Presented:

The University of Texas School of Law
9th Annual Consumer Bankruptcy Practice

August 8 - 9, 2013
Galveston, Texas

Adversary Proceedings Nuts and Bolts From Filing through Appeal

Behrooz P. Vida

Behrooz P. Vida
The Vida Law Firm, PLLC
3000 Central Drive
Bedford, Texas 76021
Tel: (817) 358-9977
Fax: (817) 358-9988
behrooz@vidalawfirm.com
www.vidalawfirm.com

APPEALS

This paper is intended to provide a basic primer on appeals in the Fifth Circuit and to be a quick reference source only. Since the Fifth Circuit has opted not to utilize Bankruptcy Appellate panels, issues relating to such panels are not discussed in this paper.

This paper addresses appeals by private parties only and does not address the special rights and timelines that exit for the benefit of the federal government and the various agencies.

Before a decision to appeal is made, a three prong consideration must be made with respect to: (1) the financial considerations, (2) the legal considerations, and (3) the common sense considerations

Consumers who file bankruptcy have limited resources. Generally, an appeal is not in the budget! Trial transcripts are expensive. The longer a trial goes, the more expensive the cost of the appeal becomes. Travel expenses have to be taken into account if an appeal to the Fifth Circuit results in the granting of oral argument. Other financial considerations such as fees and briefing costs have to be considered as well. For example, the Fifth Circuit charges $5.00 for filing fee and $450.00 for docketing fee.

The legal considerations include (i) whether the appeal will be "an appeal as of right" or "an appeal by leave;" (ii) whether the standard of review on appeal will be "de novo" or "abuse of discretion;" after all, an appeal governed by de novo standard has a has a higher chance of success than one governed by abuse of discretion; and (iii) whether there is standing to appeal; for example, in *Manda v. Sinclair*, 278 F.2d 629 (5th Cir. 1960) the debtor had given a mortgage to a bank immediately before filing bankruptcy and the district court had decided that the mortgage was invalid as to the trustee. Debtor unhappy with the ruling, appealed to the court of appeals but the appeal was dismissed because the debtor lacked financial interest in the outcome even if the district court was to be reversed.

Common sense dictates that you make a determination of your chances for success even if you think you have a valid basis for an appeal. For the 12 month period which ended on June 30, 2012 bankruptcy appeals increased by 48 appeals or 60% (i.e. from 80 appeals in 2011 to 128 appeals in 2012). Of the appeals addressed in the area of bankruptcy law 16% resulted in reversal. By comparison the court of appeals addressed 2,692 criminal cases and only 2.8% of the cases were reversed. Overall, only 5.8% of the 3,989 appeals considered on the merit resulted in reversals. Therefore, bankruptcy law matters have the highest rate of success for reversal at the Fifth Circuit. The Fifth Circuit Clerk's Annual Report for 2011-2012 and the Statistical Snapshot may respectively be found at:

http://www.ca5.uscourts.gov/clerk/docs/arstats.pdf

http://www.ca5.uscourts.gov/clerk/StatisticalSnapshot.pdf

Once the decision has been made to proceed with an appeal to the district court, one must become intimately familiar with Bankruptcy Rules 8001 through 8020. Additionally, certain questions must be answered with respect to the judgment, order and decree of bankruptcy judge:

(1) Is it final?

(2) If not, is the judgments, order and decree *deemed* final under one of the judicially created exceptions?

(3) If the order is neither final nor deemed final, is the interlocutory order appealable with leave of the appellate court or pursuant to any applicable statute?

For simplicity, this paper limits itself to appeals as of right on final orders.

The established general rule is that the taking of an appeal transfers jurisdiction from the bankruptcy court to the appellate court with regard to any matters involved in the appeal and divests the bankruptcy court of jurisdiction to proceed further with such matters. *In re Texas Extrusion Corp*., 836 F.2d 217, 220-221 (5th Cir. 1988); *Midwest Properties No. Two v. Big Hill Inv. Co*., 93 B.R. 357 (Bankr. N.D. Tex. 1988).

I. FINAL ORDER

Some practitioners often look at the issue of final order on the basis of whether they can, or have the opportunity, to appeal. But if you have a final order, you MUST appeal before the deadline or you lose the ability to appeal.

The concept of finality in bankruptcy context is a flexible one. *ASARCO, Inc. v. Elliott Mgmt. (In re Asarco, L.L.C.),* 650 F.3d 593 (5th Cir. 2011); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985). As a result the Fifth Circuit has provided various descriptions of a final order in a bankruptcy case. For example, a final order –

- constitutes a "final determination of the rights of the parties to secure the relief they seek" in the suit. *In re County Management, Inc.,* 788 F.2d 311, 313 (5th Cir. 1986).

- finally disposes of a discrete dispute within the larger case. *In re Moody,* 817 F.2d 365, 367-68 (5th Cir. 1987).

- conclusively determines substantive rights of parties. *In re Delta Services Industries*, 782 F.2d 1267, 1270 (5th Cir. 1986).

The standard for determining finality is easy to state, but difficult to apply. That is why examples drawn from case law are helpful.

a. Automatic Stay

Orders granting or denying relief from automatic stay have generally been found to be final. *Chunn v. Chunn (In re Chunn)*, 106 F.3d 1239, 1241 (5th Cir. 1997). The rationales offered for the finality include: (i) the automatic stay is an injunction and orders granting or denying an injunction are final orders. *Id*. at 1241, (ii) orders denying or granting relief from stay require no further proceeding at the bankruptcy court and therefore are final. *In re Leimer*, 724 F.2d 744, 745 (8th Cir. Neb. 1984), and (iii) such orders are not final but should be deemed final under the collateral order doctrine. *In re Looney,* 823 F.2d 788 (4th Cir.), *cert denied*, 484 U.S. 977 (1987).

b. Claims

An order that conclusively determines a separable dispute over a

Title search: Adversary Proceedings Nuts and Bolts from Filing through Appeal

First appeared as part of the conference materials for the
9th Annual Consumer Bankruptcy Practice session
"Adversary Proceedings Nuts and Bolts from Filing through Appeal"