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Bankruptcy Law

Fifteen Ways To Beat a Bankruptcy Appeal, Without Addressing the Merits

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You have just won a crucial motion in bankruptcy court. While you are relieved, you are concerned as well — because you know that the bankruptcy court could easily have ruled in your adversary's favor on the merits. Sure enough, the adversary files an appeal. Time to panic? Not necessarily. A district court may dismiss a bankruptcy appeal for any of a number of procedural reasons having nothing to do with the merits of the appeal. Thus, in opposing a bankruptcy appeal, an appellee should consider the following questions.

Is the appeal timely?

Bankruptcy Rule 8002(a) requires that a notice of appeal be filed within 14 days of the bankruptcy court order or judgment at issue. A district court lacks jurisdiction over an untimely appeal. *Shareholders v. Sound Radio, Inc.*, 109 F.3d 873, 878-79 (3d Cir. 1997).

Did the appellant refer to the order or judgment at issue in its notice of appeal?

A district court lacks jurisdiction over a bankruptcy court order or judgment that is not directly or indirectly referred to in the notice of appeal. *In re Smith*, WL 1716684 at *2 (3d Cir. June 22, 2006).

Is the bankruptcy court order final?

Under 28 U.S.C. § 158(a), a district court may hear appeals only from final judgments, orders and decrees of a bankruptcy court. Although district courts liberally construe finality in bankruptcy appeals, an order in a bankruptcy case may be considered interlocutory, and hence, subject to dismissal, if the order does not implicate a discrete issue which in and of itself will determine the rights and liabilities of the parties concerned. Thus, for example, in *In re Elsinore Shore Assocs*., a district court lacked jurisdiction over an appeal from an order approving a disclosure statement. 82 B.R. 339, 341-42 (D.N.J. 1988). Moreover, the general antipathy toward piecemeal appeals still prevails in individual bankruptcy adversary proceedings. Thus, for example, in *Natale v. French & Pickering Creeks Conservation Trust, Inc. (In re Natale)*, the Third Circuit held that an order granting summary judgment regarding the priority of competing liens, but not deciding whether the debtor could avoid a particular lien, was not a final appealable order. 295 F.3d 375, 379-80 (3d Cir. 2002).

Does the appellant meet the standard for interlocutory review?

If the appellant seeks review of an interlocutory bankruptcy court order, a district court may grant leave to hear an appeal from the order only upon the satisfaction of three elements: (i) the appeal involves a controlling question of law; (ii) the question is one on which a substantial ground for difference of opinion exists; and (iii) an immediate appeal would materially advance the ultimate termination of the litigation. *Orr v. Ameriquest Mortg. Co. (In re Hollis)*, 2010 WL 336132 at **1-4 (D.N.J. Jan. 22, 2010).

Does the appellant have standing to appeal?

Only a party whose rights or interests are directly and adversely affected in a pecuniary fashion by a bankruptcy court order may appeal from the order. *In re PWS Holding Corp*., 228 F.3d 224, 248-49 (3d Cir. 2000).

Is the appeal constitutionally moot?

Generally, a bankruptcy appeal, like an appeal in civil litigation, is dismissed as moot when events during the pen-

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dency of the appeal prevent the appellate court from granting any effective relief. So, for instance, in *In re Highway Truck Drivers & Helpers Local Union No. 107*, the Third Circuit held that an appeal relating to an order granting relief from the automatic stay to permit a debtor to move for reconsideration of a decision entered by a state court was rendered moot by an intervening state court judgment relieving the debtor of its liability to the appellants. 888 F.2d 293, 297-99 (3d Cir. 1989).

Is the appeal equitably moot?

A bankruptcy appeal is equitably moot when, even if the district court has jurisdiction to grant relief, implementation of such relief would result in an inequitable outcome. The doctrine usually applies in appeals involving a confirmed Chapter 11 plan of reorganization. In *Nordhoff Invs. Inc. v. Zenith Elecs. Corp.*, the Third Circuit found an appeal from an order confirming a Chapter 11 plan equitably moot on the following grounds: (i) the plan had required 18 months of negotiation among several parties and implicated hundreds of millions of dollars, restructured debt, assets, and management of a major corporation; (ii) the plan had successfully rejuvenated the corporation; (iii) the appellants had not offered evidence that the plan could be reversed without great difficulty and inequity; (iv) the appellants had failed to seek a stay of the order; (v) third parties had relied on the order; and (vi) reversal would be contrary to the public policy of encouraging successful reorganizations. 258 F.3d 180, 184-91 (3d Cir. 2001).

Is the appeal moot under section 363(m)?

According to Bankruptcy Code section 363(m), a sale or lease to a good-faith purchaser or lessee under section 363(b) or (c), once consummated, cannot be reversed or modified on appeal absent a stay. In *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, the Third Circuit dismissed as moot a buyer's appeal from an order approving a debtor's sale of franchises because the buyer had failed to obtain a stay of the sale pending appeal, the sale had closed, and the relief sought would have impacted the validity of the sale. 141 F.3d 490, 499-500 (3d Cir. 1998).

Is the appeal moot under section 364(e)?

Under Bankruptcy Code section 364(e), an order authorizing a trustee or debtor to obtain credit or incur debt from, or granting a priority or lien to, a good-faith lender, once implemented, cannot be reversed or modified on appeal absent a stay. In *Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, the Third Circuit held that an appeal from a post-petition financing order was moot because the proceeds of the loan had been immediately distributed to the debtor in possession, the district court had denied a stay of the order and the debtor in possession had apparently expended the loan proceeds. 16 F.3d 552, 559-63 (3d Cir. 1994).

Did the appellant fail to timely file a designation of record and statement of issues?

Bankruptcy Rule 8006 requires an appellant to file and serve, within 14 days after filing the notice of appeal or the entry of an order granting leave to appeal, a designation of items to be included in the appellate record and a statement of issues on appeal. Local Bankruptcy Rule 8006-1 requires the clerk to file and serve a certification of any failure to comply with the requirement. Such failure constitutes cause for dismissal of the appeal. *In re Mondelli*, 2009 WL 3358465 at **2-3 (3d Cir. Oct. 20, 2009).

Did the appellant fail to obtain a copy of the bankruptcy court hearing transcript?

If an appellant has designated a bankruptcy court hearing transcript as part of the record, Bankruptcy Rule 8006 requires the appellant to immediately deliver to the reporter and file with the clerk a written request for the transcript and to pay its cost. Failure to comply with this requirement constitutes cause for dismissal of the appeal. *Orr v. Buccolo (In re Buccolo)*, 2009 WL 146528 at **1-2 (3d Cir. Jan. 22, 2009).

Did the appellant fail to designate any issues in its statement of issues?

An appellant waives its right to assert an issue on appeal if it fails to designate the issue in its statement of issues. *Interface Group-Nevada, Inc. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 145 F.3d 124, 132 (3d Cir. 1998).

Did the appellant fail to timely file its appellate brief?

Bankruptcy Rule 8009 requires an appellant to file its brief within 14 days after entry of the appeal on the docket. Failure to comply with this requirement constitutes cause for dismissal of the appeal. *Nyholm v. Israel (In re Nyholm)*, 2009 WL 114884 at *2 (D.N.J. Jan. 12, 2009).

Did the appellant fail to raise its argument before the bankruptcy court?

A district court generally may not consider in a bankruptcy appeal an argument that was not raised before the bankruptcy court. *Buncher Co. v. Off. Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 253 (3d Cir. 2000).

Did the appellant fail to make its argument in its appellate brief?

An appellant may waive its right to raise an argument before the district court if its fails to make the argument in its appellate brief. *Interface Group-Nevada, Inc. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 145 F.3d 124, 132-33 (3d Cir. 1998).■