AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Feature

By Justin M. Ellis, Jennifer Fischell and Caroline A. Veniero[1]

Appealing Options: Strategic Considerations in Bankruptcy Appeals

Justin M. Ellis
MoloLamken LLP
New York

Jennifer Fischell
MoloLamken LLP
Washington, D.C.

Caroline A. Veniero
MoloLamken LLP
Washington, D.C.

The order from the bankruptcy judge comes in — and you are on the losing side. What is next? Appealing to a higher court can sound, well, appealing. In recent years, the bankruptcy world has seen how bankruptcy appeals can not only obtain big relief for clients, but also drastically reshape the landscape — from the U.S. Supreme Court's blockbuster decision in *Harrington v. Purdue Pharma LP*, barring nonconsensual third-party releases, to the Third Circuit's decision in *In re LTL Management LLC*, undermining the so-called "Texas Two-Step."[2]

The road to a successful bankruptcy appeal is riddled with potential pitfalls. However, savvy practitioners can both avoid such obstacles and use them to their advantage. This article breaks down four key issues you could encounter when appealing a bankruptcy court's order, as well as some tips on how to use them to your benefit.

Getting Your Appeal Started

The first challenge is getting your appeal off the starting block. Prospective appellants must determine whether they can appeal at all and, if so, what procedural route to follow. The good news is that bankruptcy appeals are available in more circumstances than you might think.

With a few exceptions, only "final" orders are appealable as of right.[3] Critically, the definition of "finality" is more flexible in bankruptcy cases, thus increasing the number of situations where you have the right to appeal. Orders are final if they "definitively dispose of discrete disputes within the overarching bankruptcy case."[4] Discrete disputes are "akin to a case within a case," so dispositive orders in "[a]dversary proceedings are the archetypal example," of a final order.[5] The resolution of a contested matter under Rule 9014 of the Federal Rules of Bankruptcy Procedure may also be final, because it "could have been [a] 'stand-alone lawsuit ... but for the bankrupt[cy] status of the debtor,'"[6] though courts have divided on that issue. Other examples, depending on jurisdiction, may include orders denying stay relief, sale orders under 11 U.S.C. § 363, orders converting a case from chapter 11 to chapter 7, orders conclusively determining the meaning of a key contract and orders confirming a plan.[7]

Even if you do not have a "final" order, interlocutory orders in bankruptcy proceedings might be appealed with the appellate court's permission.[8] To seek interlocutory appeal, you first must file a motion for leave to appeal with the bankruptcy clerk.[9] This motion must include the relevant factual background, the question being presented, the relief being sought and the "reasons why leave to appeal should be granted."[10] The motion should explain why your appeal has merit and why the court should exercise its jurisdiction to hear the appeal (the

1 The authors thank Ted Shepherd and Kira Grossfield for their valuable research assistance.

2 *Harrington v. Purdue Pharma LP*, 603 U.S. 204 (2024); *In re LTL Mgmt. LLC*, 64 F.4th 84 (3d Cir. 2023).

3 *See* 28 U.S.C. § 158(a); *see also* Fed. R. Bankr. P. 8003(a)(1).

4 *See Ritzen Grp. Inc. v. Jackson Masonry LLC*, 589 U.S. 35, 37 (2020).

5 *Ritzen Grp. Inc. v. Jackson Masonry LLC (In re Jackson Masonry LLC)*, 906 F.3d 494, 500 (6th Cir. 2018), *aff'd*, 589 U.S. 35 (2020).

6 *Nicolaus v. U.S. (In re Nicolaus)*, 963 F.3d 839, 842 (8th Cir. 2020) (internal citations omitted). *Compare id.*, *with Alpha Beta Gamma Tr. v. Avery*, No. 2:25-cv-150 (C.D. Cal. July 15, 2025), Dkt. 26 (order terminating contested matter not appealable).

7 *See Ritzen*, 589 U.S. at 47-48 (order denying stay relief); *LeClair v. Tavenner*, 128 F.4th 257, 261 (4th Cir. 2025) (order that "conclusively interpreted [the debtor's] operating agreement" in motion to amend list of equity security holder); *Hazard Coal Corp. v. Am. Res. Corp. (In re Cambrian Holding Co.)*, 110 F.4th 889, 892 (6th Cir. 2024) (§ 363 sale orders); *Cal. Palms Addiction Recovery Campus Inc. v. Vara (In re Cal. Palms Addiction Recovery Campus Inc.)*, 87 F.4th 734, 739 (6th Cir. 2023) (conversion of case); *In re Nicolaus*, 963 F.3d at 842 (objection to proof of claim).

8 *Compare* Fed. R. Bankr. P. 8003, *with* Fed. R. Bankr. P. 8004.

9 Fed. R. Bankr. P. 8004(c)(1).

10 Fed. R. Bankr. P. 8004(b)(1)(A)-(D).

full set of requirements is set forth in Bankruptcy Rule 8004(b)). The district court or bankruptcy appellate panel (BAP) will then rule on the motion.

It is sometimes not clear whether an order is final or interlocutory. In this situation, it is best to file both a notice of appeal and a memorandum of law that argues that your appeal is final but, alternatively, seeks leave to appeal. This way, you do not concede that the order is interlocutory, but you also do not forfeit your appeal if the reviewing court disagrees.

You might also consider whether a bankruptcy court's order can be characterized as an injunction that might be, depending on your jurisdiction, appealable as of right. Section 158(c)(2) of title 28 provides that bankruptcy appeals "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts." Under 28 U.S.C. § 1292(a)(1), injunctions issued by district courts are immediately appealable. Some courts have thus recognized that district courts must hear appeals of bankruptcy court orders that grant injunctive relief.[11] Be warned, however, that other courts have been wary of applying § 1292(a)(1) to bankruptcy court orders.[12]

Justin Ellis is a partner with MoloLamken LLP in New York. Jennifer Fischell is a partner, and Caroline Veniero is an associate, in the firm's Washington, D.C., office.

A Matter of Timing

If you think that you might want to appeal an order of the bankruptcy court, you must file a notice of appeal, or seek leave to appeal, within 14 days.[13] You have another 14 days after that to file a designation of the appellate record and a statement of the issues with the bankruptcy court.[14] Once the appeal is docketed and accepted by the district court, there are typically 30 days to file the opening brief.[15] Your opponent will have 30 days to file a responsive brief, then there will be 14 days to file a reply.[16]

Once this briefing sprint is complete, it is time to hurry up and wait. If your appeal has gone to a district court, it simply gets added to the court's queue of matters requiring resolution. Once the district court (or in some circuits, BAP) rules on your case, the losing party then can appeal to the court of appeals and ultimately, if warranted, the Supreme Court.

Another choice that may affect speed is whether you pursue the appeal before a district court or BAP. In circuits with BAPs, bankruptcy appeals go by default to BAPs, but litigants have the option of seeking a decision by a district court instead.[17] Depending on your jurisdiction, BAPs might be the faster option. While data is limited, the rate of case termination suggests that BAPs are fairly efficient.[18] Wherever your appeal sits, moreover, you can move to expedite the appeal if you have a basis that "justifies considering the appeal ahead of other matters."[19]

In the alternative, you can also try appealing directly to the court of appeals under 28 U.S.C. § 158(d). Under this provision, you can seek certification directly to the court of appeals if one of several criteria are met: (1) an "immediate appeal" would "materially advance the progress of the case"; (2) the order "involves a matter of public importance"; (3) the order involves "a question of law requiring resolution of conflicting decisions"; *or* (4) 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."[20]

Even if you begin your appeal in the court of appeals, in bankruptcy cases the median time interval between the notice of appeal to the court of appeals and the court's final disposition is approximately 12.7 months.[21] An appeal's plodding pace can affect your case before the bankruptcy court. Appeals divest the bankruptcy court of jurisdiction to hear the parts of the case that are directly implicated in the appeal,[22] which means that while your appeal is pending, the bankruptcy court cannot rule on those issues.

Depending on the circumstances, divesting the bankruptcy court of jurisdiction over a matter could help or hurt you. For example, appealing may stall important parts of the case. This could be a problem, or it could limit an adversary's ability to take full advantage of the appealed adverse order.

The Dangers of Equitable Mootness

Ongoing proceedings in the bankruptcy court also create a risk that "equitable mootness" will wipe out your appeal. "Essentially, this doctrine provides that reviewing courts will, under certain circumstances, reject bankruptcy appeals if rulings have gone into effect and would be extremely burdensome, especially to non-parties, to undo."[23] The

11 *See, e.g., Pro. Ins. Mgmt. v. Ohio Cas. Grp. of Ins. Cos. (In re Pro. Ins. Mgmt.)*, 285 F.3d 268, 282 n.16 (3d Cir. 2002); *Bartok v. DeAngelis*, No. 11-CV-03710-SDW, 2012 WL 664928, at *1 (D.N.J. Feb. 29, 2012); *Pheasant v. Zaremba*, 398 B.R. 583, 586 (D. N.D. Ohio 2008).

12 *See In re Kassover*, 343 F.3d 91, 95 (2d Cir. 2003) (courts have discretion on whether to review injunctions from bankruptcy court).

13 *See* Fed. R. Bankr. P. 8002(a)(1), 8004(a)(1).

14 *See* Fed. R. Bankr. P. 8009(a)(1)(A).

15 *See* Fed. R. Bankr. P. 8018(a)(1).

16 *See* Fed. R. Bankr. P. 8018(a)(2)-(3).

17 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8003(d)(1), 8004(c)(1).

18 From Sept. 30, 2023, to Sept. 30, 2024, BAPs nationwide began with 137 pending cases; they received 320 new cases and terminated 277 cases. "Table BAP-1, U.S. Bankruptcy Appellate Panels Judicial Business," U.S. Courts (Sept. 30, 2024), uscourts.gov/sites/default/files/2025-01/jb_bap1_0930.2024.pdf (unless otherwise specified, all links in this article were last visited on July 23, 2025); *see* "Court Insider: What Is a Bankruptcy Appellate Panel?," U.S. Courts (Nov. 26, 2012) ("Although national statistics do not conclusively show that BAPs decide bankruptcy appeals faster than district courts … comparison of the dockets of the First Circuit and Tenth Circuit BAPs with the district court dockets reveals that those BAPs, on average, produced faster dispositions.").

19 Fed. R. Bankr. P. 8013(a)(2)(B).

20 28 U.S.C. § 158(d)(2)(A)(i)-(iii).

21 *See* "Table B-4B. U.S. Courts of Appeals: Median Time Intervals in Months for Bankruptcy Cases Terminated on the Merits, by Circuit," U.S. Courts (Sept. 30, 2024), uscourts.gov/sites/default/files/2025-01/jb_b4b_0930.2024.pdf.

22 *See Tex. Comptroller of Pub. Accts. v. Transtexas Gas Corp. (In re Transtexas Gas Corp.)*, 303 F.3d 571, 579 (5th Cir. 2002) ("[The] notice of appeal of the confirmation order divested the bankruptcy court of jurisdiction over the case and placed jurisdiction in the appellate court (*i.e.*, the district court).").

23 *See Bennett v. Jefferson Cnty.*, 899 F.3d 1240, 1247 (11th Cir. 2018).

doctrine exists to "prevent ... a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract."[24]

Equitable mootness exists in some form in every jurisdiction, but its application varies. In deciding whether the doctrine applies, courts will generally consider "the effects of a reversal on third parties who have relied on a bankruptcy court's order" and "the complexity and difficulty of unwinding a contested transaction."[25] The greater the complexity and the greater the reliance interests, the more likely the court is to rule that the appeal is equitably moot.

Courts have also held that the doctrine categorically does not apply in certain situations. For example, the Sixth Circuit held last year that "equitable mootness has no place in Chapter 7 liquidations."[26] However, again, results will vary, as other courts have applied equitable mootness in chapter 7 cases.[27]

Equitable mootness has been heavily criticized in recent years, and some courts — especially the Fifth Circuit — have cabined the doctrine. For example, the Fifth Circuit in *In re Serta Simmons Bedding LLC* rejected an appellee's equitable-mootness argument, declining "to upset the norms of appellate review by complying with their implausible interpretations of a judge-made, atextual doctrine of pseudo-abstention" — and going so far as to question whether the doctrine "exists at all."[28]

Because the law in this area is in flux, it is critical to understand the state of play in your specific jurisdiction. If equitable mootness is a possibility, you should seek a stay of the proceedings in the bankruptcy court. A "party's failure to seek a stay may, by itself, render that party's claims equitably moot."[29] In some circuits, even an unsuccessful stay request also could help avoid a later mootness ruling.[30] The reviewing court can condition a stay on filing a bond or other security with the bankruptcy court.[31]

Selecting Your Appellate Issues

Selecting the right issues for appeal is also critical. No matter what, first make sure that the selected issues have been preserved in the bankruptcy court. Appellate courts, with few exceptions, do not review issues in the first instance.[32] Although "parties are not limited to the *precise arguments* they made below," generally you must raise an issue to pursue it on appeal.[33]

Also be aware of the standard of review. Many decisions by bankruptcy courts are reviewed for "abuse of discretion," which requires showing that the bankruptcy court was unreasonable, as happens when a court applies the wrong legal standard or defies the record. This standard of review is difficult to surmount, and reviewing courts might be particularly deferential to bankruptcy judges given their specialization and expertise.

By contrast, courts review questions of law with *no* deference to the bankruptcy court's decision. On issues such as these, the "standard of review" means that on appeal, judges will take a fresh look at a litigant's position as long as the arguments have been properly preserved.

Appealing a bankruptcy court's interpretation of the Bankruptcy Code can be especially fruitful. Unlike bankruptcy courts, which will naturally approach disputes with a practical eye toward reorganizing the debtor's business, appellate courts typically focus on the Bankruptcy Code's plain text. Cases like *Purdue Pharma* and *In re Serta* are recent examples.[34] Use this tendency to your advantage by highlighting any ways in which the bankruptcy court deviated from the text of the Code.

Finally, it is important to remember that like in ordinary civil appeals, you should not throw every possible argument at the wall. Pick and choose the ones that you have the best chance of winning — with an eye toward how the court will review those issues.

Conclusion

When a bankruptcy judge rules against you, it is not necessarily the end of the road. You may have some promising appeal options, but be wary of common pitfalls. You should consider whether you are appealing a final or interlocutory order, how that affects the timing of your case, equitable mootness, and what issues are most appealing. abi

Reprinted with permission from the ABI Journal, Vol. XLIV, No. 9, September 2025.

24 *See Nordoff Invs. Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 185 (3d Cir. 2001).
25 *See Reynolds v. Servisfirst Bank (In re Stanford)*, 17 F.4th 116, 121 (11th Cir. 2021).
26 *Taleb v. Miller, Canfield, Paddock & Stone PLC (In re Kramer)*, 71 F.4th 428, 452 (6th Cir. 2023).
27 *See, e.g., Stokes v. Gardner*, 483 F. App'x 345, 346 (9th Cir. 2012) (concluding appeal of chapter 7 case was equitably moot).
28 *Excluded Lenders v. Serta Simmons Bedding LLC (In re Serta Simmons Bedding LLC)*, 125 F.4th 555, 587-88 (5th Cir. 2024).
29 *Stokes*, 483 F. App'x at 346.
30 *Compare, e.g., Search Market Direct Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1341 (10th Cir. 2009) ("[W]e will also examine an appellant's efforts to obtain a stay, even if those efforts were unsuccessful."); *with Matter of UNR Indus.*, 20 F.3d 766, 770 (7th Cir. 1994) ("A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization.").
31 Fed. R. Bankr. P. 8007(c).
32 *See, e.g., Bank of Miami v. Espino (In re Espino)*, 806 F.2d 1001, 1002 (11th Cir. 1986) (issue that was "never properly presented to the bankruptcy court ... was not preserved for appeal").
33 *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added).
34 *See Purdue Pharma*, 603 U.S. at 218-20; *In re Serta*, 125 F.4th at 589-91.