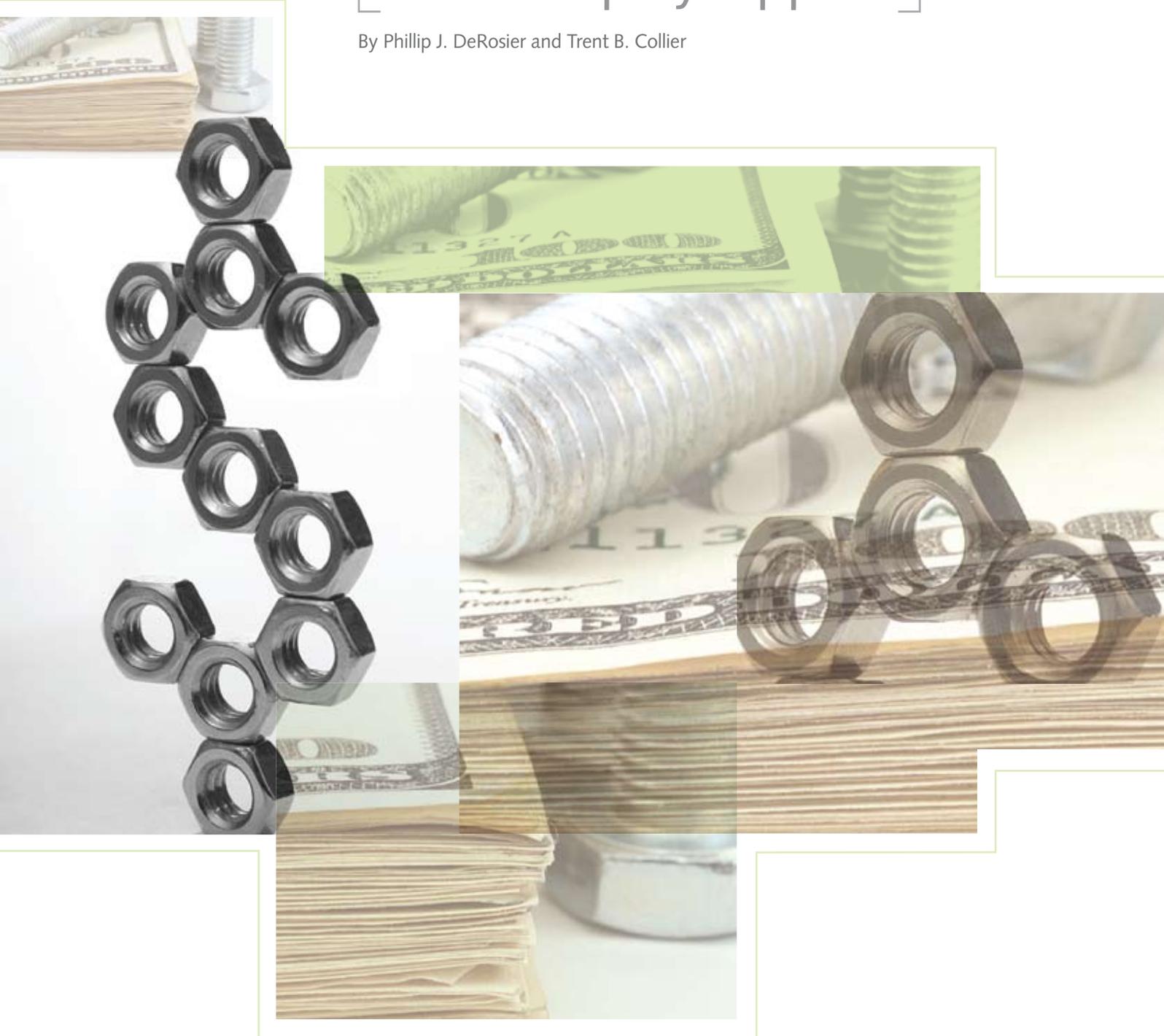




The Nuts and Bolts [of Bankruptcy Appeals]

By Phillip J. DeRosier and Trent B. Collier



Introduction

Many practitioners will find themselves at some point in the position of appealing from an adverse bankruptcy court decision. Becoming familiar with some of the more common issues arising in bankruptcy appeals is the key to ensuring that the appeal process flows as smoothly as possible.

Is the Order Appealable Immediately?

One of the initial, and potentially difficult, issues arising in any bankruptcy appeal is whether the judgment, order, or decision at issue is appealable immediately as a matter of right. Congress has essentially created three categories of orders in bankruptcy proceedings for appeal purposes. The first category consists of “final judgments, orders, and decrees,” which are always appealable immediately.¹ The second category consists of interlocutory orders increasing or decreasing the time for filing a plan for reorganization under Chapter 11. These orders are also appealable immediately.² All other orders fall within the third, “catch-all” category of “interlocutory orders and decrees” that may be appealed “only by leave of the court.”³

So how does one determine whether a judgment or order is “final”? In the Sixth Circuit, it is often said that a “final order” is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁴ However, “[t]he concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation.”⁵ Thus, “[a]n order that concludes a particular adversarial matter within the larger case should be deemed final and reviewable in a bankruptcy setting.”⁶ Although by no means an exclusive list, orders that have been recognized as appealable immediately include (1) “[a] bankruptcy court’s judgment determining dischargeability,”⁷ (2) “[a]n order denying a debtor’s request to convert from [C]hapter 7 to [C]hapter 13,”⁸ (3) “[a]n order on an objection to a debtor’s claim of exemption,”⁹ (4) “[a]n order dismissing a Chapter 13 case,”¹⁰ (5) an order overruling a creditor’s

objections and confirming a Chapter 11 plan,¹¹ and (6) orders granting or denying relief from the automatic stay.¹²

Standing to Appeal

Another common issue in bankruptcy appeals involves whether the appellant has standing to appeal. It is well established in the Sixth Circuit and elsewhere that a party must be “aggrieved” to have standing to appeal a bankruptcy court order. Aggrieved means that an appellant “must have been ‘directly and adversely affected pecuniarily by the order.’”¹³ “Thus, a party may only appeal a bankruptcy court order when it diminishes their property, increases their burdens or impairs their rights.”¹⁴

Timing and Process for Appeal

Unlike general civil appeals, the period for taking an appeal in the bankruptcy setting is shortened. Rule 8002(a) provides that a notice of appeal must be filed “within 10 days of the date of the entry of the judgment, order, or decree appealed from.” Pursuant to FR Bankr P 9006, this period includes intermediate Saturdays, Sundays, and legal holidays.

Certain motions will toll the time for filing the notice of appeal, including motions (1) “to amend or make additional findings of fact under Rule 7052,” (2) “to alter or amend the judgment under Rule 9023,” (3) “for a new trial under Rule 9023,” or (4) “for relief under Rule 9024.”¹⁵ If such a motion is timely filed, a subsequent notice of appeal will be considered timely if it is filed within 10 days after the entry of the order disposing of the motion.¹⁶ Moreover, the bankruptcy court has discretion to extend the time for filing a notice of appeal as long as the request is made before the time for filing a notice of appeal. If the request is made beyond the 10-day appeal period, but not later than 20 days after the expiration of that period, a request for an extension may be granted on a showing of “excusable neglect.”¹⁷ However, such an extension “may not exceed 20 days from the expiration of the time for filing a notice of appeal... or 10 days from the date of entry of the order granting the motion, whichever is later.”¹⁸

The time for filing a notice of appeal may not be extended if the appeal is from a judgment, order, or decree (a) “grant[ing] relief from an automatic stay under § 362, § 922, § 1201, or § 1301,” (b) “authoriz[ing] the sale or lease of property or the use of cash collateral under § 363,” (c) “authoriz[ing] the obtaining of credit under § 364,” (d) “authoriz[ing] the assumption or assignment of an executory contract or unexpired lease under § 365,” (e) “approv[ing] a disclosure statement under § 1125,” or (f) “confirm[ing] a plan under § 943, § 1129, § 1255, or § 1325 of the Code.”¹⁹

The process for filing an appeal is fairly straightforward. Notices of appeal are always filed in the bankruptcy court. Rule

Fast Facts:

While only “final” orders are appealable as a matter of right, the concept of finality is more flexible in the bankruptcy setting; orders concluding a particular adversarial matter within the larger case can be appealed immediately.

Only “aggrieved” parties are entitled to appeal bankruptcy orders, although determining whether a party is aggrieved can be difficult depending on the nature of the order being appealed.

The timing and process for pursuing appeals in bankruptcy proceedings are largely rule-driven, so practitioners should carefully review the applicable bankruptcy rules and case law construing them.



8001(a) governs appeals as a matter of right, providing that the notice of appeal “shall (1) conform substantially to the appropriate Official Form [which usually can be located on the bankruptcy court’s website], (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee [currently \$455].”

The process is essentially the same for appeals from interlocutory orders, except that the notice of appeal must be “accompanied by a motion for leave to appeal prepared in accordance with Rule 8003.”²⁰

District Court or Sixth Circuit BAP

In appeals arising out of the Western District of Michigan, parties have the option of having their appeal determined either by the Sixth Circuit Bankruptcy Appellate Panel (or BAP) or the district court. The Eastern District, on the other hand, does not utilize the BAP.

When a party intends to file an appeal from a bankruptcy court order in a circuit that has created a BAP (like the Sixth Circuit) and from a district that has authorized the BAP to hear appeals (like the Western District of Michigan), that party faces a choice. On the one hand, the party can pursue its appeal before the BAP; on the other hand, the party may elect at the time of filing to have the appeal heard by the district court.²¹ The appellee also faces a choice: assuming that the appellant does not elect to have an appeal decided by the district court, the appellee (or any other party) may elect to have the appeal heard by the district court within 30 days after service of the notice of appeal.²²

Record and Issues on Appeal

Within 10 days of filing the notice of appeal, and regardless of whether the appeal proceeds before the district court or the BAP, the appellant must file a designation of the items that will comprise the record on appeal and a statement of issues to be presented. The appellant must also order any pertinent transcripts at that time. The appellee can designate additional items for the record on appeal within 10 days after service of the appellant’s designation.²³

The record on appeal must include “the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court.”²⁴ The party filing the designation of

items has two options regarding the transmittal of the record: (1) the party may provide copies of the designated items to the clerk, or (2) the party can have the clerk of court prepare copies of designated items at the party’s expense. If the transcript is part of the record to be transmitted, the appellant must file a written request for the transcript with the clerk immediately after filing the designation. The court reporter then has 30 days to complete the requested transcript.²⁵

When the record is complete, the bankruptcy court clerk transmits the record to the district court or the BAP, which then docket the appeal and sends a notice to the parties.²⁶

Filing the Brief on Appeal

Unless adjusted by the district court or BAP in its discretion, the appellant’s brief is due 15 days after the appeal is docketed, and the appellee’s brief is due 15 days after service of the appellant’s brief.²⁷ Both briefs are limited to 50 pages.²⁸ The appellant may file a reply brief limited to 25 pages within 10 days of service of the appellee’s brief.²⁹ If the appeal is before the BAP, the appellant is also required to file an appendix containing certain excerpts from the record.³⁰

Motions

Motions brought during the course of an appeal are governed by FR Bankr P 8011. Motions must “contain or be accompanied by any matter required by a specific provision” of the rules, must “state with particularity the grounds on which it is based,” and must “set forth the order or relief sought.”³¹ Briefs are not required, but “[i]f a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion.”³² The non-moving party may file a response within seven days after service of the motion, but this period can either be shortened or extended in the discretion of the district court or the bankruptcy appellate panel.³³

Rule 8011 also sets forth a procedure for filing emergency motions, which are considered those requiring “expedited action... on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court or bankruptcy appellate panel to receive and consider a response.”³⁴

Stays on Appeal

Stays on appeal are governed by Rules 7062 and 8005. For appeals arising in adversary proceedings (e.g., from a money judgment), there is, pursuant to Rule 7062 and FR Civ P 62, an automatic 10-day stay of proceedings following the entry of a bankruptcy court order, judgment, or decree, except in the case of an interlocutory or final judgment in an action for an injunction, an interlocutory or final judgment in a receivership action, and a judgment or order directing an accounting in an action for patent infringement.³⁵ The purpose of this initial period is to allow the appellant to make arrangements for a stay pending appeal, which, in adversary proceedings, is generally available upon the posting of an appropriate supersedeas bond.³⁶



It is important to keep in mind that Rule 7062 does not apply to contested matters per Rule 9014, unless ordered by the court.³⁷ But certain contested matters, such as requests for relief from the automatic stay, contain their own provisions relating to preliminary 10-day “automatic” stays on appeal. Included are orders under “Rules 3020 (plan confirmation in chapters 9 and 11), 4001 (automatic stay), 6004 (use, sale, or lease of property) and 6006 (assignments of executory contracts), unless the court orders otherwise.”³⁸

Other than the situation in which a supersedeas bond is posted to stay a judgment, order, or decree in an adversary proceeding, a continued stay pending appeal is ordinarily discretionary and governed by Rule 8005. Such requests must “ordinarily be presented to the bankruptcy judge in the first instance.”³⁹ Under Rule 8005, the bankruptcy court has discretion “to suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.”⁴⁰ Rule 8005 also provides the district court or bankruptcy appellate panel with independent authority to entertain a request for a stay pending appeal.⁴¹

In determining whether to grant a discretionary stay, with or without a bond, courts consider the same four factors that apply for obtaining a preliminary injunction: (1) the movant’s likelihood of success on appeal, (2) whether the movant will incur irreparable harm if the court denies the motion to stay, (3) the likelihood that others will be harmed if the court grants the motion to stay, and (4) the public interest in granting a stay.⁴²

In Conclusion

Pursuing any bankruptcy appeal requires careful evaluation of various procedural issues. In addition to consulting the Federal Rules of Bankruptcy Procedure and relevant caselaw, it might also make sense to consider consulting with an appellate specialist. ■



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FOOTNOTES

1. 28 USC 158(a)(1).
2. 28 USC 158(a)(2).
3. 28 USC 158(a)(3). Motions for leave to appeal are governed by FR Bankr P 8003.
4. *In re St. Clair*, 380 BR 478, 480 (BAP CA 6, 2008).
5. *In re Millers Cove Energy Co.*, 128 F3d 449, 451 (CA 6, 1997) [citation omitted].
6. *Olson v Anderson (In re Anderson)*, 377 BR 865, 868 (BAP CA 6, 2007) [citation omitted].
7. *In re Hertzfel*, 329 BR 221, 224–225 (BAP CA 6, 2005).
8. *In re Condon*, 358 BR 317, 320 (BAP CA 6, 2007).
9. *In re Alam*, 359 BR 142, 145 (BAP CA 6, 2006).
10. *In re Raynard*, 354 BR 834, 836 (BAP CA 6, 2006).
11. *In re United Producers, Inc.*, 353 BR 507, 508 (BAP CA 6, 2006).
12. *In re Sun Valley Foods Co.*, 801 F2d 186, 189–190 (CA 6, 1986); *In re Shultz*, 347 BR 115 (Table), 2006 WL 1407466 (BAP CA 6, 2006).
13. *In re First Cincinnati, Inc.*, 286 BR 49, 51 (BAP CA 6, 2002) [citation omitted].
14. *Id.*
15. FR Bankr P 8002(b).
16. *Id.*
17. FR Bankr P 8002(c)(2).
18. *Id.*
19. FR Bankr P 8002(c)(1).
20. FR Bankr P 8001(b).
21. 28 USC 158(c).
22. *Id.*
23. FR Bankr P 8006.
24. *Id.*
25. FR Bankr P 8007(a).
26. FR Bankr P 8007(b).
27. FR Bankr P 8009(a).
28. FR Bankr P 8010.
29. *Id.*; FR Bankr P 8009(a)(3).
30. FR Bankr P 8009(b).
31. FR Bankr P 8011(a).
32. *Id.*
33. *Id.*
34. FR Bankr P 8011(d).
35. See FR Civ P 62(a).
36. See, e.g., *In re John Richards Homes Bldg Co.*, 320 BR 139, 141 (ED Mich, 2005).
37. See *In re Anderson*, 2007 WL 433194 (Bankr D SC, 2007). See also 10 Collier on Bankruptcy ¶ 7062.03 (15th ed rev 2007).
38. 10 Collier on Bankruptcy ¶ 8005.3 (15th ed rev 2007).
39. FR Bankr P 8005.
40. *Id.*
41. See 10 Collier on Bankruptcy ¶ 8005.10 (15th ed rev 2007).
42. *In the matter of Cybernetic Services, Inc.*, 94 BR 951, 954–955 (WD Mich, 1989).