2022 Alexander L. Paskay Memorial Bankruptcy Seminar

Nuts & Bolts of Bankruptcy Appeals

PLENARY SESSION

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2022

2022 ALEXANDER L. PASKAY MEMORIAL BANKRUPTCY SEMINAR

NUTS & BOLTS OF BANKRUPTCY APPEALS

I. PRE-APPEAL CONSIDERATIONS

A. Standing to Appeal?

- **"Persons Aggrieved" Standard.** In the Eleventh Circuit, only individuals that are "persons aggrieved" by the bankruptcy order being appealed have standing to appeal that decision. This standard is more exacting than constitutional standing under Article III . A "person aggrieved" is one that has a "direct and substantial interest in the question being appealed." Stated differently, an appellant must be "directly and adversely affected pecuniarily by[,]" and "have a financial stake" in, the order to have standing to appeal. "A person has a financial stake in the order when that order diminishes their property, increases their burdens or impairs their rights." *Westwood Cmty. Two Ass'n, Inc. v. Barbee (In re Westwood Cmty. Two Ass'n, Inc.)*, 293 F.3d 1332, 1335 (11th Cir. 2002) (quoting *In re Troutman Enter., Inc.*, 286 F.3d 359, 364 (6th Cir. 2002)); *Tucker v. Mukamal*, 616 F. App'x. 969 (11th Cir. 2015) (a party that will receive no distribution from a bankruptcy lacks a financial stake in a bankruptcy court's order and lacks standing).

- According to the Eleventh Circuit Court of Appeals, "[t]his general rule was developed as a means to control, in an orderly manner, proceedings that often involve numerous creditors who are dissatisfied with any compromise that jeopardizes full payment of their outstanding claims against the bankrupt." "The rationale for such a strict requirement is that bankruptcy litigation almost always involves the interests of numerous parties who may or may not be parties to the litigation. Restricting standing to those who have a direct pecuniary interest in the litigation avoids endless appeals brought by individuals affected only indirectly by the bankruptcy court's orders." Therefore, a party has standing to appeal an order when its reversal would have an immediate effect on that individual's pecuniary interests, not where reversal simply raises the mere possibility that some pecuniary benefit may inure to the individual in the future. *Abdulla v. Coleman (In re Sportsman's Link, Inc.)*, No. CV412-045, 2013 WL 1289048, at *2 (S.D. Ga. Mar. 27, 2013).

    - Assignor of claim against debtor lacks standing. *In re Fullenkamp*, 477 B.R. 826, 830–31 (Bankr. M.D. Fla. 2011) (holding that a judgment creditor that assigned to a third party the judgment creditor's claim against the debtor lacked standing to object to the debtor's application to employ a law firm); *In JMP-Newcor Int'l, Inc.*, 225 B.R. 462, 464 (Bankr. N.D. Ill. 1998) (holding that an assignor of a claim against the debtor lacked standing to object to a

final judgment even though the assignor maintained a legal claim against the assignee and the assignee received no distribution under the bankruptcy plan).

- Creditor of debtor's creditors lacks standing. *In re Comcoach Corp.*, 698 F.2d 571, 574 (2d Cir. 1983) (holding that a mortgagee lacked standing to move to lift an automatic stay on proceedings against the mortgagor's lessee, the debtor); *In re Lifeco Inv. Group,* 173 B.R. 478, 487–88 (Bankr. D. Del. 1994) (collecting cases and finding "no statutory or judicial support to conclude that a creditor of a creditor has standing in a bankruptcy case"); *In re Tour Train P'ship*, 15 B.R. 401, 402 (Bankr. D. Vt. 1981) (holding that a judgment creditor of the debtor's creditor lacked standing to move to lift an automatic stay on proceedings against the debtor). *See also Seacoast National Bank v. Jordyn Holdings IV, LLC*, 392 B.R. 876 (M.D. Fla. 2008).

B. Final Order or Interlocutory Order?

i. **Jurisdictional Issue.** The threshold issue in this case is the district court's jurisdiction to entertain the appeal. *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).

ii. **Final Orders.** 28 U.S.C. § 158(a)(1) (right to immediate appeal from the bankruptcy court to the district court from "final judgments, orders, and decrees.") and Fed. R. Bankr. P. 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).

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).

- *In re Belli*, 268 B.R. 851, 854-855 (9th Cir. BAP 2001) ("Adversary proceedings are merely federal civil actions under another name, and do not ordinarily present the types of uncertainties that necessitate 'flexible finality' analysis. . . . Thus, we hold that finality for purposes of jurisdiction over 'as of right' appeals under 28 U.S.C. § 158(a)(1) in adversary proceedings does not differ from finality in ordinary federal civil actions under 28 U.S.C. § 1291.").

- 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).

iii. <u>Interlocutory Orders</u>.

- Occasionally, non-final orders (interlocutory orders) can be appealed. A party needs leave of court under 28 U.S.C. § 158(a). The same analysis used in a non-bankruptcy, federal action generally applies, which is the analysis under 28 U.S.C. § 1292(b). It asks whether (a) there is a controlling question of law; (b) as to which there is substantial ground for difference of opinion; and (c) an immediate appeal may materially advance the ultimate termination of the litigation

- "The list of contested matters is 'endless' and covers all sorts of minor disagreements. *Bullard v. Blue Hills*, 135 S.Ct. 1686, 1694 (2015). 10 Collier on Bankruptcy ¶ 9014.01, at 9014–3.

- An interlocutory order is one that "does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *In re Kutner*, 656 F.2d 1107, 1111 (5th Cir. 1981).

- "An order is not final for appellate review when it merely disposes of an incidental procedural matter during the proceedings in bankruptcy court." *In re Tidewater Grp., Inc.*, 734 F.2d 794, 795 (11th Cir. 1984).

- Orders appointing or denying counsel for trustees are interlocutory (majority view). *In re Delta Servs. Indus., Etc*., 782 F.2d 1267, 1273 (5th Cir. 1986); *KK-PB Fin., LLC v. 160 Royal Palm*, LLC, 2019 WL 9075950, at *2 (S.D. Fla. 2019); *Estate of Arlene Townsend v. Scharrer*, No. 8:20-cv-00928-SDM (M.D. Fla. Sept. 21, 2020); 1 Collier on Bankruptcy ¶ 5.08.

- Orders granting or denying discovery are generally not final orders and not immediately appealable. *In re Int'l Horizons, Inc.*, 689 F.2d 996,1000-1001 (11th Cir. 1982); *Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 745 (11th Cir. 1982).

- Interlocutory review is generally disfavored for its piecemeal effect on cases. Many courts view interlocutory appeals as "inherently disruptive, time-consuming, and expensive." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000).

- Consider whether, in a bankruptcy appeal, an order from a district court to a circuit court of appeals is still final and appealable, depending on the action taken in the appeal by the district court.

iv. Judgment on Multiple Claims or Involving Multiple Parties.

- Fed. R. Civ. P. 54(b) Certifications (incorporated into Fed. R. Bankr. P. 7054(a))-"Express Determination" and "Express Direction": When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. *See also* 19 MOORE'S FEDERAL PRACTICE – Civil § 202.06; accord 10 COLLIER ON BANKRUPTCY ¶ 7054.03.

- A prevailing party may move for 54(b) certification. *See Curtiss-Wright Corp. v. General Elec. Co.,* 446 U.S. 1, 3 (1980) (approving the prevailing party's motion for certification under Rule 54(b)); *Williams v. Taylor Seidenbach, Inc.,* 958 F.3d 341, 353 (5th Cir. 2020) (("[B]oth the winning and losing side of a court order have an

incentive to request partial final judgment under Rule 54(b), and thus end the district court litigation. Winning parties have an incentive to seek judgment in order to enforce their win."); *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 951 (7th. Cir. 1980) (permitting prevailing party to obtain immediate judgment under Rule 54(b) in order to collect upon the claim despite remaining claims against other defendants); *Comite Pro Rescate de La Salud v. P.R. Aqueduct & Sewer Auth*., 888 F.2d 180, 183 (1st Cir. 1989) (granting Rule 54(b) certification sought by prevailing defendants, with support of plaintiffs); *Halliburton Energy Servs. v. NL Indus.*, No. H-05-4160, 2008 U.S. Dist. LEXIS 50919, *1, 2008 WL 26973452008 (S.D. Tex. Jul. 2, 2008) (holding similarly).

- "A district court must follow a two-step analysis in determining whether a partial final judgment may properly be certified under Rule 54(b)." *Lloyd Noland Foundation, Inc. v. Tenet Health Care Corp*., 483 F.3d 773, 777 (11th Cir. 2007). "First, the court must determine that its final judgment is, in fact, both 'final' and a 'judgment.'" *Id.* "That is, the court's decision must be 'final' in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action, and a 'judgment' in the sense that it is a decision upon a cognizable claim for relief." *Id.* (quotation marks omitted). "Second, having found that the decision was a final judgment, the district court must then determine that there is no 'just reason for delay' in certifying it as final and immediately appealable." *Id.* (quotation marks omitted). "The district court must act as a 'dispatcher' and exercise its discretion in certifying partial judgments in consideration of judicial administrative interests—including the historic federal policy against piecemeal appeals—and the equities involved." *Id.* at 778 (quotation marks omitted). Certification is appropriate "if there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal." *In re Southeast Banking Corp*., 69 F.3d 1539, 1547 (11th Cir. 1995).

- The factors which a trial court should consider when making a Rule 54(b) determination include: (1) the relationship between the adjudicated and unadjudicated claims, (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time, (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final, and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing

claims, expense and the like. *General Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1030 (6th Cir. 1994) (citations omitted).

- Determination of whether to grant certification of dismissal of fewer than all claims is committed to discretion of district court, and will be set aside only for abuse of discretion. *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 629 (2d Cir. 1991); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1369 (11th Cir. 1983), *reh'g denied*, 706 F.2d 318, *cert. denied*, 104 S.Ct. 239, 464 U.S. 893, 78 L. Ed. 2d 230.

- Ordinarily, issuance of separate final judgments should not be indulged as a matter of routine or as a magnanimous accommodation to lawyers or litigants; instead, separate final judgments under the Federal Rule of Civil Procedure governing separate final judgments must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. *Noonan v. Wonderland Greyhound Park Realty LLC*, 723 F. Supp. 2d 298, 354 (D. Mass. 2010) (citations omitted).

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v. **Stay Pending Appeal?** Fed. R. Bankr. P. 8007.

- 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)).

- Equitable Mootness Considerations. 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). 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.").

- Bond Requirements. Fed. R. Bankr. P. 8007(c) and (d).

C. Standard of Review?

- The United States District Court functions as an appellate court in reviewing decisions of the United States Bankruptcy Court. 28 U.S.C. § 158(a); *In re Failla*, 838 F.3d 1170, 1174 (11th Cir. 2016). The legal conclusions of the bankruptcy court are reviewed de novo, while findings of fact are reviewed for clear error. *In re Globe Mfg. Corp.*, 567 F.3d 1291, 1296 (11th Cir. 2009); *Ballato v. Ballato*, 190 B.R. 447, 448 (M.D. Fla. 1995) (*citing In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593 (11th Cir. 1990)).

- Equitable decisions are subject to the abuse of discretion standard. *In re General Dev. Corp.*, 84 F.3d 1364, 1367 (11th Cir. 1996) ("Equitable determinations by the Bankruptcy Court are subject to review under an abuse of discretion standard."); *In re Kingsley*, 518 F.3d 874, 877 (11th Cir. 2008) ("In reviewing for abuse of discretion, we recognize the existence of a 'range of possible conclusions the trial judge may reach,' and 'must affirm unless we find that the ... court has made a clear error of judgment, or has applied the wrong legal standard.'") (quoting *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2007)).

    - Settlements or compromises approved by bankruptcy courts are reviewed under the abuse of discretion standard. *In re Superior Homes & Invs., LLC*, 521 F. App'x 895, 898 (11th Cir. 2013); *Chira v. Salkin (In re Chira)*, 567 F.3d 1307, 1311 (11th Cir. 2009); *In re Van Diepen, P.A.*, 236 F. App'x 498, 504 (11th Cir. 2007).

- "The 'abuse of discretion' standard of review controls appeals from orders involving motions to sell pursuant to § 363(b)." *Big Shanty Land Corp. v. Comer Properties, Inc.*, 61 B.R. 272, 277 (N.D. Ga. 1985) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

i. **Clearly Erroneous Standard of Review**. A district court reviews a bankruptcy court's factual finding for clear error. *Seacoast Nat'l Bank v. Jordyn Holdings IV, LLC*, 392 B.R. 876, 879 (M.D. Fla. 2008) (Kovachevich, J.). "Clear error is a highly deferential standard of review. A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1319 (11th Cir. 2007). In other words, "if the bankruptcy court's assessment of the evidence is plausible in light of the entire record, the appellate court may not reverse, even if it may have weighed the evidence differently" (and certainly if the district court agrees). *Rensin v. Fed. Trade Comm'n*, 604 B.R. 917, 924 (S.D. Fla. 2019).

ii. **Abuse of Discretion Standard of Review.** A court "abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, makes findings of fact that are clearly erroneous", or applies the law in an unreasonable or incorrect manner. *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa.*, 713 F.3d 71, 77 (11th Cir. 2013) (citing *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004)).

D. Pendent Appellate Jurisdiction

- Pendent appellate jurisdiction is "a judicially-created, discretionary exception to the final judgment requirement." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006) (under this exception, the appellate court retains the discretion to review issues that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review).

- Pendent appellate jurisdiction is present when a nonappealable decision is "inextricably intertwined" with the appealable decision or when review of the former decision [is] necessary to ensure meaningful review of the latter. … [T]he Supreme Court has signaled that pendent appellate jurisdiction should be present only under rare circumstances. … [A] more expansive exercise of such jurisdiction would undermine the statutory scheme governing interlocutory appeals. Our Circuit has found pendent appellate jurisdiction in only limited factual scenarios. Pendent jurisdiction does not exist when "resolution of the nonappealable issue [is] not necessary to

resolve the appealable one." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379–81 (11th Cir. 2009) (citing *Johnson v. Jones*, 515 U.S. 304, 318 (1995); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995).

II. PERFECTING THE APPEAL[1]

A. Notice of Appeal

- Fed. R. Bankr. P. 8002(b)(1): List of authorized tolling motions
- Fed. R. Bankr. P. 8002(a): filed with the bankruptcy court within 14 days after entry of the judgment, order, or decree being appealed.
- Fed. R. Bankr. P. 8002(d): Authorized extensions of time to file a Notice of Appeal in certain instances
- Fed. R. Bankr. P. 8003(a)(3): Contents of Notice of Appeal taken as of right
- Fed. R. Bankr. P. 8004(a) Contents of Notice of Appeal by leave

B. Motion for Leave to Appeal. 28 U.S.C. § 158(a)(3) (utilizing the standards set forth at 28 U.S.C. § 1292(b) by analogy); Fed. R. Bankr. P. 8004(b) (contents of motion); and Fed. R. Bankr. P. 8007(b)(2) and (3) (showing or statement required and additional content).

- An appellant must show that the appealed order "(1) presents a controlling question of law; (2) over which there is a substantial ground for difference of opinion among courts; and (3) the immediate resolution of the issue would materially advance the ultimate termination of the litigation." *Laurent v. Herkert,* 196 F. App'x 771, 772 (11th Cir. 2006); *In re Celotex Corp.,* 187 B.R. 746, 749 (M.D. Fla. 1995).
- Can the appellate court (i) refer to the order for the background necessary to gain an appreciation of the controlling question of law; (ii) adjudicate it quickly and cleanly without the need to delve beyond the surface of the record to determine the facts; and (iii) resolve an issue having general relevance to other cases in the same area of law. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1271 (11th Cir. 2004); *In re Wiand*, No. 8:10-cv-00071-EAK-MAP, 2012 WL 611896, at *3 (M.D. Fla. Jan. 4, 2012).

[1] Note that the bankruptcy appeals to the circuit court of appeals is different procedurally. Federal Rules of Appellate Procedure apply.

C. Statement of Issues

- Fed. R. Bankr. P. 8009(a)(1): Appellant must file the Statement and Designation within 14 days after the appellant's notice of appeal as of right becomes effective under Rule 8002 or an order granting leave to appeal is entered.
- Fed. R. Bankr. P. 8009(a)(2): Appellee may file a Designation within 14 days after being served with Appellant's Statement and Designation.

D. Designation of Items for Inclusion in the Record on Appeal

- Fed. R. Bankr. P. 8009(a)(4): Items which must be included.

- "The touchstone for the designation of matter as part of the record is whether the matter was before the lower court (or at least considered by that court) in entering the order or judgment appealed from." *In re Fundamental Long Term Care, Inc.)*, 557 B.R. 824, 830 (Bankr. M.D. Fla. 2016).

III. APPELLATE MOTION PRACTICE

A. Motion to Strike/Correct/Modify/Conform the Record on Appeal.

- Fed. R. Bankr. P. 8009(e)(1) and 8013: "If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item."

B. Motion to Supplement the Record on Appeal.

- Fed. R. Bankr. P. 8009(e)(2) and 8013: "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: (A) on stipulation of the parties; (B) by the bankruptcy court before or after the record has been forwarded; or (C) by the court where the appeal is pending."

- It would be inappropriate to supplement a record on appeal with evidence the appellant had an opportunity to present, but failed to present, prior to entry of the judgment on appeal. *Estate of Juanita Jackson, et al. v. General Electric Capital Corp., et al. (In re Fundamental Long Term Care, Inc.)*, 557 B.R. 824 (Bankr. M.D. Fla. 2016).

C. Motion to Seal Items in the Record on Appeal.

- Fed. R. Bankr. P. 8009(f) and 8013: "A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending."

IV. APPELLATE BRIEFS

- Fed. R. Bankr. P. 8018(a)(1): Appellant's Brief must filed within 30 days after the docketing of notice that the record has been transmitted or is available electronically. But see flexibility given to the district court.

- Fed. R. Bankr. P. 8018(a)(2): Appellee's Brief must be filed within 30 days after service of the Appellant's Brief.

- Fed. R. Bankr. P. 8018(a)(3): Appellant's Reply Brief may be filed within 14 days after service of the Appellee's Brief (or at least 7 days before scheduled argument unless the appellate court for good cause allows a later filing).

- Fed. R. Bankr. P. 8014(a) and (c): Contents of Appellant's Brief and Reply Brief

- Fed. R. Bankr. P. 8014(b): Contents of Appellee's Brief

- Fed. R. Bankr. P. 8015: Form and Length of Briefs; Form of Appendices and Other Papers

- Fed. R. Bankr. P. 8018(b) and (c): Requirements for the Appendix to the Brief

V. ORAL ARGUMENT – Fed. R. Bankr. P. 8019. Note the presumption in the rule.

VI. POST-RULING MOTIONS

- Fed. R. Bankr. P. 8020(a): Motion for Damages & Costs for Frivolous Appeal

- Fed. R. Bankr. P. 8022: Motion for Rehearing. *See, e.g., In re Fundamental Long Term Care, Inc.*, No. 8:19-cv-02082-SDM (M.D. Fla. Dec. 18, 2020) (motion for rehearing filed 28 days after affirmance of bankruptcy order and entry of judgment untimely).

Faculty

Hon. Scott M. Grossman is a U.S. Bankruptcy Judge for the Southern District of Florida in Fort Lauderdale, appointed in February 2019. He previously was bankruptcy and restructuring attorney and litigator based in Greenberg Traurig, LLP's Ft. Lauderdale and Miami offices, where he represented distressed companies, debtors, trustees, secured and unsecured creditors, landlords, official committees, defendants in insolvency-related litigation, and purchasers of distressed assets. He had worked on bankruptcy cases across various industries, including real estate, hospitality, health care, banking, technology, energy and financial fraud. He also litigated and advised clients on bankruptcy tax issues, Florida's homestead exemption, and fraudulent transfer and preference claims. While primarily involved in chapter 11 reorganizations, Judge Grossman also represented clients in out-of-court workouts and restructurings, chapter 7 liquidations, receiverships, assignments for the benefit of creditors, and insolvency-related litigation. Before that, he was a trial attorney in the Attorney General's Honors Program with the U.S. Department of Justice, Tax Division, where he litigated federal tax controversies in bankruptcy courts and federal district courts. From July 1, 2015, to June 30, 2016, Judge Grossman served as the president of the Bankruptcy Bar Association of the Southern District of Florida. He received his B.S. in 1996 from the University of Florida and his J.D. in 1999 from George Washington University Law School.

Ceci C. Berman is a managing shareholder at Brannock Humphries & Berman in Tampa, Fla., and is board-certified in appellate practice. She focuses on complex commercial appeals and has experience handling bankruptcy, family law and land-use appeals. She regularly speaks and writes on these and other appellate topics. Before joining Brannock Humphries & Berman, Ms. Berman was a shareholder with Fowler White Boggs, P.A., now Buchanan Ingersoll and Rooney P.C., where she specialized in appellate practice and served on both the Writing Committee and the Associate Evaluation Committee. She is a past chair of the Florida Bar's Appellate Practice Section, and she has served on the Appellate Court Rules Committee. In addition, she is the Immediate Past Chair of the Civil Procedure Rules Committee. Ms. Berman has been recognized by numerous "Best Lawyer Lists" as a leading lawyer for appellate and commercial litigation, including *Chambers USA* and *Florida Trend*, and she has appeared annually as one of *Super Lawyers*' Top 100 lawyers and Top 50 women lawyers in Florida. Ms. Berman received her undergraduate degree from the University of Florida with honors and her J.D. from the Georgetown University Law Center.

Robert F. Elgidely is a partner with Fox Rothschild LLP in Miami and New York, where he focuses his practice on complex bankruptcy disputes and commercial litigation matters. In his bankruptcy practice, he regularly represents court-appointed fiduciaries in connection with chapter 7 and 11 cases stemming from fraud and financial crimes. He also regularly represents debtors, creditors, creditors' committees and liquidating trustees. Mr. Elgidely has handled business, real estate, aviation, admiralty, sports and entertainment, motor vehicle and ERISA/employee benefits disputes. He prosecuted avoidance claims seeking more than $84 million in recoveries in a chapter 7 bankruptcy case stemming from a massive check-kiting scheme, served as special counsel to the chapter 7 trustee in a bankruptcy case involving a $350 million international Ponzi scheme in which 7,000 victim-creditors obtained significant recoveries, represented the chapter 11 trustee of a law firm that collapsed following the revelation of a $1.2 billion Ponzi scheme perpetrated by the firm's principal

and secured recoveries that contributed to a 100 percent distribution to victim-creditors, and represented several Italian professional tennis players in connection with a suit against the ATP concerning provisions of the official rulebook for the sport. Prior to joining Fox Rothschild, Mr. Elgidely was a partner in the bankruptcy law and litigation practice of a Florida boutique law firm. Before he became a lawyer, he served in the U.S. Army National Guard and U.S. Army Reserve; he completed Basic Combat Training at Fort Leonard Wood, Mo., in 1989 and Advanced Individual Training as a medic at Fort Sam Houston, Texas, in 1990. Mr. Elgidely received his B.A. from Siena College in 1993, his J.D. in 1996 from Nova Southeastern University Shepard Broad College of Law and his LL.M. in taxation in 1997 from the University of Miami School of Law.

Hon. William F. Jung is a U.S. District Court Judge for the Middle District of Florida in Tampa. He was nominated to the court by President Donald Trump on Dec. 21, 2017, and confirmed by the U.S. Senate on Sept. 6, 2018, by a voice vote. Judge Jung was previously nominated to the same federal judicial post in April 2016 by President Barack Obama. On Jan. 3, 2017, his nomination was returned to President Obama at the *sine die* adjournment of the 114th Congress. Prior to his 2018 judicial appointment, Jung was a partner at the Tampa, Fla.-based law firm of Jung and Sisco, P.A., which he co-founded in 1993. He received his undergraduate degree from Vanderbilt University in 1980 and his J.D. in 1983 from the University of Illinois College of Law.