AMERICAN BANKRUPTCY INSTITUTE

2017 Alexander L. Paskay Memorial Bankruptcy Seminar

PLENARY SESSION

You Lost! Now What? Appellate Issues: Is Your Order Final?

Paul J. Battista, Moderator
Genovese Joblove & Battista, P.A.; Miami

Paul A. Avron
Berger Singerman LLP; Boca Raton

Ceci C. Berman
Brannock & Humphries; Tampa

Mark D. Hildreth
Shumaker, Loop & Kendrick, LLP; Sarasota

2017

SEEKING APPELLATE REVIEW OF BANKRUPTCY ORDERS: FINALITY AND APPEALABILITY

Ceci Berman
Brannock & Humphries, Tampa, Florida

I. Introduction

Determining whether a court order is appealable can be a difficult analysis. That analysis often becomes more challenging in the bankruptcy context because of the special types of orders entered in those proceedings. This paper provides an overview of how to determine whether a bankruptcy order is final and appealable.

II. Finality: Is the order appealable?

Practitioners, and even judges, often struggle with the concept of finality and what it means to the appealability of an order. Finality is exactly what it sounds like: whether the order that a party wants to appeal is "final" and thus, appealable. In federal appeals, in particular, where there are very few appeals of non-final orders allowed, finality is often the lynchpin of whether an order is appealable.[1]

A. Final orders

With any potential appeal, the immediate question is whether a bankruptcy court's order is final. Whether a particular order is final—any order, even those outside the bankruptcy context—"is not always easy to determine."[2] For that reason, an extensive body of "final order" jurisprudence has developed to govern the test for finality in federal court. These general federal principles, developed under 28 U.S.C. § 1291, apply to determining the finality of a bankruptcy order.[3] Thus, like the typical federal test for finality,[4] a bankruptcy order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute judgment.[5]

---

[1] *See Leishman v. Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943) (noting that finality is essential to appealability).

[2] *Stewart v. Kutner* (*Matter of Kutner)*, 656 F.2d 1107, 1110 (5th Cir. 1981).

[3] *Wisz v. Moister (In re Wisz)*, 778 F.2d 762, 764 (11th Cir. 1985) ("In determining what is a final order in a bankruptcy appeal this court consistently has applied the final-order jurisprudence developed under 28 U.S.C. § 1291."); *Int'l Horizons, Inc. v. Comm. of Unsecured Creditors (Matter of Int'l Horizons, Inc.)*, 689 F.2d 996, 1000 n.6 (11th Cir. 1982) (noting that "in determining whether we are presented with a final and appealable order for the

Although this sounds simple enough in theory, applying the test for finality in practice is not always so straightforward. That is especially true in bankruptcy matters, which present unique complexity given the different types of proceedings that take place within a single bankruptcy. For example, bankruptcy proceedings always include the main bankruptcy itself, but there are often also adversary proceedings. In the main bankruptcy, an example of a final, appealable order is the order confirming the plan of reorganization.[6]

However, with respect to orders in adversary proceedings, usually it is the particular adversary proceeding that must have been finally resolved rather than the entire bankruptcy litigation.[7] This application of the test for finality is consistent with the idea that an adversary proceeding operates as a standalone litigation matter within the bankruptcy, which proceeds much like any other standard civil litigation case.[8] Because "a truly simultaneous resolution" of each adversary proceeding is impossible, courts treat any order within a bankruptcy case that concludes a particular adversary proceeding as final and appealable.[9]

As with other federal matters, though, if an order in an adversary proceeding disposes of fewer than all of the claims in an adversary proceeding, or if the order does not dispose of every party in the adversary proceeding, then the order is not final.[10] However, under Bankruptcy Rule

---

purposes [of § 1293], we shall look to the extensive final order jurisprudence that has developed in the context of appeals brought under 28 U.S.C. § 1291").

[4] *Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

[5] *Commodore Holdings, Inc. v. Exxon Mobil Corp.*, 331 F.3d 1257, 1259 (11th Cir. 2008); *Guy v. Dzikowski (In re Atlas)*, 210 F.3d 1305, 1307 (11th Cir. 2000).

[6] *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 875 (11th Cir. 2010) ("The bankruptcy court's confirmation of Tennyson's Chapter 13 plan is a final order."); *see also Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1550 (11th Cir. 1990).

[7] *Commodore Holdings*, 331 F.3d at 1259.

[8] *Martin Bros. Toolmakers, Inc. v. Indus. Dev. Bd. of the City of Huntsville (In re Martin Bros. Toolmakers, Inc.)*, 796 F.2d 1435, 1436-37 (11th Cir. 1986) (noting that "a bankruptcy case is simply an aggregation of controversies, many of which would constitute individual lawsuits had a bankruptcy petition never been filed").

[9] *Id.*

[10] *See Dzikowski v. Boomer's Sports & Recreation Ctr., Inc. (In re Boca Arena, Inc.)*, 184 F.3d 1285, 1286 (11th Cir. 1999).

7054, which incorporates Federal Rule 54(b), the party whose claims have been disposed of can seek certification from the bankruptcy court that the party should be able to immediately proceed with an appeal.[11]

In further recognition that bankruptcy is sometimes just a little bit different from other types of litigation, federal courts have come to treat the issue of finality in bankruptcy cases in a pragmatic, rather than overly technical, manner.[12] As the Third Circuit has explained, in a decision cited favorably by the Eleventh Circuit, the "rationale for viewing finality under a less rigorous standard" in bankruptcy is that "[b]ankruptcy cases frequently involve protracted proceedings with many parties participating."[13] To "avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory."[14] Thus, finality is viewed more flexibly in the bankruptcy context because "bankruptcy is an aggregation of controversies and suits."[15]

An excellent example of finality being flexible is found in *Walden v. Walker* (*In re Walker)*, 515 F.3d 1204, 1209 (11th Cir. 2008), a Chapter 7 case in which the bankruptcy court removed the trustee. The Eleventh Circuit found the order of removal of the trustee to be final and appealable—even though it appeared non-final—stating that judicial efficiency would be "turned on its head" if the appellate court were to delay reviewing the trustee appointment until after the entire bankruptcy proceeding concluded.[16]

---

[11] *See id.* at 1287.
[12] *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1547 (11th Cir. 1996).
[13] *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir. 1985).
[14] *Id.*
[15] *Barben v. Donovan (In re Donovan)*, 532 F.3d 1134, 1136 (11th Cir. 2008).
[16] *Walker*, 515 F.3d at 1210.

Other examples of finality as a flexible concept in bankruptcy cases include *Tobkin v. Calderin (In re Tobkin)*, 638 F. App'x 822, 824 (11th Cir. 2015) (reviewing bankruptcy court's "turnover" order and denial of the debtor's motion to alter or amend); *In re Olson*, 730 F.2d 1109, 1110 (8th Cir. 1984) (concluding that a bankruptcy order resolving claim priority and directing the trustee to pay claims was final for purposes of appeal); and *Mason v. Integrity Ins. Co. (In re Mason)*, 709 F.2d 1313, 1316-17 (9th Cir. 1983) (concluding that an order for relief and the denial of a motion to vacate such an order is final and appealable in bankruptcy proceedings).

But, there is a flip side to the notion of finality being flexible in bankruptcy cases. "'Increased flexibility' in applying the finality doctrine in bankruptcy does not render appealable an order which does not finally dispose of a claim or adversary proceeding."[17] And, this flexibility means that appellate courts do not always agree on whether a particular type of bankruptcy order is final. In the Ninth Circuit, for instance, "a bankruptcy court's order denying a claim of exemption is a final, appealable order under 28 U.S.C. § 158(a)(1) and any appeal from such an order must be taken within the time allowed under the bankruptcy rules, or the right to appeal will be waived."[18] Under this approach, which is followed in many other circuits, exemption decisions are treated as final because they can "determine the entire course of the bankruptcy proceeding."[19]

But in the Eleventh Circuit, "a district court order affirming the bankruptcy court's disallowance of an exemption is not final and thus does not fall within [the court's] appellate

[17] *In re Donovan*, 532 F.3d 1136.
[18] *Preblich v. Battley*, 181 F.3d 1048, 1056 (9th Cir. 1999); *see also Matter of Jones*, 768 F.2d 923, 925 n.3 (7th Cir. 1985) (concluding that an order allowing or disallowing an exemption is final because it conclusively determines whether the asset is part of the estate).
[19] *In re Huebner*, 986 F.2d 1222, 1223 (8th Cir. 1993) (quoting *In re Barker*, 768 F.2d 191, 193 (7th Cir. 1985)).

jurisdiction."[20] That said, "finality for bankruptcy purposes is a complex subject,"[21] so the Eleventh Circuit will review such an order entered after confirmation, construing it as "effectively affirm[ing] the confirmation despite the lack of an appeal directly from that confirmation order."[22]

By contrast, with respect to orders denying relief from an automatic stay, the Ninth and Eleventh Circuits see eye to eye. In *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1309 (11th Cir. 1982), the Eleventh Circuit noted that such orders equate to granting a permanent injunction and, therefore, are final and appealable. The Ninth Circuit has also adopted this per se rule that bankruptcy court orders granting or denying relief from an automatic stay are final and appealable.[23] Yet, as a recent district court decision explained, other circuits analyze the finality of orders related to the automatic stay on a case-by-case basis.[24]

B. Non-final orders

i. Exceptions to finality

Sometimes, even when an order is non-final, in rare instances, it might be appealable as a final order. As in other federal cases, there are three exceptions in bankruptcy cases to the general rule that only a final order is appealable: (1) the collateral order, or *Cohen*, doctrine; (2) the *Forgay-Conrad* rule; and (3) the marginal finality, or *Gillespie*, rule. Each of these exceptions permits a litigant to appeal an order that is technically non-final, but that has some characteristic that makes it appropriate for immediate review. The appeal proceeds in the same

[20] *Valone v. Waage (In re Valone)*, 784 F.3d 1398, 1401 (11th Cir. 2015).
[21] *Darby v. McGregor*, 216 B.R. 657, 659 (M.D. Ala. 1997) (quoting *Cochrane v. Vaquero Invs.*, 76 F.3d 200, 203-04 (8th Cir. 1996)).
[22] *In re Valone*, 784 F.3d at 1401-02.
[23] *See In re Am. Mariner Indus., Inc.*, 734 F.2d 426, 429 (9th Cir. 1984).
[24] *Leinbach v. JP Morgan Chase Bank, NA*, No. 15-CV-00006, 2016 WL 538882, at *3 (M.D. Pa. Feb. 11, 2016).

manner as a final order appeal. But these exceptions, while in theory available in the bankruptcy context, are rarely applied.

The first exception to finality is known as the collateral order doctrine or, sometimes, the *Cohen* doctrine, after the seminal Supreme Court case establishing the rule.[25] Under this exception, an otherwise non-final order is treated as final and appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.[26] The Eleventh Circuit has stated that both it and other circuits "have freely applied the collateral order doctrine" in bankruptcy cases.[27]

However, despite this broad statement, the reality is that there are far more instances in which the collateral order doctrine has *not* been applied than instances in which it has.[28] In fact, even in the case cited by the Eleventh Circuit when it made this broad pronouncement about the applicability of the doctrine, the court cautioned that "application of the *Cohen* rule turns on practical considerations."[29] Then, the Eleventh Circuit actually *granted* a motion to dismiss the appeal for lack of finality in that case.[30]

Another exception to finality is the *Forgay-Conrad* rule, which, like the collateral order doctrine, can also theoretically apply in bankruptcy cases.[31] The *Forgay-Conrad* rule allows for

---

[25] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).
[26] *Carpenter v. Mohawk Indus., Inc. (In re Mohawk Indus., Inc.)*, 541 F.3d 1048, 1052 (11th Cir. 2008).
[27] *In re Martin Bros.*, 796 F.2d at 1437.
[28] *See, e.g.*, *Colony Lender, LLC v. Colony Beach & Tennis Club, Inc. (In re Colony Beach & Tennis Club, Inc.)*, No. 8:15-cv-1168-T-27, 2015 WL 3929823, at *2 (M.D. Fla. June 25, 2015); *Sain v. Isles at Bayshore Master Ass'n*, No. 14-20338-MC, 2014 WL 357200, at *2-3 (S.D. Fla. Jan. 31, 2014); *Charter Co. v. Prudential Ins. Co. (In re Charter Co.)*, 778 F.2d 617, 622 (11th Cir. 1985); *Providers Benefit Life Ins. Co. v. Tidewater Group, Inc. (In re Tidewater Group, Inc.)*, 734 F.2d 794, 797 (11th Cir. 1984); *Celotex Corp. v. AIU Ins. Co. (In re Celotex Corp.)*, 187 B.R. 746, 749 (M.D. Fla. 1995); *Babic v. Ford Motor Credit Corp. (In the Matter of Ashoka Enters., Inc.)*, 156 B.R. 343, 345 (S.D. Fla. 1993).
[29] *Growth Realty Cos. v. Regency Woods Apartments (In re Regency Woods Apartments, Ltd.)*, 686 F.2d 899, 902 (11th Cir. 1982).
[30] *Id.* at 902-03.
[31] *Id.* at 901-02.

appellate review whenever an otherwise non-final order requires "immediate delivery of physical property and subjects the losing party to irreparable harm" if appellate review is not allowed until the case is over.[32] As is readily apparent from its narrow parameters—especially since money is not generally considered physical property—the *Forgay-Conrad* rule is applied even less frequently than the infrequently-applied collateral order doctrine.[33]

The third and final exception to finality is termed the marginal finality or, after its namesake case, *Gillespie* rule.[34] This is the "most extreme" exception to the final judgment rule.[35] Under this exception, an appellate court will review an order that is one of marginal finality if the question presented is fundamental to further conduct of the case.[36] While that exception may sound very broad, in practice, it most certainly is not. In fact, this exception is almost never applied. Finding a decision applying this exception in a bankruptcy proceeding is challenging, to say the least.[37] In what seems to be one of the only applications of marginal finality in a bankruptcy appeal, the Eleventh Circuit in *OB/GYN Solutions, L.C. v. Six (In re Six)*, 80 F.3d 452, 455 (11th Cir. 1996), applied the marginal finality test to an interlocutory, bankruptcy summary judgment order. Since then, citing *In re Six*, at least one district court has

[32] *Masters, Mates & Pilots Plans v. Lykes Bros. Steamship Co. (In re Lykes Bros. S.S. Co.)*, 200 B.R. 933, 938 (M.D. Fla. 1996) (quoting *Forgay v Conrad*, 47 U.S. 201 (1847)).
[33] *See, e.g., In re Regency Woods*, 686 F.2d at 902; *Spencer, Spencer, Depper & Guthrie v. Paskay (In re Hillsborough Holdings Corp.)*, 164 B.R. 673, 675 (M.D. Fla. 1994).
[34] *Warner v. Unsecured Creditors' Comm. (In re Warner)*, 94 B.R. 734, 737 (M.D. Fla. 1988).
[35] *In re Martin Bros.*, 796 F.2d at 1437.
[36] *Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 727 (11th Cir. 1995) (citing *Atl. Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989) and *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-54 (1964)).
[37] *Compare OB/GYN Solutions, L.C. v. Six (In re Six)*, 80 F.3d 452, 455 (11th Cir. 1996) (applying marginal finality and *Forgay-Conrad* rules in case where three orders appealed, one final and two interlocutory), *with In re Warner*, 94 B.R. at 737 (refusing to apply marginal finality doctrine) *and Samsung Semiconductor, Inc. v. AASI Liquidating Trust ex rel. Welt*, No. 12-23707-CIV, 2013 WL 704775, at *4 (S.D. Fla. Feb. 26, 2013) (same).

found appellate jurisdiction, presumably under the marginal finality doctrine, although the district court did not use the words "marginal finality."[38]

ii. Interlocutory appeals under 28 U.S.C. § 1292(b)

So far, this paper has discussed two types of orders that are appealable in bankruptcy cases: final orders, and non-final orders that are treated as final pursuant to one of the three exceptions to finality (*Cohen*, *Forgay-Conrad*, and *Gillespie*). The only other way to appeal an order that is otherwise non-final and non-appealable is to obtain leave of court to appeal, pursuant to 28 U.S.C. § 158(a).[39] However, because interlocutory review—that is, review of non-final orders—is disfavored for its piecemeal effect on cases, this mechanism is generally considered a last resort.[40] Indeed, the Eleventh Circuit has gone so far as to characterize interlocutory appeals as "inherently 'disruptive, time-consuming, and expensive.'"[41]

Nevertheless, the district courts possess wide latitude to grant leave of court to appeal a non-final order in the right circumstances.[42] So, what are those circumstances? Neither the Bankruptcy Code nor the Bankruptcy Rules provides any standards to assist the district courts in deciding whether to grant leave of court to allow appellate review of a non-final order under this statute.[43] Thus, for guidance, the district courts have turned to the same analysis applied under

[38] *See Moore v. Herrera-Edwards*, No. 8:15-CV-447-EAK, 2016 WL 4690387, at *1 (M.D. Fla. Sept. 7, 2016) (citing *In re Six* for the proposition that "an interlocutory order that is duplicative of a final order may be reviewed along with the final order").
[39] 28 U.S.C. § 158(a) (providing that the district courts "shall have jurisdiction to hear appeals . . . with leave of the court, from interlocutory orders and decrees, of bankruptcy judges").
[40] *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (noting that "[p]iecemeal appellate review has a deleterious effect on judicial administration," principally by "increas[ing] the workload of the appellate courts, to the detriment of litigants and judges").
[41] *Id.* (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)).
[42] *See Figueroa v. Wells Fargo Bank N.A.*, 382 B.R. 814, 823 (S.D. Fla. 2007).
[43] *See In re Celotex Corp.*, 187 B.R. at 749.

28 U.S.C. § 1292(b), which governs whether to permit appellate review of non-final orders in typical federal cases.[44]

The inquiry under § 1292(b), and therefore the inquiry under § 158(a), asks whether the non-final order involves "(1) a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) . . . an immediate appeal . . . may materially advance the ultimate termination of the litigation."[45] Technically, the ultimate decision whether to grant leave to appeal a non-final order rests entirely within the district court's discretion. But district courts within the Eleventh Circuit have generally adhered to the principle that leave must be denied unless all three of the foregoing factors are established.[46]

As for the first element, there is a controlling question of law if the issue "deals with a question of 'pure' law, or matters that can be decided quickly and cleanly without having to study the record."[47] If the issue involves application of the facts to the law, or a matter within the discretion of the trier-of-fact, then the issue does not satisfy this prong.[48] Courts have, therefore, narrowly construed the term "question of law": "The term 'question of law' does not mean the application of settled law to fact."[49] Nor does it "mean any question the decision of which requires rooting through the record in search of the facts or of genuine issues of fact."[50] In fact, as one court has put it, the "antithesis of a proper § 1292(b) appeal is one that turns on

[44] *See In re Warner*, 94 B.R. at 738.
[45] *Id.* (quoting 28 U.S.C. § 1292(b)).
[46] *See Figueroa*, 382 B.R. at 823-24.
[47] *Id.* at 824; *see also In re Prestwood*, No. 4:11-CV-00154-MP-WCS, 2011 WL 1771051, at *1 (N.D. Fla. May 10, 2011) ("The Court finds that these issues involve pure legal interpretation and not any finding of fact. Thus, the first element, that there be a controlling question of law, is met."); *Colonial Bank v. Freeman (In re Pac. Forest Prods. Corp.)*, 335 B.R. 910, 919 (S.D. Fla. 2005).
[48] *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004).
[49] *Id.* (citing *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000)).
[50] *Id.*

whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence."[51]

Further narrowing this prong, some courts have said that even when a question is determinative of the case, that does not inherently render the question "controlling."[52] Rather, a question is controlling for purposes of this factor "only if it may contribute to the determination, at an early stage, of a wide spectrum of cases."[53] Thus, "a controlling question is one that rises from the details of the case to a place of relevance among similar cases."[54] Stated differently, a question is controlling not just because it determines the case at issue, but also because it disposes of a "wide spectrum of cases."[55]

As for the second element of the test, regarding whether there is a substantial ground for difference of opinion, an appellant must show that at least two courts interpret the relevant legal principle differently.[56] There can be no substantial difference of opinion if the jurisdiction where the bankruptcy order was entered has decided the issue.[57] A substantial difference of opinion also cannot be shown merely by demonstrating that the order for which an appeal is sought presents a difficult ruling.[58] Likewise, demonstrating a lack of authority on the legal issues does not show a substantial difference of opinion.[59]

Given all the ways in which courts avoid finding a substantial ground for difference of opinion, it might seem that this prong is never satisfied. Yet, to the contrary, many district courts

---

[51] *McFarlin*, 381 F.3d at 1259.
[52] *Auto Dealers Group v. Auto Dealers Servs., Inc. (In re Auto Dealer Servs., Inc.)*, 81 B.R. 94, 96 (M.D. Fla. 1987).
[53] *Id.*
[54] *In re Pac. Forest Prods. Corp.*, 335 B.R. at 920.
[55] *In re Auto Dealer Servs., Inc.*, 81 B.R. at 96 (quoting *Fed. Deposit Ins. Corp. v. First Nat'l Bank*, 604 F. Supp. 616, 620 (E.D. Wis. 1985)).
[56] *Figueroa*, 382 B.R. at 824; *In re Pac. Forest Prods. Corp.*, 335 B.R. at 922.
[57] *Figueroa*, 382 B.R. at 824.
[58] *Id.*
[59] *Id.; see also Fed. Deposit Ins. Corp.*, 604 F. Supp. at 620 (noting that this avenue of interlocutory review "was not intended merely to provide an avenue for review of difficult rulings in hard cases, and the mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute").

have in fact made such a finding.[60] A good example is *In re Pacific Forest Products Corp.*, in which the district court considered the issue of "whether a check kite is a Ponzi scheme, or whether a check kite demonstrates, *per se*, an intent to defraud creditors."[61] Finding "no case law from the Eleventh Circuit" on this legal issue, the district court looked to a bankruptcy court order from Illinois, which the district court considered to be on point.[62] Based on the conflict between the Illinois order and the bankruptcy court's underlying order, the district court found "a substantial ground for difference of opinion sufficient to warrant interlocutory review."[63]

Finally, as to the third requirement that granting leave to appeal would advance the termination of the litigation, this factor is met "if resolution of the controlling question of law substantially reduces the amount of litigation left in the case."[64] Of course, then, allowing an interlocutory appeal becomes most compelling when reversal of the issue on appeal would dispose of the entire bankruptcy case.[65] Additionally, when a decision by the district court would preclude the need for further interlocutory appeals, district courts have found that there would be a material advancement of the ultimate termination of the litigation.[66]

The key is whether the *ultimate* disposition of the case will be hastened by permitting the interlocutory appeal, not whether the appeal itself will result in an end to the litigation.[67] Such a showing can sometimes be made by demonstrating, for example, that consideration of the legal issues now will crystallize the issues to be decided at trial, or perhaps prevent a potential retrial if

---

[60] *See, e.g., Musselman v. Stanonik (In re Seminole Walls & Ceilings Corp.)*, 388 B.R. 386, 391 (M.D. Fla. 2008); *Aerovias de Mexico, S.A. de C.V. v. Feltman (In re Empresa de Transportes Aero del Peru, S.A.)*, 263 B.R. 367, 375 (S.D. Fla. 2001); *In re Lykes Bros. S.S. Co.*, 200 B.R. at 938. *But see, e.g., Figueroa*, 382 B.R. at 825; *Scarfia v. Holiday Bank*, 129 B.R. 671, 674 (M.D. Fla. 1990); *In re Auto Dealer Servs.*, 81 B.R. at 96.
[61] 335 B.R. at 922.
[62] *Id.* at 923.
[63] *Id.* at 923-24.
[64] *Figueroa*, 382 B.R. at 381.
[65] *Id.* at 825-26.
[66] *In re Lykes Bros. S.S. Co.*, 200 B.R. at 938.
[67] *In re Pac. Forest Prods. Corp.*, 335 B.R. at 924.

the bankruptcy court were later reversed.[68] On the other hand, continually seeking interlocutory appeals and otherwise being responsible for delays in the litigation can prevent a party from successfully showing that an interlocutory appeal will advance the ultimate termination of the litigation.[69]

III. The impact of finality on jurisdiction

Finally, a very brief discussion regarding when the Eleventh Circuit has jurisdiction to hear a bankruptcy appeal fits nicely into the finality discussion. Bankruptcy appeals are unique in that they are one of the only types of appeals that often involve automatic two-tier review. Many orders are appealed from the bankruptcy court to the district court and then from the district court to the circuit court of appeal without the circuit court having discretion over whether to hear the appeal.

Under 28 U.S.C. section 158(d), the circuit courts of appeal have jurisdiction to hear all final district court orders that result from the district court's exercise of appellate jurisdiction over bankruptcy court orders.[70] This is how there can be automatic two-tier review. However, the definition of a "final district court order" is the subject of debate. There is a split among circuit courts of appeal regarding whether, when there is an indisputably final bankruptcy order, finality can be affected by the district court's actions on appeal. This split extends to an intra-circuit split at some circuit courts of appeals.[71]

That is, some circuits have held that if the district court's appellate decision results in a decision that creates more substantive work for the bankruptcy court on remand, then the original

---

[68] *Id.* at 924-25.
[69] *See In re Hinners*, No. 12-80924-MC, 2012 WL 4049967, at *1 (S.D. Fla. Sept. 13, 2012).
[70] 28 U.S.C. § 158(d); *Silliman v. Cassell (In re Cassell)*, 688 F.3d 1291, 1294 n.2 (11th Cir. 2012); *Guy v. Dzikowski (In re Atlas)*, 210 F.3d 1305, 1307 (11th Cir. 2000); *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1547 (11th Cir. 1996); *Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 725 (11th Cir. 1995).
[71] See 5 Collier on Bankruptcy ¶ 5.10[1]-[2] (16th ed. 2013), for a good discussion regarding the intra-circuit and inter-circuit debates on this issue.

bankruptcy order is no longer final, and the circuit court of appeals does not have appellate jurisdiction. The First, Second, Fifth, Seventh, Tenth, and Eleventh Circuits have adopted this approach, as have certain panels at the Eighth and Ninth Circuits.[72] Other circuits have held that if the original bankruptcy order being reviewed was final, then the district court's appellate decision does not affect finality and the circuit court of appeals' appellate jurisdiction for purposes of 28 U.S.C. section 1293. The Third Circuit, as well as panels at the Eighth and Ninth Circuits, have followed this rule.[73] Finally, the Sixth Circuit has come out somewhere in the middle, using as guidance the case law from other circuits. It has decided whether there is finality and thus appellate jurisdiction on a case-by-case basis.[74] The bottom line is that the analysis of appellate jurisdiction in a circuit court of appeals in a bankruptcy case can be an extremely complex issue.

Because the Eleventh Circuit generally requires traditional finality all the way through the district court's decision, before it exercises jurisdiction, the Eleventh Circuit will often analyze the finality of the district court's order disposing of the bankruptcy appeal, and, if there is not finality, whether one of the previously-discussed three exceptions to finality apply.[75] For example, there would not be finality, and thus no jurisdiction, where a district court order reversed a bankruptcy order for the sale of property and remanded to the bankruptcy court for a

---

[72] *Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3, 5 (1st Cir. 1993); *Pegasus Agency, Inc. v. Grammatikakis (In re Pegasus Agency, Inc.)*, 101 F.3d 882, 885 (2d Cir. 1996); *Sandoz v. Crain Bros., Inc. (In re Emerald Oil Co.)*, 694 F.2d 88, 89 (5th Cir. 1982); *Suburban Bank of Cary Grove v. Riggsby (In the Matter of Riggsby)*, 745 F.2d 1153, 1155-56 (7th Cir. 1984); *First Nat'l Bank of Tekamah v. Hansen (In the Matter of Hansen)*, 702 F.2d 728, 729 (8th Cir. 1983); *Dental Capital Leasing Corp. v. Martinez (In re Martinez)*, 721 F.2d 262, 265 (9th Cir. 1997); *Masunaga v. Stoltenberg (In re Rex Montis Silver Co.)*, 87 F.3d 435, 438 (10th Cir. 1996) (citing *Homa Ltd. v. Stone (In the Matter of Commercial Contractors, Inc.)*, 771 F.2d 1373, 1375 (10th Cir. 1985) (abrogated on other grounds by *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992))); *Wisz v. Moister (In the Matter of Wisz)*, 778 F.2d 762, 764 (11th Cir. 1985).

[73] *Official Unsecured Creditors' Comm. v. Michaels (In the Matter of Marin Motor Oil, Inc.)*, 689 F.2d 445, 449 (3d Cir. 1982); *Bayer v. Nicola (In re Bestmann)*, 720 F.2d 484, 486-87 (8th Cir. 1983); *Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants, Inc.)*, 754 F.2d 811, 814 (9th Cir. 1985).

[74] *Breyfogle v. Grange Mut. Cas. Co. (In re Gardner)*, 810 F.2d 87, 91-92 (6th Cir. 1987).

[75] *See, e.g., In re Atlas*, 210 F.3d at 1307-08; *In re F.D.R. Hickory House*, 60 F.3d at 725.

full adversary hearing.[76] Another good example of a lack of finality, and thus lack of appellate jurisdiction in the Eleventh Circuit, might be a district court's reversal of a bankruptcy court's order granting a motion to dismiss. On the other hand, a district court order that affirms a bankruptcy court's order on the merits is final and appealable. This is true even when entitlement to attorneys' fees remains undecided (depending on the basis for the fee claim).[77]

IV. Conclusion

The finality of an order is the crux of appellate jurisdiction. And, untangling finality and appellate jurisdiction can be tricky, especially in the bankruptcy world. However, with careful analysis, litigants can usually determine whether certain orders are final and appealable and can then plan accordingly.

[76] *See TCL Investors v. Brookside Sav. & Loan Ass'n*, 775 F.2d 1516, 1517 (11th Cir. 1985). *But cf. Jove Eng'g*, 92 F.3d at 1548 (finding no lack of finality, even with remand by district court to bankruptcy court, when remand contemplated performance of a purely ministerial, discrete duty).
[77] *See DeLauro v. Porto (In re Porto)*, 645 F.3d 1294, 1298-99 (11th Cir. 2011).

WINNING THE APPEAL BUT LOSING THE WAR: STAYS PENDING APPEAL

By:
Mark D. Hildreth
Partner, Shumaker, Loop & Kendrick, LLP

I. "Automatic Stays" After Entry of a Judgment or Order

Once it has been determined that the order or judgment of the bankruptcy court is "final" for purposes of appeal, the losing side must then determine if the anticipated consequences flowing from the ruling are sufficiently damaging that implementation of the ruling needs to be delayed while the decision is appealed. Under some circumstances, orders and judgments of the bankruptcy court are automatically stayed for a period of 14 days after entry and this time period can be critical in formulating an appropriate strategy to set the stage for seeking a stay discretionary stay pending appeal.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

> **(d) Stay with Bond on Appeal.** If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.
> **(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.
> **(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.
> **(g) Appellate Court's Power Not Limited.** This rule does not limit the power of the appellate court or one of its judges or justices:
>
> > **(1)** to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending; or
> > **(2)** to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.
>
> **(h) Stay with Multiple Claims or Parties.** A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Initially, this rule provides for an "automatic" stay for a period of 14 days after entry of a judgment entered in an adversary proceeding but the stay only prevents execution or enforcement of the judgment during that time. This stay does not depend on an appeal having been filed. After expiration of the 14 day period, execution on or enforcement of the judgment may proceed only if the losing party posts a supersedeas bond. Because the court must approve any supersedeas bond, it is incumbent upon the moving party to file a motion seeking approval of the bond. Such a motion may be filed at any time before or after commencement of an appeal but the stay will not become effective until the court approves the bond. Rule 7062 is not applicable in contested matters arising under Rule 9014 unless the court orders otherwise.

An automatic stay similar to the Rule 7062 stay occurs in certain situations as outlined in Bankruptcy Rules 3020, 3021, 4001, 6004, and 6006 and delays the implementation of the following orders:

> **Rule 3020(e):** Unless the court orders otherwise, an order confirming a chapter 9 or chapter 11 plan is stayed for 14 days.
>
> **Rule 3021:** In accordance with Rule 3021(e), distributions under a confirmed plan are stayed for 14 days.
>
> **Rule 4001(a)(3):** Unless the court orders otherwise, an order granting relief from an automatic stay under Rule 4001(a)(1) is stayed for 14 days.

Rule 6004(h): Unless the court orders otherwise, an order authorizing the use, sale, or lease of property other than cash collateral is stayed for 14 days.

Rule 6006(d): Unless otherwise ordered by the court, an order authorizing the trustee to assign an executory contract or unexpired lease under §365(f) is stayed for 14 days

II. Discretionary Stays Pending Appeal

A. Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) Initial motion in the Bankruptcy Court

(1) In general

Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

(2) Time to file

The motion may be made either before or after the notice of appeal is filed.

(b) Motion in the district court, the BAP, or the Court of Appeals on direct appeal

(1) Request for relief

A motion for the relief specified in subdivision (a)(1)--or to vacate or modify a bankruptcy court's order granting such relief--may be made in the court where the appeal is pending.

(2) Showing or statement required

The motion must:

(A) show that moving first in the bankruptcy court would be impracticable; or

(B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for the ruling.

(3) Additional content

The motion must also include:

(A) the reasons for granting the relief requested and the facts relied upon;

(B) affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) Serving notice

The movant must give reasonable notice of the motion to all parties.

(c) Filing a bond or other security
The district court, BAP, or court of appeals may condition relief on filing a bond or other appropriate security with the bankruptcy court.
(d) Bond for a trustee or the United States
The court may require a trustee to file a bond or other appropriate security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.
(e) Continuation of proceedings in the Bankruptcy Court
Despite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may:

(1) suspend or order the continuation of other proceedings in the case; or
(2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest.

B. First Stop—Bankruptcy Court (or is it?)

Rule 8007(a)(1)(A) "ordinarily" requires the party seeking a stay pending appeal to file such a motion in the bankruptcy court in the first instance. The motion can be filed before or after the notice of appeal is filed.

While Rule 8007(b), on its face, permits the appellant to file a motion for stay pending appeal in the district court (or the BAP or Court of Appeals, as appropriate), attempts to end-run the requirement to first seek a stay from the bankruptcy court are typically not successful. See, *In re Bifani*, 2014 WL 2722920 (M.D.Fla.); *In re Zahn Farms*, 206 B.R. 643 (2d Cir.BAP 1997); *In re Rivera* 2015 WL 6847973(N.D.Cal.). Indeed, a failure to first seek relief in the bankruptcy court has been held to deprive the district court of jurisdiction to hear the motion for stay. *In re Taub*, 470 B.R.273, 276 (E.D.N.Y. 2012).

If a party seeks to utilize the provisions of Rule 8007(b)(2) and make a request to the district court for a stay pending appeal, the motion must show that "moving first" in the bankruptcy court would be impracticable or that, if such a motion was made in the bankruptcy court, the motion filed with the district court must state either that the bankruptcy court has not yet ruled on the motion or that the bankruptcy court has ruled and set out any reasons given for the ruling. The latter requirement provides a basis to assert the Rule 8007(b)(2) argument in situations where the bankruptcy court may have ruled but no written order has been entered. See, *DBD Credit Funding LLC v. Silicon Laboratories, Inc.* 2016 WL 6893882 *7 (N.D.Cal.)

The requirement that the moving party explain why relief was not obtained in the first instance from the bankruptcy court has been analyzed in a leading treatise as follows:

> One of two reasons might explain why the relief was not obtained in the first instance from the bankruptcy judge. The first is that the motion for a stay was denied. In that case, it is the burden of the

> appellant to convince the district court or appellate panel that the bankruptcy judge was incorrect....
>
> The second reason ... would be that it was not practicable to seek relief from the bankruptcy court.... It would seem that a showing of impracticability would normally require a showing that the bankruptcy judge is unavailable, or that, to be effective, relief must be immediate, and that based upon what occurred in the bankruptcy court, relief from it is improbable.[1]

If the movant is unsuccessful in obtaining a stay from the bankruptcy court and then seeks to proceed with seeking a stay from the district court, the ruling of the bankruptcy court denying the stay is reviewed under an abuse of discretion standard in the district court. In that circumstance, the district court's review encompasses a *de novo* review of the law and clearly erroneous review of the facts with respect to the underlying issues. *In re North Plaza, LLC* 395 B.R.113, 119 (S.D.Cal.2008).

The importance of building an appropriate record in the bankruptcy court and moving expeditiously to request a stay pending appeal cannot be overstated. In *Bifani* the losing party sought a stay pending appeal in order to prevent a sale of property and asserted that (a) the pending sale of the property causes impracticality; (b) that there was not enough time before closing to obtain ruling at the bankruptcy court level and then, if denied, appeal to the district court; (c) that it would essentially be futile to request a stay from the bankruptcy court given its "reluctance to grant any stay"; and (d) that the bankruptcy court lacked jurisdiction to consider such a motion. The district court rejected all four arguments. As to the impracticality argument, the court noted that such motions are regularly considered even with an impending sale date. As to insufficient time, the court noted that the movant created her own urgency by waiting four weeks after the bankruptcy court approved the sale to seek a stay and she offered no reason for her delay. The district court further noted that there was no record evidence to support the argument that the bankruptcy court was "reluctant" to grant a stay and that the movant's affidavit to this effect was a "bald, self-serving statement [that was] which is not probative evidence of impracticability...and considering the affidavit's failure to refer to any action or statement of the Bankruptcy Court that could be understood to indicate an unwillingness to consider a stay." Finally, the court noted that the "general rule" which deprives a trial court of jurisdiction when a notice of appeal is filed does not apply in bankruptcy proceedings. *Bifani*, *3-4.

C. Required Showing To Obtain A Discretionary Stay Pending Appeal

A stay pending appeal is considered an "extraordinary remedy" and requires a substantial showing on the part of the movant. *In re F.G. Metals, Inc.* 390 B.R. 467, 471 (M.D.Fla.2008). Bankruptcy jurisprudence has long recognized that the party seeking a stay

[1] 10 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 8005.11, at 10–8005 (16th ed. 2013) (quotation marks and brackets omitted).; See also, *In re BGI,* 504 B.R. 754, 761(S.D.N.Y.2014).

pending appeal is required to make a showing roughly equivalent to that necessary to obtain an injunction. Those elements are:

(1) That the movant is likely to prevail on the merits of her appeal;

(2) That the movant will suffer irreparable injury if a stay or other injunctive relief is not granted;

(3) That other parties will suffer no substantial harm if a stay or other injunctive relief is granted; and

(4) In circumstances where the public interest is implicated, that the issuance of a stay will serve, rather than disserve, such public interest.

Tooke v. Sunshine Trust Mortgage Trust, 149 B.R. 687,689 (M.D.Fla.1992).

1. Likelihood Of Prevailing On Appeal

This standard derives from the requirement in injunctive relief cases that requires the party seeking an injunction to establish a "likelihood of success on the merits". Court decisions appear, at first blush, to vary on the degree of proof required to meet this standard. The district court in *Bifani* observed that this "criterion is generally considered the most important" and compared it to the standard needed to obtain a stay pending appeal from a district court decision to the court of appeals where the movant must show that the trial court decision was "clearly erroneous" in order to establish a "likelihood of success on the merits". *Bifani,* at *8, fn. 4. Another characterization of this standard is one of "substantial likelihood" of success on the merits. *In re Brown*, 290 B.R. 415, 424 (Bkrtcy.M.D.Fla.2003). The "substantial likelihood" standard is akin to the "substantial possibility" standard applied by the court in *In re General Credit Corp.*, 283 B.R. 658, 665-665 (S.D.N.Y.2002). In *General Credit Corp.,* the court analyzed various permutations of the standard. Initially, the court rejected the notion that a mere showing of a "likelihood of success" as applied in injunction cases was sufficient to stay an appeal because that standard presupposes no prior judicial ruling. The court also found that cases which mandate the movant establish a "strong likelihood of success" went too far and had little support in the case law. Accordingly, the court chose to use a "substantial possibility of success on the merits—i.e., the same standard utilized on a motion to stay a district court's order pending appeal to the Court of Appeals." *Id.* A likelihood of success is shown when the movant has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for more deliberate inquiry. *In re Advanced Telecommunication Network, Inc.* 2011 WL 722766 (M.D.Fla.)

In practice, the movant must first be aware of the overall procedural posture of the order at issue as well as the status of the underlying case. The bankruptcy court found the moving party could not meet this test in the case of *In re The Sanibel Diamond Store, LLC* 2014 WL 890589 (Bkrtcy.M.D.Fla.) because any appeal of the subject order would be dismissed as untimely and the appeal was also likely to be dismissed under the doctrine of equitable mootness. *Id.* at *3.

Additionally, the court also determined that the moving party had failed to present evidence in support of its objection to the order for which it was seeking a stay pending appeal.

2. The Movant Will Suffer Irreparable Injury If A Stay Pending Appeal Is Not Entered

This standard is measured, in part, by whether the moving party would have an adequate remedy at law in the absence of a stay and numerous court decisions hold that a monetary injury "is by its nature not irreparable". *In re Drislor Associates*, 110 B.R. 937, 939 (D.Colo.1990); *Tooke,* supra. The anticipated injury must also be "imminent"—not speculative. *In re DuCharme*, 2008 WL 4488965(D.Vt.). Apart from the effect on his legal rights that will occur during the pendency of the appeal if a stay is not granted, it remains incumbent on the movant to present sufficient evidence of the adverse impact it will suffer if the order is not stayed. See, *Sanibel Diamond*, at *2.

3. Other Parties Will Not Suffer Substantial Harm If The Stay Is Imposed

This factor is roughly equivalent to the "irreparable injury" standard albeit viewed from the perspective of the non-moving party and their exposure to damage or hamr if the stay is imposed. Moreover, in the bankruptcy context, particularly in chapter 11 cases, the consequences to the entire creditor body and other parties of interest who may be affected by a stay pending appeal must be considered—particularly if the order at issue is one that confirms a chapter 11 plan or a sale anticipated in a chapter 11 case. See, *In re Revel AC, Inc.*802 F.2d 558, 572-573 (3d Cir. 2015) (recognizing the argument by the debtor that a stay of a sale of the debtor's primary asset would might force conversion to chapter 7 and the loss of thousands of jobs but disregarding such argument due to a failure to present evidence in support).

4. If The Public Interest Is Implicated, The Issuance Of A Stay Will Serve, Rather Than Disserve, Such Interest

The case law does not provide much consistency on how the public interest is, in fact, implicated by the decision the court will make on the stay, however, courts have often looked both to factors intrinsic to the debtor's case as well as general implications as to how a stay might or might not interface with other laws. In the *Revel AC* case, the non-moving party argued (without presenting supporting evidence) that the public interest of Atlantic City, New Jersey, would be adversely impacted by a stay pending appeal of an order approving a Section 363 sale because of the possibility of the loss of 4,000 local jobs and the resulting economic consequences to the workers and the community as a whole. While the Third Circuit reversed lower court orders denying a stay pending appeal for a number of reasons, it observed that part of the public interest included having a "stake in protecting the rights of tenants in commercial properties" [2]

The court in *Advanced Telecommunications*, supra, addressed this issue in the context of a movant's efforts to stay post-judgment discovery on a money judgment and simply noted that

[2] *Revel* involved a tenant of the debtor's real property whose lease agreement would be terminated if the Section 363 sale was permitted to proceed.

"the public interest is not implicated in this case, as it involves private rights of private litigants". *Advanced Telecommunications,* at *3.

The public interest has also been implicated "by ensuring that properly conducted state court foreclosure sales are not disrupted by unnoticed reinstatements of the automatic stay". *Brown,* supra, at 424. In *Sanibel Diamond*, the court was left to speculate on the public interest as the movant failed to present any evidence "as to what that public interest is, let alone how it would be disserved by allowing the sale…to continue". *Sanibel Diamond*, at *2. The court considered that the City of Sanibel might have an interest in limiting the types of advertising that would otherwise be beneficial to the debtor's sale efforts but also noted that "[P]ublic policy also favors the satisfaction of debts" and the sale being opposed by the city would maximize payments to the debtor's creditors. *Id.*

D. Application Of The Four Part Test

In the *Brown* decision, the court noted that the moving party "must show satisfactory evidence on all four criteria, and the failure to satisfy one prong is fatal to the motion. *Brown,* at 424. Accord, *In re Advanced Telecommunication Network, Inc.* supra.

In the *Revel* decision, the Third Circuit took the view that courts, "in order not to ignore the many gray shadings" that stay requests present, balance all four factors and consider the relative strength of each. *Revel,* at 568. The court then noted that" the stronger the balance of harms and public interest is in [the movant's] favor, the less a showing of potential likelihood of success" would be required but keeping in mind that the likelihood of success must be "at least a substantial case on the merits." *Id.* at 571.

Equitable Mootness: *Is it time to pull the plug*?

Paul A. Avron, Esq.
Berger Singerman LLP, Boca Raton, FL

7529041-3

At least two federal circuit court judges have recently called into question the viability of the judge-made doctrine of equitable mootness through which courts hearing appeals from bankruptcy courts —principally district and circuit courts — decline to exercise their statutory-based appellate jurisdiction under 28 U.S.C. § 158(a) and (d), respectively, and dismiss bankruptcy appeals on equitable grounds. Generally, under the equitable mootness doctrine, an Article III appellate court declines to consider an appeal from an order of an Article I bankruptcy court on the merits given consummation of all (or substantially all) of the transactions authorized by that order. Appellate courts sitting in bankruptcy have principally applied the equitable mootness doctrine to dismiss appeals of orders confirming chapter 11 plans of reorganization and approving settlements. This article examines the reasons recently advanced for questioning the viability of the equitable mootness doctrine, which has prompted calls for its flat-out abandonment, or at least narrowing its application, and posits that intervention by the United States Supreme Court is needed to address the validity of the doctrine and, if valid, its proper scope.

In re City of Detroit, Michigan[i]

On October 3, 2016, a divided panel of the Sixth Circuit affirmed the district court's dismissal of several related, consolidated appeals by pensioners from the bankruptcy court's order confirming the City of Detroit's Chapter 9 plan of adjustment on equitable mootness grounds.[ii] The majority opinion, authored by Judge Batchelder, explained that "[i]n resolving its bankruptcy, the City crafted a complex network of settlements and agreements with its thousands of creditors and stakeholders, memorialized those agreements in a comprehensive Plan," described as "intricate and carefully woven," "with almost all of [the City's] creditors and stakeholders."[iii] Judge Batchelder detailed significant post-confirmation transactions which had

occurred in reliance on the confirmation order, including issuance of bonds in excess of $1 billion, and $720 million in new notes, the irrevocable transfer of all Detroit Institute of Art assets to a perpetual charitable trust and the transfer of interests in real property pursuant to certain settlement agreements, as the basis of dismissal of the appeal.[iv]

Quoting from *In re Ormet Corp.,*[v] Judge Batchelder explained that "[e]quitable mootness is not technically 'mootness'—constitutional or otherwise—but instead a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that 'finality' by 'prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract.'"[vi] After setting forth the factors applied by Sixth Circuit case law, Judge Batchelder concluded that the issue was "not a close call," and equitable mootness compelled dismissal of the appeals.[vii] Judge Batchelder rejected the contention that , given recent pronouncements by the Supreme Court challenging prudential doctrines that abdicate jurisdiction which federal courts have a duty to exercise,[viii] equitable mootness is no longer viable.[ix] Judge Batchelder acknowledged that recent Supreme Court cases questioning prudential doctrines cited by the appellants, but stated that those were not bankruptcy cases and their holdings did not extend to the doctrine of equitable mootness previously adopted by Sixth Circuit law and which could not be abolished under the prior panel precedent rule.[x]

In dissent, Judge Moore took direct aim at the viability of the doctrine of equitable mootness explaining that "[t]he current trend at the Supreme Court is toward a greater recognition of our 'virtually unflagging obligation…to exercise jurisdiction given [us].'"[xi] Citing to *Lexmark*, note viii, *supra*, Judge Moore stated that "having one's case decided by an Article III Judge is no mere formality."[xii] Judge Moore concluded that there was no legal basis

for the equitable mootness doctrine; she noted that most circuit courts which have adopted it have made little inquiry into a basis for it, and described the Seventh Circuit's decision in *In re UNR Indus.*, note x, *supra*, wherein it relied upon 11 U.S.C. §§ 363(m)[xiii] and 1127(b),[xiv] as unpersuasive.[xv]

Judge Moore further questioned the proposition that equitable mootness can be justified by abstention doctrines, with the former characterized as an "abdication" doctrine because the litigant is thrown out of court, whereas in the latter the litigant merely is directed to a different forum.[xvi]

Judge Moore also posited that application of the equitable mootness doctrine raises separation of powers concerns, that is, a decision by a district or circuit court judge to dismiss, *i.e.*, not hear a bankruptcy appeal, is a rejection of powers granted to the courts by Congress.[xvii] Judge Moore's discussion of equitable mootness in the context of separation of powers applies to the bankruptcy system which is premised upon appellate review by Article III courts: "The problem with equitable mootness is not only that it cuts off entirely the right to appeal to an Article III court, but that 'it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue' because 'bankruptcy courts control nearly all of the variables' that are considered in assessing whether an appeal is equitably moot."[xviii] In sum, Judge Moore posited that premising continued use of the equitable mootness doctrine based on reliance interests of third parties is insufficient.[xix]

In re One2One Commc'ns

The matter before the Third Circuit was a district court order dismissing as equitably moot an appeal of a bankruptcy court order confirming the debtor's chapter 11 plan of reorganization.[xx] Writing for the panel, Judge Greenway explained that the appellant asked the

court to use the appeal to declare invalid Third Circuit law adopting the doctrine of equitable mootness in *In re Continental Airlines*[xxi] as unconstitutional and contrary to the provisions of the Bankruptcy Code.[xxii] Judge Greenway, like Judge Batchelder in *City of Detroit*, concluded that the panel was bound to adhere to *Continental Airlines*' adoption of the doctrine of equitable mootness under the prior panel precedent rule, and that did not change given the holding in *Stern v. Marshall*.[xxiii] Judge Greenway explained that since adoption of the doctrine of equitable mootness, the Third Circuit has "emphasized that the doctrine must be construed narrowly and applied in limited circumstances,"[xxiv] and ultimately reversed the district court and remanded the matter back to the district court for an adjudication of the appeal on the merits.[xxv]

Judge Krause wrote a concurring opinion because she did not believe the Third Circuit should continue in what she described as its "failed attempts" to limit the doctrine of equitable mootness, a "legally ungrounded and practically unadministrable 'judge-made abstention doctrine.'"[xxvi] Judge Krause explained that Supreme Court case law handed down since the Third Circuit adopted the doctrine of equitable mootness confirmed that the doctrine "cannot survive constitutional scrutiny today."[xxvii] Judge Krause noted that equitable mootness is not included among the limited, abstention doctrines recognized by the Supreme Court which contemplate postponement, not abdication, of a federal court's exercise of jurisdiction.[xxviii] Judge Krause rejected as a basis for equitable mootness 28 U.S.C. § 1334(c)(1), which provides that "nothing in this section prevents a district court in in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under Title 11," and if it were it would violate the provisions of 1334(d) which provides that a decision to abstain or not abstain is not reviewable by a court of appeals or the Supreme Court.[xxix] Judge Krause then rejected the

contention that 11 U.S.C. §§ 363(m),[xxx] 364(e)[xxxi] and 1127(b)[xxxii] provide a basis for equitable mootness; she explained that "[b]ecause Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel us to presume that Congress did *not* intend for other orders [*i.e.*, confirmation orders] to be immune from appeal."[xxxiii]

Judge Krause further explained that even if one could read the foregoing statutes as supporting equitable mootness constitutional concerns would militate against such reading, that is, adjudication by an Article 1 bankruptcy court without Article III review recently reaffirmed by the Supreme Court in *Wellness Intern. Network, Ltd. v. Sharif*,[xxxiv] and the doctrine's "effective[] delegate[ion] [of] the power to prevent that review to the very non-Article III tribunal whose decision is at issue."[xxxv] Finally, Judge Moore explained that, while equitable mootness "was intended to promote finality, … it has proven far more likely to promote uncertainty and delay," noting years of litigation over the issue of whether a bankruptcy appeal is equitably moot, and if not, remands back to district courts to adjudicate the merits of appeals years after entry of the orders in question.[xxxvi]

Conclusion

The doctrine of equitable mootness has been used, and continues to be used, offensively to obtain dismissal of bankruptcy appeals of confirmation orders and orders approving settlements without review of the appeal on the merits by Article III courts. It is only recently that certain federal judges, as well as certain law professors, have called into question the doctrine of equitable mootness, and those that have done so have concluded that there is no statutory basis for it, and that its use raises constitutional issues that are not easily answered. The

continuing vitality of the doctrine of equitable mootness is an issue that is ripe for consideration, and resolution, by the United States Supreme Court.

---

[i] *Ochadleus, et al. v. City of Detroit, Michigan (In re City of Detroit, Michigan)*, 838 F.3d 792 (6th Cir. 2016).

[ii] Before the district court on intermediate appeal, several individual pensioners challenged, among other things, the reductions in municipal benefits called for in the City's Chapter 9 plan, urging that the applicable provisions relating to pensions be stricken from the confirmation order and sought a remand with directions to exempt pensions from the municipal reductions. *In re City of Detroit*, 838 F.3d at 797. The Sixth Circuit decided the separate appeals in one decision because equitable mootness was the "determinative issue" in all of them. *Id.* at 797-98.

[iii] *Id.* at 795.

[iv] *Id.* at 797.

[v] 355 B.R. 37 (S.D. Ohio 2006).

[vi] *In re City of Detroit*, 838 F.3d at 798.

[vii] *Id.* at 799.

[viii] *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

[ix] *In re City of Detroit*, 838 F.3d at 800.

[x] *Id.* Every circuit court has recognized the doctrine of equitable mootness and applied it, or decided not to apply it, based on the particular facts before it. *See*, *e.g.*, *Rochman v. Ne. Utils. Serv. Group (In re Pub. Serv. Co. of N. Hamp.),* 963 F.2d 469 (1st Cir.1992); *R2 Investments, LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.)*, 691 F.3d 476 (2d Cir. 2012); *In re One2One Commc'ns, LLC*, 805 F.3d 428 (3d Cir. 2015); *MAC Panel Co. v. Virginia Panel Corp.,* 283 F.3d 622 (4th Cir. 2002); *Bank of New York Trust Co., N.A. v. Official Unsecured Creditors Committee of The Pacific Lumber Co. (In the Matter of The Pacific Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009); *Ochadleus, et al. v. City of Detroit, Michigan (In re City of Detroit, Michigan),* note i, *supra*; *In re UNR Indus.,* 20 F.3d 766 (7th Cir.1994); *Metro Property Mgmt. Co. v. Information Dialogues, Inc.*, 662 F.2d 475 (8th Cir. 1981); *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Properties, Inc.)*, 801 F.3d 1161 (9th Cir. 2015); *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327 (10th Cir. 2009); *First Union Real Estate Equity and Mtg. Investments v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065 (11th Cir. 1992); *In re AOV Indus., Inc.,* 792 F.2d 1140 (D.C. Cir. 1986), *vacated in part on other grounds,* 797 F.2d 1004 (D.C. Cir. 1986). Under the prior panel precedent rule, "the holding of the first panel to address an issue is the law of th[e] [c]ircuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001).

[xi] *In re City of Detroit*, 838 F.3d at 805 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), quoting *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 821 (1976)). As previously, and similarly explained by the Fifth Circuit in *Bank of New York Trust Co., N.A. v. Official Unsecured Creditors Comm. of The Pacific Lumber Co.,*

> '[e]quitable mootness' has evolved in bankruptcy appeals to constrain appellate review, and potential reversal, of orders confirming reorganization plans. Equitable mootness is a kind of appellate abstention that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest. *See In re Manges,* 29 F.3d 1034, 1039 (5th Cir.1994). Despite its apparent virtues, equitable mootness is a judicial anomaly. Federal courts 'have a virtually unflagging obligation' to exercise the jurisdiction conferred on them. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976). Although the Bankruptcy Code forbids appellate review of certain un-stayed orders and restricts post-confirmation plan modifications, it does not expressly limit appellate review of plan confirmation orders. Moreover, equitable mootness cannot claim legitimacy based on Article III mootness. The latter doctrine, of constitutional origin, prevents adjudication when cases are no longer 'live'; the former abdicates appellate review of very real, continuing controversies. As

> then-Judge Alito wrote, Article III mootness concerns arise when a judicial ruling would have no effect; equitable mootness applies when a judicial ruling might have too much effect on the parties to a confirmed reorganization. *In re Continental Airlines,* 91 F.3d 553, 569 (3d Cir.1996) (*en banc*) (Alito, J., dissenting). *See also In re UNR Industries,* 20 F.3d 766, 769 (7th Cir.1994) (Easterbrook, J.) (equitable mootness is a misnomer).

584 F.3d at 240 (internal footnotes omitted).

[xii] *Id.* at 806. That application of the equitable mootness doctrine to dismiss bankruptcy appeals for which statutory rights to appeal exist, 28 U.S.C. § 158(a), (d), is another basis given for questioning the viability of the doctrine. *Id.* at 809-10 ("Congress has plainly authorized appeals from confirmation orders, …, so *UNR*'s federal-common-law theory suggests that federal courts may refuse to hear appeals that are plainly permitted by statute solely because 11 U.S.C. § 363(m) and 1127(b) imply a general policy against upsetting reliance interests.").

[xiii] Section 363(m) of the Bankruptcy Code provides that reversal of an order approving a sale or lease shall not affect the validity of the sale or lease to a purchaser who acted in good faith. *See* 11 U.S.C. § 363(m).

[xiv] Section 1127(b) of the Bankruptcy Code provides the circumstances wherein a confirmed chapter 11 plan can be modified post-confirmation and prior to "substantial consummation." *See* 11 U.S.C. § 1127(b). The phrase "substantial consummation" is defined in Section 1101(2) of the Bankruptcy Code as the transfer of all or substantially all of the property to be transferred under the plan, assumption by the debtor or a successor thereto under the plan, and commencement of distributions contemplated by the plan. *See* 11 U.S.C. § 1101(2)(A)-(C).

[xv] *In re City of Detroit,* 838 F.3d at 809-10. Judge Moore quoted from Judge Krause's concurring opinion in *One2One Commc'ns*, note x, supra, as follows: "[A]s courts and litigants … have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none." *Id.* at 809.

[xvi] *See id.* at 811.

[xvii] *Id.* at 810 ("Although equitable-mootness is imposed by judges on ourselves, it is no less an affront to the separation of powers than a doctrine usurping jurisdiction that Congress never provided.").

[xviii] *Id.* at 812 (quoting *In re One2One Commc'ns*, 805 F.3d at 445) (Krause, J., concurring).

[xix] *Id.* at 814.

[xx] 805 F.3d at 431.

[xxi] *Id.*

[xxii] 91 F.3d 553 (3d Cir. 1996) (*en banc*).

[xxiii] *One2One Commc'ns*, 805 F.3d at 433 (noting, among other things, that *Stern* did not "consider whether Article III requires appellate review of a bankruptcy judge's decisions by an Article III judge.").

[xxiv] *Id.* at 435.

[xxv] *Id.* at 438.

[xxvi] *Id.* (quoting *Samson Energy Resources Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 317 (3d Cir. 2013)) (Krause, J., concurring).

[xxvii] *Id.*

[xxviii] *Id.* at 440.

[xxix] *Id.* at 441-42 (Judge Krause explained that the second clause in Section 1334(c)(1) regarding the interests of comity with State courts or respect for State law was inapposite, and as to the first clause, it would not be "just" to avoid deciding a case on the merits when a federal court "could use its equitable authority to fashion a limited remedy while still protecting third parties that may be harmed if a plan is undone[.]").

[xxx] Note xiii, *supra*.

[xxxi] Section 364(e) provides that "[t]he reversal or modification on appeal from an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or lien so granted, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal." 11 U.S.C. § 364(e).

[xxxii] Note xiv, *supra*.

[xxxiii] *One2One Commc'ns*, 805 F.3d at 443-44.

[xxxiv] 135 S. Ct. 1932 (2015).

[xxxv] *One2One Commc'ns*, 805 F.3d at 444-45. Judge Krause explained that "[a]lthough Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new

entities (in which third parties may invest) are formed, and whether distributions (including to third parties) under the plan begin—all before plan challengers reach an Article III court." *Id.* at 445.

[xxxvi] *Id.* at 446-47. In her concurring opinion, Judge Moore noted that a group of bankruptcy law professors have also challenged the continuing vitality of the equitable mootness doctrine, *id.* at 448-49, citing to an amicus brief filed in support of certiorari in *Law Debenture Trust Co. of N.Y.C. Charter Commc'ns, Inc.*, which was denied. 133 S. Ct. 2021 (2013). A subsequent amicus brief by law professors in support of certiorari—also denied by the Supreme Court—was filed in *Aurelius Cap. Mgmt., LP v. Tribune Media Co.*, No. 15-891, 2016 WL 552720 (Feb. 12, 2016). In the more recent filing, the law professors argued for certiorari so that the Supreme Court could reaffirm district and circuit courts' obligation to hear cases within their jurisdiction, stating, in the Summary of Argument, as follows:

> To be sure, courts can – and should – decline to exercise jurisdiction beyond the bounds of Article III. This is the basis for the various justiciability doctrines – such as standing, ripeness, and mootness – which are intended to ensure that federal courts hear only live cases or controversies as Article III requires. But while these rules prevent courts from violating Article III by issuing rulings when there is no case or controversy, equitable mootness only arises when there *is* a live controversy regarding a bankruptcy court's decision.
>
> This Court has traditionally been careful to circumscribe the conditions under which the lower courts may abstain from hearing cases within their jurisdiction; that may be done 'only in exceptional circumstances.' As set forth below, however, those circumstances are narrow, and none is intended to extinguish a live claim of a party with a congnizable injury in fact.

2016 WL 552720, *4-5 (internal citation omitted) (italics in original). The appellant's petition for certiorari advanced some of the same points challenging the equitable mootness doctrine discussed above. *See* 2016 WL 159570, *3-4, 14-22 (Jan. 11, 2016) (including noting that "[t]he constitutional concerns implicated by courts' oversight of the plan confirmation process have been magnified by *Bullard* [*v. Blue Hills Bank*, 135 S. Ct. 1686 (2015)]. This Court held that bankruptcy court orders *denying* confirmation are not entitled to immediate appellate review - a decision premised on the assumption that orders *approving* confirmation are the more significant orders entitled to Article III review. See 135 S. Ct. at 1692. Equitable mootness, however, leaves the entire confirmation process without *any* Article III oversight, contrary to the express will of Congress." *Id.,* *20) (italics in original).