BANKRUPTCY APPEALS:

A STUDY IN ARCHITECTURE

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Recent Cases

Reversal of a default judgment. *MobileVision Imaging Services, L.L.C. v. LifeCare Hospitals of North Texas, L.P.*, 280 S.W.3d 561 (Tex. App.—Dallas 2008, no pet.).

Maintained Texas state court venue over a multiparty case with multiple removals and parallel suits. *See Ondova Limited Co. v. Manila Indus., Inc.*, 513 F. Supp.2d 762 (N.D. Tex. 2007).

Complex "con-tort" case about the sale of satellite facilities. *GWTP Investments, L.P. v. SES Americom, Inc.*, 497 F3d 478 (5th Cir. 2007).

Recent Publications

"Forum Non Conveniens & Mexico," *Revista Mexicana de Derecho Internacional Privado* (forthcoming 2009).

"Outer Bounds of Arbitration," *Commercial & Business Litigation* (Spring 2009).

"Appeals Plus: The Appellate Practice of the 21st Century," *Dallas Bar Association Headnotes* (April 2009).

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Recent Law Related Presentations & Publications

Contributor, Drafting to Avoid Litigation: Thoughts on Preventing Will and Trust Contests, *Presented at State Bar of Texas 33rd Annual Advanced Estate Planning and Probate Course*, June 11, 2009.

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2008 J.D., University of Pittsburgh School of Law
Intern, Hon. Chief Justice Donetta W. Ambrose, Third Circuit Court of Appeals
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BANKRUPTCY APPEALS: A STUDY IN ARCHITECTURE

I. INTRODUCTION

The Bankruptcy Code is a specialized system for resolving the unique issues created by insolvency. The system includes a framework for appealing bankruptcy court rulings. This paper studies that framework, both to illustrate "nuts-and-bolts" points about how it works, and to compare it to other appellate rules. The paper is organized by asking the questions "who," "where," "what," "when," and "how and why" about bankruptcy appeals. Wherever possible, the article emphasizes case law from the Texas judicial districts and the Fifth Circuit.

II. STRUCTURE

A. "Who" – Standing to Appeal.

Because bankruptcy courts are authorized by Article I of the Constitution rather than Article III, the traditional rules of judicial standing do not apply. Originally, standing was governed by the statutory "person aggrieved" test. 11 U.S.C. § 67(c). Although Congress did not include this provision when the Code was revised in 1978, courts hold that this test continues to govern standing. *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.,* 32 F.3d 205, 210 & n.18 (5th Cir. 1994) ("Although the applicable statute has since been repealed, bankruptcy courts still limit appellate standing to those 'aggrieved.'"); *see also In re Hipp, Inc.*, 859 F.2d 374, 375 (5th Cir. 1988).

Because bankruptcy cases often involve many parties, the "person aggrieved" test demands "a higher causal nexus" between act and injury than the traditional constitutional standard. *In re Coho Energy, Inc*., 395 F.3d 198, 202-203 (5th Cir. 2004); *see also In re P.R.T.C*., 177 F.3d 774, 777 (9th Cir. 1999) ("To prevent unreasonable delay, courts have created an additional prudential standing requirement in bankruptcy cases: The appellant must be a 'person aggrieved' by the bankruptcy court's order.") An appellant must show that he was "directly and adversely affected pecuniarily by the order of the bankruptcy court." *In re Coho Energy, Inc.*, 395 F.3d at 202. A remote possibility of harm does not satisfy the test. *Id.* at 203; *see also H&M Oil & Gas L.L.C. v. Brazos 440 Partners, L.P.*, 386 B.R. 631, 634 (W.D. Tex. 2008).

In *Coho Energy*, the Fifth Circuit found that a debtor lacked standing because it was not directly and adversely affected pecuniarily by the approval of a settlement. Thomas & Culp ("Thomas") represented Coho Energy in litigation with a third party. Coho fired Thomas and hired Gibbs & Bruns ("Gibbs"). Gibbs negotiated an $8.5 million settlement in the litigation with the third party. Then Coho and the two law firms disputed how much each firm would be paid. At first, the bankruptcy court approved a $2.55 million fee for Gibbs. In a later order, the court then held that both firms had to split a single $2.55 million fee, and awarded roughly $1.55 million to Thomas and $1 million to Gibbs. The district court affirmed the $1.55 million to Thomas, but vacated the reduction in Gibbs' fee. Coho then settled with Gibbs for $2.3 million. The district court approved the settlement over Thomas' objection. Thomas appealed to the Fifth Circuit, and Gibbs challenged Thomas' standing. Thomas argued that the settlement might exhaust the funds available to pay its own fee claim, but the court labeled this injury "indirect and improbable," and found Thomas lacked standing to appeal.

B. "Where" – Which Court.

Bankruptcy appeals "shall be taken . . . to the district court for the district in which the bankruptcy judge is serving." 28 U.S.C. § 158(a). Direct review by the Fifth Circuit[1] may occur when: (1) the bankruptcy or district court certifies that there is no controlling decision from the Supreme Court or circuit court; (2) the case involves a matter of public importance; (3) there are conflicting precedents; or (4) an immediate appeal may materially advance the progress of the bankruptcy proceeding. 28 U.S.C. § 158(d)(2)(A)(i)-(iii); *see also In re OCA, Inc.*, 552 F.3d 413 (5th Cir. 2008) (examining factors and finding jurisdiction to hear the debtor's direct appeal from bankruptcy court). Two other good examples are:

- *Weber v. U.S. Trustee*, in which the Second Circuit said it would most likely exercise its discretion to permit direct appeal where there was uncertainty in the bankruptcy courts or where the court found it patently obvious that the bankruptcy court's decision was either manifestly correct or incorrect, but would be reluctant to accept a direct appeal when a decision would benefit from percolation through the district court. It then declined to exercise jurisdiction over the appeal before it. 484 F.3d 154 (2nd Cir. 2007).

- *Weaver v. Harmon Law Offices*, in which the First Circuit held that discretionary denial of leave to appeal was warranted where there was a substantial possibility that jurisdiction would ultimately be rejected due to appellants' failure to file a notice of appeal in bankruptcy court or to obtain authorization of a direct appeal from the bankruptcy court. The court cautioned litigants, courts and bankruptcy appellate panels to take care to follow the procedures set forth in Section 158. 542 F.3d 257 (1st Cir. 2008).

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[1] Unlike several other circuits, the Fifth Circuit does not have a specialized Bankruptcy Appeal Panel.

C. "What" – Defining the Issues.

1. Appealable Issues.

The Code provides that "final judgments, orders and decrees" are immediately appealable as of right. 28 U.S.C. § 158. With the exception of orders expressly made appealable elsewhere in the Code, all "[o]ther interlocutory orders and decrees" can only be appealed with leave of the district court. 28 U.S.C. § 158(a)(3). Interlocutory appeals are discouraged because they "interfere with the overriding goal of the bankruptcy system, expeditious resolution of pressing economic difficulties." *In re Hunt Int'l Res. Corp.*, 57 B.R. 371, 372 (N.D. Tex. 1985). While Section 158 does not set out a specific test for interlocutory orders or decrees, most district courts use the three-part standard set by 28 U.S.C. § 1292(b) for appeal of interlocutory orders from district courts: "(1) a controlling issue of law must be involved; (2) the question must be one where there is substantial ground for difference of opinion; and (3) an immediate appeal must materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b); *Compare Matter of Ichinose*, 946 F.2d 1169 (5th Cir. 1991) (allowing appeal of debtors' motion to dismiss a nondischargeability complaint); *with DuPree v. Kaye*, No. 3:07-CV-0768-B ECF, 2008 WL 294532 (N.D. Tex. Feb. 4, 2008) (finding, from a judicial economy perspective, that the burden of continued litigation did not overcome the general presumption against interlocutory appeals when appeal risked keeping the bankruptcy proceedings in limbo for an indeterminate period of time).

2. Standard of Review.

When reviewing a bankruptcy court's decision in a core proceeding, the district court functions as an appellate court and applies the standard of review generally applied in the federal court of appeals. *Matter of Webb*, 954 F.2d 1102 (5th Cir. 1994); *see also In re Allied Physicians Group, P.A.*, No. CIV. A. 3:04-CV-0765-G, 2004 WL 2965001, *2 (N.D. Tex. Dec 15, 2004). The Fifth Circuit summarizes the basic principles: "We review the Bankruptcy Court's findings of fact for clear error and its conclusions of law de novo." *In re Eldercare Properties Ltd.*, 568 F.3d 506, 514 (5th Cir. 2009).

Federal Rule of Bankruptcy Procedure (hereinafter, "Rule") 8013 states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." This deferential standard shows the respect of appellate courts for first-hand credibility determinations by the bankruptcy judge. *Firstbank v. Pope*, 141 B.R. 115, 118 (E.D. Tex. 1992), *aff'd*, 979 F.2d 1534 (5th Cir. 1992). The reviewing court determines whether the evidence supports the bankruptcy court's findings and will set them aside only if left with "the definite and firm conviction that a mistake has been committed." *In re Dennis*, 330 F.3d 696, 701 (5th Cir. 2003); *In re Williams*, 337 F.3d 504, 508-09 (5th Cir. 2003). Examples of the kinds of settings that can receive this deference are appeals of motions to compromise or to lift a stay. *In re Martin*, 222 Fed. Appx. 360, 362 (5th Cir. 2007).

3. Stays.

Rule 7062 provides an automatic ten-day stay of proceedings following 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.

Under Rule 8005, a stay motion "must ordinarily be presented to the bankruptcy judge in the first instance," and a motion for relief to the district or appellate court must show why the relief, modification, or termination was not obtained from the bankruptcy judge. Although, in the case of *In re SI Restructuring, Inc.*, the filing of a stay motion in the district court instead of the bankruptcy court was held not to violate Rule 8005. 542 F.3d 131 (5th Cir. 2008). The bankruptcy court delayed effectiveness of its order for ten days to give the parties an opportunity to seek a stay from district court, making it clear that no additional stay would be granted by the bankruptcy court. *Id.*

Under Rule 8017, "[j]udgments of the district court or the bankruptcy appellate panel are stayed until the expiration of 10 days after entry, unless otherwise ordered by the district court or the bankruptcy appellate panel." Rule 8017(b) provides that on motion and notice to the parties, the district court may stay its judgment pending an appeal to the court of appeals but the stay cannot extend beyond thirty days "unless it is extended for cause shown." Under this rule, if before the stay expires, the party who obtained the stay takes a further appeal, "the stay shall continue until final disposition by the court of appeals." Relief under Rules 8005 and 8017 may be conditioned on posting security.

Rule 7062 does not apply to "Contested Matters" governed by Rule 9014. FED. R. BANKR. P. 9014(c). Several other rules contain their own stay provisions similar to what Rule 7062 provides.

4. Motions.

Motions during a bankruptcy appeal are governed by Rule 8011, although its scope has been clarified to provide that it does not apply to all motions for relief, but only motions relevant to the matter the district court is considering on appeal. *Home Life Ins. Co. v.*

Abrams Square II, Ltd., 95 B.R. 51 (N.D. Tex. 1988). Rule 8011 requires that a motion "contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, state with particularity the grounds on which it is based, and set forth the order or relief sought." If a motion is supported by pleadings they must be served and filed with the motion. *Id.* Any party may file a response in opposition to a motion, other than one for a procedural order, within seven days after service of the motion, but the appeal court may shorten or extend the time for responding to any motion. *Id.*

Emergency motions, under Rule 8011(d), can seek expedited action on the grounds that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court to receive and consider a response. *See In re Florida West Gateway, Inc.*, 993 F.2d 1543 (5th Cir. 1993) (Appellant did not meet the requirements of Rule 8011(d) because he failed to (1) substantiate that a motion to stay the transfer order advancing the grounds presented in the emergency motion was ever filed with the bankruptcy court; and (2) because he failed to notify the parties of the emergency motion).

D. "When" -- Mootness.

The doctrine of equitable mootness is designed to address fairness concerns unique to bankruptcy proceedings. *Technology Lending Partners LLC v. San Patricio County Community Action Agency*, No. 08-40517, 2009 WL 2025467 (5th Cir. July 14, 2009); *In re Manges*, 29 F.3d 1034, 1038 (5th Cir. 1994). The doctrine does not look into whether a case or controversy exists, but instead recognizes that there is a point beyond which a court cannot order fundamental changes in a reorganization. *Technology Lending Partners,* 2009 WL 2025467 at *3. Generally speaking, an appeal is equitably moot when a plan of reorganization has been so substantially consummated that a court cannot order effective relief even though a dispute may still remain among some parties to the bankruptcy case. *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008).

This issue can arise with sales, as Title 11, Section 363(m) of the Code provides that the validity of a sale of property is not affected by a subsequent reversal on appeal unless a stay is obtained. If the prevailing party on a sale issue proceeds with transactions that cannot be reversed, an appeal about the sale could become moot. *In re Ginther Trusts,* 238 F.3d 686, 689 (5th Cir. 2001) (citing *In re Sax*, 796 F.2d 994, 997 (7th Cir. 1986).

In *Wooley v. Faulkner*, 542 F.3d 131 (5th Cir. 2008), the Fifth Circuit concluded that the doctrine of equitable mootness did not apply to attorneys representing clients in a Chapter 11 bankruptcy. According to the court, the ultimate question to be decided is "whether the Court can grant relief without undermining the plan and, thereby, affecting third parties." The Fifth Circuit reasoned that an order compelling disgorgement of attorney fees and expenses would not unravel a complicated bankruptcy plan but instead "would require only that one party disgorge the money it has received, money that would then be distributed pursuant to the bankruptcy court's final decree."

Another illustration of the doctrine appears in *Technology Lending Partners LLC v. San Patricio County Community Action Agency*, in which the Fifth Circuit applied the doctrine of equitable mootness to a Chapter 7 liquidation. Technology Lending Partners (Lender) argued that the district court improperly applied the doctrine of equitable mootness to dismiss their case. Because the case was resolved on mootness, the district court never decided whether Technology Lending Partners' state-law tort claims against San Patricio County (Debtor) were part of the bankruptcy estate. The court examined three factors: (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 the parties not before the court or the success of the plan. In this case, the first two factors were not an issue. The court held that the doctrine did not apply here because the district court never reached summary judgment on whether the Lenders' claims were part of the estate.

E. "How and Why" – Appellate Procedure.

1. Docketing the Appeal.

Under Rule 8002(a), an appellant only has ten days to file its notice of appeal – twenty less than what is typical under the Federal Rules of Appellate Procedure. A bankruptcy court may permit a late filing "where the failure to act was the result of excusable neglect" and grant up to twenty additional days. FED. R. BANKR. P. 9006(b)(1); *In re Pollak*, 223 Fed. Appx. 309 (5th Cir. 2007). To determine whether there is excusable neglect, the court should take into account all relevant circumstances, including the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, and whether the debtor acted in good faith. *In re Pollak*, 223 Fed. Appx. at 310; *Christopher v. Diamond Benefits Life Ins. Co. (In re Christopher)*, 35 F.3d 232, 236 (5th Cir. 1994) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993)).

The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from (a) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301; (b) authorizes the sale or lease of property or the use of cash collateral under § 363; (c) authorizes the obtaining of credit under § 364; (d)

authorizes the assumption or assignment of an executory contract or unexpired lease under § 365; (e) approves a disclosure statement under § 1125; or (f) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code. FED. R. BANKR. P. 8002(c)(1).

Appellants must also file a statement of the issues to be presented in the appeal, separate from the notice of appeal, within ten days of filing the notice. FED. R. BANKR. P. 8006. If an issue is not included in this statement, even if it was raised in and decided by the bankruptcy court, it is not preserved for appeal. *In re Martin*, 222 Fed. Appx. at 362 (citing *In re GGM, P.C.*, 165 F.3d 1026, 1032 (5th Cir. 1999)). (Similarly, the reviewing court will not likely consider issues on appeal that were not raised before the bankruptcy court. *In re Ginther Trusts*, 238 F.3d 686, 689 & n.3 (5th Cir. 2001)).

In the same time period, an appellant must also file and serve a designation of the items to be included in the record. FED. R. BANKR. P. 8006. The record 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." *Id.* Either the party seeking to appeal can provide copies of these items to the clerk or the clerk can prepare them, at the expense of the party. If there is a transcript, the appellant must file a written request for it immediately after filing the designation. *Id.* If the transcript cannot be done within thirty days of receipt of the request the reporter shall seek an extension of time from the clerk. FED. R. BANKR. P. 8007.

Rule 8001 permits dismissal of a bankruptcy appeal if a party fails to take any required step other than filing its notice of appeal. *In re Juan Pequeno*, 240 Fed. Appx. 634, 635 (5th Cir. 2007) (citing *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 n.6 (5th Cir. 1985)). Examples include:

- When appellants did not mention their motions for fines and sanctions in their Rule 8006 notice, they waived the right to appeal the bankruptcy court's denial of these motions. *In re Martin*, 222 Fed. Appx. at 362.
- After the appeal was dismissed by the district court because appellant failed to timely file a brief and designate a record on appeal -- and then did not timely appeal from that dismissal -- the Fifth Circuit lacked jurisdiction. *State Farm Mut. Auto. Ins. Co. v. Wilkins*, 242 Fed. Appx. 183 (5th Cir. 2007).
- Appellant waived the issue that the trustee failed to plead and prove all conditions precedent to a suit on a note by not including it in the statement of issues to be presented on appeal to the district court. *In re GGM, P.C.*, 165 F.3d 1026 (5th Cir. 1999).
- A bankruptcy appeal may be dismissed for not filing an initial brief. *In re Braniff Airways, Inc.*, 774 F.2d at 1305 n.6.

2. <u>Briefing.</u>

An appellant's brief is due fifteen days after the appeal is docketed, the appellee's brief is due fifteen days after the appellant's brief is served, and any reply brief is then due in another ten days. Rules 9009(a), 8010; *see also State Farm,* 242 Fed. Appx. 183 (5th Cir. 2007). Unless an order or local rule provides otherwise, principal briefs cannot exceed fifty and reply briefs cannot exceed twenty-five pages (exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material). Rule 8010.

3. <u>Finality.</u>

Justice Irving Goldberg eloquently wrote: "A paradox of appellate jurisdiction is that the season begins only after the game has ended. In baseball, it is easy to tell when the game is over. In bankruptcy, Title 11 of the United States Code not only changes the rules of the game, it reshapes the concept of the game." *In the Matter of Green County Hospital*, 835 F.2d 589, 589 (5th Cir. 1988). The character of the bankruptcy court's order determines whether appeal is available as of right to the district court. *Id.* at 595. Under 28 U.S.C. §§ 158 and 1292, a bankruptcy court order must be final with respect to a "single jurisdictional unit" to be appealable. A final order must "resolve a discrete unit in the larger case." *In re Green County Hosp.*, 835 F.2d at 595; *see also Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 420 (5th Cir. 1998).

A final order must "conclusively determine substantive rights." *In re Green County Hosp.*, 835 F.2d at 595 (quoting *In re Delta Services, Industries*, 782 F.2d 1267, 1271 (5th Cir. 1986)). "On the other hand, the courts of appeals have considered bankruptcy court orders that constitute only a preliminary step in some phase of the bankruptcy proceeding and that do not directly affect the disposition of the estate's assets interlocutory and not appealable." *Id.* Several cases show how these principles apply:

- When a district court sitting as a court of appeals in bankruptcy remands a case to the bankruptcy court for significant further proceedings, the remand order is not "final" and therefore not appealable. *In re Pratt*, 524 F.3d 580 (5th Cir. 2008).
- A district court's remand of a bankruptcy court's decision to award attorney's fees to counsel for an equity security holder required

"significant further proceedings," and so was not a final order over which the Court of Appeals had jurisdiction. The district court called for a complete re-adjudication of the attorney's fees issue, and such a proceeding would likely have required further factual development and would likely have generated a new appeal or affected the issue that the losing party would want to raise on appeal, thus requiring the bankruptcy court to perform a judicial function. *In re Gadzooks Inc.*, 291 Fed. Appx. 652 (5th Cir. 2008).

- A bankruptcy court order granting defendant's summary judgment motion and dismissing a complaint was properly appealed to the district court as of right. *In re County Management*, 788 F.2d 311 (5th Cir. 1986); *see also In re Bowman*, 821 F.2d 245, 246 (5th Cir. 1987) (dismissal of a complaint ends that dispute).
- A bankruptcy court's recognition of a creditor's security interest is final as it conclusively establishes a claim against the estate. *In re Lift & Equipment Service, Inc.*, 816 F.2d 1013, 1015 (5th Cir. 1987).
- An order requiring an individual to turn over an antique coin, is final; it authoritatively settles the inclusion of a piece of property in the estate. *In re Moody*, 817 F.2d 365 (5th Cir. 1987).

III. CONCLUSION

The bankruptcy appeal system, like the Code of which it is a part, is designed to efficiently and fairly deal with the complexities of the unique disputes it faces. The briefing and other basic rules parallel the Federal Rules of Appellate Procedure with a handful of differences designed to advance the policy goals of the Code. The same is true for the Code's treatment of concepts such as standing and mootness. In approaching other appellate systems, such as those within administrative agencies, similar study of how those systems implement their policy goals may help highlight their important features as well.