

# Making Appeals More Appealing: When and How to Appeal

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# Seven Bankruptcy Appeals Questions Answered

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It was not long ago that the authors were involved in a bankruptcy case in which two different parties sought untimely reconsideration of bankruptcy court orders. When reconsideration failed at the bankruptcy court level, the parties appealed, first to the district court and then, in one appeal, to the court of appeals. While we believe that the appeals ultimately would have been dismissed on the merits, the appellants made the process easier (although not fast) by making numerous procedural blunders in the appeal process, creating additional bases to dismiss the appeals. We trust that, with a quick review of this article, the young or new bankruptcy lawyer will not make the same procedural mistakes as the noted adversaries. In all cases, the young or new lawyer should be aware that the (infrequently-used) appeal procedures may present dangerous traps for the unwary.

## When Is a Matter Appealable?



Douglas E. Deutsch

Broadly speaking, an appeal of a bankruptcy court order may be heard either when the order is final, as of right, or when the order is interlocutory, with leave of the district court. See 28 U.S.C. §158. As the *ABI*

*Journal* examined these issues in a recent issue,<sup>1</sup> we address these concepts only briefly below.

First, whether an order of the bankruptcy court is final is not necessarily easily determined. Courts take a pragmatic and flexible approach. See, e.g., *In re Armstrong World Indus. Inc.*, 432 F.3d 507 (3d Cir. 2005); *Comm. of Dalkon Shield Claimants v. A. H. Robbins Co.*, 828 F.2d 239, 241 (4th Cir. 1987). Second, under 28 U.S.C. §158(a) (3) and in most cases, an appeal from an interlocutory order may be heard only

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with leave of the court. Significantly, only the district court or bankruptcy appellate panel (BAP) may hear an appeal from an interlocutory order under this section; a circuit court of appeals' jurisdiction is limited to final orders. See *In re White Beauty View Inc.*, 841 F.2d 524, 526 (3d Cir. 1988) (citations omitted) (dismissing appeal from interlocutory order where bankruptcy court failed to certify interlocutory order for appeal and district court did not grant leave to appeal). When an appellant seeks to appeal from an order under 28 U.S.C. §158(a)(3), that appellant

*Kloza*), 222 Fed. Appx. 547, 550 (9th Cir. 2007) (affirming BAP finding that counsel is expected to monitor docket and that failure to receive notice of order is not excusable neglect); *In re Barbel*, 212 Fed. Appx. 87, 89 (3d Cir. 2006) (stating that failure to receive order is no defense, and that appellant has responsibility to monitor docket).



Thomas Michael Horan

The FRBP provide a very limited exception in certain instances that extends the time period to file a notice of appeal from 10 days to 20 days. As a general practice, you should never seek to take

advantage of this exception because the standard on the exception may be difficult to satisfy and a failure to timely file a notice of appeal within the 10 days creates a jurisdictional barrier that bars

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must file not only a notice of appeal under Rule 8002 of the Federal Rules of Bankruptcy Procedure (FRBP), but also a motion for leave to appeal. See Fed. R. Bankr. P. 8001(b), 8003(a).<sup>2</sup>

## What Are the Appeal Deadlines?

Under Fed. R. Bankr. P. 8002, the notice of appeal must be filed with the clerk of the bankruptcy court that entered the order within 10 days of the date of entry of the order. See Fed. R. Bankr. P. 8002(a). This period is less than the 30 days generally provided in nonbankruptcy federal court appeals. (Do not listen to your litigators in this instance.) You would be well-served to monitor the court's docket as the time period will start whether you receive specific notice of the docketing of the relevant order or not. There are cases holding that a litigant has a responsibility to monitor the docket, and that failure to do so is not "excusable neglect." See, e.g., *SN Servicing Corp v. Kloza* (*In re*

appellate review. See *Wiersma v. Bank of the West*, 483 F.3d 933, 938 (9th Cir. 2007); *In re Salem*, 465 F.3d 767, 774 (7th Cir. 2006); *Siemon v. Emigrant Savs. Bank*, 421 F.3d 167, 169 (2d Cir. 2005); *Shareholders v. Sound Radio Inc.*, 109 F.3d 873, 879 (3d Cir. 1997). Nevertheless, for those readers who like to push the envelope, we will quickly review the exception.

To satisfy the exception (and obtain an additional 20 days to file the appeal), a showing of "excusable neglect" must be made. The seminal case on the doctrine of "excusable neglect" is *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380 (1993). In *Pioneer*, in discussing what types of circumstances may present "neglect," the Supreme Court held that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. If a court determines that there was neglect, the court can then proceed to determine whether the neglect was excusable by looking at several factors: (1) danger of

<sup>1</sup> See Andrew D. Stosberg, "A Primer on Interlocutory and Final Orders," 28 *ABI Journal* 46 (June 2009).

<sup>2</sup> To address those instances where it is unclear whether an order is final, and the party files only a notice of appeal, but it turns out that the order was interlocutory, the district court or BAP may grant leave to appeal or direct the appellant to file a motion for leave to appeal. See Fed. R. Bankr. P. 8003(c).

prejudice to the debtor; (2) the length of the delay and the resulting potential impact on judicial proceedings; (3) the reason for the delay, including whether the delay was within the reasonable control of movant; and (4) whether the movant acted in good faith. *Id.* at 395. Importantly, where the neglect at issue relates to a rule that is entirely clear, courts may expect “that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* case.” *See Lynch v. USA (In re Lynch)*, 430 F.3d 600, 604 (2d Cir. 2005) (citations omitted). As set forth below, a number of additional deadlines start to run after each subsequent event takes place in the appeal process.

### What Steps Do I Take to Appeal a Bankruptcy Court Order?

Perfection of an appeal requires that the appellant take various steps. Whether the appeal is believed to be as of right or sought by leave of the court, the appellant’s first step is to file a notice of appeal with—we add emphasis here because this does not seem inherently intuitive—the clerk of the bankruptcy court. *See* Fed. R. Bankr. P. 8001.<sup>3</sup> Unlike for most other pleadings, the clerk is tasked with serving notice of the filing of the appeal. *See* Fed. R. Bankr. P. 8004.<sup>4</sup>

Since the notice of appeal is only required to identify the order, judgment or decree from which appeal is taken, the appellant must take a next step (within 10 days of the filing of the notice of appeal) to (1) identify the issues to be presented on appeal and (2) define the record that the appeals court is to review. Fed. R. Bankr. P. 8006 addresses both of these requirements. The appellee then has an additional 10 days to file a designation of additional items to be included in the record on appeal and, if the appellee files a cross appeal, to serve a statement of the issues to be presented in the cross-appeal.

It is important to note that Fed. R. Bankr. P. 8006 specifically requires that the record on appeal include the following items: (1) the items designated by the parties; (2) the notice of appeal itself; (3) the order, judgment or decree that is the subject of the appeal; and (4) any opinions, findings of fact and conclusions of law of the court. Any party filing a designation of the record on appeal is also required to deliver to the

clerk a copy of the items designated. In practice, each party typically will create a binder containing the documents, along with an index to the binder.<sup>5</sup>

The parties then wait for the appeal “record” to be docketed. *See* Fed. R. Bankr. P. 8007 and 8009. During this period, the parties are well-advised to monitor the court docket and check in with the court clerk occasionally. The docketing of the record will trigger the next step (15 days later): the filing of the appeal briefs. *See* Fed. R. Bankr. P. 8009. Detailed requirements are set forth in the FRBP regarding the form and length of the brief. *See* Fed. R. Bankr. P. 8010.

Fed. R. Bankr. P. 8001(a) provides that a failure to take any step other than the filing of the notice of appeal shall be grounds for the appeals court to take any action it deems appropriate, including dismissal of the appeal. *See, e.g., In re Tampa Chain Co.*, 835 F.2d 54, 55 (2d Cir. 1987) (appeal dismissed as, among other things, appellate brief was not filed within 15-day period established by Fed. R. Bankr. P. 8009); *Burton v. Schachter (In re Burton)*, 316 B.R. 138, 139–40 (S.D.N.Y. 2004) (appeal dismissed as, among other things, designation of items and statement of issues not filed within 10-day period established by Fed. R. Bankr. P. 8006).

### In What Court Can Bankruptcy Appeals Be Heard?

There are actually three forums in which bankruptcy appeals can be heard: (1) the local district court, (2) the relevant circuit’s BAP, if such a panel exists in that circuit and (3) directly to the relevant circuit court of appeals but only in some instances. We will discuss each of these options in turn.

The most common approach is to appeal a bankruptcy ruling to the relevant district court. This is the standard that can be most easily followed in the FRBP, cited herein, and as can otherwise be found in the FRBP. *See* Fed. R. Bankr. P. 8008–8015. The other more-standard option permitted in the First, Sixth, Eighth, Ninth and Tenth Circuits is to appeal to a BAP. *See* 28 U.S.C. §158(c). A BAP consists of three sitting bankruptcy judges. However, the BAP is not a mandatory forum; parties to appeals in these circuits may elect to have their appeals be heard by district court judges instead of the BAP. Each BAP has specific rules that must be

consulted prior to consideration as an appeal path.

Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), an appeal can also be made directly to the relevant circuit court of appeals where the case is pending. *See* 28 U.S.C. §158(d). Such a direct appeal is allowed only in limited instances where, among other things, it is certified that the case involves a question of law where there is no controlling decision in the relevant circuit, or the circuit must weigh in on the resolution of conflicting decisions.

### What Is the Standard of Review on Appeal?

When reviewing an order, judgment or decree on appeal from the bankruptcy court, the appellate court reviews the bankruptcy court’s legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof. *See In re United Healthcare Systems Inc.*, 396 F.3d 247, 249 (3d Cir. 2005). Where there are mixed questions of fact and law, the court must accept the bankruptcy court’s finding of “historical or narrative facts unless clearly erroneous, but exercise ‘plenary review of the trial court’s choice and interpretation of legal precepts and its application of those precepts to the historical facts.’” *See Mellon Bank NA v. Metro Communications Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 101–02 (3d Cir. 1981)).

### How Do You Obtain a Stay Pending Appeal?

In many instances, filing an appeal of a bankruptcy court order would be an empty gesture if the order were implemented. Indeed, the U.S. Court of Appeals for the Third Circuit has recognized that “myriad... circumstances can occur that would necessitate the grant of a stay pending appeal in order to preserve a party’s position.” *In re Highway Truck Drivers & Helpers Local Union #107*, 888 F.2d 293, 298 (3d Cir. 1989). For that reason, Fed. R. Bankr. P. 8005 provides a mechanism for seeking a stay of an order pending the outcome of the appeal.

Fed. R. Bankr. P. 8005 provides that, in the first instance, a request for a stay pending appeal “must ordinarily be presented to the bankruptcy judge.” *See* Fed. R. Bankr. P. 8005. The bankruptcy court also possesses the authority—

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<sup>3</sup> Fed. R. Bankr. P. 8002 should rescue the appellant who mistakenly files a notice of appeal with the clerk of the district court or the clerk of the BAP.

<sup>4</sup> The clerk is required to mail a copy on counsel of record to each party other than appellant, or if the party is not represented by counsel, to the party’s last known address, and to “transmit” a copy of the notice of the appeal to the U.S. Trustee.

<sup>5</sup> As with all matters involving an appeal, it is essential to check the court’s local rules, as well as any applicable guidelines promulgated by the clerk of the court to see if there are specific requirements that must be followed.

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subject to the authority of the district court and the BAP—to continue or suspend other proceedings in the bankruptcy case or to enter any other order during the pendency of the appeal as will protect the rights of all parties in interest. *Id.*

Whether to grant a motion for stay pending appeal is within the court's discretion. The standards that guide the court in the exercise of its discretion are similar to the standards for granting a preliminary injunction. *See, e.g., In re Del. & Hudson Ry. Co.*, 90 B.R. 90, 91 (Bankr. D. Del. 1988). The party seeking a stay pending appeal must show that: "(1) it is likely to prevail on the merits of its appeal; (2) it will suffer irreparable injury absent a stay; (3) a stay will not cause substantial harm to other interested parties; and (4) a stay will not harm the public interest." *Id.* at 91. *See also U.S. v. Trans World Airlines Inc. (In re Trans World Airlines Inc.)*, 18 F.3d 208, 211 (3d Cir. 1994). Significantly, the "[m]ovant's failure to satisfy one prong of the standard for granting a stay pending appeal dooms the motion." *In re Deep*, 288 B.R. 27, 30 (N.D.N.Y. 2003) (citations omitted).

If a stay pending appeal is not obtained from the bankruptcy court, a party may file a motion for a stay or modification or termination thereof from the district court and the BAP, but the motion must show why the relief was not obtained from the bankruptcy court. Fed. R. Bankr. P. 8005. Under those circumstances, the district court and the

BAP may order the posting of a bond or other appropriate security. *Id.*

### When Might Damages Be Awarded?

The FRBP governing costs and damages vary in certain respects from the otherwise-prevailing "American Rule." Fed. R. Bankr. P. 8014 provides that "[e]xcept as otherwise provided by law, agreed to by the parties, or ordered by the district court or the BAP, costs shall be taxed against the losing party on an appeal." *See* Fed. R. Bankr. P. 8014. However, there is no requirement that the district court or BAP award the prevailing party all its costs. *See, e.g., In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008).

If the court determines that an appeal was frivolous, either on motion or *sua sponte*, after giving the appellant a reasonable opportunity to respond, the district court or the BAP may "award just damages or double costs to the appellee." *See* Fed. R. Bankr. P. 8020. Not surprisingly, there is a fairly exacting standard for a finding of frivolity; the result must be obvious and the appellant's argument must be without merit. *See, e.g., Ramirez v. Debs-Elias*, 407 F.3d 444, 450 (1st Cir. 2005) (sanctions warranted where "the overwhelming weight of precedent was against appellant's position, where appellant could set forth no facts to support its position, or where, in short, there simply was no legitimate basis for pursuing an appeal." (citation omitted));

*In re Alta Gold Co.*, 236 Fed. Appx. 266, 267 (9th Cir. 2007) (citation omitted). However, even when the court finds an appeal to be frivolous, whether to impose sanctions is within the court's discretion. *See, e.g., Flaherty v. Gas Research Institute*, 31 F.3d 451, 459 (7th Cir. 1994).

Fed. R. Bankr. P. 8020 is identical, in relevant part, to Rule 38 of the Federal Rules of Appellate Procedure; "therefore, a court considering a Bankruptcy Rule 8020 motion should be guided by cases applying Appellate Rule 38." *See Safety Nat'l Cas. Corp. v. Kaiser Aluminum & Chem. Co.*, Civ. A. No. 02-1580 (JJF), 2003 U.S. Dist. LEXIS 23841, \*4 (D. Del. Nov. 25, 2003) (citing 10 *Collier on Bankruptcy*, ¶8020.02 (15th ed. rev. 2003) (citation omitted)).

There appear to be relatively few reported cases where damages or costs were awarded under Fed. R. Bankr. P. 8020. However, in one recent case, a district court awarded damages against a *pro se* appellant where the court found the appellant's appeals to be frivolous and malicious under 28 U.S.C. §1915. *See Roper v. Garden Ridge Corp. (In re Garden Ridge Corp.)*, Civ. A. No. 06-555 (GMS), 2009 U.S. Dist. LEXIS 1207, \*5-9 (D. Del. Jan. 9, 2009). In another recent case, the appeals court affirmed the BAP's imposition of sanctions where the appeal was "wholly without merit" and the appellant lacked standing to litigate her claims. *See Spirtos v. Day (In re Spirtos)*, 270 Fed. Appx. 540, 542 (9th Cir. 2008). ■

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