The Pivotal Election of a Bankruptcy Appeal

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National, state and local elections are right around the corner. While there are lots of issues to be decided by the electorate, not all voters adequately educate themselves before entering the voting booth. Even though voter apathy seems to at an all-time high, elections do matter. When appealing a bankruptcy decision, deciding between the bankruptcy appellate panel (BAP) and the district court can be the election that determines the winners and the losers.

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After an appeal is filed, both parties to a bankruptcy appeal have an opportunity to cast their vote for the BAP or the district court. See 28 U.S.C. §158(c)(1). If neither party timely elects the district court, the BAP is automatically "elected" as the appellate court. See 28 U.S.C. §158(c)(1).

But which candidate is better? As is the case is most elections, the answer is not always clear and it may depend on the circumstances surrounding the appeal. But first, the poll numbers.

Historically, the Ninth Circuit BAP has handled 49-60 percent of all bankruptcy appeals. See on page 43 here. Because all bankruptcy appeals are subject to an election, the Ninth Circuit BAP has been the popular choice by more than a simple majority. The popularity of the Ninth Circuit BAP could, however, be illusory and nothing more than a byproduct of its automatic designation as the de facto appellate court for a bankruptcy appeal. Or it could be the effectiveness of the Ninth Circuit BAP.

Recently, only 42.7 percent of all bankruptcy appeals before the Ninth Circuit Court of Appeals emanated from the BAP. See here. On the other hand, 57.3 percent of all bankruptcy appeals to the Ninth Circuit were taken from the district courts. Id.

Nationally, BAP decisions have a 83 percent chance of being affirmed; district court decisions stand only a 61 percent chance of being affirmed. See Jonathan R. Nash and Rafael I. Prado, An Empirical Investigation Into Appellate Structure and the Perceived Quality of Appellate Review, The Law School of the University of Chicago, John M. Olin Law & Economics Working Paper No. 367, October 2007 (at 41).

Based upon the empirical data, not only is the BAP more popular, but BAP decisions are appealed less frequently and are rarely vetoed by the circuit courts. But is the BAP the obvious choice in all situations? As is usually the case in elections, the correct choice depends on a variety of factors.

Other than electing the BAP or district court, the preliminary procedures for a bankruptcy appeal are the same for the BAP and the district court. See F.R.B.P. 8001-8007. Once the election occurs, the path of a bankruptcy appeal diverges.

Bankruptcy appeals pending before a district court located in the Central District of

California are governed by the three-and-a-half pages of rules found in Chapter IV of the Local Rules. Bankruptcy appeals submitted to the Ninth Circuit BAP, however, are subject to 11 pages of rules found in the Rules of the United States Bankruptcy Appellate Panel of the Ninth Circuit. The rules of the two courts are not the same.

For example, a Certification of Interested Parties and Notice of Related Cases is required to be filed "with the notice of appeal" in the district court. See rule 2.1. A similar disclosure is not required in the Ninth Circuit BAP until the initial brief is filed. See 8015(a)-1. If a party seeks an extension of time for briefing, a motion filed with the district court is ruled upon by the district court judge. See rule 5. A similar motion is not ruled upon by a BAP judge, but instead, the BAP clerk. See 8018(a)-1(b). These nuances are minor and are not necessarily sufficient reason to elect one court over the other. But there are very important differences between the two courts that should be weighed before one court is elected over the other.

One of the most significant differences between the Ninth Circuit BAP and a Ninth Circuit district court is the power to fashion mandamus relief. The Ninth Circuit has recently held that the Ninth Circuit BAP, which is not an Article III court, does not have jurisdiction to consider a petition for writ of mandamus. Ozenne v. Chase Manhattan Bank (In re Ozenne), 818 F.3d 514 (9th Cir. Cal. 2016). It is noteworthy the Ninth Circuit BAP will reconsider the Ozenne decision sitting en banc. Until then, however, the Ninth Circuit BAP cannot issue mandamus relief.

Unlike the Ninth Circuit BAP, a district court is an Article III court and is empowered to issue mandamus relief. See 28 U.S.C. §1651(a) (aka the "All Writs Act."). As a result, the Ozenne decision does not impair a district court's mandamus power. If mandamus relief is sought, the district court is the only appellate court that can afford mandamus relief.

Another difference is the number of judges deciding an appeal. Established by the Ninth Circuit Judicial Council in 1979, the Ninth Circuit BAP consists of seven bankruptcy judges that serve for a seven-year term. Each BAP appeal is heard by a panel of three judges. See 28 U.S.C. 158(b)(5). In appropriate circumstances, an appeal may be decided en banc by the Ninth Circuit BAP. See Rule 8019-(a). In contrast, only the judge of the assigned district court reviews a bankruptcy appeal, and there is no process for obtaining en banc appellate review. See FRBP 8005(a).

Additionally, the process for seeking oral argument after it has been waived is different. Under the local rules of the Ninth Circuit BAP, the BAP may determine that oral argument is not necessary and oral argument can be waived by the BAP. See Rule 8019-1. Although not codified as a rule or procedure in the Ninth Circuit BAP's local rules, appellants are often notified by a "clerk's order" that oral argument is not necessary and that appellants are permitted to file a written response to the clerk's order explaining the need for oral argument. Upon consideration of an appellant's response to the clerk's order, oral argument may be set by the Ninth Circuit BAP even though oral argument was previously determined to be unnecessary.

The district courts for the Central District of California, on the other hand, have no established rule or procedure on oral argument for bankruptcy appeals. See Chapter IV of the Local Rules. Even though the rules are silent on oral argument, district courts frequently waive oral argument and notify parties a decision will be rendered on the briefs without the opportunity for oral argument. Unlike the BAP's procedure for requesting oral argument, the district courts do not typically provide an order allowing appellants to seek permission to present oral argument.

Finally, some appeals are better tailored for a bankruptcy judge, while others may be better suited for a district court judge. Namely, parsing the text of complex provisions of the Bankruptcy Code is unquestionably within the wheelhouse of the BAP. On the other hand, obscure issues arising under nonbankruptcy law or procedure are more likely within the province of a district court judge's knowledge, experience and expertise. Hence, the election of the appellate court best suited to decide an appeal may increase the chances that an appeal will be properly decided.

Before casting a vote in the election between the BAP and the district court, appellants should consider the important differences between the two courts and weigh each carefully. Otherwise, voter apathy could materially affect the outcome of a bankruptcy appeal.

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