



AMERICAN
BANKRUPTCY
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Consumer Track

Appeals 101: Practical Tips and Considerations in Bankruptcy Appeals

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BANKRUPTCY APPEALS: LAW AND PROCEDURE



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**HONORABLE JANICE MILLER KARLIN, CHIEF JUDGE, UNITED
STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS
AND THE TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL**

**HONORABLE THOMAS L. SALADINO, CHIEF JUDGE, UNITED
STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEBRASKA
AND THE EIGHTH CIRCUIT BANKRUPTCY APPELLATE PANEL**

Overview of Topics



- Pre-appeal Considerations
- Deadlines to File Notice of Appeal
- Typical BAP Timeline
- BAP and Circuit Court Rules
- Jurisdiction of the Appellate Courts
- Finality and Appealability
- Standing to Appeal
- Mootness
- Stay Pending Appeal
- Jurisdiction of the Bankruptcy Court During an Appeal
- Proceedings After Remand
- Tips and Strategies for Effective Appeals and Brief Writing
- Oral Argument Tips

Pre-appeal Considerations

- Facts of underlying case – “Bad facts make bad law”
- Issue on appeal
- Global impact of ruling
- Record at bankruptcy court level
- Written opinion
- Motion to reconsider?

Deadlines to File Notice of Appeal

- Appeal from bankruptcy court
 - Fed. R. Bankr. P. 8002(a)(1)– 14 days from the date of the entry of the judgment, order or decree being appealed
 - Fed. R. Bankr. P. 8002(d)(1) - extension of the deadline must be filed within the time period to appeal or within 21 days after that time upon a showing of excusable neglect (extension is not available in every situation – 8002(d)(2) for exclusions)
- Appeal from the BAP/District Court to the Circuit Court
 - Fed. R. App. P. 6 – within 30 days after the entry of the judgment or order appealed from

Typical Timeline for 8th Circuit BAP Appeal With a Transcript

- Day 1 – notice of appeal filed
- Day 3 – BAP clerk enters briefing schedule
- Day 14 – deadline for appellant to order transcript and notify parties that the transcript has been ordered
- Day 30 – transcript filed with the clerk of the bankruptcy court and transmitted to the BAP clerk
- Day 60 – appellant’s brief filed
- Day 90 – appellee’s brief filed
- Day 160 – oral argument
- Day 210 – the Court issues its opinion
- Day 224 – motion for rehearing filed
- Day 230 – motion for rehearing decided

Appellate Rules

- Review the Federal Rules of Bankruptcy Procedure 8001-8028
- Review the Federal Rules of Appellate Procedure
- Always check the court’s website for the most recent version
- 8th Circuit
 - BAP
 - Current Local Rules were revised November 1, 2016
 - <http://media.ca8.uscourts.gov/newbap/rules/rules1116.pdf>
 - Also review the Internal Operating Procedures Manual – revised February 2017
 - <http://media.ca8.uscourts.gov/newbap/rules/iopsfeb2017.pdf>
 - Includes information about motion practice and brief covers, font and type size

Appellate Rules

- Court of Appeals
 - <http://media.ca8.uscourts.gov/newrules/coa/LocalRules12-16.pdf>
 - Briefs are filed electronically – once reviewed and accepted for filing, paper copies must be submitted
- 10th Circuit
 - BAP
 - Current rules effective December 1, 2014
 - www.bap10.uscourts.gov/sites/default/files/downloads/2014LocalRulesAmendments.pdf
 - Court of Appeals
 - Current rules effective December 1, 2016
 - <https://www.ca10.uscourts.gov/sites/default/files/clerk/FRAP%20RULES%202017%20FINAL.pdf>

Appellate Jurisdiction: District Court and BAP

- District court and Bankruptcy Appellate Panel (“BAP”) have appellate jurisdiction over:
 - Final judgments, orders, and decrees of bankruptcy court
 - Interlocutory orders that either increase or decrease time to file a plan in Chapter 11
 - Other interlocutory orders and decrees, with leave of court
 - ✦ See 28 U.S.C. § 158(a)-(b)
- Jurisdiction is narrower than appeals from district court
 - *E.g.*, grant or denial of a preliminary injunction by a bankruptcy court is not appealable as a matter of right
 - Must file notice of appeal and motion for leave to appeal with bankruptcy clerk under Fed. R. Bankr. Proc. 8004

Appellate Jurisdiction: District Court and BAP

- BAP is the default, unless:
 - Appellant elects district court when filing the appeal, or
 - Another party elects district court within 30 days after service of the notice of appeal.
 - ✦ *See* 28 U.S.C. § 158(c); Fed. R. Bankr. Proc. 8005

Appellate Jurisdiction: Court of Appeals

- Court of appeals has jurisdiction over:
 - Final decisions, judgments, orders, and decrees of district court or BAP
 - *See* 28 U.S.C. § 158(d)(1)
 - Final decisions of bankruptcy court, if certified for direct appeal by bankruptcy court, district court, or BAP
 - Court of appeals may decline to hear a certified appeal
 - *See* 28 U.S.C. § 158(d)(2)

Appellate Jurisdiction: Court of Appeals

- Notably, § 158(d) does not provide court of appeals with jurisdiction over interlocutory orders or decrees
 - Court of appeals does not have jurisdiction if the matter began as an interlocutory decision of bankruptcy court
 - Court of appeals also does not have jurisdiction if bankruptcy court's decision was final but district court or BAP decision renders the matter non-final
- Also notable, is the fact that if district court withdraws reference to bankruptcy court under § 157(d), court of appeals' jurisdiction is the same as in ordinary appeals arising from the district court

Finality and Standing

- “It ain’t over till it’s over.”
 - *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1693 (2015) (Chief Justice Roberts quoting Yogi Berra)
- Complex issue—much broader than ordinary civil litigation
 - This is because a bankruptcy case involves an aggregation of individual controversies, many of which would exist as stand-alone lawsuits but for the bankruptcy status of the debtor
 - There are some circumstances where it would not be equitable or efficient to put off an appeal
- In *Bullard*, the Supreme Court of the United States stated that a bankruptcy court order is final when it “alters the status quo and fixes the rights and obligations of the parties”

Finality

- **Sometimes finality is analyzed with a three factor balancing test:**
 - (1) whether the order leaves the bankruptcy court with nothing to do but execute the order;
 - (2) whether delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and
 - (3) whether a later reversal on that issue would require recommencement of the entire proceeding
 - ✧ *In re Farmland Indus., Inc.*, 397 F.3d 647, 650 (8th Cir. 2005); *United States Trustee v. Sorrells (In re Sorrells)*, 218 B.R. 580, 582 (B.A.P. 10th Cir. 1998)

Caution: Whenever dealing with factors and tests, remember that: “It is important not to allow judicial glosses . . . to supersede the statute itself.” *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013)

Standing to Appeal

- Standing in a bankruptcy appeal is narrower than Article III (“case or controversy”) or prudential (“zone of interests protected”) standing
 - The principal policy underlying the heightened standing requirement is that bankruptcy proceedings—often administratively and procedurally unwieldy—not be prolonged by unnecessary appeals. See *In re O & S Trucking, Inc.*, 811 F.3d 1020, 1023 (8th Cir. 2016)
- **Person aggrieved doctrine**
 - An appellant is a party aggrieved if the bankruptcy court order diminishes the person’s property, increases the person’s burdens, or impairs the person’s rights
 - ✧ See *Opportunity Fin., LLC v. Kelley*, 822 F.3d 451, 458 (8th Cir. 2016); *Lopez v. Behles (In re American Ready Mix, Inc.)*, 14 F.3d 1497, 1500 (10th Cir. 1994)
 - Limits standing to persons with a financial stake in the bankruptcy court’s order

Three Kinds of Mootness

• Constitutional Mootness

- No live controversy remains or no effective remedy is available
- Often arises when a stay is not issued in the bankruptcy proceeding, and circumstances change while an appeal is pending that make it impossible for the court to grant “any effectual relief whatsoever” to a prevailing party. *See Bank of Commerce & Trust Co. v. Schupbach (In re Schupbach)*, 607 Fed. Appx. 831, 835 (citing *Prier v. Steed*, 456 F.3d 1209, 1212-13 (10th Cir. 2006); *In re Williams*, 256 B.R. 885, 895 (B.A.P. 8th Cir. 2001)
- *E.g.*, The sale of a debtor’s property to a non-party if the debtor seeks only a return of its property

Three Kinds of Mootness

• Statutory Mootness

- Occurs when a statute, such as 11 U.S.C. § 363(m) or § 364(e), limits the relief an appellate court can dispense based on the occurrence of certain events while the appeal is pending and in the absence of a stay pending appeal
- 11 U.S.C. § 363(m) provides that, if an appellant has not obtained a stay pending appeal of an order that permits the sale of a debtor’s assets, and a good faith purchaser purchases or leases debtor property, that purchase or lease cannot be invalidated on appeal
 - *Sian v. Montoya (In re Sandia Resorts, Inc.)*, No. NM-17-003, 2017 WL 3725924, at *7 (B.A.P. 10th Cir. Aug. 30, 2017) (appeal of order authorizing sale was statutorily mooted per § 363(m) when debtor failed to obtain stay pending appeal and sale was made to good faith purchaser)
- A similar rule applies under § 364(e) when the bankruptcy court has authorized the trustee to obtain credit or incur debt, and an entity then extends credit to the trustee in good faith

Three Kinds of Mootness

• Equitable Mootness

- Doctrine developed by appellate courts reviewing bankruptcy cases which allows an appellate court to dismiss a case as moot, based on equitable grounds, even though effective relief could conceivably be fashioned. *See In re Williams*, 256 B.R. 885, 896 (B.A.P. 8th Cir. 2001); *Southwestern Bell Telephone Co. v. Long Shot Drilling, Inc. (In re Long Shot Drilling, Inc.)*, 224 B.R. 473, 478-79 (B.A.P. 10th Cir. 1998)
- Situation would be unmanageable; parties not before the court would be adversely affected; comprehensive change of circumstances; etc.
- Most often applied in the context of a reorganization bankruptcy where the bankruptcy court has confirmed a plan, the plan has been substantially consummated, and then a party seeks appellate review of an issue that, if upset, would unduly disturb the plan

Stay Pending Appeal

- A party seeking a stay must make essentially the same showing as a party seeking a preliminary injunction
- A party seeking a stay pending appeal must demonstrate that:
 - (1) it is likely to succeed on the merits,
 - (2) it will suffer irreparable injury unless the stay is granted,
 - (3) no substantive harm will come to other interested parties, and
 - (4) the stay will do no harm to the public interest
 - *See In re Perry*, 223 B.R. 167, 169 (B.A.P. 8th Cir. 1998); *Farm Credit Services of the Midlands, PCA v. Fremont Sheep Corp. (In re Fremont Sheep Co.)*, 110 F.3d 73, 1997 WL 174116, at *2 (10th Cir. 1997)
- Court may require a supersedeas bond to protect the appellee's interests during the appeal

Stay Pending Appeal



- An appellant must ordinarily request a stay from the bankruptcy court first
 - Fed. R. Bankr. Proc. 8007
- If it would be impracticable to file the motion to stay in the bankruptcy court, or if such a motion was filed and the bankruptcy court failed to rule or denied the motion, an appellant can file a motion to stay in the appellate court
- Likewise, if a stay was granted, the appellee can request that it be vacated or modified
- Fed. R. Bankr. Proc. 8025 permits district court or BAP to stay its judgment pending appeal to court of appeals

Jurisdiction of the Bankruptcy Court During an Appeal



- The filing of a notice of appeal confers jurisdiction on the appellate court and divests the bankruptcy court of control of those aspects of the case involved in the appeal
 - Bankruptcy court can move forward with other aspects of the case that are not the subject of the appeal
- If a party seeks relief that the bankruptcy court can't grant because of an appeal, the bankruptcy court may elect to:
 - Defer consideration of the motion
 - Deny the motion, or
 - State that the court would grant the motion if the appellate court remanded for that purpose, or note that the motion raises a substantial issue
 - Fed. R. Bankr. Proc. 8008

Proceedings After Remand

- Every question decided by the appellate court, expressly or by necessary implication, is finally settled and determined
 - Bankruptcy court cannot re-examine those issues on remand
 - But court may pass upon any issue that was not expressly or impliedly disposed of on appeal
 - Bankruptcy court also may revisit its own earlier rulings, unless they were explicitly or implicitly adopted by the appellate court
- This is generally known as the mandate rule
 - It's also an aspect of the doctrine of law of the case

Brief Writing Tips

- Prepare an outline
 - This will serve as the headings of your brief
 - ✦ Headings and subheadings break up and clarify the argument
 - ✦ Keep them short so they are not distracting
 - The outline may also be your table of contents
 - ✦ The first thing the judge or law clerk will read
 - ✦ Should basically summarize your position

Brief Writing Tips



- Put your strongest argument first
- Throw out your weak arguments
 - Weak arguments make strong arguments look weaker
 - Briefs that raise too many issues lack direction
- If you have to make weak arguments, call out the weaknesses and say why your case is distinguishable
 - The Court will trust you more
 - The Court won't think you are hiding weak points in your brief

Brief Writing Tips



- Write like a judge
 - Limit use of hyperbole
 - ✦ Don't exaggerate or use excessive exaggerated language
 - Clearly, Obviously, Blatantly, Manifestly
 - If it is clear, you do not need to say so
 - Be polite
 - ✦ Don't attack the judge
 - ✦ Don't accuse the opposing party of wrongdoing (absent some really extenuating circumstance)
 - State the facts clearly and with just the right amount of advocacy (not too much)
 - ✦ If done just right, you might find the court copies and pastes them into its order

Brief Writing Tips



- Write (and argue) for a generalist audience
 - BAP judges are familiar with bankruptcy law and procedure, but not necessarily with the substantive law or the customs and practices of your state and locale
 - Don't simply cut and paste your facts and legal arguments from your filings in bankruptcy court
 - If possible, have a non-bankruptcy colleague read and comment on a draft brief
- Help the court understand that your preferred outcome is not only right, but fair
 - Judges are human—want to do justice

Brief Writing Tips



- Don't be sloppy
 - Take a break and then proofread
 - Have your assistant proofread
 - Print and read
 - Read out loud
 - Typos and grammatical errors make you look less credible
 - ✦ Stigma will stay with you

Brief Writing Tips

- Avoid passive voice
 - Sarah was told by Katherine
 - ✦ or
 - Katherine told Sarah

Brief Writing Tips

- Avoid legalese
- Use pictures
 - Brief to Tenth Circuit Court of Appeals
 - ✦ Invoice
 - Trademark dispute between the Indianapolis Colts and the Baltimore CFL Colts
 - ✦ Judge Posner wrote about an oral argument where he asked to see the products—hats looked identical

Brief Writing Tips



- Be honest and trustworthy
 - Never misstate the record, the facts, or the law
 - ✦ Accident is not an excuse. If you discover a mistake, tell the court
- Confront unfavorable facts or law up front
 - Don't let it come out for the first time in opposing counsel's brief
 - ✦ Explain why negative facts do not impact the outcome
 - ✦ Explain why unfavorable case law is distinguishable
 - May have an ethical obligation if binding precedent is against you

Brief Writing Tips



- Keep sentences short
- Vary sentence and paragraph structure
 - Make some shorter and some longer
 - Punchy is effective

Brief Writing Tips

- Humanize your client
 - Unless there is a rule requiring otherwise, call your client by name, not “Plaintiff,” “Defendant,” “Appellant” or “Appellee”

Brief Writing Tips

- Avoid excessive use of acronyms!
 - Brief Right Blog
 - Gunston Specialty Holdings Corp. LLC
 - Gunston?
 - or
 - GSHCLLC?
 - They are difficult to read
 - United States Court of Appeals for the District of Columbia
 - × Refuses to accept briefs with too many acronyms
 - × “Parties are expected to limit the use of acronyms and to avoid using acronyms that are not widely known.”

Brief Writing Tips



- Minimize lengthy block quotes
 - Large blocks of text are intimidating and hard to read
 - Interrupt flow of writing
 - Judges may skim or skip altogether
 - Brief Write Blog calls them BRIQs
 - ✦ Big, Really Impenetrable Quote
 - Only utilize where absolutely necessary
 - ✦ Summarize wherever possible

Brief Writing Tips



- Use parentheticals
 - Often more beneficial than going through all of the facts of a case—just get to the point
 - But keep them short
- Minimize string cites
 - Especially where the proposition is well-established
 - Really only helpful if there is a split of authority on the issue

Brief Writing Tips

- **Be Brief!**
 - If I had more time, I would have written a shorter letter.
 - ✦ Blaise Pascal, 1657
 - Judges always say this is their number one complaint about briefing
 - ✦ Chief Justice Roberts' explanation
 - Avoid repetition
 - ✦ Within the body of your argument, make your point only once.
 - ✦ A short summary of the argument is generally required at the beginning
 - ✦ No need to repeat it in the conclusion

Brief Writing Tips

- **Do your research**
 - You should be able to write the brief for either the appellant or the appellee, and anticipate the other side's arguments
- **Do your opponent's research and address it.**

Should You Elect the BAP or the District Court?



- Free Mediator in the Tenth Cir. BAP
 - David Aemmer, Chief Circuit Mediator/10th Circuit
- Oral Argument
- Relative Speed of Decisions
- Statistics on Affirmance/Reversals

Should You Elect the BAP or the District Court?



	2014	2015	2016
Total Bankruptcy Appeals – 10th Circuit	108	109	89
% Opting for BAP (after both elections)	58	46	34
BAP Average disposition time (days)	204	136	116
BAP Median Disposition Time (days)			53
District Court Average disposition time (days)	293	303	223
District Court Median Disposition time (days)			212
10th Circuit Average Disposition Time for Appeals from BAP (days)	373	308	150
10th Circuit Average Disposition Time for Appeals from District Court (days)	483	388	291

Should You Elect the BAP or the District Court?



- **2016 affirmance rates (10th Circuit) when reviewing bankruptcy appeals from BAP versus appeals from District Courts**
 - 10th Circuit affirmed 70.8% of bankruptcy appeals from the District Court
 - 10th Circuit affirmed 78.3% of bankruptcy appeals from the BAP

Should You Elect the BAP or the District Court?



- **2016 affirmance rates by 10th Circuit BAP when reviewing bankruptcy decisions compared with District Courts**
- The BAP affirmed 62.5% of appeals on merits/25% affirmed in part
- The District Courts affirmed 64.7% of appeals on merits/11.85% affirmed in part

Oral Argument Tips



- From the Judge's perspective
- From the arguing attorney's perspective

Questions???



- Does anyone have any questions?
- Any thoughts that we have not touched on?