

A Practical Guide to Bankruptcy Appeals

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I. Introduction

Litigating a bankruptcy appeal presents unique challenges. Procedurally, in addition to the special rules for taking bankruptcy appeals, multiple different sources of authority can appear to apply concurrently. And, substantively, bankruptcy is a particularly challenging subject-matter that has its own title in the U.S. Code, its own set of rules, its own terms of art, and its own body of case law in which traditional legal doctrines function differently or not at all. These complexities can stump even the most capable of attorneys.

Furthermore, imagine how daunting it can seem to judges that rarely encounter bankruptcy. In Fiscal Year 2016, there were 1,952 bankruptcy appeals filed in the district courts, which is approximately 0.67% of newly filed civil matters, and 757 bankruptcy appeals filed in the courts of appeals, which is approximately 1.25% of newly filed appeals.¹ Only 635 were filed in bankruptcy appellate panels (“BAPs”), which have been authorized in the First, Sixth, Eighth, Ninth, and Tenth Circuits.²

This paper is intended to provide a practical guide through the bankruptcy appellate process. The first section provides quick references to key statutes and rules. The second section addresses critical issues to consider in deciding whether to take a bankruptcy appeal. The third section provides a walkthrough of the nuts and bolts of the appellate process, with a primary emphasis on an appeal to the district court. The fourth section provides advice on how to craft an argument that will maximize your chances for success in a bankruptcy appeal.

II. Overview of Key Statutes and Rules

- *28 U.S.C. § 158* is the primary jurisdictional provision governing bankruptcy appeals. It provides subject-matter jurisdiction for appeals to the district courts, bankruptcy appellate panels, and courts of appeals, but not the Supreme Court. It also establishes the potential forums, finality requirements, and timeliness requirements for bankruptcy appeals.
- *Bankruptcy Rule 8002* establishes the deadlines for taking bankruptcy appeals and the rules applicable to

¹ <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016>

² *Id.*

extensions of those deadlines. Because it is incorporated by section 158, these deadlines are jurisdictional in nature.

- *Bankruptcy Rule 8003* establishes the procedures for taking an appeal of right.
- *Bankruptcy Rule 8004* establishes the procedures for requesting leave to appeal an interlocutory order.
- *Bankruptcy Rule 8006* establishes the procedures for certifying a direct appeal to the circuit court.
- *Bankruptcy Rule 8009* requires the filing of the designation of the record of appeal and the statement of the issues on appeal within fourteen days after the filing of the notice of appeal.
- *Bankruptcy Rule 8018* establishes a default briefing schedule, with the appellant's opening brief due within thirty days after the appeal is transmitted to the appellate court.
- *28 U.S.C. § 2107(d)* provides that the general statutory provision establishing the deadlines for taking an appeal to a court of appeals is inapplicable in bankruptcy matters.

III. Things to Consider Before Taking an Appeal

A. Can You Take an Appeal?

The first thing to consider before taking an appeal is to assess the potential bases for, and defects in, appellate jurisdiction, both statutory and constitutional.³ Jurisdictional requirements are strictly construed and strictly applied. In other words, a jurisdictional defect will entirely preclude an appellate court from hearing the appeal; it cannot be excused or waived. *See Bowles v. Russell*, 551 U.S. 205 (2007). As such, it is critical to understand jurisdiction from the very outset of the appellate process.

³ Under Article III, the judicial power of the United States extends only to "cases" and "controversies." The case-or-controversy requirement means that there must be an actual dispute capable of judicial resolution. This requirement applies at every stage of the case, including on appeal. This is considered a jurisdictional requirement because it defines the scope of the court's authority to hear and decide cases, just like statutory subject matter jurisdiction.

Appellate jurisdiction for bankruptcy matters is established by 28 U.S.C. § 158:

- Subsection (a) provides the district court with jurisdiction to hear appeals from final and interlocutory orders⁴ entered by bankruptcy judges.⁵
- Subsections (b) and (c)(1) authorize the courts of appeals to establish BAPs and, if so established, provide BAPs with the same scope of appellate jurisdiction as provided to district courts, provided that the parties consent to have the appeal heard by the BAP.
- Subsection (c)(2) provides that appeals to a district court or BAP “shall be taken in the same manner” as civil appeals generally and “in the time provided by Rule 8002.”
- Subsection (d) provides the courts of appeals with jurisdiction to hear appeals from final orders “entered under subsections (a) and (b)” and with jurisdiction for direct review of bankruptcy court orders, with leave from the court of appeals, where the bankruptcy court determines or the parties agree that:
 - (i) the order involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

4 Although the statute uses the phrase “judgments, orders, and decrees,” for the purposes of appeal these terms are interchangeable. Indeed, “[i]n a legal sense, these three words share, as their common denominator, the notion of a decision carrying some kind of command or adjudicating consequence.” *Wortley v. Bakst*, 844 F.3d 1313, 1321 (11th Cir. 2017). For convenience, this paper uses the term “order” to refer to any such judicial decision, unless otherwise relevant.

5 Under subsection (a)(2), a party may take an appeal as of right from an interlocutory order modifying the exclusivity period in which a chapter 11 debtor may file a plan. Under subsection (a)(3), all other interlocutory appeals may be heard with leave of court. Although subsection (a)(3) does not promulgate a standard for granting interlocutory review akin to that in 28 U.S.C. § 1292(b), courts have consistently applied the section 1292(b) test (as described in detail below). *See, e.g., Gache v. Balaber-Strauss*, 198 B.R. 662, 664 (S.D.N.Y. 1996).

- (ii) the orders involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the order may materially advance the progress of the case or proceeding in which the appeal is taken.

The following discussion walks through the four types of common jurisdictional defects that can present traps for the unwary: finality, untimeliness, mootness, and standing.

B. Finality

Finality is a threshold question that is often overlooked. But it is critical to the nature of the appellate process. After all, if an order is not final, then a party cannot take an appeal of right and must overcome the high standards that apply in seeking leave to bring an interlocutory appeal. Understanding finality is therefore necessary for accurately evaluating the time, cost, and probability of success at the outset of an appeal.

1. The “Flexible Finality Doctrine”

In non-bankruptcy civil litigation, a party must typically wait until the end of the case to appeal. In bankruptcy, however, something called the “flexible finality doctrine” applies. Under this doctrine, a party may take an appeal of right from an order that resolves a “discrete dispute” within a bankruptcy case. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006); *In re Barte*, 212 F.3d 277, 282 (5th Cir. 2000).

The flexible finality doctrine is currently in a state of flux. Historically, the majority of circuits would analyze (i) whether the specific order in question materially impacted, or determined a substantive issue that would have material impact on, a party’s substantive rights and (ii) whether appeal could be meaningfully postponed.⁶ See *England v. Fed. Deposit Ins. Corp. (In re England)*, 975 F.2d 1168, 1171 (5th Cir. 1992) (holding that an order granting or denying an exemption is a final order); *United States v. Durensky (In re Durensky)*, 519 F.2d 1024, 1029 (5th Cir.

⁶ Although not traditionally described this way, the flexible finality doctrine could be viewed as a more relaxed version of the collateral order doctrine, which permits immediate appeal of “claims of right separable from, and collateral to, rights asserted in action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

1975) (holding that the right of appeal turned on whether the order possessed “definitive operative finality”). Application of the flexible finality doctrine led to a variety of results. *See, e.g., In re Ross-Tousey*, 549 F.3d 1148, 1152-53 (7th Cir. 2008) (holding that an order denying a motion to dismiss a chapter 7 case for abuse under the means test is a final order); *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 837 (9th Cir. 2008) (holding that a determination on whether the appellant had a conflict of interest and therefore was statutorily precluded from serving as a chapter 7 trustee was a final order); *In re BH&P, Inc.*, 949 F.2d 1300, 1307 (3d Cir. 1991) (same); *Turshen v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987) (holding that a factual determination in an order denying a debtor’s motion to remove a trustee had preclusive effect in a subsequent proceeding); *In re Olson*, 730 F.2d 1109 (8th Cir. 1984) (holding that an order overruling an objection to a claim is a final order); *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444-46 (1st Cir. 1983) (holding that an order determining creditor priority is a final order); *City Nat’l Bank & Trust Co. v. Charmar Inv. Co. (In re Charmar Inv. Co.)*, 475 F.2d 560, 563 (6th Cir. 1973) (holding, under the Bankruptcy Act, that an order that determined the movants did not qualify as creditors was final for the purpose of appeal because it conclusively determined the parties’ status as creditors). A minority of circuits, however, have categorically rejected the flexible finality doctrine. *See In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013); *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 91 (2d Cir. 1982).

The Supreme Court addressed the flexible finality doctrine in *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015). There, the Court held that an order denying confirmation of a chapter 13 debtor’s repayment plan could not be a final order. The Court stated that the flexible finality doctrine applied in bankruptcy, but focused on the nature of the proceeding from which the putative appeal would arise, rather than the actual impact of the order. *Id.* at 1692 (“The present dispute is about how to define the immediately appealable ‘proceeding’ in the context of Chapter 13 plans.”). But the Court also reasoned that an order is final under the flexible finality doctrine when it “alters the status quo” between the parties, such as when an order has preclusive effect or “dooms the possibility of a discharge and the other benefits available to a debtor,” such as the availability of the automatic stay. *Id.* at 1692–93.

Those two concepts—the nature of the proceeding and the impact on the legal status quo—are not necessarily congruent. Unlike in garden variety civil litigation, a party’s substantive rights may be impacted at different stages throughout the bankruptcy process and

in different ways; it is the character of the bankruptcy court's order that has traditionally mattered, not the procedural context in which it arises. See *England*, 975 F.2d at 1171; *Bartree*, 212 F.3d at 283. An example of this can be seen in the Fourth Circuit's decision in *Turshen*. There, a debtor brought a motion to remove a chapter 7 trustee, in which the debtor asserted a claim for breach of fiduciary duty as the cause for removal. The bankruptcy court found that the trustee's actions were proper and no party appealed. The debtor later raised the breach of fiduciary duty claim in response to a collection action by the trustee against the debtor. The debtor argued that the earlier decision lacked preclusive effect because an order denying a motion to remove a trustee is interlocutory in nature. The Fourth Circuit rejected this argument, explaining that "the bankruptcy court's resolution of [the debtor's] breach of fiduciary claim constituted a nontentative final and reviewable determination of a discrete controversy within the bankruptcy litigation." *Turshen*, 823 F.2d at 839-40.

The impact of *Bullard* is still being felt. On one side, the Seventh Circuit recently refused to extend *Bullard* in determining that an order denying a motion to modify a confirmed chapter 13 plan was a final, appealable order. *Germeraad v. Powers*, 826 F.3d 962 (7th Cir. 2016). In *Germeraad*, the debtor argued that pursuant to *Bullard*, the trustee could only bring an appeal by obtaining dismissal of the case. The Seventh Circuit disagreed, reasoning that the order was final because relief was denied on the merits and there was no reasonable possibility that the basis for the requested relief could be re-litigated. It analogized the situation to that of a motion for relief from judgment under Civil Rule 60(b), stating that "even though it is theoretically possible that more than one Rule 60(b) motion will be filed in a single civil case, a district court's order denying any one motion will be considered final and immediately appealable." *Id.* at 967.

On the other side, the Tenth Circuit BAP held that, under *Bullard*, a bankruptcy court order that (i) approved the employment of a property broker and (ii) determined that certain of the debtors' properties were property of the estate was not a final, appealable order. *Wolff v. Sender (In re Wolff)*, No. 16-016 (B.A.P. 10th Cir. July 18, 2016) (unpublished). Although an order adjudicating a parties' interests in property would normally be considered final as an adjudication of substantive rights, the BAP determined that under *Bullard* the order was not final because it arose in the context of a motion to employ an estate professional, which did not result in a final order.

2. *Potential Stern Problems for Appeals*

In evaluating whether an order is final for the purpose of taking an appeal, it is important to be cognizant of any implications from *Stern v. Marshall*, 131 S. Ct. 2594 (2010).⁷ *Stern* determined that it was unconstitutional for an Article I bankruptcy judge to enter a final judgment on a tort claim under 28 U.S.C. § 157(b)(2)(C) because the authority to resolve that type of dispute was reserved to Article III judges. In *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), the Supreme Court held that parties may consent to the entry of a final judgment by a bankruptcy judge on a matter that would otherwise be prohibited under *Stern*.

Thanks to the prevalence of local rules and procedures that force parties to provide explicit consent or raise *Stern* issues before trial, a party considering an appeal should have a very good sense of whether the bankruptcy court's order may be considered final under *Stern*. But even if there has not been a previous *Stern* dispute, the issue can still arise on appeal because the appellate court has an independent duty to determine its own jurisdiction. If there is any reason to doubt the opposing party's consent to bankruptcy court adjudication, consult with appellate counsel.

Be extra careful when taking a direct appeal to a circuit court. De novo review by a district court judge can cure *Stern* problems. See *Executive Benefits Ins. Agency v. Arkinson*, 134 S. Ct. 2165 (2014). But pushing for a direct appeal from an order with potential *Stern* problems can leave the appellant exposed. The Seventh and Eleventh Circuits have held that a direct appeal may not be certified if the bankruptcy court enters a final order that is later determined to be unconstitutional under *Stern*. See *Wortley v. Bakst*, 844 F.3d 1313 (11th Cir. 2017); *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 908–09 (7th Cir. 2011). If the appellate court, on its own jurisdictional review, determines that the underlying order is not final, the appeal will be dismissed and the parties' expenditures of time and money in pursuing the appeal will be for naught.

C. **Timeliness**

The deadline for taking a bankruptcy appeal is much shorter than a typical civil appeal. Under Bankruptcy Rule 8002, which is

⁷ For a more in-depth analysis, see K.M. Lewis, Paul M. Lopez, Scott Lawrence & Timothy S. Springer, *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases; Volume II of II: Preclusion*, 67 Okla. L. Rev. 733, 816–28 (2015).

incorporated by reference into the jurisdictional statute, 28 U.S.C. § 158(c)(2), a party has only fourteen days to file a notice of appeal. Like other jurisdictional rules, this deadline is strictly enforced. In the absence of a timely notice of appeal, the appellate court is without jurisdiction to consider the appeal, regardless of whether the putative appellant could demonstrate excusable neglect (or any other equitable test). *See, e.g., Stangel v. United States (In re Stangel)*, 219 F.3d 498, 500 (5th Cir. 2000); *In re Caterbone*, 640 F.3d 108, 112-14 (3d Cir. 2011); *Siemon v. Emigrant Sav. Bank (In re Siemon)*, 421 F.3d 167, 169 (2d Cir. 2005).

Given the harsh penalty for an untimely filed appeal, it is critical to keep track of the applicable rules. The following are common traps for appellants.

- The notice of appeal must be filed—as in received by the clerk, via ECF, hand filing, or mailing—within the fourteen-day period. The mailbox rule does not apply unless the appellant is in prison.
- Know how deadlines are calculated in your district. In particular, keep in mind that under Rule 9006(a), the time for electronic filing ends at midnight in the court’s time zone.
- An initial motion to amend, for a new trial, or for rehearing will toll the deadline until the court rules on the motion, but there is no tolling for subsequent motions.
- A motion to extend the deadline under Bankruptcy Rule 8002(c)(2) must be made by a “written motion.”
- There is a grace period in which a motion to extend the deadline may be filed up to twenty-one days after the deadline passed, but this requires a showing of excusable neglect.

Consider the example of the appellants from *Fletcher v. Harrington (In re Soundview Elite Ltd.)*, 512 B.R. 155 (S.D.N.Y. 2014). In this case, the pro se appellants sought to appeal an order directing the appointment of a chapter 11 trustee. The bankruptcy case was in New York, but the appellants lived in California. The appellants emailed the notice of appeal to the clerk of court at 11:00 p.m. PST, on the fourteenth day after the order had been entered—two hours too late. They thought the appeal was timely

filed and so the grace period expired without further incident. After the appeal was transmitted to the district court, the appellee filed a motion to dismiss the case. The district court held that it had to dismiss the appeal for lack of subject-matter jurisdiction, as there was no timely written motion requesting an extension and it could not excuse the non-compliance with any deadlines under Bankruptcy Rule 8002 because of the rule's incorporation into the jurisdictional statute. *Id.* at 157-58.

By contrast, there do not appear to be any jurisdictional timeliness requirements for taking a bankruptcy appeal from the district court or BAP to the court of appeals. Section 158's incorporation of Bankruptcy Rule 8002 applies only to appeals from the bankruptcy court to a district court or BAPs. *See* § 158(c)(2). And the general statute that establishes the deadlines for filing a notice of appeal to a court of appeals does not apply to bankruptcy appeals. *See* 28 U.S.C. § 2107(d) (“This section shall not apply to bankruptcy matters or other proceedings under Title 11.”). Accordingly, the only deadlines for circuit appeals are established by Rule 4 of the Federal Rules of Appellate Procedure. As a court's subject-matter jurisdiction can only be established by statute, those rule-based deadlines cannot be jurisdictional in nature. *See Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) (“Only Congress may determine a lower federal court's subject-matter jurisdiction.”).

D. Mootness / Equitable Mootness

In considering whether and/or how to prosecute an appeal, parties should be aware of how unfolding case developments may moot an appeal. Although the equitable nature of a bankruptcy case often means that some form of relief may be fashioned, given the vicissitudes of a bankruptcy case, it remains important to keep the possibility of mootness in mind, particularly when the appeal would take place under the spectre of a motion to convert or dismiss the case or could implicate an order under 11 U.S.C. § 363(m).

A case may become moot if, subsequent to a lawsuit's initiation, events render it impossible for a court to render effective relief. In effect, the dispute is no longer a live controversy and further proceedings would result in an advisory opinion. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Mills v. Green*, 159 U.S. 651, 653 (1895) (when “an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal”).

The test is theoretical in nature, looking only at whether “some form of relief” is possible, even if the court cannot “restore the parties to the positions they used to occupy.” *See In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). There are two primary exceptions to mootness:

- When the harm is capable of repetition, yet evading review. *See Davis v. FEC*, 554 U.S. 724 (2008). This exception applies when (a) the action is too short to be fully litigated and (b) there is a reasonable expectation that the same party will be subject to the same action.
- Voluntary cessation by the defendant. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000). This exception prevents a defendant from voluntarily ceasing a challenged practice for the purpose of rendering the case moot, unless it is impossible for the practice to recur.

In addition, any consideration of an appeal from an order confirming a chapter 11 plan must take into account the doctrine of equitable mootness. Although the name of the doctrine refers to the constitutional doctrine of mootness, equitable mootness is not grounded in the case-or-controversy requirement of Article III. Rather, it is a judicial abstention doctrine by which an appellate court may exercise discretion to decline to hear an appeal from an order confirming a chapter 11 plan when, although possible to grant relief to the appellant, the appellate court determines that an inequitable result would follow.

Equitable mootness has been recognized by a majority of the courts of appeals, including the Fifth Circuit. *See In re Crystal Oil Co.*, 854 F.2d 79 (5th Cir. 1988); *see, e.g., Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co.)*, 963 F.2d 469 (1st Cir. 1992); *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993); *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996). Although variations exist in the exact language used among the courts of appeals, in practice there are three fundamental steps to the analysis: (i) whether a confirmed plan has been substantially consummated; (ii) whether granting relief to the appellant would require undoing the plan, or whether the plan could be modified or other relief granted that would not cause the plan to collapse; and (iii) the extent to which granting relief would harm the bankruptcy case and third parties who have relied on the confirmation order. *See Manges v. Seattle First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039-41 (5th Cir. 1994); *In re One2One Comm'ns, LLC*, 805 F.3d 428, 434 (3d Cir. 2015); *JPMCC 2007-C1 Grasslawn*

Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props. Inc.), 801 F.3d 1161, 1167 (9th Cir. 2015).

The propriety of the equitable mootness doctrine has been a subject of great controversy, even in circuits that have adopted the doctrine, as it is well established that federal courts have a “virtually unflagging obligation” to exercise jurisdiction when so given. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); see *Continental*, 91 F.3d at 568-69 (Alito, J., dissenting); see also *Bank of N.Y. Trust Co. v. Official Unsecured Creditors Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009) (quoting then-Judge Alito’s dissent in *Continental*). As explained by then-Judge Alito’s dissent, the objective of the equitable mootness doctrine “implicates a question of remedy, to be decided after the merits of the Trustees’ arguments are addressed, and not a threshold question of ‘mootness.’” *Continental*, 91 F.3d at 571. The trend in recent appellate decisions seems to be in favor of limiting the doctrine and, in some cases, eliminating it entirely. See *Pacific Lumber*, 584 F.3d at 240; *Transwest*, 801 F.3d at 1167; *One2One Commc’ns*, 805 F.3d at 438 (Krause, J., concurring).

Notably, the Seventh Circuit has rejected the doctrine entirely and, on numerous occasions, attacked the assumptions underlying the equitable mootness as logically flawed and patently inconsistent with bankruptcy practice. See *In re Res. Tech. Corp.*, 430 F.3d 884, 886-87 (7th Cir. 2005) (Easterbrook, J.) (“Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations.”); *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (Easterbrook, J.) (“Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization.”) (citation omitted).

The Fifth Circuit has taken a middle-ground approach, at least in the context of third-party releases. See *In re Pacific Lumber Co.*, 584 F.3d at 251-53. Third-party or non-debtor releases through a plan is a hotbed issue often intertwined with equitable mootness. See *id.* at 252 (collecting cases). In *Pacific Lumber*, the Fifth Circuit sought to “apply equitable mootness with a scalpel rather than an axe[.]” carving out for consideration the impermissible non-debtor releases contained in the confirmed plan. *Id.* at 240, 249-53. The court explained that “the goal of finality sought in equitable mootness analysis does not outweigh a court’s duty to

protect the integrity of the process.” *Id.* at 252. The court concluded that “protecting the released non-debtors from negligence suits arising out of the reorganization” did not upset the substantially consummated plan. *Id.*

E. Standing

Another threshold question that is often overlooked is that of standing. A litigant who seeks to challenge a bankruptcy court order must satisfy more than the traditional constitutional requirement that the party have a sufficient “personal stake” in the outcome of the appeal. *See Camreta v. Greene*, 563 U.S. 692 (2011); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).⁸ The putative appellant must also satisfy a heightened, prudential requirement of being a person that is directly “aggrieved” by the order. *Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.)*, 845 F.3d 609, 619 (5th Cir. 2016) (citing *Thomas & Culp LLP v. Gibbs & Bruns LLP (In re Coho Energy Inc.)*, 395 F.3d 194, 202 (5th Cir. 2004)).

The “person aggrieved” test is based on a statutory provision under the Bankruptcy Act. *Id.* (citing 11 U.S.C. § 67(c) (1976)). Although that statute was repealed, the courts of appeals have determined that Congress did not intend to depart from that practice under the Bankruptcy Act and therefore retained the test to limit appellate standing. *Id.*

To qualify as a person aggrieved in the Fifth Circuit, “the appellant must show that he was directly and adversely affected pecuniarily by the order of the bankruptcy court.” *Id.* at 203; *see In re El San Juan Hotel*, 809 F.2d 151, 154-55 (1st Cir. 1987) (stating that an appellant is a “person aggrieved” if the order directly “diminishes his property, increases his burdens, or impairs his rights”). The mere prospect of future financial injury—by diminished recovery through the bankruptcy case or exposure to liability in another proceeding—does not provide standing to appeal a bankruptcy court order. *See Coho*, 395 F.3d at 203 (holding that a claim of injury based on diminution of estate assets by a creditor did not provide standing to appeal a bankruptcy court order approving a settlement); *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1146 (1st Cir. 1992) (same); *Travelers Ins. Co. v. H.K. Porter Co. (In re H.K. Porter Co.)*, 45 F.3d 737, 743 (3d Cir. 1995) (holding

⁸ The general constitutional standing analysis requires that the party (i) has suffered or is immediately threatened by a concrete and particularized injury; (ii) the injury is fairly traceable to the proceeding below; and (iii) the injury is likely to be redressed by a favorable decision.

that an insurance company was not a “person aggrieved” by a bankruptcy court order allowing a lawsuit to recover against a debtor’s insurance policy); *Calpine Corp. v. O’Brien Envtl. Energy, Inc. (In re O’Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 531 (3d Cir. 1999) (holding that a losing bidder at a section 363 sale does not have standing to appeal the order authorizing the sale to the prevailing bidder); *Cronkite v. Turner (In re Cronkite)*, No. 11-094 (B.A.P. 1st Cir. Mar. 8, 2012) (same).

IV. Direct Appeals

A. Overview

Under section 158(d)(2), a bankruptcy court order may be appealed directly to the court of appeals if certain criteria are met. First, a bankruptcy court, district court, or bankruptcy appellate panel must certify the appeal. Certification is mandatory if the lower court finds, or the parties jointly agree, that one of the three following circumstances exist:

- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

Second, the court of appeals must authorize the direct appeal. The court of appeals has discretion in whether to authorize the direct appeal. Section 158(d)(2) does not provide standards to guide the exercise of that discretion.

B. Procedural Steps

The first step is for a party to file a timely notice of appeal. A motion for direct certification is not a substitute for perfecting the appeal. *See* Fed. R. Bankr. P. 8006(a) (requiring a perfected notice of appeal for certification to be effective). With respect to interlocutory orders, however, an authorization for direct appeal will satisfy the requirement under section 158(a)(3) that the party obtain leave of court. *See* Fed. R. Bankr. P. 8004(e).

A party seeking certification must file a motion within sixty days of the entry of the order to be appealed. 28 U.S.C. § 158(d)(2)(E); Fed. R. Bankr. P. 8006(f)(1). This deadline is jurisdictional. *Stansbury v. Holloway (In re Holloway)*, 425 F. App'x 354, 357 (5th Cir. 2011).

A motion for certification must contain the following: “(A) the facts necessary to understand the question presented; (B) the question itself; (C) the relief sought; (D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) applies; and (E) a copy of the judgment, order, or decree and any related opinion or memorandum. Fed. R. Bankr. P. 8006(f)(2).

If the motion is filed within thirty days after the first notice of appeal from the order is perfected, then the motion must be filed in the bankruptcy court. If the motion is filed after that deadline, the motion must be filed in the district court or BAP in which the appeal is pending. Fed. R. Bankr. P. 8006(b).

A party may file a response within fourteen days after the motion is served. A party may file a cross-request for certification within the earlier of (i) fourteen days after the motion is served or (ii) sixty days after the entry of the order. Fed. R. Bankr. P. 8006(f)(3).

Within thirty days of certification, then appellant must file a motion for permission to appeal in the court of appeals under Appellate Rule 5. Fed. R. Bankr. P. 8006(g).⁹

Note that this process does not stay or serve as a substitute for the appellate process before the district court or BAP. The proceedings continue on a dual track; the court in which the appeal is pending retains jurisdiction unless the court of appeals grants the petition for direct review.

C. Should You Take an Appeal?

Appeals can involve significant costs and delays. And the odds are stacked against the appellant. For example, the Fifth Circuit's

⁹ Bankruptcy Rule 8006(g) contains what appears to be a scrivener's error. The literal text of the rule requires that “a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with F.R.App.P.6(c).” Appellate Rule 6(c), however, concerns the steps necessary for forwarding the record on appeal. Appellate Rule 5 governs petitions for permission to appeal.

reversal rate is 7.5%.¹⁰ As such, even when it is possible to take an appeal, it is also important to assess whether doing so is in the client's best interest. That turns on the nature of the issues and applicable standard of review.

- Factual determinations are reviewed for clear error—a highly deferential standard of review. Under the clearly erroneous standard, an appellate court will reverse only if there is **no basis** in the record for the bankruptcy court's finding. That is, whenever the record could support multiple plausible views of the evidence, a bankruptcy court's "choice between them cannot be clearly erroneous." *Waldron v. Adams & Reese, L.L.P. (In re Am. Int'l Refinery, Inc.)*, 676 F.3d 455, 463 (5th Cir. 2012).
- Discretionary determinations, such as whether a bankruptcy case should be converted or fees should be awarded, are reviewed for abuse of discretion. Under the abuse of discretion standard, an appellate court will reverse only when the bankruptcy court applies an improper legal standard or rests its decision on clearly erroneous findings of fact. *Caplin & Drysdale v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 526 F.3d 824, 826 (5th Cir. 2008). Like the clearly erroneous standard, this is a highly deferential standard.
- Legal determinations are reviewed de novo. This means that the appellate court will not give formal deference to the bankruptcy court's determination.
- Mixed questions of law and fact are neither easily nor consistently classified. Such questions typically involve determinations under a legal standard. *See Perez v. Bruister*, 823 F.3d 250, 258 (5th Cir. 2016) (stating that the issue of whether an individual qualified as an ERISA fiduciary was a mixed question of law and fact). For mixed questions, determinations of historical facts (e.g., did the individual have signatory authority on the account) are reviewed for clear error, but the ultimate conclusion is reviewed de novo. In a sense, review of mixed questions is much like discretionary determinations except without the deference to the bankruptcy court's conclusion.

¹⁰ <http://www.ca5.uscourts.gov/docs/default-source/default-document-library/clerk-39-s-annual-report-july-2014---june-2015.pdf?sfvrsn=0>

If an appeal would turn on the review of a factual or discretionary determination, carefully assess whether it is possible to prevail under the applicable standard of review in light of the record. And even if it is possible to bring a non-frivolous appeal, the significance of the deference given to the bankruptcy court should not be underestimated. Unless the bankruptcy court's error is obvious and egregious, expect the order to stand. *See Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (noting that reversal for abuse of discretion occurs only when the decision is "beyond the pale of reasonable justification").

Similarly, it is axiomatic that appeals that turn on questions of law are the best candidates for appeal. But keep in mind that even when review is de novo, the appellate court will consider and give serious weight to a reasoned opinion by the bankruptcy judge, who is a respected colleague and recognized expert in this highly specialized area of law.

Next, consider whether there are other facts and circumstances that could undermine the chances for success. In particular, think about whether the error could be seen as harmless or whether the record could support affirmance on an alternative basis. *Zuspann v. Brown*, 60 F.3d 1156, 1160 (5th Cir. 1995) ("We are free to uphold the district court's judgment on any basis that is supported by the record.").

In addition, consider whether the time and cost of pursuing an appeal are consistent with the client's goals, both short and long term. Sometimes it simply may not be cost-effective to appeal an order, even if there is a strong case for reversal. But if the client would benefit from a change in the law, bringing the right appeal over a small-figure dispute can prove valuable in the long term. In considering the cost of bringing an appeal, always remember that generally applicable rules authorize the prevailing party to recover costs from the losing party, which can include items such as transcripts, fees for posting bonds, and filing fees. *See Fed. R. Bankr. P. 8021; Fed. R. App. P. 39.*

Finally, be careful in deciding to take an appeal that may be on the margins of frivolousness. The appellate court will not ignore the circumstances of the case and what the appellant's ultimate goals may be. Taking an appeal purely as a matter of principle can lead to sanctions. *See Mahanna v. Bynum*, 465 B.R. 436, 442 (W.D. Tex. 2011) (imposing sanctions, sua sponte, upon appellants who took an appeal from an order dismissing a chapter 11 case without prejudice so as to avoid having to pay the filing fee associated with bringing a new petition).

D. Guidance on Seeking Direct Appeal

The legislative history and purpose of section 158 was comprehensively analyzed by the Second Circuit in *Weber v. United States Trustee*, 484 F.3d 154 (2d Cir. 2007). The Second Circuit explained that although section 158 was intended to help remedy the “widespread unhappiness at the paucity of settled bankruptcy-law precedent,” it was not intended to “privilege speed over other goals.” *Id.* at 158, 160. “Courts of appeals benefit immensely from reviewing the efforts of the district court Permitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law.” *Id.* at 160. It concluded that direct appeal is particularly appropriate where the issues are purely legal and there is uncertainty among the bankruptcy courts, or when the stakes are sufficiently high and the bankruptcy court’s decision is either manifestly correct or incorrect,” such that the benefit from additional district court consideration would be negligible. *Id.* at 161.

In considering whether to seek direct appeal, think carefully about how the court of appeals will view the case and the potential systemic impact of taking a position on the issue. “Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed.” *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2011). Likewise, as discussed above in section III.B.2, consider whether proper jurisdiction and authority existed at the bankruptcy and district court levels to provide proper jurisdiction and authority for appellate review. Consulting with appellate counsel can be very helpful in assessing whether a case is a strong candidate for direct appeal.

V. The Nuts & Bolts of Taking a Bankruptcy Appeal

A. Read the Local Rules

Courts have significant discretion in suspending and modifying the rules applicable to bankruptcy appeals. Many bankruptcy courts and district courts, and all BAPs, have local rules that govern bankruptcy appeals. Always remember to check the local rules at the outset of an appeal.

B. Filing the Notice of Appeal / Motion for Leave to Appeal

1. Deadlines

A notice of appeal must be filed in the bankruptcy court within fourteen days after the entry of the order being appealed. Fed. R. Bankr. P. 8002(a)(1). If the notice of appeal is filed after a decision has been announced, but before the entry of an order, the notice of appeal is treated as being filed on the date of the entry. Fed. R. Bankr. P. 8002(a)(2). If one party files a timely notice of appeal, then any other party may file a notice of appeal within fourteen days after the first notice of appeal is filed. Fed. R. Bankr. P. 8002(a)(3). If a notice of appeal is mistakenly filed in the appellate court, it is deemed filed in the bankruptcy court as of the date it was received by the appellate court. Fed. R. Bankr. P. 8002(a)(4). These deadlines apply to both final and interlocutory orders. *See Stumpf v. McGee (In re O'Connor)*, 258 F.3d 392, 398 (5th Cir. 2001).

Take note that a party intending to challenge an order ruling on a post-judgment motion (motions to alter or amend, for a new trial, or for relief from judgment) must file a separate notice of appeal from the order disposing of the post-judgment motion. Fed. R. Bankr. P. 8002(b)(3).

2. Extensions

Upon a written motion, the deadline for filing a notice of appeal may be extended by (i) twenty-one days after the deadline or (ii) fourteen days after the entry of an order to extend time. Fed. R. Bankr. P. 8002(d)(3). If the motion to extend is filed after the initial filing deadline passes, but before the twenty-one day grace period ends, the movant must show excusable neglect. Fed. R. Bankr. P. 8002(d)(1).

Extensions are prohibited for orders lifting the automatic stay, authorizing the sale of property, obtaining credit, authorizing the assumption or assignment of an executory contract, approving a disclosure statement, or confirming a plan. Fed. R. Bankr. P. 8002(d)(2).

3. Tolling

The deadline for filing a notice of appeal is tolled until the disposition of a timely filed post-judgment motion. Fed. R. Bankr. P. 8002(b)(1). The tolling effect applies only to the first post-

judgment motion. Further post-judgment motions will not have a tolling effect.

4. *Matters of Form*

For appeals from final orders, the notice of appeal must conform substantially to the Official Form (Form B 417A) and include the order to be appealed and the filing fee. Fed. R. Bankr. P. 8003(a). Parties may file a joint notice of appeal if “their interests make joinder practicable.” Fed. R. Bankr. P. 8003(b). Any defect in the notice of appeal other than timeliness does not divest the appellate court of jurisdiction, but may serve as grounds for dismissal or other sanctions as the appellate court “considers appropriate.” Fed. R. Bankr. P. 8003(a)(2); *see Becker v. Montgomery*, 532 U.S. 757 (2001) (holding that the failure to sign a notice of appeal does not create a jurisdictional defect, although noting that it may be sanctionable).

For appeals from interlocutory orders, the notice of appeal must be in the same form as prescribed by Bankruptcy Rule 8003 and also be accompanied by a motion for leave to appeal. Fed. R. Bankr. P. 8004(a).

A motion for leave to appeal must include the following:

- the facts necessary to understand the question presented;
- the question itself;
- the relief sought;
- the reasons why leave to appeal should be granted; and
- a copy of the interlocutory order to be appealed.

Fed. R. Bankr. P. 8004(b)(1). Although the statute does not provide a standard for when interlocutory review should be granted, most courts apply the test applicable to circuit court appeals under 28 U.S.C. § 1292(b). *See Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643, 649 (B.A.P. 1st Cir. 1998). That test requires the appellate court to determine (i) that the order involves a controlling question of law, (ii) a substantial ground for difference of opinion exists, and (iii) immediate appeal may materially advance the ultimate termination of the litigation. *See* § 1292(b).

A party may file an opposition or cross-motion within fourteen days after the motion is served. Fed. R. Bankr. P. 8004(b)(2). Appellate courts have discretion to excuse a party's failure to file a written motion requesting leave to appeal. Fed. R. Bankr. P. 8004(d).

C. Selecting the Forum

In jurisdictions that have authorized appeals to the BAP, appeals shall be heard by the BAP unless a party elects to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1). The appellant must make the election at the time of the filing of the notice of appeal. *Id.* The appellee may make the election within thirty days after the notice of appeal has been served. *Id.* The election must be made in the form of a separate writing that substantially conforms to Official Form 417B. Fed. R. Bankr. P. 8005(a).

Although the Fifth Circuit does not have a BAP, in jurisdictions that have authorized BAPs, there exists a unique strategic opportunity for the parties on the appeal to choose the forum for the appeal. Parties should take full advantage of this choice when possible and carefully consider the relative strengths of each forum. Do not fall into the trap of thinking that one forum is inherently better or worse than the other.

The BAP provides a forum where the judges have great expertise in matters of bankruptcy law and everyday bankruptcy practice. Furthermore, as specialized appellate courts, BAPs have well established appellate procedures and great efficiency in resolving appeals.

In contrast, district court judges are generalists. They are typically not as familiar with bankruptcy law, but have significant expertise and comfort with issues involving trial procedure and generally applicable matters of law, particularly with respect to discovery and evidentiary disputes. District court appeals may also provide certain strategic advantages due to potential statutory gaps involving BAP jurisdiction and authority. *See* 28 U.S.C. §§ 158(d), 1292 (providing the courts of appeals with jurisdiction over interlocutory orders from district courts, but not interlocutory orders from BAPs); *compare Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 893-96 (9th Cir. 1992), *with In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 105 (3d Cir. 2008) (noting the circuit split over whether the definition of the term “court of the United States” includes non-Article III courts, and thus whether bankruptcy judges may grant relief under statutes such as 28 U.S.C. §§ 1915 and 1927).

Accordingly, an appeal that turns on a highly technical bankruptcy law argument may be better suited for the BAP. An appeal from an interlocutory order may be better suited for the district court. And no matter what, be familiar with the case law from both forums. Although neither district court nor BAP decisions are binding, if there is an adverse on-point case in one forum, consider proceeding in the other forum.

D. Designating the Record and Issues on Appeal

Within fourteen days of the filing of the notice of appeal, or for interlocutory appeals, an order granting leave to appeal, the appellant must file and serve “a designation of the items to be included in the record on appeal and a statement of issues to be presented.” Fed. R. Bankr. P. 8006(a)(1). Within 14 days after being served with the appellant’s designation, the appellee may file and serve a supplemental designation of the record. Fed. R. Bankr. P. 8002. The same process applies with respect to a cross-appeal. *Id.* Only the appellant and/or cross-appellant should file the statement of issues.

With respect to record designations, it pays to be overinclusive. The appellate court will not consider anything that has not been designated as part of the record on appeal. Although the rules only require that the appellant provide the order to be appealed and a copy of the transcript, be sure to designate anything you may conceivably want to cite. Furthermore, keep in mind that parties are not limited to designating only the materials that are directly connected to the order on appeal (i.e., the immediate pleadings and exhibits admitted at trial). The record may include any document filed before the bankruptcy court entered the order. That means the petition, schedules, statement of financial affairs, first day declarations, etc., may all be designated, and typically should be. The ultimate goal is to be able to provide the appellate court with the same context and background information that influenced the bankruptcy court’s decision.

With respect to the statement of issues, some circuit courts, including the Fifth Circuit, will not typically consider merits arguments that were not included in the statement. *See In re GGM, P.C.*, 165 F.3d 1026 (5th Cir. 1999); *In re TWA, Inc.*, 145 F.3d 124 (3d Cir. 1998). In these jurisdictions, this case law forces appellants into something of a balancing act. Stating the issues too broadly may result in waiving distinct legal issues on which the bankruptcy court’s ultimate determination rests. But stating the issues too narrowly may result in waiver of arguments for reversal before there has been sufficient time to analyze the bankruptcy

court's order. A good rule of thumb is to describe the issues in terms of the ultimate questions of law and/or fact supporting the bankruptcy court's decision.

Consider the example of an order dismissing a chapter 11 case for cause based on inability to confirm a plan, where the determination of inability turns on discrete issues of the plan's feasibility and compliance with substantive nonbankruptcy law. In this circumstance, a good statement of the issues would look as follows:

- Whether the bankruptcy court abused its discretion in determining that there was cause for dismissal because the debtor could not satisfy the feasibility requirement for plan confirmation under 11 U.S.C. § 1129(a)(11).
- Whether the bankruptcy court abused its discretion in determining that there was cause for dismissal because the debtor could not satisfy the requirement that the means of the plan's implementation comply with substantive nonbankruptcy law under 11 U.S.C. §§ 1123(a)(5) and 1129(a)(3).

E. Stay Pending Appeal

To obtain a stay pending appeal, a party should seek relief from the bankruptcy court as soon as possible; a motion can be brought even before a notice of appeal is filed. Fed. R. Bankr. P. 8007(a). A party may request relief from an appellate court in the first instance, but must show that obtaining relief from the bankruptcy court would be "impracticable." Fed. R. Bankr. P. 8007(b)(1). If a motion was made in the bankruptcy court, but was denied or has not yet been ruled on, the motion before the appellate court must explain those circumstances and, if applicable, the basis for the denial of relief. Fed. R. Bankr. P. 8007(b)(2). A court may condition a stay upon the filing of an appeal bond. Fed. R. Bankr. P. 8007(a)(1)(B), (c).

The party requesting a stay pending appeal has the burden of demonstrating that the stay is appropriate under the traditional, four-factor test for injunctive relief. The movant must show: (1) a likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) absence of substantial harm to other parties from granting the stay; (4) granting the stay is in the public interest. *See Prudential Mortg. Cap. Co., L.L.C. v. Faidi*, 444 F. App'x 732, 736 (5th Cir. 2011).

In a practical sense, failure to obtain a stay pending appeal often means that a plan will become substantially consummated and prevent appellate review. But the Fifth Circuit provided an in-depth analysis and construct for overcoming the lack of a stay pending appeal in the equitable mootness analysis in *Pacific Lumber*. There, the Fifth Circuit noted that other procedural mechanisms, such as expedited or direct appellate review, a tailored supersedeas bond, or “myriad possibilities,” exist to ensure that “substantial legal issues can and ought to be preserved for review. *In re Pac. Lumber Co.*, 584 F.3d at 242–43.

F. Motions

Unless local rules or orders state otherwise, motions practice is governed by Bankruptcy Rule 8013. The rule is open-ended and allows parties to generally request both procedural and substantive relief. Fed. R. Bankr. P. 8013(a)(2). The default rule is that any response must be filed within seven days of service of the motion and any reply by the movant must be filed within seven days of service of the response. Fed. R. Bankr. P. 8013(a)(3). On a motion requesting procedural relief, the appellate court may rule at any time without awaiting a response. Fed. R. Bankr. P. 8013(b).

Motions practice in an appellate court is very different from motions practice in the bankruptcy court. By default, motions and responses are limited to twenty pages and replies are limited to ten pages. Fed. R. Bankr. P. 8013(f)(3). Separate briefing is prohibited. Fed. R. Bankr. P. 8013(a)(2)(D)(i). Separate notice of the motion and the provision of a proposed order are not required and, unless ordered otherwise, should not be filed. Fed. R. Bankr. P. 8013(a)(2)(D)(ii). Motions will almost always be decided without oral argument, although the appellate court retains discretion to order otherwise. Fed. R. Bankr. P. 8013(c).

Although there are no time limits for filing motions under Bankruptcy Rule 8013, it is good practice to file all dispositive motions, such as motions to dismiss for lack of jurisdiction or for noncompliance with Bankruptcy Rule 8003, well before the opening brief is due. Also, consider requesting that the appellate court toll the briefing schedule pending the resolution of the dispositive motion. Courts will typically appreciate the effort to save everyone the time and expense of merits briefing.

G. Briefing: Structure and Timing

The appellate briefing process is very different from the briefing process in trial courts, both in terms of the structure of the briefs,

the timing, and other procedural requirements. Pay close attention to Bankruptcy Rules 8014 (contents), 8015 (form), and 8018 (timing). In addition, many courts of appeals and BAPs provide checklists, practitioner guides, and sample briefs to assist parties in preparing briefs. All such materials should be carefully reviewed and followed to the greatest extent possible. In particular, BAPs have clerks that specifically review briefs for matters of form and will reject defective briefing.

Unless local rules or orders state otherwise, the appellant's opening brief is due within thirty days after the appeal is docketed in the appellate court. Fed. R. Bankr. 8018(a)(1). The appellee's answering brief is due within thirty days after the service of the opening brief. Fed. R. Bankr. P. 8018(a)(2). The appellant may file a reply brief within fourteen days of service of the answering brief, provided that it may be filed no later than seven days before the scheduled date for oral argument. Fed. R. Bankr. P. 8018(a)(3). The opening and answering brief may be no longer than thirty pages or 14,000 words and a reply brief may be no longer than fifteen pages or 7,000 words. Fed. R. Bankr. P. 8015(a)(7).

As a special note, when litigating in the court of appeals, the authors implore practitioners to take heed of formatting-specific requirements set forth in Fed. R. App. P. 32. Failure to follow these straight-forward guidelines will prevent a truthful certification of compliance and immediately indicate an inattention to detail, undermining the credibility of strong arguments.

After briefing is complete, the appellate court will review the briefing and determine whether oral argument is necessary. Although the general rule is that oral arguments shall be permitted if requested, it is not required. Fed. R. Bankr. P. 8019. In practice, most appeals will be decided on the briefs alone and particularly so in district court appeals. Do not draft a brief with the expectation that an opportunity for oral argument will be available.

H. The Appendix / Record Excerpts

One of the biggest differences between trial briefing and appellate briefing is the requirement to provide an appendix, which may also be called the excerpts of record. In short, the purpose of the appendix is to provide the appellate court with a quick reference guide to the record. It should not contain the entire record on appeal.

Bankruptcy Rule 8018 contains a list of mandatory contents that the appellant must provide, including a copy of the bankruptcy court docket sheet, pleadings, the order on appeal, notice of appeal, and relevant portions of transcripts. Fed. R. Bankr. P. 8018(b)(1). The appellee may cite to documents in the appellant’s appendix and may file a supplemental appendix for any necessary materials that were omitted by the appellant. Fed. R. Bankr. P. 8018(b)(2).

A common point of confusion concerns what optional items should be included in the appendix. Providing too much information in the appendix defeats its purpose, so do not include copies of every document cited in the brief. The appellate court already has the full record on appeal and, in the vast majority of circumstances, citation to the relevant docket entries (or, in the Fifth Circuit, the corresponding page number from the official “Record on Appeal” that is prepared by the clerk) will be sufficient. The optional items should include excerpts from the most critical documents in the record, such as trial exhibits and affidavits, not otherwise included in the mandatory items. In addition, it is good practice to include authenticated copies of relevant statutory provisions in the appendix, particularly when dealing with statutory provisions that have undergone recent revisions.¹¹

I. Supplemental Authorities Letter

If “pertinent and significant authorities come to a party’s attention” after the completion of briefing or oral argument, a party may file a supplemental authorities letter with the appellate court. The letter must identify the reason for presenting a supplemental authority and how it relates to one of the arguments on appeal, and may not exceed 350 words. A response may be filed within seven days and is also limited to 350 words. Fed. R. Bankr. P. 8014(f).

J. Settlements

In many instances, the parties will need to obtain bankruptcy court approval to effectuate the settlement of an appeal. For example, consider an appeal from a fee award where the parties have decided to settle over a stipulated amount. The debtors, however, do not have unfettered discretion to pay the amount; the bankruptcy court still must determine the fees are reasonable and enter the award under 11 U.S.C. § 330. But, because the

¹¹ For federal statutes, the Government Publishing Office provides authenticated PDF copies of many government publications including the U.S. Code, Code of Federal Regulations, and Congressional Record, through its website at <https://www.gpo.gov/fdsys>.

bankruptcy court lacks jurisdiction over the matter while the appeal is pending, it cannot do so.

In such situations, Bankruptcy Rule 8008 authorizes the parties to seek an indicative ruling from the bankruptcy court as to whether it would grant the requested relief. If so granted, the parties must then notify the appellate court and may then seek limited remand for the purpose of entering such relief. After the relief is entered, the parties can then move to dismiss the appeal under Bankruptcy Rule 8023.

K. Special Considerations for Circuit Appeals

The 8000-series rules apply only to district court and BAP appeals. So, as a threshold matter, consider consulting with appellate counsel for any circuit appeal. The following, however, are some key points for bankruptcy counsel to keep in mind when prosecuting a circuit appeal.

- The Federal Rules of Appellate Procedure have special procedures for taking an appeal from a final order of a district court or BAP that is exercising its appellate jurisdiction under section 158. *See* Fed. R. App. P. 6.
- In circuit appeals, the default deadline for filing the notice of appeal is 30 days. That deadline is extended to sixty days if the United States, a United States Agency, or an officer or employee thereof in an official capacity is a party to the appeal. Fed. R. App. P. 4(a).
- If a timely motion for rehearing is filed, the time to appeal runs from the entry of the order disposing the motion. Fed. R. App. P. 6(b)(2)(A).
- The appellant must file the designation of record and statement of issues within fourteen days after the notice of appeal has been filed and the appellee may file a supplemental designation of record within fourteen days after service of the appellant's designation. Fed. R. App. P. 6(b)(2)(B).
- Unless otherwise ordered by the court, the appellant's opening brief is due within forty days after the case is docketed, the appellee's answering brief is due within thirty days after the opening brief is served, and the appellant's reply brief is due within fourteen days after service of the answering brief. Fed. R. App. P. 31.

- The circuit court will review the merits of the bankruptcy court order under the applicable standard of review, and will not afford deference to the district court or BAP decision (if any).

VI. Maximizing Your Chances for Success

Bankruptcy can be a challenging subject matter for the generalist judges that hear most bankruptcy appeals. To begin with, the federal bankruptcy system consists of numerous interrelated statutes, rules, regulations, and administrative systems. Furthermore, in many instances, it is difficult to fully understand those authorities without practical knowledge of modern bankruptcy practice and the history of what came before. Trying to explain all of the nuances of bankruptcy law can quickly become overwhelming. The following are some suggestions to help manage these concerns on appeal:

Be Comforting. Judges are aware of the intricacies of the federal bankruptcy system and may be hesitant to adopt positions that could have unintended consequences. Even if an opponent is not explicitly arguing that adopting a certain position would have a detrimental, systemic impact, take the initiative in providing comfort that your position is consistent with the intended function of the federal bankruptcy system. Emphasizing how statutory language or traditional bankruptcy practice has changed or stayed the same over time—especially across major revisions in bankruptcy law, such as the transition from the Bankruptcy Act to the Bankruptcy Code, or the enactment of BAPCPA—can be particularly effective in making the appellate court comfortable with applying a specific statutory definition or rule of decision. In addition, using numbers whenever possible will catch the court’s attention and makes it easier to grasp the significance and practical consequences of deciding a case in a certain manner.

Be Straightforward. Do not let a desire for laser-like technical accuracy undermine the effectiveness of the argument. Forcing the court to slog through a series of complicated concepts or definitions before reaching the heart of the argument hinders the appellate effort. Rather, present the issues in a manner that the court will immediately understand and that will facilitate consideration of the most important arguments. To this end, avoid using any terminology that may be confusing to a non-bankruptcy practitioner. For example, use “deposition” in lieu of “Rule 2004 examination.” In addition, consider repackaging highly technical arguments in a more direct style. Even though the inter-related nature of the Bankruptcy Code lends itself to definitions and

functions that operate across various authorities, describe the matter in a more abstract form or by whatever fact or circumstance the issue will ultimately turn on.

Be Focused. Unlike traditional civil litigation, a single bankruptcy contested matter may involve many different parties, issues, and arguments. It is immensely helpful to limit discussions to only the most essential parties, arguments, and consequences. Mentioning that certain other arguments were raised but rejected, or that other parties may have supported the requested relief, but did not join the appeal, will at best serve as a distraction and at worst imply weakness in the argument and undermine the chances of success. For example, if there were numerous parties to and grounds for a motion to dismiss, but the bankruptcy court ultimately found cause for dismissal based only on one of those grounds, then leave the details about the other parties and arguments out of the brief to the greatest extent possible.