

Some Bankruptcy Appellate Rules to Live (and Litigate) By

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Introduction

The bankruptcy appellate process is fraught with danger, and there are many pitfalls for those not conversant with the appellate rules and the procedural deadlines. The risk of malpractice in the area of bankruptcy appeals cannot be ignored, particularly if the bankruptcy practitioner is not fully skilled as a litigator, as the opportunities for prosecuting an appeal are generally less frequent than other activities in bankruptcy practice. What follows are some rules to live by (and resources to consult) as you embark on a bankruptcy appeal:

1. **Rule:** Appeal the correct order (in the correct case).

Case: *In re High Voltage Engineering Corp.*, 544 F.3d 315 (1st Cir. 2008).

Discussion: This rule might seem obvious to the casual observer but in the complex multi-party, multi-debtor case, the risk of error requires special attention. As the High Voltage case demonstrates, where two sets of cases have not been consolidated, a litigant who seeks to appeal an order must appeal that order in the correct case. Moreover, even if consolidation were a reality, the general rule is that consolidated cases remain separate and distinct for purposes of appeal.

2. **Rule:** Be sure the order is final and appealable.

Case: *In re Northwood Properties, LLC*, 509 F.3d 15, 21 (1st Cir. 2007).

Discussion: The Circuit courts of appeal have further appellate jurisdiction over “all final decisions, judgments, orders, and decrees” issued by the district court sitting in its appellate capacity in bankruptcy proceedings. 28 U.S.C. § 158(d)(1). This limitation on the Circuit court’s appellate jurisdiction recognizes that the “finality” of a bankruptcy

court's decision may be affected by the district court's disposition of the appeal.

Requiring the bankruptcy court's decision to be truly final, which requires the district court's appellate review to be final, avoids piecemeal appellate review before the Circuit court, thereby conserving judicial resources. Since bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other, however, “finality” is generally given a flexible interpretation in bankruptcy.

3. **Rule:** Beware of mootness (constitutional, equitable, statutory).

Case: *In re PW, LLC*, BAP No. CC-07-1176-MkKuPa (B.A.P. 9th Cir. May 30, 2008).

Discussion:

Constitutional: An appeal is constitutionally moot only if it is impossible to grant relief.

This principle applies in all cases, not just bankruptcy.

Equitable: Two types of equitable mootness:

(1) Equitable mootness requires the court to look beyond impossibility of a remedy to the consequences of the remedy and the number of third parties who have changed their position in reliance on the order that is being appealed. Courts have applied the doctrine of equitable mootness when the appellant has failed to obtain a stay and although relief is possible, the ensuing transactions are too complex and difficult to unwind.

(2) When appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court, thus permitting such a comprehensive change of circumstances to occur as to render it inequitable to consider the merits of the appeal.

Statutory: Certain statutes may have mootness implications. Thus, 11 U.S.C. § 363(m) is a codification of some aspects of equitable mootness with respect to sales in bankruptcy. Likewise, 11 U.S.C. § 364(e) is a codification of similar concepts with respect to bankruptcy financing orders. The only possible antidote to mootness is to obtain a stay.

4. **Rule:** Consider where to file your appeal.

Case: *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 252 (1992).

Discussion: Bankruptcy court decisions are generally appealable to a U.S. District Court, *see* 28 U.S.C. §158(a), or a Bankruptcy Appellate Panel, *see* 28 U.S.C. §158(b).

Decisions of the U.S. District Court or Bankruptcy Appellate Panel are then appealed to the U.S. Circuit Court of Appeals. *See* 28 U.S.C. §158(d). In some circumstances, bankruptcy decisions may be appealed directly to a U.S. Circuit Court of Appeals. *See* 28 U.S.C. §158(d)(2)(A).

5. **Rule:** One may not first raise new issues on appeal that were not presented before the bankruptcy court.

Case: *See In re Ginther Trusts*, 238 F.3d 686, 689 & n.3 (5th Cir. 2001).

Discussion: *See* Statement of Rule, above, as it is fairly straightforward. You will generally not be able to rethink your case on appeal. That work has to be done in the bankruptcy court action. As with all things, however, there may be some exceptions. *See Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355 (11th Cir. 1984).

6. **Rule:** The notice of appeal must actually be filed with the clerk within the statutory period, and not simply mailed.

Case: *In re LBL Sports Center, Inc.*, 684 F.2d 410, 413 (6th Cir. 1982).

Discussion: Service is complete on mailing (*see* Fed. R. Bankr. P. 7005(b)(2)(C) and 9006 (e)); a notice of appeal must be filed “with the clerk.” Fed. R. Bankr. P. 8001(a). The general appeal period in bankruptcy is ten (10) days from entry of the judgment or order appealed from, not thirty (30) days as in other courts. Rule 8002(a). That ten-day period is calculated based on calendar days, as Saturdays, Sundays, and holidays are excluded only when the applicable period is less than eight (8) days. *See* Rule 9006(a).

7. **Rule:** Monitor the docket and calendar of the underlying proceeding to determine when the order is entered.

Case: *See, e.g., In re Cahn*, 188 B.R. 627, 632 (B.A.P. 9th Cir. 1995) (“It is well-settled that failure to receive notice of entry of judgment or order is not an excuse for an untimely appeal because it is the party's affirmative duty to monitor the dockets”).

Discussion: It may seem a bit unfair but “[l]ack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed...” Fed. R. Bankr. P. 9022.

8. **Rule:** The law is unsettled as to whether bankruptcy appellate deadlines are “jurisdictional,” such that objections to untimeliness may be waived if not promptly made.

Case: *See In re Fryer*, 235 Fed. Appx. 951, 953 (3d. Cir. 2007).

Discussion: Courts have held that a district court lacks jurisdiction over an appeal of a bankruptcy court ruling that is untimely under Bankruptcy Rule 8002. *See In re Universal Minerals, Inc.*, 755 F.2d 309, 310 (3d Cir.1985). However, that principle has been called into question by the U.S. Supreme Court’s decisions in *Eberhart v. United States*, 546 U.S. 12 (2005), and *Kontrick v. Ryan*, 540 U.S. 443 (2004). Rule 8002 might now qualify as a non-judicial “claim-processing rule” that is mandatory when invoked by a party, but subject to waiver if no objection is raised as to untimeliness. *See Eberhart*, 546 U.S. at 19.

9. **Rule:** Errors in a judgment can only be corrected without leave of the appellate court before the appeal is docketed in the appellate court.

Case: *In re Cisneros*, 994 F.2d 1462, 1466 & n.4 (9th Cir. 1993) (bankruptcy court may act *sua sponte* under Bankruptcy Rule 9024).

Discussion: Bankruptcy Rule 9024 incorporates Federal Rule of Civil Procedure 60. The key to this Rule is that the Bankruptcy Court can correct clerical mistakes, oversights or other omissions with or without a motion and with or without notice(!), but only before the appeal is docketed in the appellate court. Docketing the appeal requires the record to have been transmitted from the Bankruptcy Court to the appellate court and that takes some time. *See* F.R. Bankr. P. 8007(b). Always check to be sure that no amended or revised order or judgment has entered, in which case your notice of appeal will have to be re-filed to refer to the amended judgment or order. *See* Rule 1 above (“Appeal the correct order (in the correct case)”).

10. **Rule:** Once your appeal is underway, chart out and monitor the applicable deadlines for each and every step along the way including, for example, designating the record and articulating the issues, filing briefs, etc.

Further reading on appellate issues:

Samuel R. Maizel & Jessica D. Gabel, ABI's Bankruptcy Appeals Manual (2007).

Hon. Terrence L. Michael, Ten Tips for Effective Brief Writing,
<http://www.bap10.uscourts.gov/forms/briefftips.pdf>.

Norman L. Pernick, Bankruptcy Deadline Checklist (3d ed. 2006) (Available at www.amazon.com for \$49.95).

U.S. Department of Justice, Civil Resource Manual 69: Appellate Procedures in Bankruptcy,
http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00069.htm. (Intended for Assistant U.S. Attorneys, but contains useful general information.)

David B. Goroff, One Dozen Important Points About Bankruptcy Appeals,
http://www.foley.com/files/tbl_s31Publications/FileUpload137/4814/goroff.pdf.