

# APPEALS

## SHOULD WE OR SHOULDN'T WE?

Daniela Dimovski  
Daniela Dimovski Attorney at Law P.C.  
44200 Garfield Rd. suite 124  
Clinton Twp., MI 48038

There are many things to consider when determining whether or not to file an appeal. These steps should be recognized very early on and discussed with your client so that you are not faced with such an important decision when you don't get the ruling you were expecting. Most importantly there are time limitations and procedural rules that must be followed to ensure that an appeal will be heard. Before looking at the procedural aspects of an appeal, ask yourself a few important questions.

### **Is this case appealable?**

This may seem like a basic question but it may present difficulty to many practitioners. Pursuant to 28 U.S. C. Section 158(a), the district court shall have jurisdiction to hear appeals from final judgments, orders, and decrees or interlocutory orders. Generally, final judgments, orders, and decrees are appealable as a matter of right. Meanwhile interlocutory orders are appealed by permission of the court. See Fed. R. Bankr P. 8001(a) and 8001(b).

How does one determine whether the order is final? In the context of bankruptcy, an order is deemed final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgement." *Midland Asphalt Corp. v. U.S.*, 489 U.S. 794, 798, 109 S. Ct. 1494, 1497 (1989)(citations omitted).

Some examples of a final order include:

1. Confirmation of a plan, *Sanders Confectioner Prods. V. Heller Fin. Inc.* 973 F. 2d 474, 480 (6<sup>th</sup> Cir. Mich. 1992).
2. Orders granting attorney fees, *Boddy v. US Bankruptcy Court, Western District Ky. (In re Boddy)*, 950 F.2d 334, 336 (6<sup>th</sup> Cir. 1991)
3. Orders granting or denying relief from the automatic stay, *In re Schaffrath*, 214 BR 153, 154 ( BAP 6<sup>th</sup> Cir. 1997)
4. Orders allowing or disallowing a debtor's exemption, *Menninger v. Schramm (In re Schramm)*, 431 B.R. 397, 399 (B.A.P. 6<sup>th</sup> Cir. 2010) citing *Wicheff v. Baumgart (In re Wicheff)*, 215 BR 83, 840 (BAP 6<sup>th</sup> Ci. 1998).

If the order is not a final order then you must file a motion for leave to file an interlocutory appeal. The district court may hear an interlocutory appeal if “(1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation.” *In re A.P. Liquidating Co.*, 350 B.R. 752, 755 (E.D. Mich. 2006) (Hood, J.) (quoting *West Tenn. Chapter of Associated Builders & Contractors, Inc. v. City of Memphis*, 293 F. 3d 345, 350 (6<sup>th</sup> Cir. 2002)).

Examples of interlocutory orders include:

1. Order denying motion to dismiss case or adversary proceeding, *Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.)*, 894 F.2d 1136 (9<sup>th</sup> Cir. 1990)

2. Order denying motion for summary judgment, *Comsource Independent Foodservice Cos. Inc. v. Union Pacific R. R. Co.*, 102 F.3d 438, 441-42 (9<sup>th</sup> Cir. 1996)
3. Order imposing monetary sanctions against an attorney, *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999)
4. Order granting a motion to reopen a bankruptcy case, *Wilborn v. Gallagher (In re Wilborn)*, 205 B.R. 202 (9<sup>th</sup> Cir. B.A.P. 1996)
5. Order denying objection to confirmation of plan, *Davis v. Green Tree Servcing, LLC (In re Davis)*, 386 B.R. 182, 184 (B.A.P. 6<sup>th</sup> Cir. 2008).

**Is *this* the “right” case?**

While each client has the right to have his or her day in Court, ask yourself, will taking this client’s case to the next step help or hurt my client and any future clients? Appealing a case has the potential of creating binding law. If the Court rules against your client, there may be severe ramifications in your case and future potential debtors filing for bankruptcy. Therefore, make sure the facts surrounding this case are strong enough to lead to a ruling that will help your current client prevail and create law that supports the needs of future bankruptcy debtors.

**Is your client the right party to bring the appeal?**

The issue of standing is a preliminary issue in the appellate process. There are times the Court may even consider the issue without being raised by any of the parties. As noted in *Harker v. Troutman* 286 F.3d 359, 364 (6<sup>th</sup> Cir. 2002), the issue of standing may be considered sua sponte because “[s]tanding is a jurisdictional issue and we are under a continuing obligation to verify the jurisdiction over a case.” To have standing, the Sixth Circuit has established that “a

party must be directly and adversely affected pecuniarily by the order". *Moran v. LTV Steel Co., Inc.*, 560 F.3d 449, 452-53 (6<sup>th</sup> Cir. 2009). This is known as the person aggrieved doctrine. "Thus, a party may only appeal a bankruptcy court order when it diminishes their property, increases their burdens or impairs their rights." *In re First Cincinnati, Inc.* 286 BR 49, 51 (BAP 6<sup>th</sup> Cir. 2002).

### **Is your issue ripe?**

The court will only decide issues that have substantial controversies, not simply hypotheticals or possible scenarios. As such, the ripeness doctrine is used to prevent the court from prematurely deciding a case and getting caught up in abstract agreements. *Deja Vu of Nashville, Inc. v Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 399 (6<sup>th</sup> Cir. 2001). If your issue is not ripe, the court will lack the jurisdiction to hear the case.

### **Is it cost effective?**

This can be one of the most important issues in the entire process. If the debtor is in a chapter 7, determine whether the debtor can afford to move forward with the appeal. An appeal can be time consuming and expensive. Have a meeting with your client to determine whether it's a good decision for your debtor to invest the money for an appeal.

Also, consider how important of a legal issue you are dealing with. Is it an issue that could establish a precedent that will benefit your current client and future clients? Are you willing to take the case on pro bono?

If the debtor is in a chapter 13, determine how the costs of an appeal will affect the debtor's plan. Recognizing that the issue may create a problem from the onset of the case may

help you calculate a plan that can continue feasibility and allow you to pursue the appeal for your client. However, you may be faced with having to pursue an appeal on an issue you did not expect. In that case, once again ask yourself whether the debtor's best interest will be served and whether the appeal is cost effective.

### **Filing the Appeal**

Once you have decided that you are going to file the appeal, time limitations and procedural rules must be followed to make sure that an appeal will be heard. Section 8 in the Federal Rules of Bankruptcy Procedure addresses the timelines and procedures to follow in appealing a case to the District Court. Appeals should be filed in the Bankruptcy Court.

For appeals as a matter of right under 28 USC 158(a)(1), Fed. R. Bankr. P. 8001 and 8002 set forth that a notice of appeal must be filed with the clerk within 14 days from the entry of the order. In the Eastern District of Michigan, a party must attach, as an exhibit, a completed Bankruptcy Matter Civil Case Cover Sheet. See L.B. R. 8001-1. Failure to file the notice timely may result in the dismissal of the appeal. The notice of appeal must conform to the appropriate Official forms, contain the names of the parties and the names, addresses, and telephone numbers of the respective attorneys and must be accompanied by the appropriate fee which is currently \$255.00.

There are circumstances in which the time to file the notice of appeal may be extended. These motions include a motion (1) "to amend, or make additional findings of fact under Rule 7052," (2) "to alter or amend the judgment under Rule 9023," (3) for a new trial under 9023," or (4) for relief under Rule 9024." See Fed. R. Bankr. P. 8002(b). A motion to extend the time must be filed timely, meaning it must be filed within the original 14 days. A motion for

extension of time to file the notice of appeal may be granted if a motion is filed not later than 21 days after the expiration of time for the filing of the notice of appeal if there is a showing of excuseable neglect. See Fed. R. Bankr. P. 8002(c)(2) and Fed. R. Civ. P. 60(b).

There are also circumstances in which the Court may not extend the time to file a notice of appeal. If the judgment or order grants relief from the automatic stay under sections 362, 922, 1201, or 1301, the time may not be extended. If the order authorizes the sale or lease of property or use of cash collateral under section 363, authorizes the assumption of an executory contract, approves a disclosure statement under section 1125, or confirms a plan under section 943, 1129, 1225 or 1325, the time may not be extended. See Fed. R. Bankr. P. 8002 (c). Be mindful of the type of order you are dealing with in your case to make sure all timely deadlines are met.

For appeals of interlocutory orders, follow rule Fed. R. Bankr. P. 8001(b). For an appeal by leave, all the guidelines of Fed. R. Bankr. P. 8001(a) must be followed. In addition to the notice of appeal, a motion for leave must be filed according to Fed. R. Bank. P. 8003. The motion for leave to appeal shall contain a statement of facts, necessary to an understanding of the questions to be presented, a statement of those questions and of relief sought, a statement why the appeal should be granted and a copy of the judgment and any opinion relating to the judgment. The opposing party has 14 days to file an answer to such motion. See Fed. R. Bankr. P. 8003.

Finally, there are certain cases which may be appealed directly to the Circuit Court of Appeals. See Fed. R. Bankr. P. 8001(f).

## **The Record on Appeal**

Once the notice of appeal has been filed, or after an order granting leave to appeal has been granted, the appellant has 14 days to file a designation of items to be included on the record and a statement of the issues that will be presented. In turn, the appellee has 14 days to then file a designation of additional items to be included on the record, and if the appellee files a cross appeal, the appellee must file its own designation of items to be included and statement of issues presented. See Fed. R. Bankr. P. 8006. Failure to include an issue in this statement waives the issue on appeal.

The record on appeal must include the items so designated by the parties, the notice of appeal, the judgment or order, and any opinions of the Court. The parties are responsible for providing a written request and payment for transcripts. When the record of appeal is complete, the clerk will transmit the appeal to the district court and the parties will receive notice. See Fed. R. Bankr. P. 8006 and 8007.

Once the appeal is docketed, the parties are under specific deadlines to file their briefs with the Court. Unless the Court enters a separate briefing schedule, an appellant has 14 days to file his or her brief with the court. The 14 days is calculated from the time the appeal was docketed with the district court. The parties' briefs shall not exceed 50 pages. Then the appellee also has 14 days to file a response brief. The appellant then has 14 days to file a reply brief, limited to 25 pages, addressing the appellee's response. Fed. R. Bankr. P. 8009. The requirements regarding the form and the length of briefs can be found in Fed. R. Bankr. P. 8010.

## **Conclusion**

Filing an appeal can be a difficult and time consuming experience. Appeals involve specific rules, procedures and deadlines that are crucial to the success of the appeal. Appeals also involve more litigation than the average bankruptcy attorney experiences. Given the intricate nature of appeals, make sure that you and your client discuss the risks of an appeal and consider hiring an appellate attorney to handle the appeal if necessary.