed. Appx. 46 (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).
[36] *See In re PWS Holding Corp.*, 228 F.3d 224, 249 (3d Cir. 2000).
[37] *See In re Owens Corning*, 419 F.3d 196, 203 (3d Cir. 2005).
[38] *Id.*