Circuit Splits and Ethical Implications

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CIRCUIT SPLITS AND ETHICAL IMPLICATIONS

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Section 502(d)
MUST A JUDGMENT BE OBTAINED, OR ARE ALLEGATIONS SUFFICIENT TO EVOKE § 502(d)?

Some courts hold that a claim cannot be disallowed under § 502(d) until a judgment with respect to one of the enumerated code sections found in § 502(d) is first obtained. Other courts will disallow a claim under § 502(d) based upon allegations of recoverable property or an avoidable transfer. The cause of the split resides in the interpretation of the language of the statute.

11 U.S.C. § 502(d) reads as follows:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is *recoverable* under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer *avoidable* under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, *unless* such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is *liable* under section 522(i), 542, 543, 550, or 553 of this title. (*emphasis added*).

The split is the result of some courts placing paramount importance upon the word "liable", while other courts focus upon the words "recoverable", "avoidable", and "unless". Those courts that focus on the word "liable" conclude that § 502(d) applies only when the trustee has first obtained a judgment against the creditor. A common theme among these courts is that the purpose of § 502(d) is to ensure compliance with judicial orders, and that until a judicial order is obtained, § 502(d) cannot be evoked. The courts reason that a creditor is only "liable" to the trustee after a final judgment is obtained by the trustee.

The courts which focus on the words "recoverable" and/or "avoidable" apply § 502(d) to disallow the claim of a creditor based on a trustee's allegation that property is recoverable from the creditor under any of the Code sections mentioned in § 502(d). These courts point out that if Congress had intended for the trustee to first obtain a judgment to recover or avoid a transfer, Congress would have used the terms "recovered" and "avoided". Because congress used the terms "recoverable" and "avoidable" these courts reason that no judgment is required under the trustee's avoiding action prior to evoking § 502(d). These courts read the word "unless" in § 502(d) for the proposition that the phrase following the word "unless" is an exception to the rule of disallowing the creditor's claim, which exception should apply only if the creditor has paid the amount or turned over the subject property to the trustee.

The effect of this split can have a substantial economic effect on the estate. Unlike courts that require a judgment be obtained prior to evoking §502(d), most courts that disallow a claim based upon allegations will allow a trustee or debtor-in-possession to block distributions on these temporarily disallowed claims pending a final determination of liability, providing the trustee with the ability to preserve assets of the estate for equitable distribution upon final avoidance action determinations, rather than seeking recovery of distributed funds thereafter. Courts interpreting § 502(d) to apply based upon allegations will also permit, upon the adoption of

appropriate procedures and the presentation of appropriate evidence, the trustee or debtor-in-possession to assert recoupment or offset rights against claimants based on the estate's § 502(d) rights, thus reducing litigation costs for the recovery of avoidance actions for the benefit of all creditors. Finally, based on the language of the statute, these courts will also permit § 502(d) to be applied defensively as a part of claims litigation in the estate even though the trustee's avoiding power may be time barred by a statute of limitation. The economic impact of these advantages arising out of this interpretation of the statute are particularly important in Ponzi scheme cases and can result in tremendous savings in litigation costs for the benefit of all claimants.

Trustees and debtors-in-possession who are administering cases in those districts where § 502(d) cannot be evoked defensively because a judgment must first be obtained prior to evoking § 502(d) must institute litigation early to achieve some of the advantages for the estate that the alternative interpretation allows. Since litigating avoidance actions to a conclusion is absolutely necessary under this approach, it is necessarily more costly for the estate.

Cases holding that the Trustee must obtain a Judgment Before § 502(d) Can be Evoked.

Although not entirely on point, the case most often cited to by courts requiring a judgment prior to allowing a trustee to evoke § 502(d) is *In re Davis*, 889 F.2d 658 (5th Cir. 1989). In *Davis*, the trustee obtained a judgment against the IRS and asserted § 502(d) to disallow the IRS setoff claim until the IRS paid the judgment. The IRS appealed from the trustee's judgment and asserted that it stood ready, willing and able to comply with the turnover order once the litigation was finalized. The Fifth Circuit found that utilizing § 502(d) in such a circumstance would penalize a party for appealing its liability and would be an improper application of § 502(d). The Fifth Circuit stated that § 502(d)is designed to assure an equality of distribution of the assets of the bankruptcy estate, not create penalties for asserting a setoff right, and that a creditor should be afforded a reasonable time in which to turn over the amount adjudicated to belong to the bankruptcy estate before § 502(d) should be applied. The rationale utilized by the *Davis* court is that "[t]he legislative history and policy behind § 502(d) illustrates that the section is intended to have the coercive effect of insuring compliance with judicial orders." *Davis*, at 661. Even though the trustee obtained a final judgment in the *Davis* case, the Fifth Circuit found § 502(d) to be inappropriate under the circumstances because the matter was on appeal and "creditor is still entitled to a reasonable time after the final determination until Section 502(d) is kicked into effect." *Davis*, at 662.

The Eighth Circuit in *In re Odom Antennas, Inc.*, 340 F.3d 705, 708 (8th Cir. 2003) states that the purpose of § 502(d) is to ensure compliance with judicial orders and that the language of § 502(d) expressly provides that an entities claim is not disallowed if the entity or transferee paid the amount, or turned over any such property for which entity or transferee is liable. Focusing on the word "liable" the Eighth Circuit reasoned that the language of § 502(d) indicates that it should be used to disallow a claim after the entity is first adjudged liable; otherwise, the court could not determine if the exception applies.

Section 502(d) envisions some sort of determination of the claimants liability before its claims are disallowed, and in the event of an adverse determination, some opportunity for the

creditor to turn over the property should be provided. *In re Atlantic Computer Sys.*, 173 B.R. 858, 862 (S.D.N.Y. 1994).

In order to benefit from § 502(d), the trustee must prove the avoidability of a transfer, which is a condition precedent to the operation of § 502(d). *In re Ameriserve Food Distribution Inc.*, 315 B.R. 24, 34 (Bankr. D. Del. 2004).

Cases holding that the Trustee need only allege that a transfer is avoidable in order to evoke § 502(d).

Matter of Mid Atlantic Fund, Inc., 60 B.R. 604 (Bankr. S.D.N.Y. 1986) held that although the statute of limitations under § 546 has expired, the trustee may rely upon § 502(d) defensively to preclude entities which have received voidable transfers from sharing in the distribution of the assets of the estate unless, and until, the voidable transfer has been returned to the estate. In so ruling, the court relied upon case law development under the former Bankruptcy Act holding that a trustee could raise an otherwise time-barred voidable transfer as to cause disallowance of a claim under § 57g of the Act. Cases relied upon in *Mid Atlantic* include: *In re Meredosia Harbor & Fleeting Service, Inc.*, 545 F.2d 583 (7th Cir. 1976), *cert. denied*, 430 U.S. 967, 97 S.Ct. 1649, 52 L.Ed. 2d 359 (1977); *In re Cushman Bakery*, 526 F.2d 23 (1st Cir. 1975), *cert. denied*, 425 U.S. 937, 96 S.Ct. 1670, 48 L.Ed. 2d 178 (1976); and *In re Supreme Synthetic Dyers, Inc.*, 3 B.R. 189 (Bankr. E.D.N.Y. 1980).

The Ninth Circuit in *In re America West Airlines, Inc.*, 217 F.3d 1161 (9th Cir. 2000) held that the creditor need not be determined by the court to be liable to the estate prior to the trustee evoking § 502(d) because the use of the word "unless" in § 502(d) indicates that the phrase following the word "unless" is not an additional requirement for disallowance of the creditor's claim, but is an exception to the general rule that a claim based on an avoidable transfer must be disallowed. The exception to the general rule of disallowance exists, because if the transferee has already relinquished the avoidable transfer, there is no need to disallow the claim.

The Sixth Circuit agreed with the Ninth Circuit in *In re McKenzie*, 737 F.3d 1037, 1041 (6th Cir. 2013) and held that a trustee may use his avoidance powers defensively under § 502(d) even if the statute of limitations set forth in § 546 has expired.

The Third Circuit in *In re KB Toys Inc.*, 736 F.3d 247 (3d Cir. 2013) held that if a claim is subject to disallowance under § 502(d) in the hands of the original claimant, it is also disallowable in the hands of a subsequent transferee. Here, the case turned on the interpretation of the phrase "any claim of any entity." The Court stated that because the statute focuses on claims, and not claimants, claims that are disallowable under § 502(d) must be disallowed no matter who holds them.

The 9th Circuit BAP had earlier stated that it could discern no purpose for § 502(d) if it applied only when the transfer therein contemplated could form the basis of an independent avoidance action seeking affirmative relief from the transferee. *In re KF Dairies, Inc.*, 143 B.R. 734, 737 (9th Cir. BAP 1992). *See also, In re Larry's Marineland of Richmond Inc.*, 166 B.R. 871, 874-75 (Bankr. E.D. Ky. 1993) (the inability of the trustee to obtain affirmative monetary

recovery does not prevent the operation of section 502(d)); *In re Discount Family Boats of Texas, Inc.*, 233 B.R. 365, 368 (Bankr. E.D. Tex. 1999) (a creditor's claim must be disallowed if trustee us able to make a prima facie showing that the transfer was improper even if the transfer could not be recovered due to the statute of limitations).

As explained by the bankruptcy court in the Southern District of New York, the language of § 502(d) explicitly refers to a transfer avoidable, rather than an avoided transfer or claims that have been avoided. A claim may be disallowed at least temporarily and for certain purposes, subject to reconsideration, simply upon the allegation of an avoidable transfer. *In re Enron Corp.*, 340 B.R. 180, 190 (Bankr. S.D.N.Y. 2006).

Case Holdings That Form a Middle Ground to the Split.

Section 502(d) envisions a judicial determination of avoidability, whether obtained in the context of a claim objection, a declaratory judgment action or an adversary proceeding. The limitation periods of §§ 546(a) and 549(d) are applicable to claim objections under § 502(d). *In re Metiom, Inc.*, 301 B.R. 634, 642 (Bankr. S.D.N.Y. 2003).

Thus, these courts interpret § 502(d) as automatically holding up the allowance of a claim pending a preference determination, but state that until there is a judicial order entered requiring the turnover property, § 502(d) does not become operative. *In re Ampace Corp.*, 279 B.R. 145, 163 (Bankr. D. Del. 2002).

Administrative Claims under § 503(b).

Another split has arisen in relation to § 502(d); the question of whether § 502(d) is limited to prepetition claims. The 9th Circuit held in *In re Microage, Inc.*, 284 B.R. 914 (9th Cir. BAP 2002) that nothing in § 502(d) limits its application to prepetition claims. Section 502(d), by its terms applies to "any claim" of an entity that received an avoidable transfer, and the definition of a "claim" is sufficiently broad to include requests for payment of expenses of administration. Thus, this case decides that §502(d) applies to administrative claims, but notes once a claim has been allowed, § 502(d) may not be raised as a bar to payment.

However, more recent cases in Michigan and the 2nd Circuit have disagreed. The 2nd Circuit held that § 502(d) does not bar the allowance of postpetition administrative expenses within the scope of § 503(b). *In re Ames Dept. Stores, Inc.*, 582 F.3d 422 (2nd Cir. 2009). Similarly, the Court in *In re Energy Conversion Devices Inc.*, the Court held that an administrative expense request under § 503(b)(9) may never be disallowed based on § 502(d). *In re Energy Conversion Devices, Inc.*, 486 B.R. 872 (Bankr. E.D. Mich. 2013).

FINALITY OF DENIAL OF A PLAN

There is a current conflict in the courts of appeals on the appealability of denials of plan confirmation. This conflict has prompted a petition for certiorari to the Supreme Court to resolve

the conflict.[1] In the six-to-three conflict, six courts have held that the denial of a plan confirmation is not appealable; three courts have held that a debtor may immediately appeal a denial of plan confirmation.

Courts that allow the debtor to immediately appeal a denial of plan confirmation.

The Third, Fourth, and Fifth Circuits allow debtors to appeal an order denying confirmation.

In *Mort Ranta v. Gorman*, 721 F.3d 241, 250 (4th Cir. 2013) a divided panel held that an order denying confirmation of a Chapter 13 plan was "a final order for purpose of appeal even if the case has not yet been dismissed." 721 F.3d at 248. The court noted that while other courts had reasoned that a denial of plan confirmation was not final because "the debtor may propose an amended plan before the case is dismissed," that the same could be said about a confirmation order, because [e]ven after a plan is confirmed, the debtor is always free to propose a modification to the plan, which could substantially modify the terms of repayment and the rights of creditors." *Id.* at 247-48.

In *In re Bartee*, 212 F.3d 277 (5th Cir. 2000), the court similarly held that the denial of confirmation of a Chapter 13 plan was appealable because it "conclusively determined the substantive rights at issue and ended the dispute" over them. *Id.* at 283-84.

In *In re Armstrong World Indus.*, 432 F.3d 507 (3d Cir. 2005), a divided panel held that a denial of a confirmation of a Chapter 11 plan is appealable. The court applied a four-factor test to determine that the denial of confirmation was final and appealable; the test considers "(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy." *Id.* at 511.

Courts that do not allow debtors to immediately appeal a denial of plan confirmation, and instead require debtors to propose plans they do not want or incur dismissal in order to obtain review.

The First, Second, Sixth, Eight, Ninth, and Tenth Circuits have held that an order denying confirmation of a debtor's plan is non-final and non-appealable.

In *In re Gordon*, 743 F.3d 720 (10th. Cir. 2014), the Tenth Circuit joined five other circuits in holding that an order denying confirmation of a debtor's plan is non-final and non-appealable. The court previously held that an order denying confirmation of a proposed Chapter 13 plan is not a final, appealable order. *In re* Simons, 908 F.2d 643, 645 (10th Cir. 1990). In *Gordon*, the Tenth Circuit held that it "cannot overrule *Simons*,", and that, as in *Simons*, "significant further proceedings" remained in the case because petitioners are free to revise their proposed plan. The Tenth Circuit acknowledged the circuit conflict on whether denials of plan

[1] Summary of cases and arguments taken from the petition for certiorari filed in *In re Gordon*, No. 13-1416.

confirmation are appealable but stated that it "[saw] no reason to ask the en banc court to reexamine *Simons* at this time."

In *Maiorina v. Branford Savings Bank*, 691 F.2d 89 (2d Cir. 1982), a divided panel of the Second Circuit held that in a Chapter 13 case an "order denying confirmation of the proposed plan is interlocutory only and hence not appealable," because "for all we know, the bankruptcy court may very well confirm another plan" that does not include the contested provision. *Id.* at 90-91. In *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996), the court acknowledged that "the concept of 'finality' is more flexible in the bankruptcy context than in ordinary civil litigation." Yet the court also held in *Flor* that a denial of plan confirmation was not appealable.

In *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013) the court held that "a decision rejecting ... confirmation [of a] plan is not a final order appealable under" 28 U.S.C. 158(d)(1), the statute specifically addressing appeals to the courts of appeals in bankruptcy cases. Here, confirmation of the debtor's Chapter 11 plan had been denied on the ground that it violated the absolute-priority rule. The Sixth Circuit held that the debtor could not appeal unless the remaining proceedings would be "of a ministerial character." *Id.* Because the debtor could propose a new plan, to which the creditors could object, the remand involved "[f]ar more than a few ministerial tasks[.]" *Id.*

The Eighth Circuit has also held that "a bankruptcy court order that 'neither confirms a plan nor dismisses the underlying petition, is not final.'" *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993) (quoting *Lewis v. United States*, 992 F.2d 767, 772 (8th Cir. 1993)). The court concluded that the denial of a Chapter 11 plan confirmation was not final and appealable, because "the bankruptcy court has remaining tasks that are not purely mechanical or ministerial, such as considering any amended plan that may be proposed, or determining how to dispose of the case if no confirmable plan is proposed." *Id. Accord In re Fisette*, 695 F.3d 803, 805-06 (8th Cir. 2012).

The Ninth Circuit rejected the contention of both parties that it had jurisdiction of an appeal from a denial of plan confirmation, categorically holding that "a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory." *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997). In reaching that conclusion, the court cited *Flor*, *Pleasant Woods*, and the Tenth Circuit's decision in *Simons*.

The First Circuit recently held in a Chapter 13 case that "[a]n order of an intermediate appellate tribunal [*i.e.*, a district court or bankruptcy appellate panel] affirming the bankruptcy court's denial of confirmation of a reorganization plan is not a final order so long as the debtor remains free to propose an amended plan." *In re Bullard*, No. 13-9009, 2014 WL 1910868 at *3 (1st Cir. May 14, 2014).

ETHICAL ISSUES
When is The Unbundling of Services Appropriate?

Courts have been split in determining whether or not the limited representation, or unbundling of consumer bankruptcy services is appropriate or allowable, and to what extent it is

permitted. While nothing in the Bankruptcy Code prohibits "unbundling;" whether doing so is ethical is an issue that continues to reach the courts.

The Ninth Circuit has addressed this issue twice in recent years. Most recently, in *In re Seare*, 2014 Bankr. LEXIS 3584 (9th Cir. BAP 2014), the Court sanctioned an attorney for failing to adequately represent his bankruptcy clients in a related adversary proceeding. The court acknowledged that unbundling is permissible in Nevada, and that an attorney can charge additional fees for adversary proceedings, but that it must be done in a manner consistent with the rules of ethics and responsibility. The court further noted that Seare's decision to unbundle adversary services prior to meeting with the debtors, and before he had determined what services would be "reasonably necessary" to the debtor's anticipated result, was improper. Finally the court noted that the attorney did not sufficiently explain the scope of services covered under the flat fee, and what services were available for additional fees.

Similarly, in *Hale v. U.S. Trustee*, the court appears to require that an attorney provide, at a minimum, those services "critical and necessary" to the bankruptcy case. 509 F.3d 1139, 1141 (9th Cir. 2007).

In *In re Egwim*, 291 B.R. 559 (Bankr. N.D. Georgia 2003) the court held that an attorney representing a chapter 7 debtor may not ordinarily limit the scope of that engagement. "Competent representation of a chapter 7 debtor requires that the attorney represent the debtor in all matters in the case that are necessary to the pursuit of the client's primary objectives, including the receipt of a discharge of debts and retention of exempt property. Representation to pursue those goals necessarily involves the provision of services to the debtor in adversary proceedings and contested matters that affect the debtors interests. The scope of that representation ordinarily cannot be limited". *Id.* at 579.

Similarly, in *In re Castorena*, 270 B.R. 504 (Bankr. Idaho 2001), the court stated that it would be difficult for any debtor to give truly informed consent in agreeing to limit services in a chapter 7 case due to the difficulty in predicting necessary services.

The Court in *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. Nov. 1, 2012) similarly held that unbundling pre-petition and post-petition legal services is not per se prohibited by the Model Rules of Professional Conduct, but that not all agreements to unbundle legal services are permissible. *Id.* at 589. The Court disagreed with the *Egwim* court's definition of competence and reasoned that it is better that a debtor have the assistance of an attorney for at least part of the case rather than not at all. The court held that the unbundling of services did not breach the duty of competence under the MRPC, but was unable to determine whether or not the debtors received adequate consultation regarding the unbundling.

> "As long as a Chapter as a Chapter 7 debtor's attorney competently performs those services that the debtor has hired the attorney to perform, provides an adequate consultation to the debtor concerning any limitations placed upon the services to be rendered in connection with the filing of a case, and obtains such individual's fully informed consent to such limitations, the attorney may unbundle the pre-petition services from the post-petition services by entering into a separate pre-petition agreement

> describing the services to be rendered and the fee to be paid prior to filing bankruptcy, and a separate post-petition agreement describing the services to be rendered and the fee to be paid post-petition. Stated another way, the Court holds that if the attorney's legal services for an individual debtor are unbundled between pre-petition services and post-petition services, in strict conformance with the MRPC, such unbundling of legal services does not by itself warrant any relief under § 329 of the Bankruptcy Code." *Id.* at 597.

However, we have found no authority prohibiting the unbundling of appellate representation from representation in the trial court, so long as such unbundling is deemed appropriate and not "necessary" in relation to the original bankruptcy case. Disclosure and informed consent should be obtained in the retainer agreement to ensure compliance under the MRPC.

Disclosing Adverse Authority

Ethical rules require that you disclose controlling authority that is adverse to your position even if your opponent does not. Rule 3.3(a)(2) of the American Bar Association Model Rules of Professional Conduct states that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Rule 3.3(a)(1) further states that a lawyer shall not knowingly "make a false statement of law to a tribunal or fail to correct a false statement of ... law previously made to the tribunal by the lawyer." If, however, a case is not controlling or is not "directly adverse," the lawyer is not required to disclose the case under 3.3(a)(2).

Consequently, if there is controlling adverse authority, you must cite to the case. You may then distinguish the case, or simply argue that the decision is wrong. Arguments against controlling case law, however, must meet the standards of Rule 3.1, and must not be either factually or legally frivolous. A position is not frivolous if the lawyer can make a good faith argument that the facts are as claimed or that the present law should be changed. While the overturning of controlling precedent is not done lightly, it does happen, and an argument against controlling authority can be made without violating the rules of professional conduct as long as the adverse case is cited and the argument is not frivolous. *See Brown v. Board of Education*, 347 U.S. 483 (1954); *see also In re Grossman's Inc.*, 607 F.3d 114 (3d Cir. 2010) (overruling *Avellino & Bienes v. M. Frenville Co. (Matter of M. Frenville Co.)*, 744 F.2d 322 (3d Cir. 1984).

Venue Shopping

28 U.S.C. § 1408 provides that debtors may file a bankruptcy in the district court for the district:

> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership. 28 U.S.C. § 1408.

This allows corporations to file for bankruptcy in a district which is either the location of its principal place of business nor where the majority of its assets are held.

The most recent example of forum shopping was seen in *In re Energy Future Holdings*, Case No. 14-10979 (Bankr. D. Del. April 29, 2014). Energy Future Holdings filed Chapter 11 in Delaware on April 29, 2014, together with 70 affiliated entities. Energy Future Holdings was a Dallas-based, privately held energy company which serves the Texas Market. While Energy Future Holdings did not have any business operations or assets in Delaware, 21 of the 71 debtor companies were incorporated in Delaware. Wilmington Savings Fund Associated, FSB, one of the debtor's secured creditors, filed a motion to transfer the case to Dallas. The Delaware bankruptcy court denied the motion, and stated that while the debtor was clearly forum shopping, doing so was not "insidious." Furthermore, the court stated that "[g]iven that it is a financial restructuring and given that the parties are in the Northeast, I think that favors Delaware."

Legislation has been proposed to prevent forum shopping, including the Chapter 11 Bankruptcy Reform Act of 2011, H.R. 2533 (Introduced July 14, 2011, 112th Congress, 2011-2013), which would require a debtor to file a bankruptcy petition in the district where either the debtor's principal place of business or principal assets are located. However, none of the proposed legislation has been successful.

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Recoupment - A Tale of Four Circuits

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I. Recoupment in Four Circuits

Almost like reconciling American football, European football, Canadian football and Australian football, there are four circuits that have spoken about "recoupment" using a similar definition but with somewhat different outcomes.

> "Recoupment allows a defendant to reduce the amount of a plaintiff's claim by asserting a claim against the plaintiff which arose out of the same transaction to arrive at a just and proper liability on the plaintiff's claim. *Collier on Bankruptcy* para. 553.03 (15th ed. 1984). In contrast, setoff involves a claim of the defendant against the plaintiff which arises out of a transaction which is different from that on which the plaintiff's claim is based. Id." *In re Holford*, 896 F.2d 176, 178 (5th Cir. 1990).

The Circuit Court opinions use this similar definition. The primary divergence is what is included in the "same transaction."

The theory behind recoupment being separate and apart from setoff is based on the "same transaction" distinction. While setoff rights are recognized under 11 U.S.C. § 553 and specifically stayed by 11 U.S.C. § 362(a)(7) "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor", a recoupment is viewed as a reduction or defense to the very claim being asserted "in the same transaction."

II. 5th Circuit - *In re Holford*, 896 F.2d 176 (5th Cir. 1990).

A. "Holford used rental payments due under the lease to recoup losses caused by fraud in the inducement of that same lease; clearly, the two amounts arose out of the same transaction." (p. 178).

B. The 5th Circuit allowed recoupment even though it involved recouping unliquidated fraud damages from rental payments under the very lease that was allegedly involved in a fraudulent inducement action.

C. The 5th Circuit also held that, unlike a setoff, recoupment is not stayed by the automatic stay of 11 U.S.C. § 362(a)(7). "The trustee of a bankruptcy estate 'takes the property subject to rights of recoupment.' That is, 'to the extent the damages equal or exceed the funds withheld, the debtor has no interest in the funds and, therefore, the stay has not been violated.' (p. 179, citations omitted).

III. 3rd Circuit - *In re University Medical Center* - 973 F.2d 1065 (3rd Cir. 1992).

A. A hospital filed its Chapter 11 petition on January 1, 1988, which became very important. The Department of Health and Human Services withheld payments for post-petition Medicare services to recover alleged overpayments for pre-petition charges.

B. The 3rd Circuit held that this was not recoupment but was an improper setoff because each calendar cost-year is subject to a separate and distinct annual audit. As such, each calendar year is considered to be a separate transaction. While

there was only one contract, the various transactions under that contract can be separate transaction.

C. As the 3rd Circuit described, Recoupment 'is the setting up of a demand *arising from the same transaction* as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim.' . . . (emphasis in original). This doctrine is justified on the grounds that 'where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations on setoff in bankruptcy would be inequitable.' (p. 1079-80, Citations omitted).

IV. 8th Circuit - *USPS v. Dewey Freight System, Inc.* - 31 F.3d 620 (8th Cir. 1994).

A. The debtor provided trucking services to the United States Postal Service under a long term contract. The debtor first tried to assume and assign the contract to another party but the USPS refused to accept an assignment. The debtor notified the USPS that it would cease performance and (predictably) the USPS secured a replacement contract with the trucking company it rejected, but at a higher price than if the contract had been assumed and assigned. The USPS sought to recoup this increased cost from the last payment due to the debtor for post-petition trucking services. That is, it sought recoup of an obligation to pay for post-petition performance against its claim for non-performance of the same contract.

B. The 8th Circuit found that, while the respective claims arose out of the same contract, they were not part of the same transaction. In a bit of understatement, it said, "Not surprisingly, given the equitable nature of the doctrine, courts have refrained from precisely defining the same transaction standard, focusing instead on the facts and the equities of each case." (p. 623).

C. In rejecting recoupment, the 8th Circuit noted that the rejection damages claim created after the contract was rejected was a pre-petition claim and the claim sought to be recouped was a claim for post-petition trucking services. "In these circumstances, it would frustrate the basic purpose of § 365 in a Chapter 11 proceeding to allow USPS to reduce the amount it owes to Debtor for postpetition services by offsetting claims that § 365 has explicitly removed from the post-petition scene. . . . We may not construe the equitable doctrine of recoupment so as to frustrate both the specific commands of § 365(g)(1) and § 502(g), and this overriding purpose of Chapter 11." (p. 625)

D. Recoupment was rejected because the USPS has no claim for post-petition non-performance before the contract is rejected and at that point, the claim is a pre-petition claim.

V. 9th Circuit - *Newbery Corporation v. Fireman's Fund Ins. Co., et al.* - 95 F.3d 1392 (9th Cir. 1996)

A. The debtor was an electrical subcontractor on projects that it abandoned prepetition. The surety company stepped in to complete the jobs and rented the debtor's equipment to complete the jobs. The surety declined to pay the rent in full and asserted a recoupment right against its rental obligation. It determined

that the claims arose from the same contract when the parties' General Indemnity Agreement was incorporated into the agreement that allowed the surety company to complete the projects using the debtor's equipment.

B. As an initial matter, the 9th Circuit rejected the argument that recoupment was limited to overpayments.

C. In deciding whether the relevant claims arose from the same transaction, the district court applied the 'logical relationship' test outlined by the Supreme Court in *Moore v. New York Cotton Exchange*, (citation omitted). In *Moore*, the Court stated that ' '[t]ransaction' ' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.' " (p. 1402)

D. The 9th Circuit concurred that there was a "logical relationship" in the payment for completing the work and the obligation under the indemnity agreement since the debtor's obligations to the surety company.

VI. Conclusion

While all four circuits accept some general precepts regarding recoupment, the doctrine turns on the facts in the specific situation. Some courts are more liberal in describing the "same transaction" while others make that analysis more problematic.

CIRCUIT SPLITS AND ETHICAL IMPLICATIONS

20th Annual Rocky Mountain Bankruptcy Conference

By

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Circuit Split on Contacts Required for Recognition of Foreign Proceeding Under Chapter 15

Two recent decisions highlight a split between the Second Circuit Court of Appeals and the bankruptcy court for the District of Delaware on what contacts with the U.S. are required to grant relief to a foreign representative seeking recognition of a foreign insolvency proceeding under Chapter 15. Specifically, the issue is whether a foreign representative filing a petition for recognition under Chapter 15 must satisfy the "eligibility" requirements of section 109(a) of the Bankruptcy Code.

Statutory and Legislative Background

Chapter 15 provides a bankruptcy court with authority to recognize a foreign insolvency proceeding as a Foreign Main Proceeding or Foreign Non-Main Proceeding upon petition by the debtor's foreign representative. See 11 U.S.C. §1517(b). Recognition is important because commencement of a case under chapter 15 does not automatically confer any relief on the debtor. Upon recognition of a foreign proceeding as a Foreign Main Proceeding, section 362 automatically applies. Further, sections 363, 549 and 552 apply to transfers of interest in the foreign debtor's property located in the U.S. in the same manner that such provisions would apply to transfers of estate property in Chapter 11.[2] Thus, recognition of a proceeding as a Foreign Main Proceeding[3] may be critical to a foreign representative's ability to safeguard property of the debtor in the U.S. and effect an orderly administration of U.S. assets. As expressly stated in section 1501(a), the purpose of Chapter 15 is to "incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency." Specifically included among the objectives are:

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[2] It should be noted that recognition of a chapter 15 petition does not grant to the foreign representative certain powers that would be available in chapter 11. For example, a foreign representative may not pursue preferences or chapter 5 avoidance actions against creditors, but such prohibition may not apply if the avoidance action arises under foreign law. See Tacon v. Petroquest Res., Inc. (In re Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010). Moreover, chapter 15 may not permit a foreign representative to obtain an order enforcing a reorganization plan confirmed by the foreign court without meeting the requirements of chapter 11. See Ad Hoc Group of Vitro Noteholders v. Vitro SAB de CV (In re Vitro SAB de CV), 701 F.3d 1031 (5th Cir. 2012) (denying foreign representative's request for order enforcing foreign reorganization plan under § 1507 and 1522 because plan provided for non-consensual, non-debtor releases, which would require showing of "extraordinary circumstances" in chapter 11).

[3] Certain relief is available to a foreign representative upon entry of an order recognizing the foreign proceeding as a Foreign Non-Main Proceeding, but such relief is not automatic and is limited to those assets that "should be administered in the foreign non-main proceeding or concerns information required in that proceeding." 11 U.S.C. § 1521(c).

- promoting cooperation between United States courts, foreign courts, and other competent authorities of foreign countries involved in cross-border insolvency cases
- providing greater legal certainty for trade and investment
- fair and efficient administration of cross-border insolvencies
- protection and maximizing foreign debtors' assets and
- rescuing troubled companies to preserve investment and employment

11 U.S.C. § 1501(a). The legislative history of Chapter 15 suggests that its purpose is not necessarily solely to protect assets of a debtor company located in the United States. Chapter 15 is intended to be the exclusive gateway for a foreign representative to access the U.S. courts. See H.R. Rep. No. 109-31(l), at 110 (2005).

Section 109(a) of the Bankruptcy Code provides:

> Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor *under this title*.

11 U.S.C. § 109(a) (emphasis added). The italicized language is part of the basis for the split in the decisions discussed below. Section 103(a), in turn, provides, "this chapter … appl[ies] in a case under chapter 15." For the purposes of Chapter 15, section 1502(1) defines a debtor as "an entity that is the subject of a foreign proceeding." It should be noted that Chapter 15's predecessor, section 304 of the Bankruptcy Code, did not require a foreign debtor to qualify as a "debtor" under section 109(a) as a condition to seeking relief.

In re Barnet ("Octaviar I")

In a case of first impression at the circuit court level, the Second Circuit Court of Appeals held that, in addition to proving the elements required for recognition, a foreign representative had to satisfy the eligibility requirements of section 109(a) quoted above. See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet), 737 F.3d 238 (2d Cir. 2013) ("Octaviar I"). The Court in Octaviar I ruled that the debtor did not have any assets in the U.S. and, therefore, was not eligible to be a debtor under Chapter 15. In so ruling, the Second Circuit reversed the bankruptcy court's grant of recognition of foreign proceeding as a Foreign Main Proceeding.

The debtor in Octaviar I was an Australian company named Octaviar Administration Pty Ltd, which engaged in various lines of business, including travel and tourism, corporate and investment banking, funds management and structured finance and advisory services. Immediately after announcing that it would separate its financial services businesses from its travel and tourism businesses, Octaviar's share price plummeted. The decline triggered an event

of default under a credit facility provided by Fortress Credit Corporation (Australia) II Pty Limited, an affiliate of Drawbridge Special Opportunities Fund LP ("Drawbridge"). Following a sale of a portion of its travel and tourism businesses, and repaying its debt in full, the directors of Octaviar placed the company into voluntary administration in Australia. An Australian court appointed two individuals (the "Foreign Representatives") as liquidators of Octaviar. The Foreign Representatives then commenced litigation against certain affiliates of Drawbridge in Australia, alleging breaches of the Australian Corporations Act and certain equitable claims.

The Foreign Representatives sought U.S. recognition of the voluntary administration underway in Australia as a Foreign Main Proceeding, purportedly to conduct discovery against Drawbridge. Drawbridge objected on the grounds that (i) Octaviar had no domicile, place of business, or property in the U.S. and (ii) Chapter 15 could not be used solely for discovery in aid of a foreign proceeding. The bankruptcy court overruled Drawbridge's objection, holding that section 109(a)'s eligibility requirements did not apply to a Chapter 15 debtor. In so holding, the bankruptcy court looked to prior decisions of the U.S. Bankruptcy Court in In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) and the United States District Court in In re Fairfield Litig., 458 B.R. 665 (S.D.N.Y. 2011), which explicitly held that satisfaction of section 109's requirements was not required to grant recognition for purposes of allowing discovery under Chapter 15. The bankruptcy court and Second Circuit granted the parties' joint application for a direct appeal.

The Second Circuit analyzed the statutory language employed in Chapter 15 by giving the words their plain meaning. The circuit court noted that section 103(a) expressly provides that Chapter 1 "appl[ies] in a case under chapter 15." Since section 109(a)'s eligibility requirements are contained in Chapter 1, the circuit court reasoned that the eligibility requirements must be satisfied by a foreign representative seeking Chapter 15 recognition. The Foreign Representatives argued that no debtor under Title 11 was appearing before the bankruptcy court, rather the "debtor" was a debtor under a foreign proceeding. The Second Circuit rejected this and other statutory interpretation arguments. In addition, the Second Circuit rejected the Foreign Representative's argument that the purpose of Chapter 15, which includes incorporating the Model Law on Cross-Border Insolvency, would be undermined by applying section 109(a).

In re Bemarmara Consulting a.s.

A mere six days after the decision in Octaviar I, the Delaware bankruptcy reached a contrary conclusion. In a bench ruling, Judge Kevin Gross ruled that section 109(a) does not apply in chapter 15. See In re Bemarmara Consulting A.S., No. 13-13037(KG), Hr'g Tr., at 9:11-18 (Bankr. D. Del. Dec. 17, 2013). The Bemarmara case involved a debtor in a Czech proceeding. The foreign representative sought recognition of the Czech proceeding as a Foreign Main Proceeding. Terex USA, LLC ("Terex"), a plaintiff in a case pending against Bemarmara, among other defendants, objected to the recognition and potential stay of the litigation. Terex argued, among other reasons, that recognition should be denied because Bemarmara lacked assets located in the U.S.

In his oral ruling from the bench, Judge Gross acknowledged the very recent decision of the Second Circuit in Octaviar I. Declining to follow Octaviar I, Judge Gross noted that "the decision of the Second Circuit is not controlling on this Court ... and this Court does not agree with the decision of the Second Circuit." Hr'g Tr., at 8:22-25. Further, Judge Gross offered, "it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with [the decision in Octaviar I]." Id. at 8:25-9:2. Judge Gross reasoned that a foreign representative, not the debtor, petitions a bankruptcy court for recognition. Additionally, Judge Gross noted, "there is nothing in [the] definition [of "debtor" in Section 1502 which reflects upon a requirement that [a] Debtor have assets." Id. at 9:15-17. Thus, Judge Gross appeared to have sided with the statutory interpretation arguments asserted by the Foreign Representatives in Octaviar I. In fact, the Judge Gross went even further, acknowledging the position of some commentators that there is a scrivener's error and that the intent was that section 109(a) not apply to Chapter 15 at all.

In re Octaviar Admin. Ply Ltd. ("Octaviar II")

Following the Second Circuit's decision in Octaviar I, the Foreign Representatives for Octaviar filed a second petition with the U.S. Bankruptcy Court for the Southern District of New York. This time, in light of the controlling decision of the Second Circuit, the bankruptcy court determined that the Foreign Representatives satisfied section 109(a). See In re Octaviar Admin. Pty Ltd., 511 B.R. 361 (Bankr. S.D.N.Y. 2014) ("Octaviar II").

Judge Shelley Chapman wrote that the potential claims and causes of action against Drawbridge and other U.S. entities, although intangible, constitute "property" for the purpose of satisfying section 109(a)'s eligibility requirement. The bankruptcy court noted that the Foreign Representatives met their burden with respect to eligibility because, prior to filing the second petition for recognition, the Foreign Representatives had commenced action against Drawbridge in federal and state court. Drawbridge renewed its objection on the grounds that the causes of action were property located in Australia because the debtor was domiciled there. The bankruptcy court rejected this argument, finding that the causes of action were appropriately characterized as property located in the United States because the defendants in the litigation were located in the U.S. and the lawsuits included allegations that funds had been transferred to the U.S.

In addition, although the bankruptcy court acknowledged that it did not need to reach the issue, it found that a $10,000 retainer deposited with the Foreign Representatives' counsel prior to filing the second petition for recognition also satisfied section 109(a). Rejecting Drawbridge's argument that the Foreign Representatives were attempting to "manufacture" eligibility, the bankruptcy court acknowledged the line of cases holding that a pre-petition deposit or retainer can satisfy section 109(a). See, e.g., In re Cenargo Int'l PLC, 294 B.R. 571, 603 (Bankr. S.D. N.Y. 2003); In re Yukos Oil Co., 321 B.R. 396, 401-03 (Bankr. S.D. Tex. 2005); In re Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del. 2000).

Potential Impact of Octaviar I

The significance of the Second Circuit's decision has to be called into question, particularly in light of Octaviar II. Judge Chapman's subsequent decision arguably mooted any meaningful impact of Octaviar I. If courts accept a broad interpretation of section 109's requirement that a debtor have property located in the United States to cover claims and causes of action, as did the bankruptcy court in Octaviar II, then Octaviar I may have little to no impact on future chapter 15 cases in the Second Circuit. In fact, this appears to be the trend in the short time since the Second Circuit's decision in Octaviar I. After Judge Chapman's decision in Octaviar II, Judge Stuart Bernstein, in In re Suntech Power Holdings Co., held that an account established ostensibly to satisfy section 109(a)'s eligibility requirement, which account was not even held in the name of the debtor, nonetheless qualified as "property" located in the U.S. See In re Suntech Power Holdings Co., No. 14-10383 (SMB), 2014 Bankr. LEXIS 4748, at *26. Responding to the argument that the foreign representatives' conduct in establishing the account on the eve of filing was improper, Judge Bernstein noted (possibly in a rebuke to the Second Circuit's decision in Octaviar I),

> Interpreting the Bankruptcy Code to prevent an ineligible foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests and rescue financially troubled businesses.

Id. at *27.

The takeaway from the subsequent decisions of the bankruptcy courts in the Southern District of New York appears to be that, with minimal pre-petition planning, foreign representatives might satisfy section 109(a)'s eligibility requirement. Arranging to open a U.S. bank account, transferring assets to a third-party (such as providing its attorney a retainer) or otherwise creating a nominal asset located in the United States should each satisfy the threshold (for now). Moreover, even in the absence of tangible assets located in the U.S., the decision in Octaviar II suggests that potential claims against U.S. defendants would satisfy section 109(a). There are few reasons to seek chapter 15 protection other than to protect U.S. assets or to commence litigation against U.S. defendants. Thus, foreign representatives might need not take any additional pre-filing action to establish "liquid" U.S. assets, unless a belt and suspenders approach is desired.

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By

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US Bankruptcy Court (N.D. Okla); Tulsa

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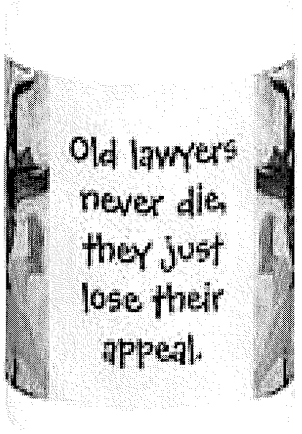

(Or, How to Lose Your Appeal Without Really Trying)
Prepared for the 20th Annual Rocky Mountain Bankruptcy Conference Presented by the American Bankruptcy Institute
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Introduction

Have you noticed that my seminar papers tell you the wrong way to do things?[1] That probably says a lot about me. As all of us old bankruptcy lawyers know, when you deal with transactions that have gone bad, you learn what not to do the next time, and how to avoid having history repeat itself. Maybe that is why so many bankruptcy lawyers become transactional lawyers at some point in their careers.[2]

The same thing is true when it comes to appeals. Having been on the Bankruptcy Appellate Panel of the Tenth Circuit for almost fifteen years, I have read lots of briefs, heard a ton of oral arguments, and done my share of consensus building. While I can't tell you what will always work, I can tell you what usually doesn't.[3] One other thing I can tell you is that a lot of appeals fail for the same few reasons. Many of these appeal killers are avoidable. Some are not. Most are things you should be aware of when you file your appeal.

What follows is a discussion of the worst appeal killers I and my BAP colleagues have seen over the years.[4] Hopefully seeing what doesn't work will help you focus on what does.

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[1] Remember "How to Lose Your Case Without Really Trying?" Sure you do.

[2] It's either that or the liberalization of the rules on venue. How much time do you want to spend in New York or Delaware anyway?

[3] If I knew how to win every appeal, I wouldn't tell you for free. I would charge for my services, and confer with anyone who hired me by video conference from my palace in Aruba.

[4] When I began this endeavor, I sent an e-mail to all of our BAP judges asking for input. They were more than happy to oblige, on the sole condition that their specific contributions remain totally anonymous. No problem.

Appeal Killer No. 1: Show Up at the Wrong Time

The quickest way to lose an appeal is by failing to timely file your notice of appeal. It probably sounds so simple that you think I'm mentioning it just to meet the minimum page requirement for this seminar paper,[5] but it happens and it happens often. In part, this is because lawyers assume that the time for filing a notice of appeal in a bankruptcy case is the same as the time for filing a notice of appeal from district court to the court of appeals. Or they assume that the deadlines for filing a notice of appeal are the same in federal court as in state court. Wrong on both counts.

Let's start with Federal Rule of Bankruptcy Procedure 8002(a):

> **Rule 8002. Time for Filing Notice of Appeal**
>
> (a) IN GENERAL.
>
> (1) Fourteen-Day Period. Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.
>
> (2) Filing Before the Entry of Judgment. A notice of appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry.
>
> (3) Multiple Appeals. If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.
>
> (4) Mistaken Filing in Another Court. If a notice of appeal is mistakenly filed

[5] As far as we know, there is no page minimum. This isn't 8th grade English class.

> in a district court, BAP, or court of appeals, the clerk of that court must state on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so stated.[6]

You have 14 days from the date of the adverse judgment to file the appeal.[7] The filing of a notice of appeal is ***jurisdictional***.[8] If you miss the deadline, you're done. Game over. The appellate court cannot hear the appeal, even if the judges want to listen to you.

Some motions stop the 14 day period from running. They are set out in Rule 8002(b)(1):

> If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> > (A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;
> > (B) to alter or amend the judgment under Rule 9023;
> > (C) for a new trial under Rule 9023; or
> > (D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.[9]

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[6] Fed. R. Bankr. P. 8002(a) (effective December 1, 2014). Be careful with the new rules. A lot of the numbers have changed, and things aren't where they used to be.

[7] We use "adverse judgment" because we assume that if you win, you're not going to appeal. That being said, I can remember at least one occasion where a *pro se* litigant appealed a decision in his favor. He tended to appeal every decision. Old habits die hard.

[8] *Emann v. Latture (In re Latture)*, 605 F.3d 830 (10th Cir. 2010) (failure to file timely notice of appeal from bankruptcy court's order is jurisdictional defect); *In re Higgins*, 220 B.R. 1022 (10th Cir. BAP 1998) (time limits established for filing a notice of appeal are "mandatory and jurisdictional").

[9] Fed. R. Bankr. P. 8002(b)(1).

The only other way to extend the time for filing a notice of appeal is to ask for an extension.

Such a request is governed by Rule 8002(d):

> EXTENDING THE TIME TO APPEAL.
> (1) When the Time May be Extended. Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion that is filed:
>
> (A) within the time prescribed by this rule; or
> (B) within 21 days after that time, if the party shows excusable neglect.
>
> (2) When the Time May Not be Extended. The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:
>
> (A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;
> (B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;
> (C) authorizes the obtaining of credit under § 364 of the Code;
> (D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;
> (E) approves a disclosure statement under § 1125 of the Code; or
> (F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.
>
> (3) Time Limits on an Extension. No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later. [10]

Read the rule closely; depending on the nature of the judgment or order entered, an extension of time to appeal may not be possible. Always be careful: even when an extension may be granted, the granting of such an extension is left to the discretion of the bankruptcy judge.

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[10] Fed. R. Bankr. P. 8002(d).

It is not a given that such a request will be granted. You file such a motion at your own risk.

Moreover, the bankruptcy judge is the only one with authority to grant an extension.[11] An appellate court is limited to reviewing the bankruptcy court's decision under the abuse of discretion standard. This means the bankruptcy court's decision will be reversed only if the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. Although there is no standard in Rule 8002(d)(1) governing the bankruptcy court's decision when the motion for extension is filed within the 14-day period set forth in Rule 8002(a), such motions are not automatically granted and depend on the facts and circumstances of each case. Further, when the motion is filed outside of the 14-day period, Rule 8002(d)(2) circumscribes the bankruptcy court's discretion because the motion to extend may be granted only when the movant demonstrates excusable neglect. Two recent cases drive these points home.

In *Rayner v. Reeves*,[12] the debtor sought to appeal the bankruptcy court's summary judgment in favor of creditors determining their state court judgment against him to be nondischargeable. Debtor filed his motion for extension of time to appeal the nondischargeability judgment one day before the Rule 8002(a) deadline for filing the notice

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[11] *In re Poddar*, 507 F. App'x 773 (10th Cir. 2013) (only bankruptcy court, not district court or court of appeals, had authority to extend period for filing appeal based on excusable neglect).

[12] 463 B.R. 143 (Table), 2011 WL 5909202 (10th Cir. BAP CO-11-035 unpublished opinion issued November 28, 2011), *aff'd* 502 F. App'x 776 (10th Cir. 2012).

of appeal, asking the bankruptcy court to extend the deadline a period of 21 days. The motion for extension, filed by debtor's trial counsel, stated that the debtor was consulting with an attorney who handles bankruptcy appeals before filing a notice of appeal. The bankruptcy court denied the motion for extension of time to appeal based upon: 1) the fact that the litigation between these parties had been pending for over ten years; 2) debtor had a demonstrated history of delay in the litigation; and 3) trial counsel for debtor had considerable appellate experience. The denial was affirmed by the BAP and the Tenth Circuit, with both courts concluding that the bankruptcy court had not abused its discretion. Both courts relied upon a 1998 decision of the Bankruptcy Appellate Panel, *In re Higgins*,[13] where the court stated that

> The fact that [creditor] filed her motion for extension within the initial [fourteen]-day appeal time does not automatically mean the extension will be granted. The word "may" contained in the first sentence of Fed. R. Bankr. P. 8002(c) [now found in 8002(d)] clearly indicates that the court has discretion in passing on such motions. If such extensions were to be automatically granted, the rule would state "shall."[14]

The message is clear: bankruptcy courts have the discretion to deny motions to extend the time for filing a notice of appeal.

In *Freeman v. Loomas (In re Loomas)*,[15] the debtor sought to appeal the bankruptcy

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[13] 220 B.R. 1022 (BAP 10th Cir. 1998).

[14] *Id.* at 1025.

[15] 2013 WL 74477 (Bankr. Colo. 2013), *aff'd* 10th Circuit BAP CO-13-017 (unpublished opinion issued October 15, 2013).

court's summary judgment in favor of his former wife finding certain debts to be nondischargeable. Unlike *Reeves*, however, the debtor filed his motion for extension of time to appeal 34 days after entry of the order, or one day before expiration of the 21-day period in Rule 8002(c)(2).[16] According to debtor, he did not receive notice of the summary judgment until after the expiration of the 14-day period for appeal by right, notwithstanding that the bankruptcy court docket sheet indicated certificates of notice filed by the Bankruptcy Noticing Center certifying that copies of the order and judgment were sent to debtor by first class mail 12 days before expiration of the appeal period.

The motion for extension was denied by the bankruptcy court. The BAP affirmed because the debtor did not demonstrate excusable neglect. Rule 9022(a) provides that lack of notice of the entry of a judgment does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002. Therefore, lack of notice or delayed notice alone does not constitute excusable neglect, because equating lack of notice (or delayed notice) with excusable neglect would render Rule 9022(a) meaningless. Additionally, failure to receive notice of the entry of a judgment is no defense to an untimely appeal. Litigants have an affirmative duty to monitor the dockets to keep apprised of the entry of orders that they may wish to appeal. In other words, you snooze, you lose.

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[16] Which is now Rule 8002(d)(2). Like I said, they have moved a lot of stuff around. That's why those rules people get the big bucks.

Appeal Killer No. 2: Show Up at the Wrong Place

This is not an appeal killer, but it is perceived as such. As you all probably know, in the five circuits with Bankruptcy Appellate Panels,[17] you have a choice: your appeal can be heard by the BAP or by the district court. If you don't make the choice, 28 U.S.C. § 158(c)(1) makes it for you: absent a timely election to proceed in district court, your appeal will be automatically heard by the BAP.[18] The procedure for filing an election is found in Rule 8005(a):

> FILING OF A STATEMENT OF ELECTION. To elect to have an appeal heard by the district court, a party must:
> (1) file a statement of election that conforms substantially to the appropriate Official Form; and
> (2) do so within the time prescribed by 28 U.S.C. § 158(c)(1).[19]

The statute requires that the election be made "at the time of filing the appeal."[20] So what exactly does that mean? It's hard to say. The local rules of our BAP and the new official form provide the answer. Under BAP Local Rule 8005-1(a), an appellant's statement

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[17] If you are keeping track, the First, Sixth, Eighth, Ninth and Tenth Circuits presently have Bankruptcy Appellate Panels.

[18] 28 U.S.C. § 158(c)(1). The reasons for choosing one appellate forum over another is the subject of another seminar paper, or maybe even a law review article. The reasons for opting out of the BAP are as varied as the people who decide to opt out. The only thing we can tell you is this: reversal rates for the BAP and the district courts in the Tenth Circuit are virtually identical. There is no statistical advantage to being in either court. Indeed, the first bankruptcy judge reversed by the BAP was the Chief Judge of the BAP. Even so, he still sends me a Christmas card. Enough said.

[19] Fed. R. Bankr. P. 8005(a).

[20] 28 U.S.C. § 158(c)(1).

of election "**must be included in the notice of appeal that is filed with the bankruptcy court**.[21] The new official form contains a "check the box" election to the district court.[22] It would appear that the Tenth Circuit BAP and the new official form have solved the problem. Use the official form and check the box if you are the appellant and want to go to the district court. Failure to do so keeps your appeal before the BAP.

The rules adopted by the other BAPs on the election issue are varied. The local rules of the Ninth Circuit BAP are silent on the issue, presumably because of the new official form combining the notice of appeal and the statement of election. In the Eighth Circuit, a dispute over the timeliness of an election is ruled upon on a case by case basis.[23] None of the other BAP rules provide any more guidance on the issue.[24] Perhaps the new official form is enough.

There isn't much case law on the issue either. The two cases we found from our BAP were pretty easy calls. In *In re Health Trio, Inc.*,[25] the appellant filed its notice of appeal on

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[21] 10th Cir. BAP L.R. 8005-1(a).

[22] Official Form 17A.

[23] 8th Cir. BAP L.R. 8005(A)(a)(2) ("If any party questions the timeliness of the election, the clerk shall refer the question to a panel.").

[24] The First Circuit BAP requires that the appellant "indicate the election in the notice of appeal." 1st Cir. BAP L.R. 8005-1(b)(1). Again, the rule follows the new official form. In the Sixth Circuit, the BAP rules talk about filing the election "at the time of the filing the appeal or cross-appeal." 6th Cir. BAP L.R. 8001-3(a)(1). Not much help here.

[25] 438 B.R. 354 (Table), 2010 WL 2730534 (10th Cir. BAP 2010).

December 23, 2009, and its election to the district court six days later. The election was summarily denied, and the appeal stayed with the BAP.[26] In *In re Vickery*,[27] a notice of appeal was filed on June 19, 2012, and the appellee filed a notice of cross appeal on July 3, 2012, some 14 days later. On July 19, 2012, or 30 days after the original notice of appeal, the appellee filed his statement of election, seeking to have ***both the original appeal and the cross-appeal heard*** in the district court. The BAP found the election timely as to the original appeal and untimely as to the cross-appeal. The original appeal went to the district court, but the cross-appeal stayed with the BAP.[28] It was the perfect appellate result. The law was correctly applied, and no one was really happy.

Whatever you do, don't ignore the BAP, or try to proceed in two courts at once. Bad things are likely to happen. Really bad things. Take the case of *Woodman v. Concept Construction LLC (In re Woodman)*.[29] In *Woodman*, on December 31, 2009, the debtor prematurely filed a notice of appeal with respect to a judgment that had not yet been entered. Additionally, debtor improperly filed the notice in the district court, which was transferred to the clerk of the bankruptcy court on January 4, 2010. On January 6, 2010, the BAP court clerk: 1) entered debtor's appeal on its docket; 2) issued an order denying election to the

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[26] So much for the holiday spirit. Bah. Humbug.

[27] 488 B.R. 680 (BAP 10th Cir. 2013).

[28] *Id.* at 684-85.

[29] 698 F.3d 1263 (10th Cir. 2012).

district court because debtor's election was not contained in a separate writing, as required under Fed. R. Bankr. P. 8001(e); and 3) sent a letter to the parties directing them to notify the BAP when the judgment had been entered. The bankruptcy court entered the judgment later on January 6, 2010, the effect of which was to perfect the appeal before the BAP.[30] The debtor, unaware of the entry of judgment, filed a "voluntary withdrawal of appeal" with the bankruptcy court on January 8, 2010. Debtor thus thought he was free and clear of the BAP. Not so fast.

On January 13, 2010, debtor filed with the bankruptcy court a "renewed notice of appeal," together with a separate election to proceed before the district court. The debtor ignored the BAP, and the BAP appeal was subsequently dismissed for failure to prosecute. A few weeks later, the appellee filed a motion to dismiss the appeal in the district court, arguing that debtor was proceeding in two appellate forums at the same time. The district court declined to dismiss the appeal, reached the merits of the case, and affirmed the bankruptcy court's judgment. The debtor appealed to the Tenth Circuit.

The Tenth Circuit determined that debtor's notice of appeal to the district court was a nullity. Specifically, the Tenth Circuit found that the "voluntary withdrawal of appeal" filed by the appellant with the BAP did not comply with Bankruptcy Rule 8001(c)(2), and

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[30] *See* former Fed. R. Bankr. P. 8002(a) ("A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof.") (superceded December 1, 2014).

did not eliminate the appeal to the BAP.[31] Since the appeal remained pending before the BAP (until it was dismissed for lack of prosecution), the district court did not have jurisdiction to review the decision of the bankruptcy court.[32] Accordingly, the Tenth Circuit Court of Appeals vacated the district court's judgment and remanded the case with

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[31] The rule provided that

> If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court or the clerk of the bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

Fed. R. Bankr. P. 8001(c)(2) (superceded effective December 1, 2014, by Fed. R. Bankr. P. 8023). The withdrawal was neither a joint agreement nor a motion. The Court of Appeals for the Tenth Circuit is a stickler for the rules.

[32] Or, as the Circuit Court put it:

> We therefore conclude that Mr. Woodman's second notice of appeal was a nullity. He could not file a second appeal so long as he had a pending appeal before the BAP. Perhaps he could file a second appeal if the first were dismissed without prejudice (although it would have to be soon enough to allow him to file a timely second appeal). But there was no such dismissal. Mr. Woodman's only effort to dismiss his appeal was his "Notice Voluntary Withdrawal of Appeal." But it was filed after his original notice of appeal became effective as a result of entry of the bankruptcy court's judgment, and it did not comply with the bankruptcy rules. Because the notice of appeal to the district court was a nullity, that court did not have jurisdiction to review the decision of the bankruptcy court.

Woodman, 698 F.3d at 1267.

instructions to dismiss the appeal.[33]

What, then, is the practitioner to make of all of this? My advice is better safe than sorry. If you want to have your appeal heard in the district court, use the official form and check the box. If you are stuck in the good old days (pre-December 1, 2014), you act at your own peril. The first thing you should file is your notice of appeal. The next thing you should file is your statement of election. The time between those two filings should be measured in minutes. Not days, not weeks, not hours. Minutes. The more time between the two filings, the greater the risk your election will be ineffective. Who wants to explain that to a client? Better yet, just update your forms and file one document.

Another Option - Go Directly to the Circuit (Do Not Pass Go, Do Not Collect $200)[34]

Maybe you are one of those lawyers that does not wish to trifle with the appellate riff-raff that is the BAP or the district court.[35] You may have another option: direct appeal to the circuit court of appeals. The possibility for direct appeals to the court of appeals was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The potential for direct appeal encompasses all appealable and potentially appealable orders , including

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[33] In other words, one reviewing court (the district court) affirmed and the other reviewing court (the court of appeals) refused to consider any possibility of reversal. We bankruptcy judges call that a "win win" situation.

[34] Two hundred dollars? Who are we kidding?

[35] Fortunately for me, the judges of the United States District Court for the Northern District of Oklahoma are good sports with great senses of humor. Or should I say, in the unlikely event they ever read this, I sure hope they are. As for my colleagues on the BAP, I just hope they won't retaliate by giving me a wedgie.

final orders, interlocutory orders increasing or reducing a Chapter 11 debtor's exclusive period under § 1121, and with leave of court, other interlocutory orders.

Direct appeals are not easy, and (at least in this judge's experience), rarely granted. You must begin the process by making a certification of one of the following items:

> (a) the order you seek to directly appeal involves:
>
> > (I) a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court, or
> >
> > (ii) a matter of public importance; or
>
> (b) the order involves a question of law requiring resolution of conflicting decisions; or
>
> (c) an immediate appeal of the order may materially advance the progress of the case or proceeding in which the appeal is taken.[36]

Maybe you can help me with the first requirement. If there were ***controlling*** authority from the Court of Appeals (assuming the bankruptcy judge followed that controlling authority, as she or he is beholden to do), what is the purpose of the appeal? Do you simply want the Court of Appeals to remind you that they have already decided this, and that they got it right? I really don't get that one. As for the other two, they are self-explanatory, but they have been difficult to establish.

A certification for direct appeal may be made by the bankruptcy court, the district court, the bankruptcy appellate panel, or all the appellants and appellees (if any) acting

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[36] 28 U.S.C. § 158(d)(2)(A). *See also* Fed. R. Bankr. P. 8006.

jointly. The Court of Appeals is not required to grant the request. It has the discretion to have the intermediate appellate court (the district court or the BAP) hear the appeal first. There are time limits. A request for the certification must be made not later than 60 days after entry of the order sought to be appealed.[37] A notice of appeal must be timely filed or there is no appeal going anywhere.

We took a look at all of the cases we could find where the United States Court of Appeals for the Tenth Circuit granted a direct appeal.[38] We hoped that the Tenth Circuit would outline the factors considered in granting a request for direct appeal. No such luck. In cases where direct appeal was granted, the Court did not discuss why the direct appeal was granted. The best we can do is summarize the cases and try to discern a pattern (if any). What follows is a summary of the cases where direct appeal was granted.

1. ***In re Jones.***[39] In *Jones*, creditors that had provided purchase-money financing within 910 days of the debtors filing for Chapter 13 relief objected to proposed plans as improperly failing to provide for payment of postpetition interest on creditors' claims. The bankruptcy court confirmed the plans over the objections, and creditors appealed. The BAP granted the creditors' motion requesting certification for direct appeal, which was granted by the Tenth Circuit. The Tenth Circuit held that in light of BAPCPA's "hanging paragraph" to § 1325(a), which makes the bifurcation provision of § 506 inapplicable to "910 vehicle" claims, a creditor secured by a "910 vehicle" is fully secured and entitled to interest calculated to ensure that it receives the

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[37] 28 U.S.C. § 158(d)(2)(E). *See also* Fed. R. Bankr. P. 8006.(f)(1).

[38] We could not figure out a way to check all of the bankruptcy court dockets in the Tenth Circuit to see how many requests for direct appeal were denied and/or the reasons given for such denial.

[39] 530 F.3d 1284 (10th Cir. 2008).

present value of its claim. Because the plans did not provide for payment of interest on creditors' claims, they failed to satisfy the present value of the claim requirement, the Tenth Circuit reversed and remanded the bankruptcy court's decision.

2. ***In re Hunt.***[40] In *Hunt*, the creditor objected to a proposed plan, arguing that its security interest in the debtors' vehicle was a "purchase money security interest" for purposes of § 1325 as amended by BAPCPA, and therefore protected from "strip down" in a Chapter 13 case. The bankruptcy court overruled the creditor's objection to confirmation. The creditor appealed to the BAP and the parties then filed a certification and petition for permission to directly appeal, which the Tenth Circuit granted. The Tenth Circuit stated the question as "whether the incorporation of negative equity into certain pre-bankruptcy debtor motor vehicle financing transactions vitiates the purchase money security interest nature of those transactions for purposes of application of the creditor protection provisions of the so called hanging paragraph of 11 U.S.C. § 1325(a)." The Tenth Circuit did not, however, reach the merits, but instead dismissed the appeal as moot. Debtors filed a motion to dismiss after the vehicle in issue was totaled in an accident and their case was converted to one under Chapter 7.

3. ***In re Ford.***[41] In this Chapter 13 case, the debtors sought to bifurcate their automobile debt to creditor under 11 U.S.C. § 506(a) into secured and unsecured claims, with the unsecured claim being the portion of the debt used to discharge the negative equity in the trade-in. The creditor objected, claiming the debt bifurcation was impermissible under BAPCPA's "hanging paragraph" to § 1325(a). The bankruptcy court sustained the objection, and the parties sought an immediate appeal to the Tenth Circuit. In light of a variety of results reached by bankruptcy courts within the circuit, the Tenth Circuit granted permission for direct appeal, and answered the question it was unable to reach in *Hunt*. The Tenth Circuit affirmed the bankruptcy court, ruling that under Kansas law, the trade-in exchange was essentially a single transaction, and therefore, the expense incurred in retiring the lien on the trade-in vehicle was an expense incurred in connection with acquiring rights in the new car.

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[40] 550 F.3d 1002 (10th Cir. 2008).

[41] 387 B.R. 827 (Bankr. D. Kan. 2008), *aff'd*, 574 F.3d 1279 (10th Cir. 2009).

4. ***In re Soos.***[42] In *Soos*, the question before the bankruptcy court was whether 11 U.S.C. § 707(b)(2)(A)(ii)(I) permits an above-median-income debtor to deduct from monthly income the "ownership cost" of a vehicle allowed under the IRS local standards when the debtor's vehicle is unencumbered and the debtor makes no monthly loan or lease payments. The bankruptcy court permitted such deductions as ownership costs, and the trustee appealed. The BAP certified the direct appeal *sua sponte,* noting that: 1) the Tenth Circuit had not ruled on the issue; 2) others circuits were split on the issue; 3) the bankruptcy judges in the Tenth Circuit that had addressed the issue were split on the issue; and 4) the issue was one of "public importance." The Tenth Circuit granted the direct appeal, but then abated the appeal pending a decision from the Supreme Court. Ultimately, the Tenth Circuit reversed and remanded based on the Supreme Court's decision in *Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. 716 (2011).

5. ***In re Stephens.***[43] In *Stephens*, the issue was whether under BAPCPA's amendments to Chapter 11, an individual debtor may "cram down" a plan as "fair and equitable" under § 1129(b) where the debtor retains prepetition property and a dissenting class of creditors is not paid in full. In other words, is the absolute priority rule abrogated for individual Chapter 11 debtors? The continued applicability of the absolute priority rule came into question based on the addition of language to § 1129(b)(2)(B)(ii) that permits an individual debtor to retain property that is included in the estate under § 1115. The debtors sought confirmation of a plan that violated the absolute priority rule, and the creditors objected. The bankruptcy court confirmed the plan, and creditors appealed. The BAP certified the issue for direct appeal, noting that: 1) the Tenth Circuit had not ruled on the applicability of the absolute priority rule to individual debtors; 2) others circuits were split on the issue; 3) only one bankruptcy judge in the Tenth Circuit had addressed the issue; and 4) the issue was one of "public importance." The parties took the hint and thereafter sought direct appeal, which was granted by the Tenth Circuit. Addressing the merits, the Tenth Circuit reversed the bankruptcy court's order confirming the plan and remanded for further proceedings, concluding that Congress did not clearly indicate that past bankruptcy practices were to be eroded, and therefore individual Chapter 11 debtors were still subject to the absolute priority rule.

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[42] 427 F. App'x 728 (10th Cir. 2011).

[43] 704 F.3d 1279 (10th Cir. 2013).

6. ***In re Sandoval.***[44] In *Sandoval*, the judgment creditor, a professional bail bondsman, filed an adversary complaint, seeking a nondischargeability determination under 11 U.S.C. § 523(a)(7) with respect to debt arising from the Chapter 7 debtor's agreement to indemnify bondsman for full amount of posted bond in the event that criminal defendant failed to appear for trial. The bankruptcy court determined that the debt was dischargeable and dismissed the complaint for failure to state a claim. The creditor then appealed, and the bankruptcy court certified the case for direct appeal. The following portion of the bankruptcy court's order of certification is quite interesting:

> The Final Orders "involve[ ] a question of law as to which there is no controlling decision" of the United States Court of Appeals for the Tenth Circuit (the "Court of Appeals") or of the United States Supreme Court. *See* 28 U.S.C. § 158(d)(2)(A)(I). Accordingly, the Bondsman's appeal of the Final Orders is within the jurisdiction of the Court of Appeals, and pursuant to 28 U.S.C. § 158(d)(2)(B), this Court is required to file a certification that the appeal is eligible for a direct appeal to the Court of Appeals.[45]

The Tenth Circuit granted direct appeal and affirmed the bankruptcy court's decision, concluding that because the bail bondsman was not a governmental unit, the debt did not fall within the scope of the discharge exception for debts for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, even though the bondsman ultimately paid money to the State of Oklahoma after the criminal defendant failed to appear.

So what can we learn from these cases? Five of them have to do with BAPCPA, so that might tell you something. In many cases, there was a split of lower court authority. In the *Sandoval* case, the bankruptcy judge apparently believed she had no choice but to certify the

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[44] 2007 WL 2916522 (Bankr. N.D. Okla. 2007) (memorandum opinion certifying direct appeal); 541 F.3d 997 (10th Cir. 2008). It is worth noting that the judge in *Sandoval* was one of the BAP judges that certified direct appeal in *Stephens*.

[45] 2007 WL 2916522 at *3 (Bankr. N.D. Okla. 2007).

issue for direct appeal.[46] And, perhaps most tellingly, there has not been a direct certification in over three and one-half years, and none that we could find where the district court certified the matter for a direct appeal. Bottom line: it's a long shot at best, unless the bankruptcy or intermediate appellate court does it for you.

Appeal Killer No. 3: The Lack of a Decent Record[47]

One of the hardest things to do is convince the appellate court that the trial court committed an error of fact. Remember, findings of fact are reviewed under the "clearly erroneous" standard, which basically means that no reasonable fact finder could have reached the same decision on the same set of facts.[48] The test is not whether the judges on the appellate court would have looked at the same facts in the same way, or reached the same conclusion as the bankruptcy court.[49] The test is whether there is enough (translation: ANY) evidence to support the trial court's finding.

The appellant has the burden of providing the appellate court with an adequate record

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[46] *See* 28 U.S.C. § 158(d)(2)(B).

[47] No, I'm not talking about whatever you may have in your MP3 collection, or on a CD, or (heaven forbid, you dinosaur) vinyl.

[48] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[49] As I write this, I cannot remember being on a BAP panel that reversed a factual finding. I have been party to discussions where the three BAP judges have said, "I don't think I would have reached the same factual conclusion, but there isn't any reversible error." That's about it.

for review.[50] The Tenth Circuit has held that "[a]n appellant who provides an inadequate record does so at his peril."[51] Put another way, if you claim that the trial court made a mistake, put up or shut up. If you don't bring the record to the appellate court, you lose.

This isn't rocket science. If you want to win at trial, you have to make the record. We won't do it for you. The same lies true when it comes to an appeal. If you don't show us the mistake, you will have a hard time convincing us there was a mistake, and you will most likely lose.[52]

Appeal Killer No. 4: Failure to Get to the Point

For the last ten years, I have posted brief writing tips on our court's website. Tip number five is one of my favorites:

> ***Shorter is better***. Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case. Weak arguments detract from the entire presentation. If you feel compelled in a particular case to include everything including the kitchen sink, maybe you ought to take another look at settling the case.

When I polled my BAP colleagues on what needed to be in this presentation, ***every judge***

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[50] *Burnett v. Sw. Bell Tel., L.P.*, 555 F.3d 906, 908 (10th Cir 2009).

[51] *Dikeman v. National Educators, Inc.*, 81 F.3d 949, 955 (10th Cir. 1996).

[52] For a few examples illustrating how not providing the appellate court with transcripts and exhibits spell doom, *see In re C.W. Mining Co.*, 431 B.R. 307 (Table), 2009 WL 4894278 (10th Cir. BAP 2009), *aff'd* 625 F.3d 1240 (10th Cir. 2010); *Hepner v. Kleinhans (In re Kleinhans)*, 431 B.R. 308 (Table), 2010 WL 1050583 (10th Cir. BAP 2010); *In re Castro*, 2012 WL 611437 (10th Cir. BAP 2012); *In re Isho*, 498 B.R. 391 (Table), 2013 WL 1386208 (10th Cir. BAP 2013).

who responded said the same thing: shorter briefs would be better and more helpful.[53] It's not because we are lazy. We are not lazy. We are busy.

There is a corollary to this rule. Be precise. An appeal is not a retrial of the entire case. The issue is not whether the appellate judge or judges would have made the same decision. The issue is whether the lower court ***got it wrong***. If they did, you ought to be able to tell us what was wrong and why it was wrong in relatively simple and straightforward terms. The longer it takes you to explain error to an appellate court, and the more obtuse your explanation, the worse your chances on appeal.

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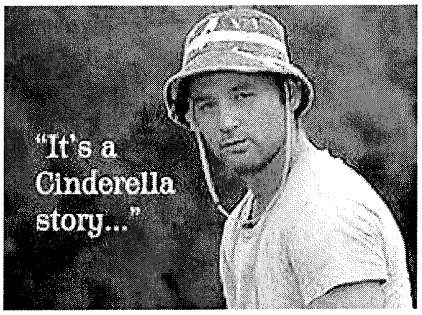
[53] If it makes you feel any better, I have learned that the same rule applies to me as well. The shorter the opinion, the more the district court (or BAP, or circuit court, for that matter) seem to like it (and by ***like***, I mean ***affirm***).

Appeal Killer No. 5: Failure to Think Like a Judge



I assume you all recognize this man – Carl Spangler, the unsung hero from the greatest golfing movie of all time: "Caddyshack." Consider this line uttered by Carl as he prepared to meet his enemy, the gopher:

> "I have to laugh, because I've often asked myself, my foe, my enemy, is an animal. In order to conquer him, I have to think like an animal, and, whenever possible, to look like one. I've got to get inside this dude's pelt."[54]

Now I would never ask any of you to consider a BAP judge your foe, or to look like an appellate court judge, but you need to think the way we do. Let me explain. We are not looking to retry the case. We are not deciding whether we would have done the same thing or reached the same result. We are looking for error. Reversible error. That's all.

When the BAP office in Denver assigns a case to a panel, they send each member of the panel (and their law clerks) copies of the order appealed from, the record, and the briefs submitted by the parties. The first thing I read is the opinion issued by the bankruptcy

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[54] *Caddyshack* (1980).

judge.[55] I want to know what the bankruptcy judge decided, the facts relied upon, and the reasoning behind his or her decision. I want to get that straight from the horse's mouth before I have the lawyers tell me what the trial court did wrong. After considering the trial court opinion, I go to the appellant's brief. In my first reading of that brief, I want to learn what it is that the trial court did wrong, and why it was wrong. In my second reading of the brief, I look to see if the record supplied by the appellant supports the allegation of error. I will then turn to the appellee's brief to see why the appellant is wrong and the trial court is right. After I have been through the briefs and looked at the portion of the record identified by the parties, I will begin discussing the case with my law clerk.

Here is how, in her own words, my BAP law clerk approaches things (the footnotes are hers as well):

> The first thing I do upon receipt of the materials for an appeal one of my judges has been assigned to is review the screening memorandum and jurisdictional checklist prepared by the BAP clerk's office.[56] I double check for timely filing of the notice of appeal, finality of the order being appealed, standing of the parties, and ripeness or mootness of the issues– all of which can be "Appeal Killers."[57] Next, I read the bankruptcy court's opinion and

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[55] If the ruling on appeal is a bench ruling, I go to the transcript and read the ruling as it was read into the record.

[56] No disrespect to the BAP clerk's office whatsoever. They are understaffed, and jurisdictional issues can be thorny to say the least.

[57] Occasionally I learn something interesting. Who knew that Christmas Eve is sometimes a federal legal holiday for purposes of Fed. R. Bankr. P. 9006(a)(6) because a president may issue an executive order declaring it one? *See* Executive Order 13633 (dated December 21, 2012). According to the LA Times, giving federal employees an extra holiday on December 24th, 2012, was a goodwill gesture to improve morale of the

> order, and then review the appellant's brief to ascertain what they assert are the issues on appeal, i.e., the alleged errors made by the bankruptcy court that require reversal. After comprehending the issues, I try to determine which issues may be dispositive and which issues are merely gratuitous.[58] Now having 12 years of experience as an appellate law clerk, and never having worn two hats–trial and appellate–simultaneously or otherwise,[59] I'm getting pretty good at separating the wheat from the chaff so that answering unnecessary questions and giving advisory opinions can be avoided.[60] The next, and perhaps most important step, is to determine the appropriate standard of review for each issue. And as you can tell from what follows below, in the appellate world, the standard of review is ***KING***.[61]

Well said. As you may have noticed, great minds think alike.[62]

We are looking for error. Our review is limited by the record that you give us, and the standard of review for the particular matter being reviewed. Let's quickly review the three standards of review. Findings of fact are reviewed under the clearly erroneous standard. A

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federal workforce in light of lengthy pay freezes. Yippee.

[58] In other words, the proverbial "kitchen sink" mentioned in Appeal Killer No. 4 above. Keep in mind that justice requires a fair trial or hearing, not a perfect one.

[59] Never been a trial lawyer. Never been a trial law clerk. Having just admitted to spending no time in the trenches, I hope you trial lawyers do not feel as stated by a judge of the Texas Court of Criminal Appeals, "that appellate judges [and their law clerks] watch from on high the legal battle fought below, and when the dust and smoke of the battle clears they come down out of the hills and shoot the wounded." *Black v. State*, 723 S.W.2d 674, 677 n.1 (Tex. Crim. App. 1986) (Onion, P.J., dissenting).

[60] We're all familiar with the saying "bad facts make bad law."

[61] I've heard it said that knowing the standard of review is what separates appellate lawyers from trial lawyers.

[62] sarcasm (n.): the use of words that mean the opposite of what you really want to say especially in order to insult someone, to show irritation, or to be funny. www.miriam-webster.com/dictionary/sarcasm. Just in case you were wondering, I was going for funny.

factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[63] This is a pretty tough standard, as previously discussed. Many decisions, such as whether to grant an extension of time or to award fees or punitive damages, are reviewed under the "abuse of discretion" standard. "Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[64] The United States Court of Appeals for the Tenth Circuit has held that a trial court abuses its discretion when it makes "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'"[65] Another daunting standard. The only review where the appellate court starts over is in dealing with questions of law. All legal conclusions are reviewed *de novo*.[66]

Translation: if the bankruptcy court makes a finding of fact supported by any evidence in the record, it is likely to be left alone, unless the reviewing panel says to itself,

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[63] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[64] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

[65] *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

[66] *Miller v. Bill and Carolyn Ltd. P'ship (In re Baldwin)*, 593 F.3d 1155, 1159 (10th Cir. 2010).

"no one in their right mind could have made such a finding."[67] If the bankruptcy court has discretion in an area, abuse means abuse. The only unfettered second bite at the apple lies with questions of law.

Appeal Killer No. 6: During Oral Argument, Stay on Script, No Matter What

Many of you know that I perform regularly in community theaters around Tulsa. As you might expect in any live performance, things don't always go perfectly. One of the things all actors fear is forgetting their lines, or (almost as bad) having another actor forget his or her lines or jump ahead a page or two in the script. When that happens, you have to: (1) figure out how to get the play back on script; and (2) get the audience any critical information that has been omitted. Nobody wants to go see "*The Wizard of Oz*" and have Dorothy magically transported to Lodgepole, Nebraska instead of Oz.[68]

Unfortunately, many lawyers come to oral argument with the same mind set. They have a script, and, by golly, they are going to get through it come hell or high water (or an inquisitive judge). The problem with such an approach is that it is not persuasive. Most BAP panels that I have been on are "hot:" they come well versed in the facts and the issues, and full of questions. We don't ask questions just to watch you squirm; if you are being asked a question, it is most likely because we are struggling with your argument. There may even

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[67] We get more appeals than you might think where the appellant acknowledges that two witnesses testified to two different versions of the same story, and the trial court committed error by believing the wrong one. Good luck with that.

[68] If you have been to Lodgepole, Nebraska (as I have), you know what I'm saying. If you haven't been to Lodgepole, trust me.

be a split view among the panel on the issue. Staying on script and ignoring the question (it happens, believe me) may be more comfortable, but it is not persuasive.

6627.5