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Bankruptcy Appeals

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THE RULES AND JURISDICTION OF BANKRUPTCY APPEALS

I. Overview

Review of a bankruptcy court's ruling can occur in one of three ways:

First, if the bankruptcy court has the authority under 28 U.S.C. § 157(b)(1) or (c)(2) to enter a final order in the adversary proceeding or contested matter (*i.e.* the proceeding is core *or* the parties to a non-core proceeding have consented to the entry of a final judgment by the bankruptcy court), then a party who is dissatisfied with the bankruptcy court's ruling may appeal that ruling. In the Seventh Circuit, where we do not have a bankruptcy appellate panel, appeals from final judgment orders of the bankruptcy court, can take one of two routes: (1) to the district court pursuant to 28 U.S.C. § 158(a)(1); or (2) in exceptional circumstances, directly to the court of appeals, with leave of both the bankruptcy court and the court of appeals, pursuant to 28 U.S.C. § 158(d)(2)(A). If the order remains final following district court review, a party may appeal as a matter of right to the court of appeals. 28 U.S.C. § 158(d)(1). The court of appeals, however, does not have jurisdiction to review interlocutory bankruptcy court orders or orders that become interlocutory as a result of the district court's decision. *See, e.g.*, *In re Holland*, 539 F.3d 563 (7th Cir. 2008); *In re Lopez*, 116 F.3d 1191 (7th Cir. 1997).

Second, if the bankruptcy court's ruling in a core proceeding is interlocutory, a party may appeal the bankruptcy court's order with leave of the district court. 28 U.S.C. § 158(a)(3). Parties have an absolute right to appeal an order increasing or decreasing the debtor's exclusive period under 11 U.S.C. § 1121 to file a plan of reorganization, even though such order might be viewed as interlocutory. 28 U.S.C. § 158(a)(2).

Third, if the bankruptcy court may only enter proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1) because the proceeding is non-core and the parties have not consented to the entry of a final judgment by the bankruptcy court, then review of the

bankruptcy court's proposed ruling is by objection to the district court. Fed. R. Bankr. P. 9033(b), (d). Technically this method of review is not an appeal as the bankruptcy court has not entered a judgment. If the district court enters a final judgment order following its review of the bankruptcy court's proposed ruling, a party may appeal that order as a matter of right to the court of appeals. 28 U.S.C. § 158(d)(1).

The principal difference between appellate review of core proceedings under 28 U.S.C. § 158(a) and review of objections to a proposed ruling is the standard of review applied to the bankruptcy court's factual findings. When the bankruptcy court may enter a final judgment, the district court reviews the bankruptcy court's conclusions of law *de novo* and its factual findings for clear error. *See Berg v. Social Security Admin.*, 900 F.3d 864, 867 (7th Cir. 2018); *In re Arlington Hospitality Inc.*, 637 F.3d 706, 713 (7th Cir. 2011). If the bankruptcy court may issue only a proposed ruling, the district court reviews both its factual findings and legal conclusions *de novo*. *See* Fed. R. Bankr. P. 8018.1, 9033(d). The Seventh Circuit has made clear, however, that *de novo* review of a proposed ruling does not require a new trial in the district court. *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1209 (7th Cir. 1984); *accord Chi. Bank of Commerce v. Amalgamated Trust and Savs. Bank* (*In re Mem'l Estates, Inc.*), 90 B.R. 886, 896 (Bankr. N.D. Ill. 1988) (same). It simply means that the presumption in favor of affirming factual findings is gone, or as the Seventh Circuit has put it, the district court does not have to find that the proposed factual finding must stink like a "five-week-old, unrefrigerated dead fish," to reject it. *Parts and Electric Motors, Inc. v. Sterling Elec. Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

This outline explains the rules applicable to each of these routes to higher court review and provides an outline of some practical tips for effectively presenting your appeal. Most of the deadlines related to appellate practice are jurisdictional and must be met to successfully

prosecute an appeal. Further, failure to adequately preserve the issues that you want to appeal, either by failing to appropriately advance the issues in the lower court or to include the issues in your statement of issues on appeal, can result in a forfeiture of the right to advance that issue on appeal. *Ohio Cas. Ins. Co. v. Rynearson*, 507 F.2d 573, 582 (7th Cir. 1974) ("[t]he principle that new issues ... may not be raised for the first time on appeal is too well known to require citation"); *accord Illinois Dep't of Revenue v. Hanmi Bank*, 895 F.3d 465, 480 (7th Cir. 2018). Because the penalty for such errors is so high – the loss of what might be a winning issue for your client – it is imperative for parties to pay careful attention to the procedural rules and to their development of the record in the lower court.

II. Appeals From The Bankruptcy Court To The District Court

A. Appeals From Final Orders

28 U.S.C. § 158(a)(1) is the source of the district court's jurisdiction over a bankruptcy court's final orders. Rules 8001 through 8028 of the Federal Rules of Bankruptcy Procedure supply the procedural rules.

1. How to Commence An Appeal From A Final Order

An appeal is commenced by filing a notice of appeal with the clerk of the bankruptcy court. Fed. R. Bankr. P. 8002(a)(1); 8003(a)(1).[1] A notice of appeal must comply with the requirements set forth in Official Form No. 417A. It must identify by date and docket entry the specific order that is being appealed and provide the names of all of the parties to that order along with the names, addresses and telephone numbers of their counsel. *See* Fed. R. Bankr. P. 8003, 8004; Official Form 417A. Minor technical failures with the form of the notice of appeal generally are not jurisdictional. *See In re Holly Marine Towing, Inc.*, 453 B.R. 906 (N.D. Ill.

[1] If you mistakenly file your notice of appeal with the clerk of the district court, it will be treated as if you correctly filed it with the bankruptcy court. Fed. R. Bankr. P. 8002(a)(4).

2011) (failure to name all of the parties in notice of appeal not jurisdictional); *see also Chlad v. Chapman*, No. 17 C 5198, 2018 WL 4144627, at *3-4 (N.D. Ill. Aug. 30, 2018) (noting that failure to comply with various procedural bankruptcy appellate rules was not jurisdictional). In addition, the party appealing an order must pay a filing fee of $298. 28 U.S.C. § 1930.

2. Time For Filing An Appeal

Filing your notice of appeal to the district court within the time periods set forth in Rule 8002 is jurisdictional. *In re Sobczak-Slomczewski*, 826 F.3d 429, 431-32 (7th Cir. 2016) (Rule 8002's time limits are "mandatory and jurisdictional," subject to "no equitable exceptions"); *In re Bond*, 254 F.3d 669, 673 (7th Cir. 2011) (requirements of Rule 8002 are "mandatory and jurisdictional") (internal citations omitted); *Duric v. 36 Holdings, LLC, (In re EHC, LLC)*, 18 C 3022, 2019 WL 1057201 (N.D. Ill. March 6, 2019) (holding that timing requirements of Rule 8002(a)(1) are jurisdictional and dismissing an appeal filed five minutes after midnight). If you fail to file your notice of appeal on time, the district court lacks jurisdiction to hear the appeal and must dismiss the appeal. *Bond*, 254 F.3d at 673, 678 (where time limits of Rule 8002 were not followed, appellate court ordered district court to dismiss for lack of jurisdiction). Because this is a jurisdictional requirement, the district court may raise the timeliness of the notice of appeal (or any other jurisdictional defects) *sua sponte* and, thus, this error cannot be waived. *Telesphere Liquidating Trust v. Haan*, No. 96 C 5845, 1996 U.S. Dist. LEXIS 15789, *11 (N.D. Ill. Oct. 17, 1996) ("question of timeliness of appeal is jurisdictional, the issue must be considered *sue sponte*"); *see also In re Aquilar*, 861 F.2d 873, 874 (5th Cir. 1988) (timely filing "requirement is jurisdictional and cannot be waived"); *In re Lewis*, 459 B.R. 281, 291 (N.D. Ill.

2011) (enforcing "mandatory and jurisdictional" Rule 8002 requirements); *Martin v. Bay State Milling Co.*, 151 B.R. 154, 155 (N.D. Ill. 1993) (requirements of Rule 8002 cannot be waived).[2]

A notice of appeal must be filed with the clerk of the bankruptcy court within 14 days of the date of the entry of the judgment, order or decree that is being appealed. Fed. R. Bankr. P. 8002(a)(1). An order is entered when it is noted on the clerk of the bankruptcy court's docket, which is not necessarily the day the order is dated or signed. Fed. R. Bankr. P. 5003(a), 7058, 9021; Fed. R. Civ. P. 58(c); *see In re Faragalla*, 422 F.3d 1208, 1210 (10th Cir. 2005) (district court erred in dismissing appeal as untimely based upon date order was signed because it was not entered until three days later when it was noted on the clerk's docket for the case).

In an adversary proceeding, a bankruptcy court's oral ruling or written opinion is not the final judgment order. Pursuant to Rule 58 of the Federal Rules of Civil Procedure, which is made applicable in adversary proceedings by Rule 7058, a judgment must be in the form of a document that is separate from any opinion or memorandum of the court, is self-contained and sets forth the relief provided to the prevailing party. *Greenhill v. Vartanian*, 917 F.3d 984 (7th Cir. 2019); Fed. R. Civ. P. 58(a). As the Seventh Circuit has explained, an "opinion explains the reasons for entering a judgment but is not itself a source of legal obligations." *Horn v. Transcon*

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[2] In *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), the Supreme Court held that Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure, which concerns extensions of time for filing notices of appeal from district court judgments, sets forth a was a mandatory claims-processing rule that a party can forfeit by not raising an objection. The Supreme Court reached this conclusion because the time limit set forth in Rule 4(a)(5)(C) was specified in a rule and not a statute enacted by Congress and therefore compliance was not a jurisdictional requirement. *Id*. at 16-17. In *Duric*, a district court in the Northern District of Illinois held that the time period for filing an appeal from a bankruptcy court order continued to be a jurisdictional requirement. 2019 WL 1057201 at *2-3. The district court reasoned that it was required to continue to follow Seventh Circuit authority holding that the timing requirement was jurisdictional because that authority had not been overruled. *Id.* But the district court also held that *Hamer* did not make the timing requirements for bankruptcy appeals mandatory claims-processing rules that could be forfeited because "Bankruptcy Rule 8002(a)(1)'s time limit is ... codified in a statute, 28 U.S.C. §158(c)(2)" and therefore is jurisdictional. *Id*.

Lines, 898 F.2d 589, 591 (7th Cir. 1990). A judgment, on the other hand is a self-contained document that sets forth the relief provided to the prevailing party and can be enforced. *Id*.; *see also U.S. v. Marrocco*, 578 F.3d 627, 631 n.3 (7th Cir. 2009). The Federal Rules of Civil Procedure supply a form – Form AO 450 – that this separate judgment order can take. The Seventh Circuit also has held, however, that a minute order can be a separate judgment order if: (a) it is self-contained and complete; (b) sets for the relief to which the prevailing party is entitled; and (c) does not incorporate another document or contain legal reasoning. *See, e.g.*, *Am. Nat'l Bank & Trust Co. v. Sec'y of Housing & Urban Dev.*, 946 F.2d 1286, 1289 (7th Cir. 1991); *but see In re Brown*, 484 F.3d 1116, 1121 (9th Cir. 2007) (bankruptcy court's minute order was not a final judgment order because it did not clearly dispose of the entire action).

The purpose of the separate document rule is to avoid uncertainty as to when the time to appeal has begun to run by tying that time period to the mechanical entry of a separate document indicating that judgment has been entered. *United States v. Indrelunas*, 411 U.S. 216, 220-22 (1973); *see also Pierce v. Visteon Corp.*, 791 F.3d 782, 784-85 (7th Cir. 2015). For this reason, the rule is mechanically enforced. *Indrelunas*, 411 U.S. at 220-22. The requirement for a separate judgment can, however, be waived by the parties. *See, e.g.*, *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1305 (7th Cir. 1988); *cf. Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 319 (7th Cir. 1995) (dismissing appeal where party did not agree to waive separate judgment rule).

Rule 7058 does not automatically apply to contested matters. *See* Fed. R. Bankr. P. 9014(c).[3] Before the 2009 amendments to the Federal Rules of Bankruptcy Procedure, Rule 9021

[3] The bankruptcy court has the option of making Rule 7058 applicable. *See* Fed. R. Bankr. P. 9014(c) ("[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply"); *In re American Reserve Corp.*, 840 F.2d 487, 493-94 (7th Cir. 1988) (court has discretion to determine which of the rules in Part VII of the Federal Rules of Bankruptcy Procedure apply in a bankruptcy case).

provided that Rule 58 applied in "cases under the Code." *See* Fed. R. Bankr. P. 9021 (former). In 2009, Rule 9021 was amended to provide that: "[a] judgment or order is effective when entered under Rule 5003." The reference to Rule 58 was eliminated. The advisory committee notes state that Rule 9021 was amended in conjunction with the amendment that added Rule 7058 to the Federal Rules of Bankruptcy Procedure. "The entry of judgment in adversary proceedings is governed by Rule 7058, and the entry of a judgment or order in all proceedings is governed by [Rule 9021]." Fed. R. Bankr. P. 9021, Advisory Committee Notes, 2009 Amendments. "The Report of the Committee on Rules of Practice and Procedure to the Judicial Conference explains that the purpose of these changes was to 'make clear that the separate-document requirement does not apply outside of adversary proceedings.'" "*Sumida & Tsuchiyama, LLLP v. Kotoshirodo (In re Kyung Sook Kim)*, 433 B.R. 763, 772 (D. Ha. 2010) (citing *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, at 17-18 (Sept. 2008), available at https://www.uscourts.gov/sites/default/files/ fr_import/ST09-2008.pdf).

The 14 days is counted pursuant to Fed. R. Bankr. P. 9006, which provides that you exclude the day on which the order or judgment is entered, but include every day thereafter including intermediate Saturdays, Sundays and legal holidays. Fed. R. Bankr. P. 9006(a)(1). If the last day for filing the notice of appeal expires on a Saturday, Sunday or legal holiday, the time is extended automatically to the next day that is not a Saturday, Sunday or legal holiday. *Id*. Rule 9006(f) which adds three days to any time period if service is made by mail, does not apply to notices of appeal. *See Williams v. EMC Mortg. Corp. (In re Williams)*, 216 F.3d 1295, 1296-97 (11th Cir. 2000). "By its terms, Rule 9006(f) applies when a time period begins to run after service [of a notice or other paper]. The [fourteen] day period of Rule 8002(a) begins to run upon the entry of the order, not its service." *Id*. at 1297; *accord In re Wigoda*, 11 F. App'x 624, 625

(7th Cir. 2001) (determining appeal as untimely and finding Rule 9006(f) inapplicable to Rule 8002); *In re Grason*, No. 17-CV-03170, 2017 WL 4180151, at *2 (C.D. Ill. 2017) (citing authority for proposition that Rule 9006(f) does not enlarge the time to file a notice of appeal).

The bankruptcy court may extend the time for filing a notice of appeal upon written motion except when the order at issue: (1) grants relief from the automatic stay under 11 U.S.C. §§ 362, 922, 1201 or 1301; (2) authorizes the sale or lease of property or the use of cash collateral under 11 U.S.C. § 363; (3) authorizes the obtaining of credit under 11 U.S.C. § 364; (4) authorizes the assumption or assignment of an executory contract or unexpired lease under 11 U.S.C. § 365; (5) approves a disclosure statement under 11 U.S.C. § 1125; or (6) confirms a plan under 11 U.S.C. §§ 943, 1129, 1225 or 1325. Fed. R. Bankr. P. 8002(d)(2). In these six circumstances, the appeal *must* be filed within 14 days. *Id.*

For all other orders or judgments, the party seeking to file a notice of appeal may request an extension *before* the 14 day appeal period expires. Fed. R. Bankr. P. 8002(d)(1)(A). If the court grants the extension, it will be limited to 21 days from the expiration of the original 14-day period (*i.e*. a total of 35 days to file the notice of appeal) or 14 days from the entry of the order granting the extension, whichever is later. Fed. R. Bankr. P. 8002(d)(3).

A party that fails to file a motion for an extension before the expiration of the original 14 day period may still seek an extension within 21 days of the expiration of the original appeal period (*i.e*. on or before the 35th day following the entry of the order or judgment) but such extension may only be granted if the party seeking it can prove "excusable neglect." Fed. R. Bankr. P. 8002(d)(1)(B). The United States Supreme Court has held that to determine whether a party's neglect is "excusable" the court should consider the following factors: (a) the prejudice to the debtor, (b) the length of delay and its impact on the judicial proceedings, (c) the reason for

the delay, including whether it was within the reasonable control of the movant, and (d) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993).

In the context of an untimely motion to extend the time to appeal, courts have declined to find excusable neglect when movants have mistakenly calendared the appeal deadline, failed to understand the requirements of the rules, did not receive the order at issue but were aware that a ruling would be made or mailed the notice of appeal to the court in such a manner as to create a risk it would not be received on time. *See, e.g., In re Johns-Manville Corp.*, 476 F.3d 118 (2nd Cir. 2007) (mistaken calendaring of appeal deadline not excusable neglect); *In re Enron Corp.*, 364 B.R. 482 (S.D.N.Y. 2007) (movant who failed to comply with case management order and provide mailing information to the clerk could not claim excusable neglect even though movant did not receive copy of court order); *In re Genesis Health Ventures, Inc*., 248 F. App'x. 475 (3rd Cir. 2007) (one day delay in delivery of notice of appeal not excusable neglect where movant could have mailed notice earlier); *In re K-Mart Corp.*, 311 B.R. 844 (N.D. Ill. 2004) (holding that ignorance of the rules and failure to receive written notice of the entry of the order was not excusable neglect where party was present in court when ruling was issued); *In re Motors Liquidation*, 600 B.R. 482, 489 (Bankr. S.D.N.Y. 2019) (refusing to find excusable neglect where counsel "attended the relevant hearings and should have been aware of the need to file a late claims motion," but then delayed in bringing that motion).

Finally, it is important to note two things: First, an untimely notice of appeal that is filed within the time period during which an extension may still be sought will *not* be treated as a motion for an extension of time. *See K-Mart*, *supra*, 311 B.R. at 846 n.4; *Thompson v. Solo*, 286 B.R. 667, 669 (N.D. Ill. 2002); *Martin v. Bay State Mill Co.*, 151 B.R. 154, 155-56 (N.D. Ill.

1993); *see also United States ex rel. Leonard v. O'Leary*, 788 F.2d 1238, 1240 (7th Cir. 1986) (reaching same result under Fed. R. App. P. 4(a)). In such cases, the district court will be required to dismiss the appeal for lack of jurisdiction even if excusable neglect would have provided a basis to extend the time to appeal. *In re Williams,* 216 F.3d 1295, 1297-98 (11th Cir. 2000); *In re Sykes*, 554 F. App'x 527, 529 (7th Cir. 2014); *In re Herwit*, 970 F.2d 709, 710 (10th Cir. 1992); *K-Mart*, *supra*, 311 B.R. at 846.

Second, once the 21-day time period for making an extension motion passes (*i.e.* on the 35th day after the entry of the judgment or order), the court cannot extend the time to file a notice of appeal even if excusable neglect is present. *In re Schwinn Bicycle Co.*, 209 B.R. 887, 891 (N.D. Ill. 1993); *accord In re Hardin*, 17 C 01191, 2017 WL 1233106, at *2 (N.D. Ill. Apr. 3, 2017).

3. Motions Which Automatically Extend The Time To File A Notice Of Appeal

Four types of post-trial motions will extend the time to file a notice of appeal: (1) a motion to amend or make additional findings filed under Fed. R. Bankr. P. 7052, whether or not granting such motion would alter the judgment; (2) a motion to alter or amend the judgment under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59; (3) a motion for a new trial under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59; and (4) a motion for relief from the judgment filed no later than 14 days after the entry of the judgment under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60. Fed. R. Bankr. P. 8002(b)(1). If one of these motions is filed, the 14-day time to appeal runs from the date of the entry of the order disposing of the last of such motions. *Id*.

A notice of appeal that is filed after the final order or judgment is entered but before one of these types of the motion is resolved is ineffective to appeal the judgment, until the entry of the order disposing of the last such motion. Fed. R. Bankr. P. 8002(b)(2). If a premature notice of

appeal is filed, however, and the party filing it also wishes to appeal the ruling on the post-trial motions, such party must amend the notice of appeal to indicate that the post-trial rulings are included. Fed. R. Bankr. P. 8002(b)(3). No additional fee is charged for such amendment. Fed. R. Bankr. P. 8002(b)(4).

4. What Constitutes A Final Order

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Caitlin v. United States*, 324 U.S. 229, 233 (1945); *accord Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1691-96 (2015) (discussing final and interlocutory orders in bankruptcy). In a traditional civil context, that generally means that all claims against all parties have been resolved. *See* Fed. R. Civ. P. 54(b). That definition of finality applies easily in the context of an adversary proceeding, which is a discrete civil proceeding pending in the bankruptcy case. *See, e.g.*, *Belisle v. Plunkett*, 877 F.2d 512, 513 (7th Cir. 1989) (decision considered final when it "is the 'final' disposition of an adversary proceeding that would be a stand-alone suit outside of bankruptcy"); *Matter of Anderson*, 917 F.3d 566, 569 (7th Cir. 2019).

Traditional concepts of finality are not as clearly applied in the context of orders entered in a bankruptcy case and, thus, the Seventh Circuit has held that an order entered in a bankruptcy case is "final for purposes of appeal if it resolves all contested issues on the merits and leaves merely the distribution of the assets of the bankrupt estate to creditors to be completed." *In re Wagner*, 808 F.2d 542, 544 (7th Cir. 1986) (holding that an appeal over the meaning of "gross income" in 11 U.S.C. § 101(20) was an appeal from a final order even though the appeal resulted in an order allowing the involuntary case against the debtor to continue).

Examples of final orders include: *Matter of Anderson*, 917 F.3d 566 (7th Cir. 2019) (order denying foreclosure deficiency judgment final and appealable); *Gleason v. Jansen*, 888

F.3d 847, 852 (7th Cir. 2018) (district court order dismissing appeal without prejudice final and appealable where "district court is finished with [the] case and ... nothing can be done to revive it"); *In re Katsman*, 771 F.3d 1048 (7th Cir. 2014) (order overruling objection to discharge final and appealable); *Golant v. Levy (In re Golant)*, 239 F.3d 931 (7th Cir. 2001) (order granting default judgment because party would not cooperate with discovery final and appealable); *In re Kids Creek Partners, L.P.*, 200 F.3d 1070, 1074 (7th Cir. 2000) (order fixing priority of claim for legal expenses in the event a party is sued and prevails final and appealable); *In re McGaughey*, 24 F.3d 904, 906-08 (7th Cir. 1994) (order partially lifting the automatic stay and appointing a receiver final and appealable, but order granting withdrawal of reference to the bankruptcy court not final); *In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993) (decision establishing that bank had a secured claim final because it resolved the dispute between creditor and debtor); *In re Sax*, 796 F.2d 994, 996 (7th Cir. 1986) (order approving the sale of debtor's yacht which was conveyed to law firm as a retainer final and appealable); *Suburban Bank of Cary Grove v. Riggsby (In re Riggsby)*, 745 F.2d 1153, 1154 (7th Cir. 1984) (bankruptcy court order dismissing an untimely filed complaint seeking nondischargeability of a debt final and appealable, but district court reverse and remand not final); *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1354 (7th Circ. 1990) (order confirming a chapter 11 plan "marks the termination of any distinctive bankruptcy proceeding and is therefore appealable").

Examples of interlocutory orders include: *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1690 (2015) (ordering denying confirmation of chapter 13 plan not final); *Matter of Ferguson*, 834 F.3d 795 (7th Cir. 2016) (order rejecting marshalling of estate assets and leaving open the allocation of remaining assets to creditors not final); *Kelly v. Herrell*, 602 F. App'x 642 (7th Cir. 2015) (orders approving retention of auctioneer and transfer to new bankruptcy judge not final);

Brouwer v. Ancel & Dunlap (In re Firstmark Corp. & Capitol Sec.), 46 F.3d 653, 659 (7th Cir. 1995) (order denying disqualification of counsel and awarding interim compensation for professionals not final); *X-Cel, Inc. v. Internat'l Ins. Co. (In re X-Cel, Inc.)*, 68 B.R. 131, 132 (N.D. Ill. 1986) (order granting permission to file proof of claim after the claims bar date not final); *In re Devlieg, Inc.*, 56 F.3d 32, 34 (7th Cir. 1995) (order denying motion to disqualify counsel for a trustee not final); *In re Behrens*, 900 F.2d 97, 100 (7th Cir. 1990) (order finding defendant in contempt of court for continuing to levy assessments against debtor's property and finding defendant liable for damages not final because judge did not fix amount of damages); *In re Mem'l Estates*, *Inc.*, 837 F.2d 762, 762-73 (7th Cir. 1988) (order denying receiver's motion to remand foreclosure proceeding to state court not final).

The entry of an order that is only effective upon the occurrence of a future event, even if it purports to be self-executing, is not a final order for appellate purposes. *In re Litas International, Inc.*, 316 F.3d 113, 117 (2nd Cir. 2003); *Lewis v. United States*, 992 F.2d 767, 771 (8th Cir. 1993). In *Litas*, for example, the Second Circuit held that a bankruptcy court order which required a party to take certain actions by a date certain or face dismissal of all of its claims in an adversary proceeding was not a final order, even though it appeared to be self-executing. *Litas*, 316 F.3d at 115. The Second Circuit concluded the appeal period did not begin to run from such an order until the court entered a separate judgment order finding that the conditions to the effectiveness of the earlier order had been satisfied pursuant to Fed. R. Civ. P. 58 and Fed. R. Bankr. P. 9021. *Id*. at 119-20.

5. Cross-Appeals

A cross-appeal is only necessary if the party disagrees with some aspect of the relief accorded under the court's judgment order and seeks a change to the judgment order. *See In re UAL Corp*., 411 F.3d 818, 820 (7th Cir. 2005); *Bernstein v. Bankert*, 733 F.3d 190, 225 (7th Cir.

2013) (cross-appeal "proper under the circumstances" where party sought relief "different from the relief it won in the district court's disposition"). "A party may not appeal from the judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Picard v. Credit Solutions, Inc.,* 564 F.3d 1249, 1256 (11th Cir. 2009). Thus, it is not necessary or appropriate to file a cross-appeal to advance an argument in support of the lower court's ruling that the lower court itself did not accept. In other words, you must be the loser in the lower court to appeal; simply disagreeing with the rationale of the bankruptcy court's favorable ruling or seeking to advance additional arguments in support of the bankruptcy court's ruling is not a basis to file a cross appeal. *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d 444, 449 (7th Cir. 2006) ("A winner may defend its judgment on any ground preserved in the district court, without need for a cross appeal.") The one exception to this rule is when the party may be prejudiced by the collateral estoppel effect of a particular finding in the decision. *Picard*, 564 F.3d at 1256.

If a timely notice of appeal is filed, other parties may file cross-appeals, if appropriate to do so. Fed. R. Bankr. P. 8002(a)(3). The time for filing a notice of cross-appeal is fourteen days from the filing of the original notice of appeal, or within the original fourteen day time period, which ever period expires last. *Id*. The form and procedures governing the filing of the original notice of appeal applies to cross-appeals as well.

6. Perfecting A Notice Of Appeal

The procedure for perfecting an appeal in bankruptcy appeals is different from that in other civil appeals, where the clerk of the court prepares the record and transmits it to the court of appeals without any assistance or instruction from the parties. In bankruptcy appeals, within 14 days after filing a notice of appeal, an appellant must file with the clerk of the bankruptcy court: (1) a designation of the items in the bankruptcy court record to be included in the record

on appeal and (2) a statement of the issues to be presented by the appeal. Fed. R. Bankr. P. 8009. A party opposing the appeal has 14 days following these filings to designate any additional items in the bankruptcy court record that such party wants included in the record on appeal. *Id.* If such party also has filed a cross-appeal, the party must also file a statement of the issues raised by its cross-appeal and a designation of any items that relate to the cross-appeal issues. *Id*. Following the expiration of these time periods, the clerk of the bankruptcy court will transmit the bankruptcy court record to the district court. Fed. R. Bankr. P. 8010(b). The parties may be required to provide copies of the items to be included in the record on appeal to the clerk. *Id*. If no items are designated, then no record is transmitted to the district court.

Failure to comply with Rule 8009 on a timely basis may result in a party's appeal being dismissed. *In re Thompson*, 140 B.R. 979, 982 (N.D. Ill. 1992) (time period provided for in Rule 8009 is not jurisdictional, but failure to comply may serve as grounds for dismissal); *accord In re Burling Manor, LLC*, No. 16-CV-03547 (N.D. Ill. 2016) (despite failure to timely comply with Rule 8009, appeal not dismissed).

Care should be taken in setting forth the issues to be presented in the appeal. An appellant waives issues by not raising them in the Rule 8009 statement of issues: "even if an issue is argued in the bankruptcy court and ruled on by that court, it is not preserved for appeal under Bankruptcy Rule 8009 unless the appellant includes the issue in its statement of issues on appeal." *In re GGM, P.C.*, 165 F.3d 1026, 1031-32 (5th Cir. 1999); *Snap-On Tools, Inc. v. Freeman (In re Freeman)*, 956 F.2d 252, 255 (11th Cir. 1992) (same); *see also Lake Holiday Prop. Owners' Ass'n v. Unitrust Corp.*, 84 B.R. 517, 518 (N.D. Ill. 1988) (appellant's failure to identify issue in Rule 8009 statement was "fatal" to the appeal); *but see In re Dvorkin Holdings, LLC*, 547 B.R. 880, 889 (N.D. Ill. 2016) (exercising discretion to consider issues omitted from

Rule 8009 statement of issues because the issues had been briefed in full and other parties would suffer no surprise or prejudice).

7. Effect Of Filing A Notice Of Appeal On The Bankruptcy Court's Jurisdiction

"[W]hen a case is on appeal, all lower courts lose jurisdiction over it and related matters." *See In re Teknek, LLC*, 563 F.3d 639, 650 (7th Cir. 2009). "The purpose of this rule is to avoid the confusion of placing the same matter before two courts at the same time and to preserve the integrity of the appeal process." *Id*.

Application of this rule to an appeal from a final judgment order entered in an adversary proceeding is straightforward. It is less straightforward when an interlocutory appeal is taken or the order is an order entered in the bankruptcy case. In *Teknek*, the Seventh Circuit held this rule applied to prevent a trustee from settling with individuals who were not a party to the appeal before the Court on "matters that [were] integral to the appeal." *Id*. at 651. The Court applied the rule even though the "trustee's settlement [did] not directly and specifically address the issues immediately before [the Court]" because it concluded that the settlement eliminated effectively the relief the trustee was seeking in the appellate court. *Id*. Both parties to the appeal were sanctioned $5,000. *Id*. at 652.

The moral of this story is that if you have settled the matter on appeal or a related matter and intend to move the bankruptcy court for approval of the settlement, you need to move the appellate court for permission to proceed.

While an appeal deprives the bankruptcy court of jurisdiction over many post-trial matters, it does not prevent the bankruptcy court (or the district court in the case of appeals to the court of appeals) "from handling collateral matters such as the awarding of costs and the posting of a supersedeas bond." *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers*

Union (Independent) Pension Fund v. Central Transport, Inc., 935 F.2d 114, 120 (7th Cir. 1991); *accord Albiero v. City of Kankakee*, 122 F.3d 417, 418 (7th Cir. 1997) ("[a] district court may wrap unfinished business – awarding costs and attorneys' fees, for example…"); *United States v. Brown*, 732 F.3d 781, 787 (7th Cir. 2013) ("Ancillary issues, such as attorney's fees, may still be dealt with by the district court even after an appeal has been lodged, and the district court may also issue orders in aid of the appeal, to correct clerical mistakes, . . . or in aid of execution of a judgment that has not been stayed or superseded.")

8. Staying The Enforcement Of An Order Pending Appeal

The enforcement of a final judgment order entered in an adversary proceeding is automatically stayed from enforcement for 14 days following its entry unless the bankruptcy court orders otherwise. *See* Fed. R. Bank. P. 7062, Fed. R. Civ. P. 62(a). Rule 7062(a) does not apply to contested matters unless the bankruptcy court orders that it does. Fed. R. Bankr. P. 9014(c); *American Reserve,* 840 F.2d at 493-94. Other provisions of the Federal Rules of Bankruptcy Procedure, however, automatically stay the enforcement of certain types of orders: (1) orders approving the use, sale or lease of property other than the use of cash collateral (Fed. R. Bankr. P. 6004(h)); (2) orders granting relief from the automatic stay (Fed. R. Bankr. P. 4001(a)(3)); and (3) orders confirming a chapter 11 plan (Fed. R. Bankr. P. 3020(e)).

There are two ways to stay the enforcement of an order pending an appeal. In the case of a money judgment, the party seeking a stay has a right to post a supercedeas bond. Fed. R. Bankr. P. 8007; Fed. R. Bankr. P. 7062; Fed. R. Civ. P. 62(b). In the Northern District of Illinois, both Bankruptcy Court Local Rule 2070-2 and Local District Court Rule 62.1 provide that the amount of the bond is equal to the judgment amount plus one year's interest at the rate provided

under 28 U.S.C. § 1961[4] plus $500 to cover costs. A party may move for a higher or lower amount.

In cases where the judgment is not a money judgment or the party seeks to avoid posting a bond, the losing party may seek a stay pending appeal. Fed. R. Bankr. P. 8007. A request for a stay is first made in the bankruptcy court. *Id.* If the bankruptcy court and district court both decline to enter a stay, the district court's order denying a stay may be appealed to the court of appeals. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997); *see also Lardas v. Grcic*, 847 F.3d 561, 567 (7th Cir. 2017).

Courts consider four factors in deciding whether to stay an order: (1) whether the appellant is substantially likely to succeed on the merits of the appeal; (2) whether the appellant will suffer irreparable injury absent a stay; (3) whether a stay would substantially harm other parties in the litigation; and (4) whether a stay is in the public interest. *In re A&F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *Forty-Eight Insulations*, 115 F.3d at 1300.

B. Requests For Leave To Appeal Interlocutory Orders

28 U.S.C. §§ 158(a)(2) and (3) are the source of the district court's jurisdiction over a request to appeal an interlocutory order of the bankruptcy court. Rules 8001 through 8028 of the Federal Rules of Bankruptcy Procedure supply the procedural rules.

1. How to Commence An Appeal From An Interlocutory Order

A party that wants to appeal an interlocutory order must file both a notice of appeal and a motion for leave to appeal with the bankruptcy court. Fed. R. Bankr. P. 8002(b), 8004. The motion for leave to appeal is not the same as the brief on the substantive issues sought to be appealed. The motion for leave to appeal focuses on why the applicable standards for

[4] This is a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors for the Federal Reserve System, for the week preceding the date of the judgment.

interlocutory review are satisfied by the issue the movant seeks to appeal. Fed. R. Bankr. P. 8004(b)(1) (listing issues to be addressed in motion for leave to appeal). Only if the motion for leave to appeal is granted does the party filing the appeal brief the substance of his arguments.

Any party that opposes the motion for leave to appeal must file a response to the motion with the bankruptcy court within 14 days. Fed. R. Bankr. P. 8004(b)(2). The clerk of the bankruptcy court sends the motion and any answers to the district court for determination after this deadline passes. Fed. R. Bankr. P. 8004(c).

So long as a notice of appeal is filed, the failure to file a motion for leave to appeal is not jurisdictional. Fed. R. Bankr. P. 8004(d). In such cases, the district court may order that a motion be filed or it may simply elect to either grant leave to appeal or deny the party leave to appeal. *Id.*

2. Time For Filing A Motion For Leave To File An Interlocutory Appeal

A notice of appeal and motion for leave to appeal must be filed within 14 days of the entry of the order sought to be appealed. Fed. R. Bankr. P. 8002(a), 8004. The timing issues discussed above apply to appeals from interlocutory orders.

3. Standards For Granting A Request For Leave To Appeal An Interlocutory Order

A party only has an automatic right to appeal a bankruptcy court's interlocutory order if the order is one which increases or decreases a debtor's exclusive right to file a plan in a chapter 11 case. 28 U.S.C. § 158(a)(2).

All other interlocutory orders may only be appealed with leave of the district court. 28 U.S.C. § 158(a)(3). Appeals to the District Court, however, "shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts…". 28 U.S.C. § 158(c)(2). The District Courts in the Northern District of Illinois have consistently construed these two provisions to mean that the standards contained in either 28

U.S.C. § 1292(b) or the collateral order doctrine (*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)) should be applied to determine whether the District Court has jurisdiction over an interlocutory appeal. *See, e.g.*, *Kowalski v. Paloian*, No. 19-cv-2126, 2019 WL 2297457, at *5 (N.D. Ill. May 30, 2019); *880 S. Rohlwing Road, LLC v. T&C Gymnastics, LLC*, No. 16-cv-07650, 2017 WL 264504, at *4 (N.D. Ill. Jan. 19, 2017) *In re IFC Credit*, No. 10 C 256, 2010 WL 1337142, at *2 (N.D. Ill. Mar. 31, 2010); *In re Dental Profile, Inc.*, No. 09 C 6160, 2010 WL 431590, at *4 (N.D. Ill. Feb. 1, 2010); *Lynd v. Outboard Marine Corp.*, 2004 U.S. Dist. LEXIS 15647, *6-7 (N.D. Ill. Aug. 9, 2004); *Carlson v. Brandt*, 1997 U.S. Dist. LEXIS 12821, *21-23 (N.D. Ill. Aug. 19, 1997); *In re Bowers-Siemon Chemicals Co. (Blanchford v. Bowers-Siemon Chemicals Co.)*, 123 B.R. 821, 823-25 (N.D. Ill. 1991); *Citibank, N.A. v. Telesphere Communications, Inc.*, 1992 U.S. Dist. LEXIS 7750, *11-15 (N.D. Ill. May 25, 1992); *In re Marina City Assocs.*, 1989 U.S. Dist. LEXIS 7025, *17-19 (N.D. Ill. June 7, 1989); *In re Wieboldt Stores, Inc. (Harlem-Irving Realty, Inc. v. Wieboldt Stores, Inc.)*, 68 B.R. 578, 580 (N.D. Ill. 1986); *In re X-Cel, Inc.*, 68 B.R. 131, 134 (N.D. Ill. 1986); *In re Huff*, 61 B.R. 678, 682-83 (N.D. Ill. 1986).

Under 28 U.S.C. § 1292(b), "[f]or the case to be appropriate for interlocutory appeal, 'there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation.'" *In re Emerald Casino, Inc., Flynn v. Gecker*, 09 C 3597, 2009 U.S. Dist. Lexis 101963 at *1 (N.D. Ill. 2009 Nov. 3, 2009) (quoting *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original)). When applying these standards, the courts in this District recognize that interlocutory appeals are the exception rather than the rule and "should not be granted 'absent exceptional circumstances.'" *""In re Argon Credit, LLC*, No. 17 C 5381, 2017 WL 3478812, at *2 (N.D. Ill. Aug. 14, 2017)

(quoting *Wolf v. FirstMerit Bank N.A.*, 535 B.R. 772, 776 (N.D. Ill. 2015)); *see also In re Pullman Constr. Indus. Inc.*, 143 B.R. 497, 498 (N.D. Ill. 1992) (noting that because of the "well-established judicial policy of . . . avoiding the delay and disruption which results from such piecemeal litigation," leave to appeal an interlocutory order will not be granted "absent exceptional circumstances.").

Alternatively, under the collateral order doctrine an otherwise interlocutory order will be considered final and subject to immediate appeal if it: (1) finally determines rights collateral to and separable from the main proceeding; (2) presents a serious and unsettled question; and (3) is effectively unreviewable on appeal from a final judgment such that denial of immediate review will harm the appellant irreparably. *Cohen,* 337 U.S. at 546-47. All three elements must be present for the collateral order doctrine to apply. *Good v. Voest-Alpine Indus., Inc.*, 398 F.3d 918, 925 (7th Cir. 2005) ("[t]o fall within the [collateral order] exception, an order must at a minimum satisfy three conditions. . .").

4. Perfecting An Interlocutory Appeal

Within 14 days after an order is entered granting an appellant leave to proceed with an appeal from an interlocutory order, the appellant must file his designation of the record and statement of issues to be presented. Fed. R. Bankr. P. 8009. The same rules for an appeal from a final order now apply.

5. Effect Of Failure to File An Interlocutory Appeal

Failure to appeal an interlocutory order does not bar a party from appealing a final judgment order that incorporates the earlier interlocutory order. *See, e.g., In re Kilgus,* 811 F.2d 1112, 1116 (7th Cir. 1987); *accord In re Frontier Properties, Inc.*, 979 F.2d 1358 (9th Cir. 1992). Waiting for the entry of a final judgment is often the better route, since the Seventh Circuit does not encourage interlocutory appeals, stating:

> If we took the view that any order that *may* be appealed in bankruptcy, *must* be appealed on pain of forfeiture of all review, we would be flooded with appeals. Because it has proved impossible to define exactly the set of orders to be treated as final under § 158(d), litigants would resolve all doubts in favor of instant appeal. The torrent of appeals would inundate the courts of appeals and ultimately retard rather than advance the disposition of the underlying bankruptcy.

811 F.2d at 1116 (emphasis in original); *accord United States v. Funds in the Amount of One Hundred Thousand and One Hundred Twenty Dollars ($100,120.00)*, 901 F.3d 758, 767 (7th Cir. 2018) ("an appeal from a final judgment [brings] up for review any interlocutory order that has not become moot").

III. Objections To Proposed Findings Of Fact And Conclusions Of Law

In non-core proceedings where the bankruptcy court may only enter a proposed ruling, Rule 9033 of the Federal Rules of Bankruptcy Procedure governs the district court's review of the bankruptcy court's proposed ruling. Under Rule 9033, a party may object to proposed findings of fact and conclusions of law within 14 days after being served with a copy of the proposed findings of fact and conclusions of law. Fed. R. Bankr. P. 9033(b). Service occurs when the clerk of the court mails the proposed findings of fact and conclusions of law to the party. Fed. R. Bankr. P. 9033(a). The objection is filed with the bankruptcy court. Fed. R. Bankr. P. 9033(b). Parties may respond to any objection which is filed within 14 days of being served with an objection. *Id.* The response is also filed in the bankruptcy court. There is no procedure in Rule 9033 for filing a cross-objection comparable to a cross-appeal. Thus, a party that opposes some aspect of the relief that is included in the proposed judgment cannot wait to see if his opponent objects before filing his own objection.

A party wishing to object to proposed findings of fact and conclusions of law may obtain one extension, not to exceed 21 days, by filing a motion seeking an extension before the 14-day

period for filing an objection expires. Fed. R. Bankr. P. 9006(c). If the party seeking an extension fails to make the request before the 14-day period expires, that party may seek leave for an extension within 21 days after the expiration of that period (*i.e*. within 35 days of service of the proposed ruling) upon a showing of excusable neglect. *Id*. The standards for excusable neglect are set forth above.

In the Northern District of Illinois, Bankruptcy Court Local Rule 9033-1 provides that the clerk of the bankruptcy court will transmit the proposed ruling and any objections and responses thereto to the district court upon the expiration of the time periods for filing objections to the proposed ruling and any responses. Failure to object on a timely basis to a proposed ruling in the bankruptcy court pursuant to Rule 9033 waives the right to object to the proposed ruling in the district court. *Infrastructure Serv. Co. v. Firestone*, 328 B.R. 804, 807 (C.D. Cal. 2005); *see also Bhayani v. Sood*, No. 03 C 4210, 2003 WL 22400752, at *1-2 (N.D. Ill. Oct. 21, 2003).

IV. Appeals From the District Court To the Court Of Appeals

28 U.S.C. § 158(d) is the source of the court of appeals' jurisdiction over a request to appeal an interlocutory order of the bankruptcy court.[5] Most of the Federal Rules of Appellate Procedure apply to appeals made under 28 U.S.C. § 158(d) to the court of appeals. *See* Fed. R. App. P. 6(b)(1). If, however, the district court entered the final judgment, order or decree that is the subject of the appeal (as opposed to entering the appealed order in its capacity as an appellate court), that appeal is taken like any other civil appeal under the Federal Rules of Appellate

[5] Parties often cite 28 U.S.C. § 1291 as the source of the court of appeal's jurisdiction over appeals from the district court (perhaps because that is the statute that generally applies to civil proceedings pending in district court), but if the appeal is one which seeks to appeal a district court's review of a bankruptcy court's order, 28 U.S.C. § 158(d) is the statutory basis for the court of appeal's jurisdiction. *In re Morse Elec. Co*., 805 F.2d 262, 263 (7th Cir. 1986). 28 U.S.C. § 1292, which allows for interlocutory appeals from the district court to the court of appeals in certain circumstances, however, does apply to bankruptcy cases. *A&F Enterprises*, 742 F.3d at 766; *Forty-Eight Insulations*, 115 F.3d at 1299-1300.

Procedure and all such rules apply. Fed. R. App. P. 6(a). Because the district court enters the final judgment, order or decree in a non-core matter, Rule 6(a) applies to appeals from those orders.

A. Jurisdiction Of The Court Of Appeals

28 U.S.C. § 158(d) sets forth the jurisdiction of the court of appeals over appeals from a district court's review of a bankruptcy court's order. "A court of appeals' jurisdiction over a district court's review of a bankruptcy court order can only be based on a proper exercise of the district court's jurisdiction." *See, e.g.*, *In re Vlasek*, 325 F.3d 955, 960 (7th Cir. 2003). Thus, if the district court lacked jurisdiction to hear the appeal because, for example, the notice of appeal was not timely filed, the court of appeals will lack jurisdiction as well.

Under 28 U.S.C. § 158(d)(1), a court of appeals only has jurisdiction over appeals from final orders. *Morse Elec.*, 805 F.2d at 264. The jurisdiction of the court of appeals differs from that of the district court's jurisdiction under 28 U.S.C. § 158(a) which allows the district court to hear appeals from interlocutory orders in its discretion. The court of appeals, by contrast, only has jurisdiction over those orders that were final both in the bankruptcy court *and* in the district court. *In re Cash Currency Exch.*, 762 F.2d 542, 546 (7th Cir.), *cert. denied*, 474 U.S. 904 (1985); *Matter of Ferguson*, 834 F.3d at 798-99. Thus, as the Seventh Circuit has noted "[t]here is therefore a large but ill-defined category of orders for which the appeal to the district court is the end of the line." *Morse Elec.*, 805 F.2d at 264. And even if the decision of the bankruptcy court is final, if the decision of the district court on appeal remands the matter for further proceedings in the bankruptcy court, the order is not appealable to the court of appeals unless the further proceedings that are contemplated in the bankruptcy court are "of a purely ministerial character". *In re Lopez*, 116 F.3d 1191, 1192 (7th Cir. 1997); *In re Riggsby*, 745 F.2d 1153 (7th Cir. 1984); *Matter of Ferguson*, 834 F.3d at 798-99. A remand order contemplates only a "purely

ministerial act" when the "district judge has fully resolved the litigation: there is no legal decision for a bankruptcy judge to make, no fact to find, no discretion to exercise." *In re A.G. Fin. Serv. Ctr., Inc.*, 395 F.3d 410, 413 (7th Cir. 2005); *accord In re Rockford Products Corp.*, 741 F.3d 730, 733 (7th Cir. 2013) (remands for further fact-finding require "far" more than ministerial acts).

For a discussion of what constitutes a final order see Section II.A.4.

B. How To Appeal, The Form Of The Appeal And Motions That Stay The Time To File A Notice To Appeal

Like an appeal from the bankruptcy court to the district court, an appeal from the district court is commenced by filing a notice of appeal in the district court. Fed. R. App. P. 3(a). The form of a notice of appeal is Official Form 5. Fed. R. App. P. 3(c)(5), 6(b)(1)(B); Form 5. The filing fee for filing a notice of appeal to the court of appeals is $500.00.

Unlike an appeal from the bankruptcy court to the district court, an appellant has a longer time period, 30 days, to file a notice of appeal "after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1). The time period for filing cross-appeals under Rule 4(a)(3) is 14 days after the date on which the first notice of appeal is filed, or within the 30 days of the original appeal period, whichever period ends later. Fed. R. App. 4(a)(3). *See* Section II.A.2 for a discussion of the form of the judgment order and when an order is entered.

The rules for obtaining an extension of time to file a notice of appeal differ from those that apply to appeals from the bankruptcy court to the district court. Under Rule 4(a)(5), a party may move for an extension of time to file a notice of appeal within 30 days after the time to file an appeal has expired (*i.e.* within 60 days after the order is entered). Unlike an extension of time when filing a notice of appeal to the bankruptcy court, a party seeking an extension must show either cause or excusable neglect whether the motion is made before or after the expiration of the

original 30 day time period. Fed. R. App. 4(a)(5)(A)(ii). The outside date for any extension is 60 days after the order on review is entered or 14 days after the extension order is entered, whichever is later. Fed. R. App. 4(a)(5)(C). *See* Section II.A.2 for a discussion of the excusable neglect standard.

The only motion which extends the time for filing a notice of appeal based upon 28 U.S.C. § 158(d) is a timely motion for rehearing filed under Rule 8022 of the Federal Rules of Bankruptcy Procedure. Fed. R. App. P. 6(b)(2)(A)(i). A Rule 8022 motion must be filed within 14 days after the entry of the district court's judgment. Fed. R. Bankr. P. 8022(a)(1). A premature notice of appeal is not effective until after the order disposing of the motion is entered. Fed. R. App. P. 6(b)(2)(A)(i). A party seeking to appeal that ruling, who has filed a premature notice of appeal, must amend the notice of appeal to include the order disposing of the Rule 8022 motion. Fed. R. App. P. 6(b)(2)(A)(ii).

The time to file a notice of appeal from a final judgment order entered by the district court (*i.e*. in non-core proceedings) is stayed by the same motions that would stay the time to file a notice of appeal from a final judgment order of the bankruptcy court. See Fed. R. App. 4(a)(4).

C. Perfecting The Appeal

For bankruptcy appeals based upon 28 U.S.C. § 158(d), within 14 days after filing the notice of appeal, the appellant must file with the clerk of the district court a designation of the record and statement of issues on appeal prepared in accordance with Rule 8009 of the Federal Rules of Bankruptcy Procedure. Fed. R. App. P. 6(b)(2)(B)(i). The appellee has 14 days to designate additional items into the record. Fed. R. App. P. 6(b)(2)(B)(ii).

V. Direct Appeals to the Circuit Court

The normal path for a bankruptcy appeal is first to the district court and then, if the losing party is unsatisfied with the result and there is proper jurisdiction, to the circuit court of appeals.

Under the 2005 BAPCPA amendments, a new procedure was added for direct appeal of a bankruptcy court order to the circuit court of appeals. 28 U.S.C. § 158(d)(2). This direct to circuit appeal process only applies to cases filed on or after October 17, 2005. *In re McKinney*, 457 F.3d 623 (7th Cir. 2006).

There are several potential advantages to consumer bankruptcy litigants provided by a direct to circuit appeal. First, a decision from a district court on a bankruptcy issue does not usually have any precedential effect since most districts have more than one district court judge. Therefore, the time and expense of the district court appeal will not normally result in a meaningful change in the law. Second, the amount in controversy in consumer bankruptcy cases tends to be smaller and the costs of an intermediate level appeal may be prohibitive. Third, consumer bankruptcy litigants – especially debtors – rapidly become fatigued by the appeal process as their "fresh start" remains in limbo. As an example, the debtor-appellee in the *McKinney* case cited above died prior to the completion of the appeal process.

There is another often overlooked jurisdictional advantage of a Section 158(d)(2) direct to circuit court appeal. Under the traditional appeal route provided by Section 158(d)(1), circuit courts only have appellate jurisdiction over "final" orders. Therefore, appeal of a bankruptcy court interlocutory order traditionally ends at the district court. Section 158(d)(2) has no restriction to "final" orders, and therefore grants circuit court jurisdiction over interlocutory orders. *See, e.g., Matter of Ferguson*, 834 F.3d at 798 ("Subsection (d)(2) [of Section 158] gives us discretion to accept interlocutory appeals certified as meeting certain prerequisites. . . ."); *In re OCA, Inc.* 552 F.3d 413 (5th Cir. 2008).

The procedure for a direct to circuit appeal has two steps. First, there must be a "certification". Second, the circuit court must "authorize" the direct appeal.

A. Certification (28 U.S.C. § 158(d)(2)(A))

One of three circumstances must exist to "certify" a direct to circuit appeal:

1. The issue involves a question of law to which there is no controlling circuit or Supreme Court authority or involves a matter of public importance;

2. The issue involves a question of law on which is there is split of authority; or,

3. An immediate appeal to the circuit court may materially advance the progress of the case.

B. Who May Certify An Appeal For Direct Appeal (28 U.S.C. § 158(d)(2)(A), (d)(2)(B)):

Depending on who requests certification, certification is either mandatory or at the determination of the bankruptcy or district court. The bankruptcy or district courts on their own motions or at the request of a party to the appeal may determine that grounds exist to certify the appeal for direct appeal. 28 U.S.C. §158(d)(2)(B)(i). The bankruptcy court or district court also shall certify an appeal for direct appeal if a majority of the appellants and of the appellees certify that grounds exist for a direct appeal. 28 U.S.C. §158(d)(2)(B)(ii). Finally all of the parties to an appeal can certify the appeal for direct appeal. 28 U.S.C. §158(d)(2)(A).

C. Procedure [Rule 8006]

1. A request must be a separate document and filed with the court where the matter is pending (Fed. R. Bankr. P. 8006(b));

2. The request must be filed within 60 days after the entry of the order to be appealed (28 U.S.C. § 158(d)(2)(E) (note that this deadline does not apply to the lower court acting *sua sponte*) (Fed. R. Bankr. P. 8006(f)(1));

3. A party opposing the direct appeal then has 14 days to respond (Fed. R. Bankr. P. 8006(f)(3));

4. Note that if all parties to the appeal agree to certification, the lower court must certify the appeal (28 U.S.C. § 158(d)(2)(B)(ii)).

D. Acceptance By The Circuit Court

Just because the parties or a court "certifies" an issue for direct to circuit appeal, thereby giving potential appellate jurisdiction under the statute, the circuit court of appeal must still "authorize" the appeal. 28 U.S.C. § 158(d)(2)(A); Fed. R. Bankr. P. 8006(g). Under Fed. R. Bankr. P. 8006 (a) and (g), a party has 30 days after the certification has become effective to file a Fed. R. App. 5 petition for permission. The Seventh Circuit has held that certification within the time periods set forth in Rule 8006 is a "mandatory claims-processing rule, and if properly invoked, it must be enforced." *In re Wade*, 926 F.3d 447, 448 (7th Cir. 2019). Thus, if the opposing party raises the issue, the failure to petition for permission to appeal within 30 days of the bankruptcy court certifying the appeal will result in dismissal of the appeal. *Id*.

In reaching this conclusion, the Seventh Circuit overruled two of its prior decisions—*In re Turner*, 574 F.3d 349 (7th Cir. 2009) and *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. 2018)—where petitions for permission to appeal were not filed and the Seventh Circuit declined to dismiss the appeals. 926 F.3d at 450-51. The Seventh Circuit overturned its prior decisions because these cases were decided before the Supreme Court ruled in *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017), that '"mandatory claims-processing rules ... are not subject to harmless error analysis."' 926 F.3d at 450 (quoting *Manrique*, 137 S. Ct. at 1274). Because the Seventh Circuit concluded that its harmless error analysis in *Marshall* and *Turner* "cannot coexist" with *Manrique*, the Seventh Circuit "overrule[d]" *Turner* and *Marshall* to the extent those decisions excused compliance with Bankruptcy Rule 8006(g) based on a harmless error analysis or an analysis that views the certification as the "functional equivalent" of the petition for permission to appeal. 926 F.3d at 450-51.

Little guidance is given for authorization, and many circuit courts have been using the standards for "permissive" appeals under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5. The Seventh Circuit has been taking around three to four weeks to authorize a direct appeal, normally by a brief text order without further comment. In the Seventh Circuit's reported decisions, approximately 90% of certified appeals have been authorized.

E. Seventh Circuit Direct Appeal Decisions

1. *In re McKinney*, 457 F.3d 623 (7th Cir. 2006) — Issue: Retroactivity of Section 158(d)(2)'s authorization for direct appeals. Procedure for Direct Appeal: Bankruptcy court request.

2. *In re Wright*, 492 F.3d 829 (7th Cir. 2007) — Issue: Surrender of "910" car in full satisfaction of creditor's claim. Procedure for Direct Appeal: Bankruptcy court request.

3. *In re Thompson*, 566 F.3d 699 (7th Cir. 2009) – Issue: Effect of automatic stay on vehicle repossessed pre-petition and duty of creditor to return it. Procedure for Direct Appeal: Debtor request.

4. *In re Turner*, 574 F.3d 349 (7th Cir. 2009) – Issue: Deduction of payments on secured debts from Chapter 13 disposable income where collateral is being surrendered. Procedure for Direct Appeal: Trustee request.

5. *In re Howard*, 597 F.3d 852 (7th Cir. 2010) – Issue: Negative equity trade as a basis for denying "910" car status to secured claim. Procedure for Direct Appeal: Debtor request.

6. *In re Johnson*, 382 F. App'x. 503 (7th Cir. 2010) – Issue: Change in projected income for above-median Chapter 13 debtor, mooted by *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Procedure for Direct Appeal: Bankruptcy court request.

7. *In re River Rd. Hotel Partners, LLC,* 651 F.3d 642 (7th Cir. 2011) – Issue: Credit bid rights in Chapter 11 sale. Procedure for Direct Appeal: Debtor request.

8. *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011) – Issue: Bankruptcy court's constitutional authority to enter final judgment on state-law claims. Procedure for Direct Appeal: Debtor and creditor joint request.

9. *In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012) – Issue: Dismissal of single asset real estate case. Procedure for Direct Appeal: Debtor request.

10. *Sunbeam Prods., Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012) – Issue: Effect of rejection of intellectual property license. Procedure for Direct Appeal: Creditor request.

11. *In re Castleton Plaza, LP*, 707 F.3d 821 (7th Cir. 2013) – Issue: Permissibility of insiders retaining stakes in reorganized debtors, absent competitive bidding for investment. Procedure for Direct Appeal: Bankruptcy court request.

12. *In re Draiman*, 714 F.3d 462 (7th Cir. 2013) – Issue: Whether appointing interim trustee extends the statute of limitations for avoidance actions. Procedure for Direct Appeal: Bankruptcy court request.

13. *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013) – Issue: Timeliness of joint certification request to court of appeals, constitutional authority of bankruptcy court to adjudicate preference and fraudulent conveyance claims, and applicability of Section 546(e) safe harbor to financial institutions participating in pre-petition fraud. Procedure for Direct Appeal: Trustee and creditor joint request.

14. *In re Crane*, 742 F.3d 702 (7th Cir. 2013) – Issue: Avoidability of mortgage recorded in Illinois that did not state maturity date or interest rate. Procedure for Direct Appeal: Trustee request.

15. *In re Sweports, Ltd.*, 777 F.3d 364 (7th Cir. 2015) – Issue: Bankruptcy court authority to award fees after dismissing chapter 11 case. Procedure for Direct Appeal: Creditor request.

16. *In re Pajian*, 785 F.3d 1161 (7th Cir. 2015) – Issue: Whether Rule 3002's deadline for filing proofs of claim in chapter 13 cases applies to secured and unsecured creditors alike. Procedure for Direct Appeal: Debtor request.

17. *In re Schwartz*, 799 F.3d 760 (7th Cir. 2015) – Issue: Failure to adjust standard of living to account for debts as "cause" to dismiss bankruptcy petition. Procedure for Direct Appeal: Debtor and creditor joint request.

18. *In re Great Lakes Quick Lube LP*, 816 F.3d 482 (7th Cir. 2016) – Issue: Whether relinquishment of lease constituted preference or constructively fraudulent transfer. Procedure for Direct Appeal: Debtor and creditor joint request.

19. *Wittman v. Koenig*, 831 F.3d 416 (7th Cir. 2016) – Issue: Scope of Wisconsin exemption for annuities that "compl[y] with the provisions of the internal revenue code." Procedure for Direct Appeal: Trustee and debtor joint request.

20. *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. 2018) – Issue: Whether tax refunds must be included in chapter 13 debtor's current monthly income when calculating projected disposable income, and whether refunds must be turned over to trustee for additional plan payments. Procedure for Direct Appeal: Trustee request.

21. *Matter of Anderson*, 917 F.3d 566 (7th Cir. 2019) – Issue: Scope of Wisconsin exemption for annuities that "compl[y] with the provisions of the internal revenue code." Procedure for Direct Appeal: Trustee and debtor joint request.

22. *In re Wade*, 926 F.3d 447 (7th Cir. 2019) – Issue: Whether failure to file petition for leave to appeal under Section 158(d)(2) is jurisdictional, requiring dismissal of certified direct appeal. Procedure for Direct Appeal: Debtor request.

23. *Cranberry Growers Cooperative v. Layng*, 930 F.3d 844 (7th Cir. 2019) – Issue: Constitutionality of U.S. Trustee quarterly fee schedule for debtors. Procedure for Direct Appeal: Bankruptcy court request.

VI. The Appeal Briefs

A. Time For Filing Briefs

1. Appeal To The District Court

Unless adjusted by the district court, the appellant's brief is due 30 days after the appeal is docketed. Fed. R. Bankr. P. 8018(a)(1). The appellee's response brief is due 30 days after service of the appellant's brief. Fed. R. Bankr. P. 8018(a)(2). The appellant's reply brief is due 14 days after service of the appellee's brief. Fed. R. Bankr. R. 8018(a)(3).

If the appellee has filed a cross-appeal, the appellee's response brief must separately contain the issues and arguments pertinent to the cross-appeal. Fed. R. Bankr. P. 8018(a)(2). The appellant's response brief related to the cross-appeal must be filed within 14 days of service of the appellee's response brief containing the cross-appeal (and is usually contained in the appellant's reply brief). *See* Fed. R. Bankr. P. 8018(a)(3). The appellee's reply brief is due 14 days after service of the response brief. *Id.*

2. Appeal To The Court Of Appeals

The appellant's brief is due 40 days after the appeal is docketed. Fed. R. App. P. 31(a)(1); 7th Cir. R. 31(a). The appellee's response brief is due 30 days after service of the appellant's brief. *Id.* The appellant's reply brief is due 21 days after service of the appellee's brief and at least 7 days before argument. *Id.*

If the appellee has filed a cross-appeal, the appellant's principal brief is due 40 days after the record is filed. Fed. R. App. P. 28.1(c)(1). The appellee's principal and response brief is due

30 days after service of the appellant's principal brief. Fed. R. App. P. 28.1(c)(2). The appellant's response and reply brief is due 30 days after service of the appellee's principal and response brief. Fed. R. App. P. 28.1(c)(3). The appellee's rely brief is due 21 days after service of the appellant's response and reply brief, and at least 7 days before argument. Fed. R. App. P. 28.1(c)(4).

Extensions of time to file briefs are governed by Seventh Circuit Rule 26 and "are not favored." 7th Cir. R. 26. If an extension is requested, it must be in the form of a motion and supported by affidavit. Seventh Circuit Rule 26 sets forth the grounds that "merit consideration." *Id.*[6] Generally the Court will grant one extension of the time to file briefs.

If an appellant fails to timely file a brief, the Clerk of the Seventh Circuit enters an order directing counsel to show cause why the appeal should not be dismissed. 7th Cir. R. 31(c)(2). The Court then "take[s] appropriate action." *Id.* If an appellee fails to file a brief, the Clerk enters an order requiring the appellee "to show cause within 14 days why the case should not be treated as ready for oral argument or submission and appellee denied oral argument. 7th Cir. R. 31(d). After the orders to show cause, the Court "take[s] appropriate action." 7th Cir. R. 31(c)(2), (d).

B. Length Of The Briefs

1. Appeals To The District Court

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[6] **Motions in the Court of Appeals.** Motions in the Court of Appeals are governed by Rule 27. The motion "must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. App. P. 27(a)(2)(A). While a supporting brief is barred, Fed. R. App. P. 27(a)(2)(C)(i), the movant must serve and file with the motion any affidavits or other documents that support the motion. Fed. R. App. P. 27(a)(2)(B). If the motion seeks substantive relief, the motion must include the trial court's opinion or agency's decision as an exhibit. Fed. R. App. P. 27(a)(2)(B)(iii). A party may respond to a motion within 10 days after service of the motion, unless the court shortens or extends the time. Motions for a stay or injunction pending appeal, for release in a criminal case, stay pending review and for stay of mandate may be granted before the 10-day period expires if the court gives reasonable notice to the parties that it intends to act sooner.

Bankruptcy Rule 8015 provides that principal briefs shall not exceed 30 pages and reply briefs shall not exceed 15 pages, unless they contain no more than 13,000 words or 6,500 words, respectively. Fed. R. Bankr. P. 8015(a)(7). However, by local rule the Northern District of Illinois has limited the briefs to 15 pages. L.R. 7.1. Accordingly, if the appellant's or appellee's brief is expected to exceed 15 pages (or 13,000 words), a motion should be filed immediately seeking to file a brief in excess of the page limitation.[7]

2. Appeals To The Court Of Appeals

The Federal Rules of Appellate Procedure set out page or type-volume limitations, but by Local Rule the Seventh Circuit has modified certain of those requirements. The principal brief either can exceed no more than 30 pages or contain no more than 14,000 words. Fed. R. App. P. 32(a)(7); 7th Cir. R. 32(c). The reply brief either can exceed no more than 15 pages or contain no more than 7,000 words. Fed. R. App. P. 32(a)(7); 7th Cir. R. 32(c). "Headings, footnotes, and quotations count toward" the word and line limitations. Fed. R. App. P. 32(f). The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not

[7] **Motions in the District Court.** Any motions brought during the appeal process are governed by Bankruptcy Rule 8013. A motion "must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. Bankr. R. 8013(a)(2)(A). Any affidavits or other papers that support the motion must be filed and served with it, although supporting briefs are prohibited. Fed. R. Bankr. P. 8013(a)(2)(C). A response in opposition to the motion, except for a motion for a procedural order, may be filed within 7 days after service of the motion, but this time can be shortened or extended in the discretion of the district court. Fed. R. Bankr. P. 8013(a)(3). If the motion is one for a procedural order, including one under Bankruptcy Rule 9006, the court may act at any time without awaiting a response. Fed. R. Bankr. P. 8013(b). Motions are decided without oral argument unless the court orders otherwise. Fed. R. Bankr. P. 8013(c). Bankruptcy Rule 8013 also sets forth the procedure for filing an emergency motion, where a movant requires "expedited action on a motion because irreparable harm would occur during the time needed to consider a response." Fed. R. Bankr. P. 8013(d)(1).

count toward such limitations." *Id.* The parties are required to attach certifications of compliance with the limitations. Fed. R. App. P. 32(g).

Staying within the limitations set out in the Rule is important. Word count errors, other than the sort of unintentional error made by differences in word processor counting functions, may be perceived deliberate and sanctionable. *Pecher v. Owens-Illinois, Inc.*, 859 F.3d 396, 402-03 (7th Cir. 2017). In *Pecher*, the Court issued a rule to show cause against counsel who eliminated all spacing in string citations, noting that when the citations were cleaned up, the brief was well over the word limit, causing the court to conclude that "no reasonable attorney could have, in good conscience, certified compliance with the type-volume requirements."

In *Abner v. Scott Mem'l Hosp.*, after an order to show cause was issued, the Seventh Circuit denied a belated motion to file an oversized brief where the appellant had filed an 18,000-page brief with a certificate that the brief complied with the word limitations. 634 F.3d 962, 963 (7th Cir. 2011). Judge Posner warned that "the flagrancy of the violation" in that case could have justified dismissal of the appeal, but instead affirmed the lower court on the merits. *Id.* at 965. Take heed, also, of *Custom Vehicles, Inc. v. Forest River, Inc.,* in which Judge Easterbrook gave "notice" that he will "deduct from the brief double the number of words in a motion to [strike] an opponent's brief or any other equivalently absurd, time-wasting motion." 464 F.3d 725, 728 (7th Cir. 2006).

C. The Form And Substance Of The Briefs

The form of the briefs is usually set out in the applicable rules – either the Bankruptcy Rules, the Federal Rules of Appellate Procedure or the Seventh Circuit Rules. *See* Fed. R. Bankr. P. 8010; Fed. R. App. P. 28; 7th Cir. R. 28. Depending on where the appeal is pending, the briefs generally must contain a table of contents, a table of authorities, a statement of the basis for appellate jurisdiction, a statement of the issues presented and the applicable standard of review, a

statement of the case, a statement of facts, a summary of argument, an argument and a short conclusion. *See* Fed. R. Bankr. P. 8014; Fed. R. App. P. 28; 7th Cir. R. 28.

1. The Statement Of The Basis For Appellate Jurisdiction

"Jurisdiction is the first question in every appeal." *Morse Elec.*, 805 F.2d at 264; *accord In re Boomgarden*, 780 F.2d 657, 659 (7th Cir. 1985). The Seventh Circuit has said that it "needs – more, is entitled to – the scrupulous assistance of the bar in determining jurisdiction." *Morse Elec.*, 805 F.2d at 264; *accord Baez-Sanchez v. Sessions*, 862 F.3d 638 (7th Cir. 2017) (describing importance of full and accurate jurisdictional statements). Accordingly, the District Court and the Seventh Circuit require the appellant's brief to include a statement of the source of the courts' jurisdiction. *See* Fed. R. Bankr. P. 8014(a)(4); Fed. R. App. P. 28(a)(4); 7th Cir. R. 28(a). In the District Court, the appellee's brief only has to include the statement of the basis for appellate jurisdiction if the appellee is "dissatisfied" with the appellant's statement. Fed. R. Bankr. P. 8010(a)(2). In the Seventh Circuit, the appellee's brief must state explicitly (and in so many words) whether the appellant's jurisdictional summary "is complete or correct," and, if it is not, the appellee must provide a complete statement. 7th Cir. R. 28(b); *see also Baez-Sanchez*, 862 F.3d at 641 ("The job of the appellee is to review the appellant's jurisdictional statement to see if it is both complete and correct"). It is not permissible for an appellee that disagrees with part of the appellant's jurisdictional statement to simply correct those parts that are the subject of disagreement. The appellee must provide a full statement of the basis for jurisdiction. It is imperative to get the jurisdictional statement correct, as a party can be sanctioned – including the striking of a brief or the dismissal of an appeal – for an incorrect jurisdictional statement. *See Professional Serv. Network, Inc. v. American Alliance Holding Co.*, 238 F.3d 897, 902-03 (7th Cir. 2001) (noting the frequent failure of litigants to comply with 7th Cir. R. 28(a) and (b) and reminding the bar of the importance of complying with the rules and of the risk that violators run

of being sanctioned); *Baez-Sanchez*, 862 F.3d at 641-42. The Seventh Circuit's handbook, found on line on the Court's website, contains examples of correct jurisdictional statements and the information that must be provided. *See* http://www.ca7.uscourts.gov/rules-procedures/ /Handbook.pdf.

2. The Statement Of The Issues Presented And The Applicable Standard of Review

The appellant's brief must contain a statement of the issues presented for review. Fed. R. of Bankr. P. 8014(a)(1)(5); Fed. R. App. P. 28(a)(5). It also must contain the applicable standard of review. Fed. R. of Bankr. P. 8014(a)(5). A discussion of the standard of review occurs in the argument section and can occur either in the discussion of the issue or under a separate heading placed before the discussion of the issue. Fed. R. App. P. 28(a)(8)(B). The appellee's brief only has to include the statement of issues and standard of review if the appellee is "dissatisfied" with the appellant's statements. Fed. R. Bankr. P. 8014(b); Fed. R. App. P. 28(b).

The statement of the issues is the court's first exposure to the case and the first chance for persuasion. Each statement of the issue should identify the legal issue, with sufficient reference to the determinative facts to make the question presented concrete, clear and compelling. The statement is generally one sentence and begins with the word "whether." An issue should be stated for each separate legal issue, but there should not be too many issues since this will dilute attention to any one issue.

3. The Statement Of The Case

A statement of the case is required in the District Court and the Seventh Circuit. Fed. R. Bank. R. 8014(a)(6); Fed. R. App. P. 28(a)(6). The statement of the case provides the nature of the case, the course of the proceedings, and the disposition in the court below. Fed. R. Bank. R. 8010(a)(6); Fed. R. App. P. 28(a)(6). The appellee's brief only has to include a statement of the

case if the appellee is "dissatisfied" with the appellant's statement. Fed. R. Bankr. P. 8014(b); Fed. R. App. P. 28(b). While the statement of the case is not intended for persuasion, word choice in the presentment of the procedural history of the case can lend itself to subtle persuasion, and the opportunity for persuasion should never be missed.

This section also includes a statement of facts, with appropriate references to the record. Fed. R. Bank. R. 8014(a)(6); Fed. R. App. P. 28(a)(6).

4. The Summary Of The Argument

A summary of the argument may be included in a brief filed in the District Court and must be included in a brief filed in the Seventh Circuit. Fed. R Bankr. P. 8014(a)(7); Fed. R. App. P. 28(a)(7). The summary of the argument is a clear, concise, succinct synopsis of the most persuasive parts of the argument. It should not simply be a repeat of point headings, but instead should give the court more detail than is possible in the point headings and make subtle connections between the points of the argument. The summary does not need to address all matters addressed on the argument, but should give the court a good sense of the party's argument.

5. The Argument

The most important part of the brief is the argument section. This section is, of course, required in an appeal in both the district court and the Seventh Circuit. Fed. R. Bankr. P. 8014(a)(8); Fed. R. App. P. 28(a)(8). In this section, the goal is to give the judge what he or she needs to find in your client's favor: a clear analysis of the law and a logical application of the law to the facts (those facts that you have laid out in the fact section). The argument should be easy to read and easy to follow.

Consideration must be given to the arguments that will be included in the brief. Any argument that is not raised in the briefs is generally deemed waived. This, of course, does not

mean that a "kitchen sink" approach should be followed. Instead, weak arguments should be eliminated so that they do not detract from stronger arguments. The strongest argument should generally be the leading argument, unless there are strategic grounds to present another first.

Once the arguments are determined, the argument section should be divided into separate sections with point headings, which answer a corresponding issue presented. The point headings should be argumentative and specific statements that collect the substance of the argument so that when all of the point headings are read (such as in a table of contents), the reader has a clear outline of the brief's arguments. Beyond the point headings, subheadings can be used to make subsidiary points of the argument. All in all, the point headings and subheadings should, together, identify the ruling you want, identify or allude to the controlling or proposed rule of law, refer to the key facts that are material to your argument, and state the reason why the court should rule as you ask.

Within these point headings and subheadings, the arguments should be presented through a review of relevant precedent. This review should include a citation to authority, an analysis of the cases that support your client's propositions, which should include, where appropriate, a brief synopsis of the facts, holding and rationale of the applicable cases, and an application of the law to the facts of your case.

Remember, you are an advocate and your argument should reflect that by being forceful and direct. On the other hand, your argument should avoid rhetoric, overstatement or hyperbole, and never attack a court or opposing counsel. You also should limit the use of quotations and only use them when they add to the brief. The use of too many quotations can be distracting and unappealing. Footnotes also should be used sparingly and, if you are using one, you should

question whether the material you are putting in the footnote is important enough for the text or unimportant such that it should be removed altogether.

The Seventh Circuit website includes some guides for brief writing, including a helpful article on how typography and layout affect the written text. *See* http://www.ca7.uscourts.gov/rules-procedures//Handbook.pdf. In addition, the Seventh Circuit website contains a checklist for briefs, at http://www.ca7.uscourts.gov/forms/check.pdf and examples of briefs at http://www.ca7.uscourts.gov/briefex/BRindex.htm.

D. Federal Rule Appellate Procedure 28(j) supplemental authority

If "pertinent and significant authorities come to a party's attention" after the completion of briefing of oral argument, a party may file a supplemental authorities letter with the 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 Rule 28(j) letter is a good way to let the court know of a new opinion that came out after briefing or oral argument that supports your case. However, be careful in deciding if you want to file a Rule 28(j) letter as it will allow the other side a chance to respond. A Rule 28(j) letter can also be used with regards to oral argument if you want to correct an incorrect statement or retract an admission. If during argument you are unable to answer a question, you can also ask the panel for leave to file a Rule 28(j) letter to address the question.

VII. Post-Judgment

A. Petition for Panel Rehearing

A party may file a petition for rehearing within 14 days after judgment. Fed. R. App. P. 40(a)(1). A petition for rehearing must state each ground of law or fact the panel has overlooked that require rehearing and is limited to 3,900 words. Fed. R. App. P. 40(a)(2), (b). The prevailing party is not allowed to respond to a petition for rehearing unless the court directs a response. Fed.

R. App. P. 40(a)(3). If the petition is granted, it is in the panel's discretion whether to order new argument or briefing. Fed. R. App. P. 40(a)(4). Petitions for rehearing are rarely granted, and generally not worth the effort, unless the court has made a genuine mistake.

B. Petition for *En Banc* Review

A party may file a petition *en banc* within 14 days after judgment. *See* Fed. R. App. P. 35(c), 40(a). An *en banc* petition asks all of the judges in the Seventh Circuit to rehear the case and to overturn the panel's decision. The requirements to have an *en banc* petition granted are: 1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decision, or 2) the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(a). The chances of *en banc* review being granted are even lower than having a petition for rehearing granted.

C. Petition for Writ of Certiorari

The deadline for filing a petition for writ of certiorari to the Supreme Court is 90 days following the entry of judgment. *See* 28 U.S.C. § 2101(c). However, a petition for rehearing or *en banc* review tolls the 90 days period. Fed. R. App. P. 41(b).