



# BANKRUPTCY APPEALS

By Glenn L. Smith

## Preserving Your Right of Review

**B**ankruptcy proceedings are designed to facilitate quick administration of an estate. U.S. district courts have original, but not exclusive, jurisdiction over all cases arising under, or arising in, or related to cases under Title 11, of the United States Code.<sup>1</sup> This jurisdictional grant can be referred to the bankruptcy courts in the judicial district.<sup>2</sup> Typically, this reference is automatic by virtue of local court rule but can be challenged by timely petition.<sup>3</sup> As a result, virtually any litigation involving a debtor can be brought in or transferred to a bankruptcy court having extraordinary powers for a non-Article III court.<sup>4</sup> An attorney needs to be cognizant of both the time limitations and the procedural rules that limit the right to appeal a bankruptcy court's decision.

## Bankruptcy Rules

The Federal Rules of Bankruptcy Procedures govern bankruptcy case administration, including adversary proceedings<sup>5</sup> and appeals. The bankruptcy rules consist of nine distinct parts with Part VII governing adversary proceedings and Part VIII governing appeals. Part IX sets forth general provisions such as time and entry of judgment-motions that apply to the other parts of the bankruptcy rules. While the bankruptcy rules in Parts VII, VIII, and IX often adopt or mirror the Federal Rules of Civil Procedure, in key areas dealing with time limitations and appeals, there are important distinctions.

### Preserving the District Court's Right to De Novo Review

A complaint brought by or against a debtor is captioned as an adversary complaint under the bankruptcy petition's case number.<sup>6</sup> A party filing or answering an adversary complaint must determine if the issue raised is a core matter arising in or under Title 11. A matter is "core" if it could only have been brought as a result of the bankruptcy petition and "non-core" if it could have been brought even in the absence of the bankruptcy petition.<sup>7</sup>

A nonexclusive list of core proceedings is set forth at 28 USC 157(b)(2). If the matter is core, then the bankruptcy court can adjudicate the proceeding subject to appellate review under 28 USC 158.<sup>8</sup> If the matter is non-core, but is related to a case under Title 11, then the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court for de novo review of those matters to which a party has timely and specifically objected.<sup>9</sup> This right of de novo review can, however, be waived by consent<sup>10</sup> and is often done unintentionally.

A plaintiff who mistakenly alleges that an adversary proceeding is core waives his right to de novo review under 28 USC 157(c)(1) if his opponent admits this allegation. Likewise, a defendant who mistakenly admits the allegation that an adversary proceeding is



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core also waives de novo review rights. A party asserting that a matter is non-core must include in the complaint or answer a statement of whether or not he consents to the entry of final orders or judgments by the bankruptcy court.<sup>11</sup>

Failure to include such a statement in a pleading may be construed as consent to the bankruptcy court's authority.<sup>12</sup> The significance of this issue is not inconsequential. A party inadvertently consenting to the bankruptcy court's jurisdiction will: (1) be subject to binding interim decisions of the bankruptcy court that are unappealable as interlocutory orders; (2) deny himself the right of review by the district court of the bankruptcy court's recommended findings of fact and conclusions of law; (3) shorten the time period for appealing from 30 to 10 days; and (4) face a more deferential standard on appeal.<sup>13</sup>

## Fast Facts:

- Bankruptcy actions are governed by the Federal Rules of Bankruptcy Procedure.
- Careful pleading practice is required to preserve the right to de novo review by a district court of a bankruptcy court's ruling.
- A notice of appeal of a bankruptcy court's final order must be filed within 10 calendar days.
- Appeals of adversary proceedings may be rendered moot by continued administration of the bankruptcy estate.

## Time Limitations

The court that will hear an appeal and the appropriate standard of review depends on which court issued the order or judgment that is appealed. Appeals of final judgments, orders, and decrees of the bankruptcy court are taken to the district court or the bankruptcy appellate panel established by the district court.<sup>14</sup> Final decisions, orders, and decrees of the district court, as well as appellate decisions rendered under 28 USC 158(a) are heard by the court of appeals.<sup>15</sup>

Specific objections to proposed findings of fact and conclusions of law of the bankruptcy court must be filed within 10 calendar days from the time they were received.<sup>16</sup> This time limit is not extended

by weekends or holidays.<sup>17</sup> Likewise, an appeal of a bankruptcy court's final decision, order, or decree must be filed within 10 calendar days from the date that the decision, order, or decree was filed.<sup>18</sup>

The time limits for appeals from a district court's final decision or appellate decision are less certain. The statutory time limits for appealing to courts of appeal do not apply.<sup>19</sup> However, Rule 6(a) of the Rules of Appellate Practice prescribes that an appeal of a final decision of the U.S. District Court will be taken as any other civil appeal, therefore the 30-day limit prescribed by Rule of Appellate Procedure 4 applies.

Appellate Rule 6(b) prescribes that the time limits of Rule 4 [excluding Rules 4(a)(4) and 4(b)] also apply to appeals of a district court's appellate decision taken under 28 USC 158(d). Thus, a party would have 30 days from date of judgment to take an appeal of a



district court's appellate ruling.<sup>20</sup> In addition, within 10 days of the appeal, the appealing party must file a designation of the items to be included in the appellate record and a statement of the issues.<sup>21</sup> This is true in both appeals from the bankruptcy court and from a district court review of a bankruptcy court's final decision, order, or decree.

### Interlocutory Appeals and the Collateral Order Rule

While the statutory language authorizing appeals of "final judgments, orders, and decrees" of the bankruptcy court is quite broad, it has been interpreted as authorizing only appeals of final judgments entered under Bankruptcy Rule 9021.<sup>22</sup> As in non-bankruptcy proceedings, orders falling within the exception to the finality rule under *Cohen v Beneficial Loan Corp.*, 337 US 541 (1949), also known as the Collateral Order Doctrine, are appealable under 28 USC 158(a), (d).<sup>23</sup> To fall within this exception an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.<sup>24</sup>

A party can, however, seek appellate review of interlocutory orders and decrees by the district court, with leave of the bankruptcy court.<sup>25</sup> A district court can also treat an improper but timely notice of appeal as a motion for leave to appeal.<sup>26</sup> A motion for leave to appeal must contain a statement of the facts necessary to understand the questions presented by the appeal, a statement of the questions on appeal and the relief sought, a statement of why an appeal should be granted, and a copy of the challenged order together with any related opinion or memorandum.<sup>27</sup>

Within 10 days of service, an adverse party may file an answer in opposition to such a motion.<sup>28</sup> While a district court may exercise discretionary appellant jurisdiction over an interlocutory appeal, a court of appeals cannot.<sup>29</sup>

### Keeping the Appeal from Being Rendered Moot

Unlike other litigation, adversary proceedings exist as a component of the bankruptcy petition.<sup>30</sup> As such, events can occur in the adjudication of the bankruptcy petition that can render an appeal moot. For example, if an appeal deals with an interest in property, the sale of the property during the pendency of an appeal may render the appeal moot.<sup>31</sup> Under the doctrine of equitable estoppel, "an appeal will not be heard if it disturbs the administration of the bankruptcy estate or bankruptcy reorganization."<sup>32</sup> Three factors will be considered in determining whether it is prudent to upset the plan of reorganization: "(1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated' and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan."<sup>33</sup>

It is, therefore, imperative to monitor the entire bankruptcy proceeding and not just the adversary proceeding from which the appeal was taken, to protect an appellate interest. If a sale of property or a reorganization plan is submitted to the bankruptcy court for approval, a party should consider seeking a stay of any approval

of the sale or confirmation of the reorganization plan if there is a chance it will render the appeal moot.

### Conclusion

Litigants before a bankruptcy court must consider their appellate strategy at every stage of the litigation, starting with the decision whether to consent to a bankruptcy court's jurisdiction upon filing or answering an adversary complaint. The decision to appeal an adverse order must be made promptly. In addition to pursuing the appeal, the appellant must monitor the overall bankruptcy petition proceeding to minimize the risk that the appeal will be rendered moot. ♦



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### Footnotes

- 28 USC 1334.
- 28 USC 157(a).
- For example, USDC ED Mich, L Civ R 83.50(a)(1) and USDC WD Mich L Civ R 83.3(b).
- For example, 11 USC 105; Bankruptcy Rule 7001.
- Bankruptcy Rule 7001. (Adversary proceedings include complaints to recover money or property, establishing the priority of a lien and challenging the dischargeability of a debt, among other things.)
- Bankruptcy Rule 7008.
- Accord *In re Toledo*, 170 F3d 1340, 1348-49 (CA 11, 1999).
- 28 USC 157(b)(1).
- 28 USC 157(c)(1).
- 28 USC 157(c)(2).
- Bankruptcy Rules 7008(a) and 7012(b).
- Accord *In re Aero Fastener, Inc.*, 177 BR 120 (Bankr D Mass 1994).
- In re Toledo*, 170 F3d at 1350.
- 28 USC 158(a), (b).
- 28 USC 1291 and 28 USC 158(d), respectively.
- Bankruptcy Rule 9033(b).
- Bankruptcy Rule 9006(a).
- Bankruptcy Rule 8002.
- 28 USC 2107(d).
- Rule of Appellate Procedure 4(a)(1)(A).
- Bankruptcy Rule 8006 and Rule of Appellate Procedure 6(b)(2)(B)(i).
- In re FDR Hickory House, Inc.*, 60 F3d 724, 725 and 727 (CA 11, 1995).
- Id.*, at 726-27.
- Quackenbush v Allstate Ins Co.*, 517 US 706, 712 (1996).
- 28 USC 158(a)(3).
- Bankruptcy Rule 8003(c).
- Bankruptcy Rule 8003(a).
- Id.*
- 28 USC 158(d); *In re FDR Hickory House, Inc.*, 60 F3d 724, 725 (CA 11, 1995).
- Bankruptcy Rule 7008.
- 11 USC 363(m); *In re 255 Park Plaza Associates, Ltd Partnership*, 100 F3d 1214 (CA 6, 1996).
- Accord, *City of Covington v Covington Landing Ltd Partnership*, 71 F3d 1221, 1225 (CA 6, 1995).
- Id.*, at 1,225, citing *Manges v Seattle-First Nat'l Bank (In re Manges)*, 29 F3d 1034, 1039 (CA 5, 1994), cert den, 513 US 1152 (1995).