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The Appeals Begin When the Petition Is Filed

APPEALS

A SulmeyerKupetz attorney discusses the unique attributes of the appeals process in bankruptcy proceedings. The author warns that it is imperative to follow each step in the process or the result could be a time-consuming and expensive appeal that only results in an opinion dismissing the appeal without consideration of the underlying issues.

By David J. Richardson

Appellate practice in bankruptcy is unique in many ways. Unlike a traditional civil action that might lead to a single post-judgment appeal, a bankruptcy case might spawn a dozen or more appeals, a few of which might even lead to oral argument and a ruling. Bankruptcy appeals are often strategic, whether designed to create leverage by delay, or to tip the balance for future settlement discussions. Or, the appeals might be the tactic employed by a disgruntled debtor who appeals every adverse ruling throughout the case. But regardless of the reason behind an appeal in bankruptcy, there are unique strategic considerations that must be addressed from the outset of the case in order to ensure that the appeal will not be dismissed for mootness, lack of standing, or lack of jurisdiction.

A. Standing

There is a common misconception in bankruptcy that any creditor or other party with an economic interest in the case has the standing to appeal any order of the Bankruptcy Court. For this reason, a party might sit on the sidelines during particular proceedings, such as plan confirmation, only to decide that an appeal is necessary after the Bankruptcy Court's order has been entered. But at that point, it may be too late to pursue a successful appeal, regardless of the impact that the entered order might have on your client.

This was a tough lesson learned recently in the Chapter 9 bankruptcy case of the City of San Bernardino, in an appeal that arose from the Bankruptcy Court's order confirming the city's plan. As if often the case during a protracted proceeding such as plan confirmation, some creditors chose to file simple joinders to the more detailed objections that might have been filed by other, more-active creditors, or by a committee. It is an understandable strategy, as many creditors and other interested parties cannot afford the cost of having their counsel prepare a detailed objection. And if the party's sole litigation goal is to register disapproval for the plan, a joinder may be an appropriate strategy. But if the disapproval includes the potential desire to appeal an adverse ruling, then a joinder is a potentially insufficient means of ensuring standing.

A creditor in *Renter v. City of San Bernardino (In re City of San Bernardino)*, 2018 BL 4517 (C.D. Cal. Jan. 4, 2018), chose to file a simple joinder to another party's objection. But, as is often the case in bankruptcy, and particularly in plan confirmation proceedings, the creditor that had filed the detailed objection resolved its

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disputes with the debtor and withdrew its objection. That left a joinder on file that was joining a withdrawn brief. And in the opinion of the District Court, that deprived the creditor of standing to appeal. The District Court briefly summarized the Ninth Circuit's requirement for standing in bankruptcy appeals:

> Appellant standing for a bankruptcy order or decision only exists where the ''person aggrieved'' test has been met. *Fondiller v. Robertson (Matter of Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983). That is, ''[o]nly persons who are directly and adversely affected peculiarly by an order of the bankruptcy court have been held to have standing to appeal that order.'' *Id*. Furthermore, ''attendance and objection should usually be prerequisites to fulfilling the 'person aggrieved' standard''—except for circumstances where ''the objecting party did not receive proper notice of the proceedings below and of his opportunity to object to the action proposed to be taken.''

The District Court then concluded that the appellant that had filed only a joinder, and a co-appellant that had filed nothing at all, each lacked standing to pursue an appeal of plan confirmation. Appellants' general display of ''non-consent'' was deemed insufficient to create standing, as was the filing of a joinder to a withdrawn opposition. Given the lack of standing, the appeal was dismissed.

In this era of electronic filing, the means to ensure standing in a future appeal does not necessarily require expensive briefing if there are other involved parties. Copying was frowned upon in law school, but no one is likely to scream about copyright infringement if their arguments are repeated in another party's brief. There is little cost difference between a half-page joinder and a three-page brief composed of cut-and-paste arguments from another's just-filed brief. Even if your co-objector doesn't file their brief until nine o'clock at night on the last day to object, a simple cut-and-paste joinder/opposition that preserves standing and sufficiently raises future arguments for appeal can be prepared in a matter of minutes, and filed within the deadline. It may not be a brief to cite on your resume as an example of your best legal writing, but it may be sufficient to preserve your client's standing and issues for appeal if the original brief is withdrawn.

B. The Element of Reply-Brief Surprise

Page limitations, strategic considerations, and a desire to open with only the strongest arguments, are among the reasons that an attorney might wait to raise a particular argument until the reply brief. But it is a strategy that can doom a future appeal.

Bankruptcy Courts will typically refuse to consider a new argument that is raised in the reply brief, though enforcement of the rule will vary among judges. Local Rule 9013-1(g)(4) of the Local Rules for the U.S. Bankruptcy Court for the Central District of California specifically provides that ''New arguments or matters raised for the first time in reply documents will not be considered.'' If the Bankruptcy Court applies this rule, and does not consider the issue in its ruling, it is unlikely that it will be considered on appeal.

As a general rule, an argument that is not made before the Bankruptcy Court will usually not be considered on appeal. *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 980 (9th Cir. 2009). A court may exercise its discretion to review a new issue if it is purely an issue of law. *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996). But such discretion should not be taken for granted, as an appellate court may properly refuse to consider any issue on appeal that was raised for the first time in the reply brief filed in the Bankruptcy Court. *SEC v. Fujinaga*, 698 Fed. Appx. 865 (9th Cir. June 7, 2017) (refusing to consider argument that had been raised in the lower court only in the reply brief); *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (holding that ''the argument must be raised sufficiently for the trial court to rule on it'' to be preserved for appeal.).

In order to preserve every argument for appeal, each argument should be raised in the motion and sufficiently briefed so that the Bankruptcy Court can rule on the argument, regardless of what might be added in the reply brief. This might seem like a simple rule, but there are unique pitfalls in bankruptcy that can leave important arguments unaddressed until it is too late. For example, most Bankruptcy Courts have a procedure that permits rulings on motions without a hearing if no party files an objection within fourteen days of service of the motion. This ''negative notice'' procedure is used frequently for a long list of permissible motions, and can be heavily favored as a means to reduce the cost of obtaining certain relief. However, when a debtor's attorney approaches such a motion with a certainty that no one will object, or that any objection can be addressed at any future hearing, it can lead to a motion that fails to raise or properly brief all of the arguments that the Bankruptcy Court should be asked to rule upon, in order to ensure that each argument is preserved for appeal.

These ''negative notice'' motions are frequently filed with little argument simply because the outcome appears predictable. But it is a risky approach, as it may leave a future appeal with few of the movant's arguments preserved for the appellate court. An extra hour or two spent drafting a more complete motion might seem unnecessary at the time, if no objections are anticipated, but an extra hour or two could ensure a successful prosecution or defense of a future appeal.

C. Mootness

Unlike an appeal of a civil judgment for money damages, most appeals in bankruptcy risk dismissal on grounds of mootness if the appellant does not obtain a stay of the order pending resolution of the appeal. As a practical matter, this issue dooms many appeals before they are even filed. A Bankruptcy Court that has overseen a protracted chapter 11 case is unlikely to stay a confirmation order that could doom an otherwise successful restructuring. Similarly, a Bankruptcy Court is likely to be reluctant to stay an order selling real property of the debtor if the buyer is unwilling to remain on the hook while the closing is delayed indefinitely. As a result, many appellants do not even bother to seek a stay pending appeal, and the result is often a dismissal on the grounds of mootness.

In other circumstances, the successful parties may move quickly to take action that will moot any appeals—such as by closing a sale of real property as soon as possible following entry of the order—thereby limiting the time that a potential appellant has to seek a stay pending appeal. If a viable appeal of such an order is your client's goal, consideration should be given to

the strategy for obtaining a stay pending appeal long before the order is entered. Many courts will not consider an oral motion for a stay pending appeal at the initial hearing. But if the stakes are sufficient, there is no reason why an emergency motion for a stay pending appeal cannot have been drafted before the hearing is held, and then be filed within minutes of the order being entered. It may seem unnecessary at the time, but it is a far better expense than pursuing a stay-less appeal that will most likely be dismissed on mootness grounds.

D. Take Your Time and Build the Record

Pre-hearing settlements are commonplace in bankruptcy. Even settlements reached at the hearing are fairly common. And while they can affect the standing of those who file mere joinders, as mentioned above, they can also detrimentally affect the chances on appeal of the parties to those settlements if certain issues are not addressed at the hearing.

For example, in an ordinary sale hearing, a debtor or trustee can consider all forms of economic value when evaluating competing bids. While a stalking-horse bidder might have offered an all-cash deal, an overbidder might offer a settlement of pending litigation as one of its components of value. Accepting such an overbid might make perfect sense for the debtor and its creditors. But in order to do so successfully, and avoid a problematic appeal, the movant will need to ensure that the record shows that the Bankruptcy Court either continued the hearing to permit notice and a hearing on the merits of the settlement that serves as partial consideration, or that the Bankruptcy Court showed legitimate ''cause'' to dispense with notice, and then proceeded to address the standards for approval of a settlement under Fed. R. Bankr. P. 9019(a). In *Yang Jin Co. v. Miller (In re Kong)*, 2016 BL 180453 (9th Cir. BAP June 6, 2016), the BAP overturned an order of the Bankruptcy Court that had approved such an overbid sale, on the grounds that the Bankruptcy Court's conclusion that ''nobody else really cared'' about the settlement, other than those who had appeared at the hearing, was insufficient ''cause'' to dispense with notice of the settlement that served as partial consideration for the bid. Building a clearer record at the hearing to justify cause for an immediate ruling, or a short continuance to permit notice to all interested parties, could have ensured that the eventual order approving the sale would be protected in a future appeal.

In general, creation of a complete record, argument in the motion of all issues that might be raised on appeal, establishment of standing independent of third parties' briefs, and preparation for a rush to obtain a stay pending appeal, should all be considered and addressed when any initial motion is prepared and filed in a bankruptcy case. The alternative could be a time-consuming and expensive appeal that only results in an opinion dismissing the appeal without consideration of the underlying issues.

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