Alexander L. Paskay Memorial Bankruptcy Seminar

Appeals

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CONCURRENT SESSION

2024

Jurisdiction

For any appeal, the threshold issue is the district court's jurisdiction to entertain the appeal. *See In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008). A federal district court has jurisdiction to entertain appeals from the bankruptcy court from (1) final judgments, orders, and decrees; (2) interlocutory orders increasing or reducing the time periods under 11 U.S.C. § 1121; and (3) all other interlocutory orders and decrees with leave of court. 28 U.S.C. § 158(a).

Final-Order Appeals

Final-order appeals are governed by 28 U.S.C. § 158(a)(1), which addresses the right to immediate appeal from the bankruptcy court to the district court from "final judgments, orders, and decrees," and Federal Rule of Bankruptcy Procedure 8001(a).

"[A] final judgment or order is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *In re Celotex Corp.*, 700 F.3d 1262, 1265 (11th Cir. 2012) (internal quotation marks and citations omitted). To qualify as final, the proceeding and the appealed order must "determine[ ] and seriously affect[ ] [the] substantial rights [of a party] and can cause irreparable harm if the losing party must wait until bankruptcy proceedings terminate before appealing." 1 Collier on Bankruptcy ¶ 5.08; *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 590 (2020).

"Finality is given a more flexible interpretation in the bankruptcy context" because "bankruptcy is an aggregation of controversies and suits." *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008); *see also In re Bailey*, Case No. 22-10819, 2024 WL 136907, at *4 (11th Cir. Jan. 12, 2024) (finding, in post-judgment proceedings, revival judgment to be a final order). However, this flexibility "does not render appealable an order which does not finally dispose of a claim or adversary proceeding." *In re Donovan* at 1136. Rather, final orders "completely resolve all the

issues pertaining to a discrete claim, including issues as to the proper relief." *In re Saber*, 264 F.3d 1317, 1324 (11th Cir. 2001) (citing *In re Culton*, 111 F.3d 92, 93 (11th Cir. 1997)); *In re Atlas*, 210 F.3d 1305, 1308 (11th Cir. 2000).

There are exceptions to finality: (1) the collateral order doctrine (*Cohen* doctrine); (2) the *Forgay-Conrad* rule; and (3) the marginal finality rule (the *Gillespie* rule).

Interlocutory Appeals

In the Eleventh Circuit, a district court functions as an appellate court commencing first-level review of a bankruptcy court's order or judgment. *See In re Glados,* 83 F.3d 1360, 1362 (11th Cir. 1996). 28 U.S.C. § 158(a)(3), the statutory basis for interlocutory appeals from a bankruptcy court to a district court, "does not indicate a standard a district court should use in determining whether to grant leave to appeal." *In re Ichinose,* 946 F.2d 1169, 1177 (5th Cir. 1991). District courts, including those in the Eleventh Circuit, universally apply the standards set forth in 28 U.S.C. § 1292(b) in determining whether to accept an appeal of an interlocutory order. *See, e.g., In re Seminole Walls & Ceilings Corp.,* 388 B.R. 386, 390-91 (M.D. Fla. 2008).

To qualify for leave to file an interlocutory appeal under 28 U.S.C. § 1292(b), a litigant must demonstrate: (i) a controlling question of law; (ii) over which there is a substantial ground for difference of opinion among courts; and (iii) the immediate resolution of the issue would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). "This standard is conjunctive, meaning that if any elements are not satisfied, the Court must deny interlocutory review." *In re Yormak,* No. 2:17-cv-73-FtM38, 2017 WL 2645601, at *2 (M.D. Fla. June 19, 2017). The Eleventh Circuit has characterized this standard as a "high threshold," stating that "[m]ost interlocutory orders do not meet this test." *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.,* 549 F.3d 1344, 1359 (11th Cir. 2008).

Liberal use of section 1292(b) constitutes bad policy because it tends to promote piecemeal appeals. *See McFarlin v. Canseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Stated differently, interlocutory appeals "are inherently disruptive, time-consuming, and expensive," which makes them "generally disfavored." *Prado-Steiman ex rel. Prado v. Bush,* 221 F.3d 1266, 1276 (11th Cir. 2000) (cleaned up). "§ 1292(b) certification is only proper "in exceptional cases where decision of the appeal may avoid protracted and expensive litigation ... where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided." *McFarlin,* 381 F.3d at 1256.

A "controlling question of law" arises where the appellate court can rule on a controlling question of pure law without having to search deep into the record in order to discern the facts of the underlying case. *See Allapattah Servs., Inc. v. Exxon Corp.,* 333 F.3d 1248, 1252-53 (11th Cir. 2003). A "case specific inquiry does not present a pure question of law but a mixed one of law and fact." *Nice v. L-3 Commc'ns Vertex Aerospace, LLC,* 885 F.3d 1308, 1313 (11th Cir. 2018).

Where the appellate court is in "complete and unequivocal" agreement with the district court, a "substantial ground for difference of opinion" does not exist. *McFarlin*, 381 F.3d at 1258 (quoting *Burrell v. Bd. of Trustees of Ga. Military Coll.,* 970 F.2d 785, 788-89 (11th Cir. 1992)). Moreover, "questions of first impression or the absence of binding authority on an issue, without more, are insufficient to demonstrate a substantial ground for difference of opinion." *Havana Docks Corp. v. Carnival Corp.,* No. 19-cv-21724-BLOOM/McAliley, 2019 WL 8895240, at *1 (S.D. Fla. Oct. 8, 2019) (citation omitted). In order "to demonstrate the existence of a substantial ground for difference of opinion, the appellant 'must show that at least two courts interpret the legal principle differently.'" *In re Yormak*, 2017 WL 2645601, at *3 (quoting *Figueroa v. Wells Fargo Bank, N.A.,* 382 B.R. 814, 824 (S.D. Fla. 2007)).

The final requirement is that the controlling question of law "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). This factor asks whether "resolution of [the] controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1259.

At bottom, there is a "strong presumption against interlocutory appeals," and both the district and circuit courts possess substantial discretion in certifying issues for this purpose. *OFS Fitel,* 549 F.3d at 1359 (citing *Jenkins v. BellSouth Corp.,* 491 F.3d 1288, 1291 (11th Cir. 2007)). In that regard, "[e]ven when all of [the] factors are present, the [appellate court] has discretion to turn down a § 1292(b) appeal. *McFarlin,* 381 F.3d at 1259.

Direct Appeals to Eleventh Circuit

The statutory basis for direct appeals to the Eleventh Circuit is 28 U.S.C. § 158(d)(2)(A) and (B). The procedural basis is Federal Rule of Bankruptcy Procedure 8006. Certification is appropriate where:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the Eleventh Circuit or the Supreme Court, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken[.]

28 U.S.C. § 158(d)(2)(A)(i)-(iii). The bankruptcy court can certify a direct appeal on the motion of a party or its own motion, but the Eleventh Circuit must accept jurisdiction to bypass the district court. 28 U.S.C. § 158(d)(2)(B).

Direct appeals are uncommon, but not unheard of. The factors for a direct appeal are not dissimilar to that required to qualify to take an immediate appeal of an interlocutory order to a district court, and equally hard to meet.

For example, in *Luria v. ADP, Inc.,* No. 5:18-cv-592-Oc-34, 2019 WL 13184134 (M.D. Fla. April 22, 2019), the district court denied a motion to certify an appeal of an adverse summary judgment from the bankruptcy court to the Eleventh Circuit, finding that (i) the issue of whether the defendant qualified as a "mere conduit" was not one of first impression, as Eleventh Circuit precedent established the framework to resolve the issue, and (ii) a direct appeal would not materially advance the progress or resolution of the case, pointing to the need for a trial on the merits if the order was reversed. *Cf. 5200 Enterprises Ltd. v. City of New York,* No. 3:19-cv-1045-J-39, 2020 WL 10054400 (M.D. Fla. July 16, 2020) (authorizing a direct appeal concerning the issue of whether New York courts would adopt a continuous trespass claim consistent with Appellant's interpretation of the Restatement (Second) of Torts § 161 under the facts alleged had not been addressed by the Eleventh Circuit, the United States Supreme Court, or New York's highest appellate court); *Rodriguez v. Wolfe (In re Rodriguez),* 513 B.R. 767, 770 (Bankr. S.D. Fla. July 30, 2014) (authorizing a direct appeal to the Eleventh Circuit under § 158(d)(2)(A)(iii) because substantially similar issues involving the same parties were already pending before the Eleventh Circuit and allowing a direct appeal would help all parties avoid protracted litigation, unnecessary attorneys' fees, costs, and time associated with filing another related appeal).

As an example of one certification made by a bankruptcy court on its own motion is found in *In re Blue Stone Real Estate, Constr. & Dev. Corp., et al.,* 396 B.R. 555 (Bankr. M.D. Fla. 2008). The object of the certification was an order granting a motion to appoint a Chief Restructuring

Officer (CRO). The court identified two issues for certification, one of which was whether a bankruptcy court was prohibited from approving a change in management of a Chapter 11 debtor by permitting the debtor-in-possession to retain a CRO when a motion to appoint a Chapter 11 trustee was pending before the court.

Single versus Multiple Notices of Appeal

Bankruptcy Rule 8003 concerns how an appeal is taken but is silent as to a party's right to appeal multiple orders in a single notice of appeal.

An appeal from a final judgment includes all prior non-final orders and rulings that gave rise to the judgment. *Kong v. Allied Prof'l Ins. Co.,* 750 F.3d 1295, 1301 (11th Cir. 2014). Accordingly, an appellant seeking to appeal a final judgment in an adversary proceeding and one or more interlocutory orders that gave rise to that adverse judgment should be able to file one notice of appeal for that judgment and interlocutory orders.

Similarly, an appellant seeking to appeal multiple judgments or orders of a bankruptcy court which are inextricably intertwined should be able to include all of them in a single notice of appeal. In *Zalloum v. River Oaks Community Svcs. Ass'n, Inc., et al. (In re Zalloum)*, No. 20-11483, 2021 WL 5112272 (11th Cir. Nov. 3, 2021), the Eleventh Circuit criticized a bankruptcy court for requiring an appellant to file multiple notices of appeal in respect of legally and factually intertwined rulings which were memorialized in multiple orders, stating that it seemed "illogical and inefficient (not to mention expensive) to demand that of an appellant." While *Zalloum* involved a *pro se* appellant, there is no principled reason why the same rule would not apply to parties represented by counsel. *See also U.S. v. Grant*, 256 F.3d 1146, 1151 (11th Cir. 2001) (holding that a notice of appeal that referenced only one case number evinced an intent to appeal in both cases because it referenced the single judgment entered following a consolidated hearing). *See generally*

Hill v. BellSouth Telecomms., Inc., 364 F.3d 1308, 1313 (11th Cir. 2004) (stating that while it generally has jurisdiction to review only judgments or orders specified in a notice of appeal, it liberally construes such notices "when unnoticed claims or issues are inextricably intertwined with noticed ones and the adverse party is not prejudiced."). If separate notices of appeal are filed regarding multiple orders, parties may move to consolidate the appeals if assigned to different district court judges, and should do so to avoid inconsistent rulings.

Absent a close interrelatedness of rulings across multiple orders, appellants should err on the side of caution and file multiple notices of appeal for separate orders.

Stays Pending Appeal

The party seeking a stay must establish that (1) it is likely to prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay or other injunctive relief is not granted; (3) the other parties will suffer no substantial harm if the stay is granted; and (4) the issuance of a stay will serve, rather than disserve, the public interest implicated in the case. *In re Synectic Asset Management Inc.*, 2014 WL 6065770, at *5 (M.D. Fla. Nov. 12, 2014) (quoting *In re F.G. Metals, Inc.*, 390 B.R. 467, 471-72 (Bankr. M.D. Fla. 2008)).

Generally, the most important of the four requirements is the moving party's likelihood of success on the merits of its appeal, and the court must ordinarily find that the appealed decision was clearly erroneous. However, if the balance of the equities identified in the other three requirements weighs heavily in favor of granting the stay, a stay pending appeal may be granted upon a lesser showing of the movant's likelihood of success on appeal. *Id*. (quoting *In re F.G. Metals, Inc.*, 390 B.R. at 472, and *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

Although the doctrine is falling out of favor, sometimes equitable mootness is a consideration. A bankruptcy appeal should be "dismissed as [equitably] moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325-26 (2d Cir. 1993) ("Chateaugay I"). A bankruptcy appeal is strongly presumed to be equitably moot where the reorganization plan has been "substantially consummated." *See Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996) ("Chateaugay II"); see also 11 U.S.C. § 1101(2) (defining term).

Also, failure to seek a stay or expedited appeal "weighs strongly in favor of a finding of equitable mootness." *Retired Pilots Assoc. of U.S. Airways, Inc. v. US Airways Group, Inc. (In re US Airwavs Group Inc.)*, 369 F.3d 806, 810 (4th Cir. 2004); *Chateaugay I*, 988 F.2d at 326 ("The party who appeals without seeking to avail himself of [a stay] does so at his own risk."); *In re Texaco, Inc.*, 92 B.R. 38, 45 (S.D.N.Y. 1988) ("[W]hen bankruptcy appellants have failed and neglected diligently to pursue the available remedies to obtain a stay of the Confirmation Order, they have thereby ... permitted ... a comprehensive change of circumstances to occur, and it [would be] inequitable to hear the merits of their case."). But, failure to obtain a stay is not the last word on the issue; where a there is no stay, the reviewing court "must ask whether a stay was 'unjustifiably denied or was justifiably not requested[.]" *GBR Group Ltd. v. Water Marble Holdings, LLC*, , 2023 WL 7710856, at *3 (M.D. Fla. Nov. 15, 2023) (quoting *Bennett v. Jefferson County*, 899 F. 3d 1240, 1249 (11th Cir. 2018)).

Turning from equitable mootness, constitutional mootness can be another consideration. This is an Article III issue. A bankruptcy appeal can become moot if actions occur in the

proceeding that make it impossible for the appellate court to fashion effective relief. Article III mootness is about whether a court is *able* to fashion relief; equitable mootness is about whether the court *should* fashion relief. *See In re UNR Indus., Inc.*, 20 F. 3d 766, 769 (7th Cir. 1994) (discussing the difference between traditional and equitable mootness).

Finally, be aware that a bond might very well be necessary for a stay. Fed. R. Bankr. P. 8007(c) and (d).

Indicative Rulings

The filing of a notice of appeal divests a trial court, including a bankruptcy court, of subject matter jurisdiction to take any action that would impair the appellate court's jurisdiction. As explained by the court in *Zurich Am. Ins. Co v. Southern-Owners Ins. Co.*, No. 3:15-cv-1041-J-34PDB, 2019 WL 10854447, at *2 (M.D. Fla. Aug. 6, 2019):

"Typically, the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of authority over aspects of the case involved in the appeal." See Madura v. BAC Home Loans Servicing, LP, 655 F. App'x 717, 723 (11th Cir. 1016). The appellate court retains jurisdiction over an appeal until it has "issued the mandate implementing [its] decision." Id. Thus, "'a district court generally is without jurisdiction to rule in a case that is on appeal, despite a decision by [the appellate] court, until the mandate has issued.'" Id. (quoting Zaklama v. Mount Sinai Med. Ctr., 906 F.2d 645, 649 (11th Cir. 1990)).

An indicative ruling can be made when, after a notice of appeal has been filed, a party files a motion over which the bankruptcy court lacks jurisdiction. In that scenario, under Bankruptcy

Rule 8008,[1] modeled after Federal Rule of Civil Procedure 62.1,[2] the bankruptcy court before which the motion is pending can (i) defer considering the motion, (ii) deny the motion, or (iii) state that it would grant the motion *if* the appellate court remanded for that purpose, or state that the motion raises a substantial issue.[3] *See LFoundry Rousset, SAS v. Atmel Corp.,* 690 F. App'x 748, 750 (2d Cir. 2017) ("A motion brought pursuant to [Rule] 62.1 is a procedural device that allows a district court to inform the parties and [the court of appeals] how it would rule on the merits of

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[1] (a) Relief Pending Appeal. If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer considering the motion;
(2) deny the motion; or
(3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.
Fed. R. Bankr. P. 8008.

(b) Notice to the Court Where the Appeal Is Pending. The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand After an Indicative Ruling. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the bankruptcy court has decided the motion on remand.

[2] (a) RELIEF PENDING APPEAL. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) NOTICE TO THE COURT OF APPEALS. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) REMAND. The district court may decide the motion if the court of appeals remands for that purpose.

Fed. R. Civ. P. 62.1. The corresponding rule for federal appellate courts is Fed. R. App. P. 12.1. The Eleventh Circuit's corresponding Local Rule is 11th Cir. R. 12.1-1.

[3] Courts determine if a party raises a "substantial issue" on a case-by-case basis. *See, e.g., Olivas v. Whitford,* No. 3:14-cv-01434-WQH-BLM, 2020 WL 2991509, at *7 (D.S.C. June 4, 2020) ("The Court concludes that Respondents' Motion to Vacate Judgment and the accompanying declarations and exhibits 'raise[ ] a substantial issue' as to whether Respondents have 'show[n] the evidence relied on in fact constitutes 'newly discovered evidence' within the meaning of Rule 60(b)....' Fed. R. Civ. P. 62.1(b).").

certain motions after an appeal has been filed and the district court has been divested of jurisdiction."). For example, in *Guan v. Ellingsworth Residential Community Ass'n, Inc. (In re Ellingsworth Residential Community Ass'n, Inc.)*, Adv. No. 6:21-ap-00074-LVV, 2022 WL 2388634 (Bankr. M.D. Fla. Mar. 28, 2022), Judge Vaughan abated an adversary proceeding seeking to revoke an order confirming a chapter 11 plan until the Eleventh Circuit resolved the plaintiff's appeal of the confirmation order was finally adjudicated, relying on Bankruptcy Rule 8008. If the bankruptcy court issues an indicative ruling, stating that it would grant the motion or that there is a "substantial issue," the district court, sitting in its capacity as an appellate court in bankruptcy, *U.S. Trustee v. Fishback (In re Glados)*, 83 F.3d 1360, 1362 (11th Cir. 1996), then decides whether to remand the case for a substantive ruling by the bankruptcy court.

Need to Know Nuances of Bankruptcy Appellate Practice

I. From Bankruptcy Court → District Court

- Notice of Appeal (Rule 8002)
  - 14 days after entry of order/judgment

- Record on Appeal and Issues on appeal (Rule 8009)
  - Appellant - 14 days from notice
  - Appellee – 14 days later

- Brief deadlines (Rule 8018)
  - Appellant – 30 days after notice that the record has been transmitted. (District Court will issue a notice that record is complete).
  - Appellee – 30 days later
  - Reply – 14 days later
  - Briefs must be accompanied by an appendix (Rule 8018(b))

- **Supplementing the Record (Rule 8009(e))**
  - If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:
    - on stipulation of the parties;
    - by the bankruptcy court before or after the record has been forwarded; or
    - by the court where the appeal is pending.

  - If there is a question about what the record in the BR Court reflects, ask the bankruptcy court to settle the issue and conform the record (8009(e)(1)).

  - If something was just not designated, and you don't realize it until drafting the briefs, usually ask the District Court.
    - *9 times out of 10 we stipulate to these supplementation requests.*

  - Supplementing the record should *not* be used to attempt to submit additional evidence in support or opposition.
    - General rule is that if it wasn't considered by the BR Court, then it can't later become part of the record.

- **Oral Argument**
  - Rule 8019 – Presumption of oral argument unless Court determines:
    - appeal is frivolous,
    - dispositive issues have been authoritatively decided, or
    - facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument

  - Local Rule 3.01(h) in the Middle District states that oral argument must be requested separate from the filing.
    - *We err on the side of asking for oral argument if we want it. If don't ask, experience is the Court more often finds that it doesn't need oral argument.*

- **Motions for Damages and Costs for a Frivolous <u>Appeal under Bankruptcy Rule 8020</u>**
  - Must file a motion.

  - If the District Court finds appeal to be frivolous, Court can award "just damages and single or double costs to the appellee"

  - In the District Court, no rule designating timing of this motion.
    - Generally would do so under the same timeline as a motion for fees post-trial
    - Rule 7.01 sets forth bifurcated procedure
      - 14 days to file motion for entitlement after ruling
      - Then supplemental motion on amount within 45 days after determination of entitlement.

II. Direct Certification from Bankruptcy Court → 11th Circuit

- Must timely file a notice of appeal.

- Rule 8006 Certification of Direct Appeal
  - Joint Certification by both parties, which can then be supplemented by the Court within 14 days

  - Court where action is pending may also make the certification on its own, and then can be supplemented by the parties within 14 days.

  - <u>Only pending in BR Court for 30 days from notice of appeal!</u>

- Otherwise, any party has 60 days within which to make a motion for certification. Thus, if after 30 days, the motion is made to the district court.

III. From District Court → 11th Circuit

- 30 days to file the notice of appeal

- Federal Rule App. Procedure 31 briefing deadlines
  - Appellant - 40 days after record is deemed filed (Court will issue a notice confirming the deadline)
  - Appellee - 30 days later
  - Reply - 21 days later.

- Motions for Rehearing or En Banc Review – 21 days after opinion

- **Extensions of Time (Local Rule 31-2)**

  - Can request a 30-day extension from the clerk of the court by phone, and those are generally granted if it's the first request.

  - If want more than 30 days, need to file a motion, and that motion must be filed at least seven days in advance of the deadline.

  - If motions are filed within 7 days of deadline, rule say its generally denied unless you should good cause why the motion couldn't be filed sooner.

  - Second requests are "extremely disfavored" and "granted rarely"

- **Oral Argument (FRAP 34)**

  - Oral Argument "must be allowed" unless the same three exceptions from the district court.

  - FRAP 28 - Briefs must include statement of whether or not oral argument is desired, and if so, the reasons why oral argument should be heard.

- "Court will accord these statements due, though not controlling, weight in determining whether oral argument will be heard."

- **<u>Motions for Damages and Costs for a Frivolous Appeal under FRAP 38</u>**

  - **Must be filed no later than the filing of appellee's brief per local rule 38-2**

  - THIS DIFFERS FROM THE NORMAL RULE – which requires motion for attorney fees and costs under Rule 39 must be filed within 14 days after the time to file a petition for rehearing or rehearing en banc expires, or within 14 days after entry of an order disposing of a timely petition for rehearing or denying a timely petition for rehearing en banc, whichever is later.

Faculty

Paul A. Avron is partner with Berger Singerman LLP in the firm's Fort Lauderdale, Fla., office and practices primarily in the areas of corporate reorganization, bankruptcy law, creditors' rights and appellate litigation, both state and federal. He has been involved in more than 30 appeals before the U.S. Court of Appeals for the Eleventh Circuit, many of which related to bankruptcy proceedings. Mr. Avron is rated AV-Preeminent by Martindale-Hubbell and has been listed in *The Best Lawyers in America* annually since 2018. He received his B.A. in political science from Florida Atlantic University and his J.D. from Cumberland School of Law.

Ceci C. Berman is a shareholder with Brannock Berman & Seider in Tampa, Fla., a 10-lawyer firm dedicated exclusively to appellate practice and trial support, with offices in Tampa and Tallahassee, Fla., and the largest appellate firm in Florida. She has been an appellate specialist for more than 20 years and has been Board Certified for more than 15 of those years. Ms. Berman handles all types of federal and state appeals, with a focus on commercial litigation appeals. She is a frequent lecturer and author on appellate practice topics, ranging from bankruptcy appeals to land use and real estate appeals to family law appeals, among others. Ms. Berman is a past chair of Florida's Civil Procedure Rules Committee. Likewise, she spent six years on Florida's Appellate Court Rules Committee, where she chaired its Civil Practice Subcommittee. Ms. Berman is also a past chair of the Florida Bar's Appellate Practice Section and the Hillsborough County Bar Association's Appellate Practice Section. She continues to serve on the Executive Council of the Florida Bar's Appellate Practice Section. Ms. Berman is continuously recognized by *Chambers USA* as a leading lawyer in Florida for appellate practice, *Business Today* listed her as one of the "Top 10 Influential Florida Appellate Lawyers Dominating the 2023 Legal Scene," and she has been repeatedly named by *Florida Super Lawyers* as being among the Top 100 lawyers in Florida, Top 50 women lawyers in Florida and Top 50 lawyers in Tampa Bay. *Florida Trend* has counted her among its Legal Elite, and in 2023 it named her one of Florida's Notable Women Leaders in the Law. She also has been named to *The Best Lawyers in America*'s list for Appellate Practice and Commercial Litigation, and *Tampa Magazine* has repeatedly recognized her as being a "Top Lawyer" for appellate practice. Ms. Berman received her undergraduate degree from the University of Florida with honors and her J.D. from the Georgetown University Law Center.

Steven M. Berman is a partner in the Tampa, Fla., office of Shumaker, Loop & Kendrick, LLP, specializing in the firm's bankruptcy and creditors' rights practice group. He has more than 30 years of bankruptcy experience and focuses his practice on business bankruptcy litigation, representing creditors, investors, distressed-debt lenders, trustees, committees and business entities litigating disputes in bankruptcy court. Mr. Berman is Board Certified by the American Board of Certification in both Creditors' Rights Law and Business Bankruptcy Law, and he is a member of the Florida, California, District of Columbia, New York, Puerto Rico (Federal) and Texas bars. He is also admitted to practice before the Second and Eleventh Circuit Courts of Appeals and the U.S. Supreme Court. Mr. Berman serves on the boards of directors for ABI and serves on its Endowment Committee and its Task Force on Veterans and Servicemembers Affairs. He routinely volunteers and speaks at its seminars and other programs. On a local level, Mr. Berman is a member of the Tampa Bay Bankruptcy Bar Association, the Bankruptcy Bar Association of the Southern District of Florida, the Southwest Florida

Bankruptcy Professionals Association and the San Diego Bankruptcy Forum. In addition, he guest lectures at the University of Florida College of Law and Stetson University College of Law in their advanced bankruptcy courses. Mr. Berman provides *pro bono* bankruptcy and insolvency services and training for U.S. Navy Judge Advocate General officers and staff, and represents servicemembers and their families in need. He is AV-rated by Martindale-Hubbell and was listed in *Florida Super Lawyers* from 2013-22. Mr. Berman received his B.S. in multinational business operations in 1987 from Florida State University and his J.D. in 1990 from the University of Florida Levin College of Law.

Hon. Catherine Peek McEwen is a U.S. Bankruptcy Judge for the Middle District of Florida in Tampa, appointed by the Eleventh Circuit Court of Appeals on Aug. 22, 2005, and an adjunct professor at Western Michigan University Cooley Law School. She is the first female judge appointed in her district. Prior to becoming a judge, she was in private practice for almost 23 years in Tampa, concentrating on commercial litigation with an emphasis on representing parties in bankruptcy cases, and was a solo practitioner from 2001 until she was appointed to the bench. Judge McEwen was elected into the American Law Institute in 2012. In recent years, she was appointed by Chief Justice John Roberts to be the Bankruptcy Observer to the Judicial Conference of the United States (JCUS), the policy-making body for federal judiciary, for a two-year term (2017-19). She is a member of the JCUS Advisory Committee on the Bankruptcy Rules (2020-26) and, most recently, a member of the Committee on the Judicial Branch (indefinite term). Judge McEwen is the immediate past Eleventh Circuit Governor on National Conference of Bankruptcy Judges' Board of Governors and is currently a member of the NCBJ's Legislative Committee and Centennial Celebration Committee. She also is a member of The Florida Bar's Business Law Section (BLS) Executive Council and the immediate past judicial chair of the section's Bankruptcy/UCC Committee. Judge McEwen is currently co-chair of The Florida Bar's *Pro Bono* Legal Services Committee and judicial chair of the BLS Scholars & Fellows Retention Task Force. She also is a past chair of The Florida Bar's Federal Court Practice Committee. Judge McEwen is a past chair/president of the Tampa Bay Bankruptcy Bar Association, was a court-appointed bankruptcy mediator from 1989-2005, is a past chair of the U.S. Bankruptcy Court for the Middle District of Florida's Local Bankruptcy Rules Advisory Committee, and is a past chair of a Florida Bar Grievance Committee. Prior to becoming a lawyer, Judge McEwen was a sportswriter from 1975-79 for the *Tampa Tribune* and the *Tampa Times*. She received her B.A. in political science from the University of South Florida in 1979 and her J.D. *cum laude* from Stetson University in 1982.

Hon. James S. Moody, Jr. is a District Court Judge with the U.S. District Court for the Middle District of Florida in Tampa, Fla., appointed in July 2000. Prior to being elected circuit judge from 1995-2000, he was an AV-rated, board-certified civil trial lawyer, certified public accountant, director of Hillsboro Sun Bank, chair of two Florida Bar committees (Jurisprudence and Attorneys Fees) and president of the Hillsborough County Bar Association. Judge Moody previously was engaged in private practice with Trinkle, Redman, Moody, Swanson & Byrd, P.A. He had presided over the family law and general civil divisions of the circuit court. Judge Moody was a member of the Education Steering Committee for the Conference of Circuit Court Judges and has taught courses at judicial education conferences. He received the Hillsborough County Outstanding Jurist Award as a state judge in 2003 and the Young Lawyers Statewide Award as Outstanding Jurist in 2007. Judge Moody is listed in the *Who's Who in American Law* (5th, 6th and 9th editions) and in *Marquis Who's Who in the World* for 2018 and 2019, receiving the 2018 and 2019 Albert Nelson Marquis Lifetime Achieve-

ment Award. He has been a member of the American Law Institute since 2010, and since 2010, he has taught the judicial externship course for law school students at the University of Florida Law School. Judge Moody served as a mock trial judge at the Labor and Employment Law Trial Skills program in July 2000, 2001 and 2002 at Stetson University Law School and as a mock trial judge at the Annual Moot Court Competition held at the University of Florida in 2003, 2004, 2005, 2007, 2009, 2011 and 2013. In 1998, he was nominated by the Judicial Nominating Commission to fill a position on the Florida Supreme Court. Judge Moody received the Hillsborough County Bar Association's Robert Patton Outstanding Jurist Award in March 2003 and the Florida Bar Young Lawyer's Division Outstanding Jurist Award in 2007. From 2014-15, he was the president and a founding member of the Wm. Reece Smith, Jr. Litigation American Inn of Court. Judge Moody received his undergraduate degree in accounting with high honors, his M.B.A. and his J.D. with honors from the University of Florida, where his activities earned him selection to the U. of F. Hall of Fame and Florida Blue Key.