

CHAPTER 11 - 101 THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE: A PRIMER

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Bankruptcy Appeals

Editors' Note: This is the twenty-first of 22 installments that are being published here, with permission from the American Bankruptcy Institute. The series, read consecutively, will give the reader a broad overview of the Chapter 11 bankruptcy process. The installments are chapters from a CD-Rom that is available for purchase for \$50 (\$20 to ABI members) through the ABI. For more information, you can call the ABI at (703) 739-0800 or go to www.abiworld.org. The authors welcome your comments and questions as well, and you may feel free to contact them. Jonathan Friedland is a member of the ABI Board of Directors as well as a member of NACM Oregon.

Just like the orders of other trial courts, bankruptcy court orders can be appealed. But there are important differences between bankruptcy appeals and appeals in other courts. First, only certain orders can be appealed. Second, they are appealed to different courts. Third, the procedural rules differ. Because bankruptcy cases move quickly, and appellate litigation tends to move less quickly, issues surrounding the effect of an appeal on the Chapter 11 process need to be considered. We discuss these issues below.

What Orders Can Be Appealed?

Any final order of a bankruptcy court can be appealed. This includes orders entered in a contested matter (such as an order granting relief from the automatic stay or an order authorizing use of cash collateral) as well as orders entered in an adversary proceeding (such as an order granting summary judgment).

The difficult question is what is a *final* order of a bankruptcy court? One case defined a final order as one that “resolves the litigation, decides the merits, settles liability, establishes damages, or even determines the rights of any party to the bankruptcy case.” *In re Urban Broadcasting Corp.*, 304 B.R. 263, 269 n.13 (E.D. Va. 2004) (internal citations omitted). The court contrasted this with an *interlocutory* order—“one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken to enable the court to adjudicate the cause on the merits.”

If an order meets the definition of a final order, it may be appealed. If it is interlocutory, then it may be appealed only with permission from the appellate court (more about that below). Sometimes it is not clear whether an order is final or interlocutory, and more than occasionally that issue is the subject of dispute.

It is sometimes said that bankruptcy courts have a more relaxed standard for what is a final order than non-bankruptcy courts. This is in part because, in the typical Chapter 11 process, one event builds upon another. It is therefore often more economical and efficient to resolve issues on appeal when they arise (or as soon thereafter as possible), rather than having the Chapter 11 process continue to move forward—under the assumption that some particular dispute has been resolved—only to have the result of the resolution reversed much later, and a lot of events or agreements based upon that resolution potentially unwound. In addition, appeals can be mooted by subsequent decisions that may be implemented (such as confirmation of a plan), and interpreting the finality requirement somewhat liberally may be the only way to grant an effective appellate right.

To What Court Can You Appeal?

It used to be that bankruptcy appeals automatically went to the district court. Title 28 was later amended to authorize the creation of bankruptcy appellate panels (“BAPs”)—specialized three-judge courts (comprised of bankruptcy court judges from the particular circuit) designated to hear bankruptcy appeals. Currently, there are bankruptcy appellate panels in the First, Sixth, Eighth, Ninth, and Tenth circuits. The remaining circuits do not have BAPs. The details regarding formation of BAPs and appointment of BAP judges can be found in 28 U.S.C. § 158(b). Where there is a BAP, appeals from bankruptcy court decisions go to the BAP unless one of the parties elects to have the appeal heard by a district court judge. *See* Bankruptcy Rule 8001(e) and 28 U.S.C. § 158(c). The standard of appellate review

is *de novo* on issues of law, clearly erroneous on issues of fact, and abuse of discretion on issues that are committed to the bankruptcy judge's discretion.

Appeals from a decision of the BAP or district court can be taken to a United States Court of Appeals. *See* 28 U.S.C.

§ 158(d). The standard of review is *de novo*. From there, it is possible to petition the Supreme Court for review.

Under BAPCPA, an appeal of a bankruptcy court's order can be able to be taken directly to the court of appeals under some circumstances. If the bankruptcy court, the district court, the BAP, or all of the parties to the appeal certify that (i) the appeal involves a matter of public importance or a question of law that neither the circuit court nor the Supreme Court has addressed, (ii) the appeal requires resolution of conflicting decisions, or (iii) the appeal may materially advance the progress of the case, the appeal will go to the court of appeals unless it chooses not to accept it. In addition, the Code requires the relevant lower courts to make the certification to the court of appeals, if the majority of the appellants and appellees request certification. (We assume this is only required if the grounds are satisfied, although the statute doesn't say that. In any event, it is up to the Court of Appeals whether to accept direct appeal of any bankruptcy court decision.)

What is the Process for Appeals?

The procedural rules for appeals are in Part VIII of Bankruptcy Rule—the “8000 series” rules. Here's a quick summary of the highlights:

- If you want to appeal a bankruptcy court decision, you must file a notice of appeal within 10 days after the order you are appealing from is entered. (Note that this is different than the 30-day period to appeal a district court's order to a court of appeals—more than a few lawyers have just assumed they had 30 days, and found themselves having a conversation with their insurance carrier). The bankruptcy judge may grant a limited extension of the 10-day period for most, but not all, types of appeals. For the exceptions, *see* Bankruptcy Rule 8002(c). Usually, however, you will want to file within the 10 days rather than seeking an extension. If you want to pursue the direct route to the court of appeals under the new legislation, you must request certification within 60 days of the entry of the order.
- If you want to appeal an interlocutory order, you should file a notice of appeal and a motion for leave to appeal. If you just file a notice of appeal, and the order from which you are appealing is determined to be interlocutory, the court may direct you to file a motion or, alternatively, may treat your notice of appeal as a motion for leave to appeal. *See* Bankruptcy Rule 8003(c). However, if you think your order is probably interlocutory, it is better to file the motion so you can explain why you should be permitted to

appeal. When making this explanation, think in terms of the need to get your appeal resolved in order to give you an effective remedy and to avoid delaying the reorganization process to the detriment of all parties. Of course, the specifics will vary from case to case.

- If you are in one of the circuits that has a BAP but you want your appeal heard by a district judge rather than a BAP, you must file an election. *See* Bankruptcy Rule 8001(e) and 28 U.S.C. § 158(c)(1) for the procedure and timing.
- If you need a stay pending appeal, the governing Bankruptcy Rule is 8005. The standard is generally something like the traditional injunction standard—likelihood of success on the merits, irreparable harm, the public interest, and balancing the equities. Ordinarily, you seek the stay first from the bankruptcy judge and if she denies the stay, then you can go to the district judge or BAP, and if need be to the court of appeals. Often the party seeking the stay will be required to post a bond as a condition of the stay.

If you fail to obtain a stay, then the order from which you are appealing may be implemented during the pendency of your appeal. This can result in your appeal being mooted. A somewhat common example of this is an appeal from a plan confirmation order or a § 363 Sale order. If you don't get a stay and the plan is consummated or the sale closes, you may find your appeal being dismissed as “equitably moot.”

The notion is that the plan has been consummated, and parties have relied on the consummation, to an extent such that effective relief can no longer be granted to the appellant without unfairly upsetting the expectations of other parties. You hear a lot in this context about “un-ringing bells” and “un-scrambling eggs.” A similar result may be obtained in the case of an appeal from a post-petition financing order under § 364 or an asset sale order under § 363, as a result of statutory provisions. *See* §§ 364(e) and 363(m). These mootness doctrines provide an incentive for parties to consummate plans and close sale or financing transactions as soon after entry of the order approving them as possible, whether appeal has been taken or not.

- Note that certain types of bankruptcy court orders are automatically stayed for 10 days, unless the bankruptcy court orders otherwise. These include orders authorizing the use, sale, or lease of property (Bankruptcy Rule 6004(g)), orders authorizing the assignment of executory contracts (Bankruptcy Rule 6006(d)), and an order confirming a Chapter 11 plan (Bankruptcy Rule 3020(e)).
- If you cannot obtain a stay, an alternative may be to ask the appellate court for an expedited briefing schedule and expedited treatment of the appeal. Cases where this is justified obviously are limited, but if there is a true need and demonstrable prejudice would result from things

proceeding at the normal speed, you should request an expedited appeal.

- Soon after the appeal is filed, the parties designate the record (Bankruptcy Rule 8006) and the record is then transmitted from the bankruptcy court to the BAP or district court.
- The briefing schedule and other rules concerning briefs and oral arguments are found in Bankruptcy Rules 8009, 8010, and 8012. They provide that the appellant files a brief within 15 days after the appeal is docketed, the appellee files its brief within 15 days after the appellant's brief is served, and then the appellant has 10 days to reply. This schedule is sometimes modified by court order. The BAP or district court has discretion to hold oral argument or not. *See* Bankruptcy Rule 8012.
- A party can take further appeal from the BAP or district court's decision to the court of appeals. BAP and district court decisions on bankruptcy appeals are automatically stayed for 10 days in order to facilitate this. *See* Bankruptcy Rule 8017(a). If you want a further stay, you need to seek it under Bankruptcy Rule 8017(b). These appeals are governed by the Federal Rules of Appellate Procedure and, as a result, the time limits, briefing rules, etc., differ.

And if you are not happy with the court of appeals' decision, you can always seek certiorari review in the Supreme Court—although the chances of it being granted aren't very good.

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Watch for the final issue next month!