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Chapter 11 - "101"



Bankruptcy Appeals

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Editors' Note: This is the last installment of our Chapter 11 - "101" column. It deals with appeals from bankruptcy court decisions. After a short break, we will move to Chapter 11 - "201," a new column that will deal with issues at the intersection of bankruptcy law and other areas of law (environmental, tax, securities, etc.).

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.

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 recent 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."¹ 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."²

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. 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 nonbankruptcy 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 on 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, Second, 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.³ 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 U.S. Court of Appeals.⁴ The standard of review is *de novo*.

Under the Bankruptcy Abuse and Consumer Protection Act of 2005 (BACPA), which was recently passed by Congress and signed into law by President Bush, an appeal of a bankruptcy court's order will be able to be taken directly to the appeals court under some circumstances (the new law is generally not effective until six months after its enactment). If the bankruptcy court, district court, BAP or all of the parties to the appeal certify that (1) the appeal involves a matter of public importance or a question of law that neither the circuit court nor the Supreme Court has addressed, (2) the appeal requires resolution of conflicting decisions or (3) 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 amendment to the Code will require the relevant lower courts to make the certification to the appeals court if the majority of the appellants and appellees request certification. Whether intentional or not, this second provision appears to require the lower court to make the certification even if the grounds for certification are not met.

What Is the Process for Appeals?

The procedural rules for appeals are in Part VIII of the Federal Rules of Bankruptcy Procedure—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 becomes final. (Note that this is different than the 30-day period to appeal a

¹ *In re Urban Broadcasting Corp.*, 304 B.R. 263, 269 n. 13 (E.D. Va. 2004) (citations omitted).

² *Id.*

³ See Rule 8001(e) and 28 U.S.C. §158(c).

⁴ See 28 U.S.C. §158(d).

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 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.⁵ 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.*⁶

- *If you need a stay pending appeal, the Rule governing that is 8005.* The standard is generally something like the traditional injunction standard—likelihood of success on the merits, irreparable harm, the public interest, etc. Ordinarily, you seek the stay first from the bankruptcy judge, and if she/he 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. On occasion, this will result in your appeal being mooted. A somewhat common example of this is an appeal from a plan confirmation order. If you don't get a stay and the plan is consummated, 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

⁵ See Rule 8003(c).

⁶ See Rule 8801(e) and 28 U.S.C. §158(c)(1) for the procedure and timing.

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.⁷

- *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 (Rule 6004(g)), orders authorizing the assignment of executory contracts (Rule 6006(d)) and an order confirming a chapter 11 plan (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 (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 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.⁸

- *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.⁹ If you want a further stay, you need to seek it under 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 appeals court's decision, you can always seek *certiorari*—although the chances of it being granted aren't very good. ■

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⁷ See §§364(e) and 363(m).

⁸ See Rule 8012.

⁹ See Rule 8017(a).