BANKRUPTCY APPEALS

2022 American Bankruptcy Institute Veterans Day Conference

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1. JUDGE OPPERMAN'S PRACTICE POINTERS FOR APPELLATE ATTORNEYS

There are three major areas that can impact your appeal.

A. TAKING AND PERFECTING AN APPEAL

- **Meet all deadlines** - - Time is important in the appellate process, so make sure you know and then meet each deadline. If you miss a deadline, your appeal may be dismissed without a hearing. You are then left scrambling to attempt to reinstate your appeal.

- **File a complete designation of the record** - - You need to ensure that all the pleadings and exhibits that you want in the appellate record are transmitted to the District Court or BAP. Don't rely on opposing counsel to do this for you and don't expect the Bankruptcy Court, the District Court or BAP to find it for you.

- **Be precise on what is designated** - - The bankruptcy clerk's office has to search through a lot of entries to include in the transmittal. Help them help you by making that easy to find. Also, if someone from the clerk's office calls you for guidance, take or return the call and cooperate.

- **Be familiar with local practice** - - Familiarize yourself with the applicable court website, which may include practice pointers and local rules specific to bankruptcy appeals.

B. DRAFTING THE BRIEF

- **Identify the important issue(s)** - - You have time to do this, so think about how to frame the issues that you want considered on appeal. Hopefully, you raised that issue at the trial court level, perhaps early and often. This also helps you write a concise and persuasive brief.

- **Stay within the page limits** - - The page limits are there for a reason, and fatigue sets in with longer briefs. If you are over the page limit in your first few drafts, consider editing out sections that are duplicative or words that are unnecessary. The editing process takes time, so don't sit down the night before the brief is due to write your first draft.

- **If you think you need a page extension, reconsider your request** - - Some judges may grant extensions like giving out candy at Halloween, but ask yourself if you really need it, and then ask a partner or trusted colleague what she thinks.

- **Be concise and on point** - - Persuasive writing is often concise and clear. It also helps you stay within the page limits. A shorter, well written brief is often more persuasive because the focus is on the important facts and law, and no lost in the clutter.

- **Be accurate in your case citations and quotes** - - It seems simple, but you would be surprised at the number of incomplete or incorrect case cites. Worse yet, too many briefs cite cases for doubtful principles of law. There are some instances where the quoted language is either incomplete or misleading. Chances are your adversary will catch this, and if not, the judge will.

- **Don't repeat** - - The other side of the coin of Part D. While it is appropriate to emphasize certain facts and law, pure repetition is not persuasive. Don't feel the need to fill the full page limit with repetitive statements.

C. ORAL ARGUMENT

- **Ask for oral argument** - - Whenever possible, you want another chance to convince the District Court or BAP. If the issue was important enough to appeal, you should be ready to go all out. If you represent the Appellee and can't afford oral argument, it may be time to consider Settlement.

- **Have a reason for oral argument** - - Some courts require the parties to have a good reason to have oral argument, so you should know why the issues in the appeal needs oral argument. Also, knowing why you need oral argument helps you make your oral argument.

- **Don't misrepresent the law or facts**.

- **Be aware of any time constraints** - - If oral argument is limited to 15 minutes, stay well within the time limits. You may get interrupted by questions or have to deal with a new twist on an issue, so give yourself time to do so. If you are the Appellant, reserve 1-3 minutes for rebuttal, otherwise you won't get the last word on argument. Also, judges vary as to enforcement of time. Some judges will cut you off mid-sentence.

- **Listen to questions asked of opposing counsel and of you** - - The questions give tips of what issue a judge thinks important, so you may want to tailor your argument. In doing so, be prepared for the opposite side of the issue when it is your turn. It goes without saying that when a judge asks you a question, you should answer that question.

- **Stay on task** - - Your oral argument should be structured and focused on 2-3 issues. You will be interrupted by judges with their pesky questions, so answer that question and then go back to your issues – but not necessarily your script.

- **Don't read from your brief** - - The judge can read faster than you can talk and has already read your brief. Ditto for long quotes. Instead, prepare talking points and go from there. You can then handle the inevitable interruptions and detours, get back on point, and persuasively argue for your client.

- **"Be sincere, be brief, be seated"** - - A phrase attributed to FDR, who knew how to convince people to do things. You don't need to fill all your allotted time, so if you have made your arguments effectively, with no questions from the bench, you can thank everyone and sit down.

2. GETTING IT RIGHT IN THE BANKRUPTCY COURT

A. INTRODUCTION

In preparing for this panel, the panelists agreed that, before there is an appeal, one should try to *prepare* and *think about* the possibility that either party may appeal. If you think that there may be an appeal, then it is imperative that one should put forth the best possible record in their case.

While your case may seem obvious to you, it is not always obvious to the trial court. You should view it as your job to educate the court about the facts of your case, as well as the law. It is not the job of the court to make your arguments for you, nor do they or their law clerks have the time to do so.

It is especially important that in educating the courts about your case that you put forth a case and record that an appellate court can review. The reviewing court has documents to review, including transcripts of hearings and depositions, and does not have the benefit of judging the

demeanor of testifying witnesses. Often, there is much for the appellate court to sift through and parse. Many times, oral argument in bankruptcy appeals is not granted, and decisions are rendered on the briefs alone.

Also, putting forth the best possible case can have the effect of deterring the other side from appealing. This can often be the case where the factual record is one-sided because factual findings are only set aside for clear error. If you can win on the facts, do so!

Finally, even if bankruptcy counsel will not be engaging in a subsequent appeal, bankruptcy counsel should still put forth a case that enables subsequent appellate counsel to put forth the best possible case on appeal.

B. KNOW THE ELEMENTS OF YOUR CASE

Although the strictures of the old common law pleading have given way to more liberal pleading rules, it is no longer sufficient to merely parrot the rote elements of a cause of action. Under the Supreme Court cases of *Twombly*[1] and *Iqbal*,[2] one must provide *factual* matter sufficient to show that the party is plausibly entitled to the requested relief. Failure to properly plead the elements of the case can lead to dismissal.

Furthermore, when proving your case, and in order to survive a motion for summary judgment, one must provide *facts* pertaining to *each* element of the case and parties cannot rely on the pleadings. Rule 56 requires citation to the record, with affidavits, documents, deposition transcripts, etc.

Even if the bankruptcy litigation is a contested matter, counsel must be able to provide *evidence* and not just stand on unsupported assertions.

Although bankruptcy is in many ways "form driven," and many issues can be easily resolved or handled, it appears that there is a temptation to take the short route in order to save time and money. Understandably, the economics of a situation can make it difficult to put in the time necessary. But, in the end, putting forth the time to develop facts and argumentation will end in better results for the client, and avoiding the need for further litigation trying to rectify oversights and mistakes.

C. DEVELOP THE ARGUMENT CLEARLY AND COMPLETELY

Many were taught in law school to put forth your best arguments first, and exclude the weakest arguments. However, in actuality, what counsel may learn is that they *should* put forth even the "weaker" arguments and make efforts to try to develop all the arguments that can be made.

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[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)
[2] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)

One cannot be certain what will catch a court's attention, or how that court may be swayed. Facts catch the eyes, and impress and mean different things to different people. Legal arguments persuade, or fail, based on the bent and experience of the court.

In reading various decisions, counsel learns that there are many times that a court will decide a case in a party's favor on what looks like, at first blush, the weakest argument. Sadly, and too often, certain arguments that may be perfectly valid are raised on appeal for the first time – but were not raised in front of the trial court. Generally, a court will not review those arguments made for the first time.

Therefore, given that uncertainty, it may be prudent to address all possible arguments to the court, because, failing to do so can result in waiver of an argument that was not raised or which counsel failed to articulate or develop. It may be the winning argument!

Besides, you would be standing on better ground to address all of your arguments to the court, taking your cue from one of the cases that the Sixth Circuit quotes all too often:

> "Perhaps more important, we see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."

United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)

D. MAKE A GOOD RECORD

This point may seem obvious, but it is so vital – bankruptcy counsel should be of the mind to put forth the best possible case with an eye to dealing with a potential appeal.

One issue which your panelist has seen all too often is the simple failure to put forth detailed facts in affidavits. Affidavits provide the factual basis to the court and are necessary for the bankruptcy court to make the factual determination supporting its decision.

Bankruptcy judges have denied what should be routine motions to extend the automatic stay due to the failure to even provide an affidavit with factual matter supportive of the motion.

Your panelist has seen opposing counsel fail to point to documents, deposition testimony, or even file affidavits in support of a motion for summary judgment in adversary proceedings. This was fatal to the case and opposing counsel was left scrambling trying to amend a complaint after the close of discovery and motions for summary judgment were filed.

Also seen is the failure to do adequate discovery, request documents, conduct depositions, and the like. Of all the things that should be done, it is the factual presentation in a motion or complaint which is the bedrock supporting your position. Bankruptcy Rule 9014(c)

makes discovery under Rules 26 and 28-37 available in contested matters, and counsel should take advantage of the opportunity to conduct discovery.

Again, any appeal is determined by the underlying record, and a sparse record on appeal can leave the appellate judges frustrated. Without evidence in the record, an appellate court will likely have no basis to overturn a decision which could be overturned.

3. POST JUDGMENT MOTIONS

In trying to correct a judgment that bankruptcy counsel believes to be erroneous, the first appeal is not necessarily to the district court, but to the bankruptcy court itself.

There are numerous methods provided for by the Federal Rules of Civil Procedure for correcting the bankruptcy court's decision. These include motions for reconsideration (Rule 59(e)), for relief from judgment (Rule 60(b)), to amend or make additional findings of fact (Rule 52(b), or for a new trial (Rule 59(a)).

It can be beneficial to make your first appeal to the bankruptcy court that rendered a decision against you. The bankruptcy court heard testimony and arguments and can be in the best position to reconsider its position. Granted, the bankruptcy court that just ruled against counsel may not be the most sympathetic court to appeal to. But, bankruptcy judges in this district *have* granted motions for reconsideration.

Furthermore, *failure* to make such motions prior to filing a notice of appeal may also cost counsel the opportunity to make these initial appeals for correction and prevent later attempts to do so.

A. LOST OPPORTUNITY – LOSING JURISDICTION – BUT INDICATIVE RULING!

The first reason to seek relief from the bankruptcy court in the first instance is because you may lose the ability to raise your meritorious motion for reconsideration or for relief from judgment.

The simple reason is that the filing of a notice of appeal transfers jurisdiction of the case to the court of appeals, and the district court no longer has jurisdiction "except to act in aid of the appeal." *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 n.1 (6th Cir. 1976). See also *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

Thus, once the notice of appeal is filed and case is docketed, *the bankruptcy court lost jurisdiction of the case!*

The point to make is that if you believe that you have the opportunity to correct the bankruptcy court, and you want to raise a motion for reconsideration or relief from judgment, make that case *before* filing a notice of appeal.

If you do file the notice of appeal first, and you later realize that you might have raised a motion for reconsideration or for relief from judgment, there is a method for raising such motions after the fact. Bankruptcy Rule 8008 allows for "indicative rulings." Basically, the bankruptcy court can "indicate" to the district court or BAP that "it would grant the motion or that the motion raises a substantial issue." The court hearing the appeal retains jurisdiction and "may" remand to the bankruptcy court and allow for the motion to be heard.

B. NO EXTENSION OF TIME TO FILE MOTIONS FOR RECONSIDERATION AND RELIEF FROM JUDGMENT

Bankruptcy counsel should be aware that under Rule 6(b)(2), a court has no authority to extend the time to file motions under either Rule 59(e) or (60)(b). Thus, a late filed motion will not save the right to appeal.

If a court *erroneously*, extends the time for filing a motion for reconsideration or motion for relief from judgment, and the resulting notice of appeal is actually untimely, an appellate court may still hear the appeal under the "unique circumstances" doctrine.

The "unique circumstances" doctrine stems from the Supreme Court case of *Thompson v. INS*, 375 U.S. 384 (1964) and was later clarified by the Supreme Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989) and applies in cases "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."

The Sixth Circuit recognizes the "unique circumstances" doctrine. See *Lawrence v. International Brotherhood of Teamsters*, 320 F.3d 590 (6th Cir. 2003) and *Bowles v. Russell*, 432 F.3d 668 (6th Cir. 2005).

C. EFFECT OF FILING OF MOTION ON THE TIMING OF FILING OF NOTICE OF APPEAL

Bankruptcy Rule 8002 alters the timing of the filing of a notice of appeal if certain motions are filed. That rule states:

> (b) Effect of a Motion on the Time to Appeal.
>
> > (1) In General. If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

> (A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;
>
> (B) to alter or amend the judgment under Rule 9023;
>
> (C) for a new trial under Rule 9023; or
>
> (D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

Thus, the filing of any of the aforementioned motions extends the time for filing of a notice of appeal until after resolution of the motion.

Importantly and immediately, one should notice the effect of 8002(b)(1)(D) and its effect on motions brought under Bankruptcy Rule 9024.

Bankruptcy Rule 9024 covers *any* relief sought under Rule 60, including relief under Rule 60(b). *However*, Rule 60(c) allows a motion to be brought under Rule 60(b) within a "reasonable time" or within one year after the judgment, depending on the relief sought.

The impact of 8002(b)(1)(D) is that the any motion brought under Rule 60(b) must be made within 14 days after entry of the judgment, ***regardless of the time limits of Rule 60)(c)***, if you seek to also extend the time to file the notice of appeal.

D. MOTIONS FOR RECONSIDERATION / ALTER OR AMEND JUDGMENT – RULE 59(E)

i. GENERALLY

In reality, there is no provision under the Federal Rules of Civil Procedure for a "motion for reconsideration." Instead, a motion for reconsideration is treated as a motion to alter or amend a judgment under Rule 59(e). See *Peabody Coal Co. v. United Mine Workers*, 484 F.2d 78, 81 (6th Cir. 1973) ("The present case involves a motion to reconsider, which is in the nature of a Rule 59 motion to alter or amend judgment, and therefore should be treated similarly.")

Bankruptcy Rule 9023 incorporates Rule 59 for all purposes.

ii. TIMING OF MOTION

Per Bankruptcy Rule 9023, a motion to alter or amend judgment must be brought within 14 days after entry of judgment.

Note that there can be a question of when the judgment has been finally entered. In the case of *Shapiro v Woodberry (In re Woodberry)*, 2022 U.S. App. LEXIS 9053 (6th Cir. 2022) the Sixth Circuit found that Rule 59(e) was not applicable to a trustee's motion to amend a judgment because the bankruptcy court's initial judgment did not dispose of all the Trustee's claims.

What happens if you file the motion for reconsideration on the same day that you file a notice of appeal? The notice of appeal is suspended while the court considers the motion for reconsideration. See *Markowitz v. Campbell (in re Markowitz)*, 190 F.3d 455 (6th Cir. 1999).

iii. STANDARD OF REVIEW FOR MOTION TO RECONSIDER / ALTER OR AMEND JUDGMENT

A court reviews the decision on a Rule 59(e) motion for abuse of discretion. *Intera Corp. v. Henderson*, 428 F.3d 605, 619 (6th Cir. 2005).

Furthermore, courts in this district will turn down such motions if the motion fails to demonstrate a palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof.

E. MOTIONS FOR RELIEF FROM JUDGMENT – RULE 60

i. RELIEF AVAILABLE

Rule 60 contains two important provisions for the correction of erroneous judgments and Rule 60 is incorporated by Bankruptcy Rule 9024, with some caveats.

Relief under Rule 60(a) allows a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."

Rule 60(b) allows for six forms of relief from judgment. The basis for relief are:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

ii. TIMING OF MOTIONS UNDER RULE 60 – AND TRAPS FOR THE UNWARY!

The effect of Bankruptcy Rule 8002(b)(1)(D) and its effect on the timing of the filing of a motion under Rule 60(b) if the timing of a notice of appeal is to be extended has already been noted above.

This next exception is not bankruptcy specific, but is a generally applicable exception when counsel seeking a motion for relief from judgment arguing that the court made a mistake of law and is worth noting.

A Rule 60(b)(1) motion for a "mistake" also covers mistakes of law. The normal reading of the Rule 60(c) would be that one should have at least a year to make a Rule 60(b)(1) motion for a mistake of law.

However, the Sixth Circuit has held that when it comes to rectifying mistakes of law, a Rule 60(b)(1) motion must be filed within the normal time for filing an appeal if the court is to consider the denial of any such motion on appeal. See *Daniel v. DTE Energy Co.*, 592 Fed Appx. 489 (6th Cir. 2015) (citing *Barrier v. Beaver*, 712 F.2d 231, 234 (6th Cir. 1983).

iii. STANDARD OF REVIEW FOR RULE 60(B)

1. GENERALLY

"A motion to vacate judgment under Rule 60(b) is addressed to the sound discretion of the Court, whose determination will not be disturbed upon appeal except for an abuse of discretion." *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957).

2. MISTAKE, INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLECT

a. MISTAKE

In an important decision, the Supreme Court recently confirmed that the term "mistake" in Rule 60(b)(1) applies to mistakes of law as well as mistakes of fact. *Kemp v. United States*, 142 S. Ct. 1856 (2022). The rule is not limited to "obvious" mistakes of law. Also, the mistake can be the party's or the judge's.

One very interesting point implicated by *Kemp* is whether or not a later change in the law (by means of overruling earlier decisional law) can give grounds for relief due to a "mistake" in the law.[3] In footnote 2 of the opinion the court slipped in this comment:

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[3] Apart from Rule 60(b)(1), but certainly related to it, the subject of whether or not relief will be given to a party for making a mistake of law can make for interesting reading. In Michigan, there are cases that give relief to a party who makes a mistake of law. Counsel is urged to study the following cases: *Tabor v. Michigan Mut. Life Ins. Co.*, 44 Mich. 324, 330-331 (1880); *Renard v. Clink*, 91 Mich. 1, 3 (1892); *Walter v. Walter*, 297 Mich. 26 (1941); *Moritz v. Horsman*, 305 Mich. 627 (1943); and *Stone v. Stone*, 319 Mich. 194 (1947). From an international perspective, the House of Lords granted relief from a

> Here, Kemp alleged that the District Court erred by misapplying controlling law to record facts. In deciding that this alleged error is a "mistake," we do not decide whether a judicial decision rendered erroneous by subsequent legal or factual changes also qualifies as a "mistake" under Rule 60(b)(1).

Justice Sotomayor, in a concurring opinion, picked up on this point in her concurring opinion and made the same point with respect to Rule 60(b)(6).

For the standard of review, the Sixth Circuit has stated:

> In order to be eligible for relief under 60(b)(1) the movant must demonstrate the following: (1) The existence of mistake, inadvertence, surprise, or excusable neglect. (2) That he has a meritorious defense.

Marshall v. Monroe & Sons, Inc., 615 F.2d 1156, 1160 (6th Cir. 1980). The requirement that there be a meritorious defense ensures that the reviewing court is not engaging in a futile act.

As noted previously, if counsel is alleging a mistake of law, this is covered under Rule 60(b)(1). *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1985).

b. EXCUSABLE NEGLECT

One of the motions often seen is a request for relief from judgment because of a missed deadline to respond, file papers, or other attorney error – claiming excusable neglect. Maybe a deadline was scheduled, notice was not sent to a client, or some other reason. Whatever the reason, the motion is brought as a way of an attorney to fall on the proverbial sword, plead for relief from the court, and not visit the consequences of the attorney's error on the client.

A court's determination of excusable neglect is reviewed for an abuse of discretion. *Nafziger v. McDermott International Inc.*, 467 F.3d 514, 522 (6th Cir. 2006). The determination of excusable neglect is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Partnership*, 507 U.S. 380, 395 (1993). In *Pioneer*, the Supreme Court set out five factors for courts to balance when determining the existence of excusable neglect:

> (1) the danger of prejudice to the nonmoving party,
>
> (2) the length of the delay and its potential impact on judicial proceedings,

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mistake of law where interest payments were made under swap agreements – the agreements later being ruled illegal. Mistaken payments were allowed to be recovered. See Lord Goff's excellent opinion in the case of *Kleinwort Benson v. Lincoln City Council*. https://www.bailii.org/uk/cases/UKHL/1998/38.html

(3) the reason for the delay,

(4) whether the delay was within the reasonable control of the moving party, and

(5) whether the late-filing party acted in good faith.

Importantly, as *Pioneer* makes clear, the fact that the attorney erred is *not* necessarily grounds for relief. As the court stated there: "we have held that clients must be held accountable for the acts and omissions of their attorneys." *Pioneer*, at 396.

Furthermore, an attorney's strategic errors, blunders, or misreading of the law do not constitute grounds for relief under Rule 60(b)(1). *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 593-594 (6th Cir. 2002).

c. FRAUD, MISREPRESENTATION, MISCONDUCT

To be entitled to relief under Rule 60(b)(3), the moving party must prove fraud, misrepresentation or misconduct by an opposing party. The Sixth Circuit has explained the relevant misbehavior as follows:

> "Misrepresentation" can be interpreted as an affirmative misstatement. "Fraud" can be interpreted as reaching deliberate omissions when a response is required by law or when the non-moving party has volunteered information that would be misleading without the omitted material. And "other misconduct" can be interpreted to reach questionable behavior affecting the fairness of litigation other than statements or the failure to make statements.

Jordan v Paccar, Inc., 1996 U.S. App. LEXIS 25358 (6th Cir. 1996).

Many are the ways that fraud can be practiced on the court or the parties during the course of litigation and these materials could not possibly cover all the machinations of parties or counsel.

However, two issues are worth noting in particular: (1) the withholding of information during discovery, and (2) perjury.

Both issues were addressed in the case of *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976). The points that are worth taking away from the case are the following:

- The failure of a party to disclose or provide discovery not requested, and which may be helpful to the other side, is not fraud.

- The willful failure to provide requested documents *may* be fraud.

- The fact that a person commits perjury is not necessarily fraud on the court.

- "Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." *H.K. Porter*, at 1119.

- A party must be able to demonstrate fraud *first* before asking for additional post-judgment discovery.

In order to set aside a judgment based on Rule 60(b)(3), the fraud must be shown by clear and convincing evidence.

d. JUDGMENT IS VOID

Relief under Rule 60(b)(4) is granted where the judgment is void.

In the bankruptcy context, this rule was applied in the Supreme Court case of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

In *Espinosa*, the Supreme Court dealt with the situation in which a Chapter 13 plan was confirmed containing a provision discharging the interest portion of student loan debt after payment of the principal amount without any determination of undue hardship under § 523(a)(8). Debtor paid, completed his plan, and received a discharge. When the creditor later sought to collect the unpaid interest, the debtor reopened the case to enforce the discharge injunction.

The Ninth Circuit ultimately found that the confirmation order was a final order from which the creditor could have appealed, but did not. At most, the bankruptcy court committed legal error in confirming the plan, but that did not render the confirmation order "void."

In affirming the Ninth Circuit, the *Espinosa* court held that "a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa*, at 270. The court went on to note that judgments are not void simply because they are erroneous. *Id.*

Another reason to consider a judgment void is due to lack of subject matter jurisdiction. The *Espinosa* court addressed this argument as well, noting that if the trial court is merely erroneous in finding that it has subject matter jurisdiction, this is not enough to seek relief under Rule 60(b)(4). Instead, the *Espinosa* court held that "[f]ederal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Espinosa*, at 271.

Give the Supreme Court's view as expressed in *Espinosa*, the granting of relief under Rule 60(b)(4) is a tough hill to climb.

The important takeaway – a legally erroneous order is not "void."

e. ANY OTHER REASON JUSTIFYING RELIEF

Relief under Rule 60(b)(6) is given in "extraordinary circumstances." *Pioneer Investment Services*, at 393.

Furthermore, relief covered under Rule 60(b)(1)-(5) cannot be sought under Rule 60(b)(6). As explained by the Sixth Circuit:

> This Circuit adheres to the view that courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. See *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1985), cert. denied, 474 U.S. 1104, 88 L. Ed. 2d 925, 106 S. Ct. 890 (1986). A claim of strictly legal error falls in the category of "mistake" under Rule 60(b)(1) and thus is not cognizable under 60(b)(6) absent exceptional circumstances. See *id.*, at 451. The parties may not use a Rule 60(b) motion as a substitute for an appeal, Federal Practice § 2852 at 142, or as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise. *Federal's, Inc. v. Edmonton Investment Co.*, 555 F.2d 577, 583 (6th Cir. 1977). Notwithstanding the extraordinary nature of relief under 60(b)(6), district courts may employ subsection (b)(6) as a means to achieve substantial justice when "something more" than one of the grounds contained in Rule 60(b)'s first five clauses is present. See Federal Practice § 2864, at 219-20. Accordingly, a motion made under Rule 60(b)(6) is addressed to the trial court's discretion which is "especially broad" given the underlying equitable principles involved. Cf. *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985); *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981).

Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989).

One of the extraordinary circumstances that can give rise to relief under Rule 60(b)(6) is where the underlying substantive law has changed. See the relatively recent case of *Buck v Davis*, 580 US 100; 137 S Ct 759; 197 L Ed 2d 1 (2017). There, the Supreme Court granted relief under Rule 60(b)(6) where the underlying law had changed. *Buck* was cited by Justice Sotomayor in *Kemp v. U.S.*, 142 U.S. 1856 (S. Ct. 2022), where she stated:

> I join the Court's opinion with the understanding that nothing in it casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law. See, e.g., *Buck v. Davis*, 580 U. S. 100, 126, 128, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017) (concluding that the petitioner was "entitle[d] to relief under Rule 60(b)(6)" because of a change in law and intervening developments of fact); *Gonzalez v. Crosby*, 545 U. S. 524, 531, 125 S. Ct. 2641, 162 L. Ed. 2d 480

> (2005) ("[A] motion might contend that a subsequent change in substantive law is a 'reason justifying relief,' Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim"); *Polites v. United States*, 364 U. S. 426, 433, 81 S. Ct. 202, 5 L. Ed. 2d 173 (1960) (leaving open that a "clear and authoritative change" in the law governing judgment in a case may present extraordinary circumstances). Today's decision does not purport to disturb these settled precedents.

Kemp, at 1865.

Importantly, the fact that a party may have a meritorious defense is not sufficient to warrant Rule 60(b)(6) relief. *Rogan v Countrywide Home Loans, Inc (In re Brown)*, 413 BR 700 (BAP 6th Cir, 2009).

Also worthy of note, in the case of *Zurich American Ins Co v Int'l Fibercom, Inc (In re Int'l Fibercom, Inc)*, 503 F3d 933 (9th Cir. 2007) the court there upheld the bankruptcy court's grant of relief under Rule 60(b)(6) where the bankruptcy court's prior order violated § 365.

F. STAY PENDING APPEAL

In the event of an adverse decision, bankruptcy counsel should consider filing a motion for a stay pending appeal. This is especially true because (1) an judgment/order is enforceable until overturned, and (2) by the express terms of Rule 60(c)(2), a motion for relief from judgment "does not affect the judgment's finality or suspend its operation."

A stay pending appeal is governed by Bankruptcy Rule 8007.

As to the standard in considering whether to grant a stay pending appeal, the Sixth Circuit explained as follows:

> In determining whether a stay should be granted under Fed. R. App. P. 8(a), we consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.
>
> Although the factors to be considered are the same for both a preliminary injunction and a stay pending appeal, the balancing process is not identical due to the different procedural posture in which each judicial determination arises. Upon a motion for a preliminary injunction, the court must make a decision based upon "incomplete factual

findings and legal research." Even so, that decision is generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.

Conversely, a motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment, usually following completion of discovery. As a result, a movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.

To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."

In evaluating the harm that will occur depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. In evaluating the degree of injury, it is important to remember that

> [t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again.

Michigan Coalition of RadioActive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153-54 (6th Cir. 1991) (citations omitted).

The moving party bears the burden of proving by a preponderance of the evidence that a stay should issue. *In re Holstine*, 458 B.R. 392, 394 (Bankr. E.D. Mich. 2011) (McIvor). "[A] court's decision to [grant or] deny a Rule [8007] stay is highly discretionary." *Id*. (quoting *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997)).

4. BANKRUPTCY APPELLATE JURISDICTION

A. 28 U.S.C. § 158

The jurisdiction of a court of appeals over bankruptcy decisions begins with 28 U.S.C. § 158. Importantly, that section provides that:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
>
> * * *
>
> (d)
>
> (1) The courts of appeals shall have jurisdiction of appeals from all *final* decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section

Under 28 U.S.C. 158(a)(3) the *district courts* have jurisdiction to hear appeals of interlocutory orders. Such appeals are granted by leave.

However, § 158(d)(2) provides that the *circuit court* may only hear "*final* decisions, judgments, orders, and decrees entered under subsections (a) and (b)."

Although the District Court can hear the appeal of an interlocutory order, bankruptcy counsel cannot appeal as of *right* the District Court's decision to the Circuit Court because it is not *final*. An order appealed under § 158(a)(3) is not a *final* order. See *In re Cottrell*, 876 F.2d 540 (6th Cir. 1989).

If the District Court order "cures" the issue of finality, then the appeal may be heard by the Circuit Court. As explained by the court in *Cottrell*:

> This section has been interpreted to vest a court of appeals with jurisdiction when both the bankruptcy and district courts' orders are 'final.' Conversely, if the bankruptcy court's order is interlocutory the general rule is that a court of appeals lacks jurisdiction unless the district court order in some sense 'cures' the nonfinality of the bankruptcy court order. The concept of 'finality' in the bankruptcy context for purposes of appellate review to both the district court and court of appeals should be viewed functionally. In this regard, the courts of appeals have consistently considered finality in a more pragmatic and less technical way in bankruptcy cases than in other situations.

Cottrell, at 541-542.

This does *not* prevent *circuit courts* from hearing appeals from orders that are interlocutory.

B. ADDITIONAL SOURCE OF APPELLATE JURISDICTION – 28 U.S.C. § 1292

The Sixth Circuit has held that § 158 is *not* the exclusive source of appellate jurisdiction and 28 U.S.C. 1292 can also be utilized to confer jurisdiction on the circuit court. *In re Baker & Getty Financial Services*, 954 F.2d 1169 (6th Cir. 1992). That said, as was even noted by the Sixth Circuit, this is a *minority* view. See *Baker & Getty*, at 1171 and fn 6.

Importantly, 28 U.S.C. § 1292 allows for the circuit court to hear appeals of interlocutory orders.

5. STANDING TO APPEAL

The burden for establishing standing is on the party bringing the lawsuit.

General Standing Requirements

1. Plaintiff must have suffered an injury in fact;
2. Injury must have been caused by Defendants;
3. Injury must be redressable by a judicial decision

Spokeo v. Robins, 136 S.Ct. 1540, 1548 (2016)

A. RECENT 6TH CIRCUIT CASES RE STANDING TO APPEAL

Huff v. Telecheck Servs., 923 F.3d 458, 462 (6th Cir. 2019), *cert denied*, 140 S. Ct. 1117 (2020).

To have Article III standing, a plaintiff cannot simply allege that the defendant violated the statute and that alone caused injury. Instead, the plaintiff must allege some injury that is "real, not abstract, actual, not theoretical, concrete, not amorphous." (citing *Spokeo v. Robins*, 136 S.Ct. 1540, 1548 (2016)). The court dismissed the appeal based on an incomplete credit report because the plaintiff could not prove an actual injury in fact.

Thomas v. TOMS King (Ohio), LLC, No. 20-3977, 2021 U.S. App. LEXIS 13884, *1 (6th Cir. May 11, 2021)

The plaintiff appealed a dismissal of the district court case that alleged a violation of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) when the defendant printed more than the last 5 digits of the plaintiff's credit card number on the receipt for her purchase. FACTA provides for actual and statutory damages for an alleged violation, and plaintiff sought statutory, punitive damages, costs and attorney fees. Plaintiff claimed an increased risk of identity theft and the violation placed a burden on her to safeguard her receipt. The Court affirmed the dismissal, stating that "a violation of the statute does not automatically create a concrete injury of increased risk of real harm even if Congress designed it so." The facts in the complaint did not establish an increased risk of identity theft because it did not show how criminals would have a gateway to her personal and financial data. Also, the plaintiff did not contend that her receipt was lost, stolen or seen by anyone else. The court held that a mere statutory violation does not satisfy the Article III's injury in fact requirement.

B. BANKRUPTCY APPELLATE STANDING

Because bankruptcy courts are not Article III courts, do the same standards apply? Generally, for standing, parties seeking to appeal a bankruptcy court order must show that they are a "person-aggrieved" and demonstrate a "pecuniary interest" which was harmed by bankruptcy court's decision. [The person-aggrieved test was in the Bankruptcy Code, but was deleted from 28 U.S.C. §158(a) in 1978, but the courts have continued to rely on this test for standing.]

In re Cap. Contracting Co., 924 F.3d 890, 893 (6th Cir. 2019)

Court held that bankruptcy appeals must meet the same criteria for standing if appealing to an Article III court. The appellant failed to show an Article III injury from the bankruptcy court's order approving the trustee's final report, despite the fact that the final report failed to list the debtor's appeal rights in the litigation.

Zipkin Whiting Co. v. Barr (In re Felix), 825 Fed. Appx. 365 (6th Cir. 2020)

The appellate court affirmed the district court decision that the debtor's pre-petition counsel lacked standing to object to the trustee's proposed compromise of claims. To have standing to object to a settlement agreement, however, the challenging party must have a pecuniary interest in the settlement. The court found that the law firm had no right

to a distribution (no proof of claim was filed for pre-petition legal services) and therefore lacked standing to object to the settlement.

Khan v. Regions Bank (In re Khan), 544 Fed. Appx. 617, 619 (6th Cir. 2013)

The Chapter 7 debtor filed an adversary case to object to the lien on real property. The bankruptcy court and the district court dismissed the case because she lacked standing in the no asset case. A Chapter 7 debtor does not usually have standing to object because he has no pecuniary interest in the case because no matter how the estate's assets are disbursed, none will revert to him unless it is a surplus case. The Court affirmed the decision and held that the debtor was not a person aggrieved and did not have standing to a

6. WHICH COURT TO APPEAL TO – WHERE DO I GO

A. BAP VS. DISTRICT COURT ELECTION

U.S. district courts have jurisdiction to hear appeals from final judgments, orders, and decrees, and with leave of the court from other interlocutory orders and decrees of bankruptcy judges. 28 USC §158(a)(1).

If a bankruptcy appellate panel ("BAP") has been authorized in your district, an appeal from a bankruptcy court shall be heard by a 3-judge panel of the BAP unless: (A) the appellant elects at the time of filing the appeal; or (B) another party elects, not later than 30 days after service of notice of appeal, to have the appeal heard by the district court. 28 USC §158(c)(1); Fed.R.Bankr.P. 8005.

In other words, an appeal from a bankruptcy court will automatically go to the BAP (in those districts which authorize a BAP) unless one of the parties timely elects the district court to hear the appeal.

If a party to the appeal files any paper (other than a notice of appearance) with the BAP, the party waives the right to elect the appeal to be heard by the district court. 6th Cir. BAP LBR 8005-1(a).

BAP's have been established in the First, Sixth, Eighth, Ninth and Tenth federal judicial circuits.

In the Sixth Circuit, all districts have authorized appeals to the BAP except the Eastern District of Michigan, and the Eastern District of Tennessee.

The BAP judges for the Sixth Circuit, effective 1/1/2022, are:

Chief Judge Scott W. Dales, Grand Rapids, MI
Judge Suzanne H. Bauknight, Knoxville, TN
Judge Jimmy Croom, Jackson, TN
Judge John P. Gustafson, Toledo, OH
Judge Randal S. Mashburn, Nashville, TN

Judge Alan C. Stout, Louisville, KY

A BAP decision constitutes precedent unless the BAP states that the precedential effect of the decision shall be limited to the case. 6th Cir. BAP LBR 8024-1(b).

Practice Tip: BAP judges are bankruptcy judges and are more familiar with bankruptcy law/procedure than district judges. If your issue pushes the boundaries under bankruptcy law/ procedure, you may get a more open reception from a district court judge who will not be as entrenched in bankruptcy norms as the BAP. On the other hand, if you are appealing a ruling for being outside of bankruptcy norms, the BAP may be more able to recognize the aberration and more willing to overrule the bankruptcy court than a district court judge.

B. CERTIFICATION TO APPEAL DIRECTLY TO THE COURT OF APPEALS

Under certain circumstances, an appeal from the bankruptcy court may proceed directly to the U.S. Court of Appeals, thereby bypassing the district court and/or BAP. The process involves "certification" under 28 U.S.C. §158(d).

Pursuant to 28 U.S.C. §158(d), the U.S. Court of Appeals has jurisdiction to hear an appeal directly from the bankruptcy court if the bankruptcy court, the district court, or the BAP, acting on its own motion or a party's request, or all the appellants and appellees (if any) acting jointly certify that: (a) the order involves a question of law as to which there is no controlling authority or involves a matter of public importance; (b) the order involves a question of law requiring resolution of conflicting decisions; or (c) an immediate appeal may materially advance the progress of the case. Certification by the bankruptcy court, the district court, or the BAP may also occur based on the request of a majority of the appellants and a majority of the appellees (if any).

7. INTERLOCUTORY VS. FINAL ORDERS[4]

A party may appeal as of right a bankruptcy court's final order, judgment or decree to a district court or BAP as elected. 28 U.S.C. §158 (a)(1).

In contrast, a party must seek leave to appeal a bankruptcy court's interlocutory order or decree. 28 U.S.C. §158 (a)(3). "Under 28 U.S.C. § 1292(b), a district court [or BAP as elected] may hear an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Because interlocutory appeals contravene the judicial policy opposing piecemeal litigation and the disadvantages of delay and disruption associated with it, review under § 1292(b) should be sparingly granted and then only in exceptional cases." *Fieger & Fieger, P.C. v. Nathan (In re Romanzi)*, 2017 U.S. Dist. LEXIS 11954 (E.D. Mich. 2017) (citations and internal quotations omitted).

[4] Information in this section is taken in part from Wendy K. Lappenga's article entitled "A Review of Final Orders" presented at a seminar sponsored by Federal Bar Association Bankruptcy Section- Western District of Michigan on July 23-25, 2009 and has been updated by this panel as well.

Whether an order is final or interlocutory may depend on which direction the order takes the case rather than the type of the underlying motion. For example, an order granting a motion for summary judgment is final while an order denying such a motion is not. See Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 Fed. Appx. 386 (6th Cir. 2016). See further examples below.

The district court/BAP has discretion to hearing interlocutory appeals from the bankruptcy court. 28 U.S.C. §158 (a)(3). However, the U.S. Court of Appeals has jurisdiction to hear bankruptcy appeals only when both the bankruptcy court and district court/BAP's orders are "final." 28 U.S.C. §158 (d); Taunt v. Vining (In re M.T.G., Inc.), 403 F.3d 410 (6th Cir. 2005). There is an exception under 28 U.S.C. §1292(a) which says the U.S. Court of Appeals has jurisdiction from district courts' interlocutory orders that grant, continue, modify, refuse or dissolve injunctions.

A. RULINGS ON INTERLOCUTORY ORDERS

In 2018 the BAP for the 6th Circuit issued a published opinion which illustrates the difficulty of appealing an interlocutory order. See *In re Lane*, 591 B.R. 298 (B.A.P. 6th Cir. 2018).

The pro se creditors Mr. and Mrs. Dean moved to dismiss the debtor's Chapter 13 case shortly after the bankruptcy court had confirmed the plan. The motion to dismiss was denied on the grounds that the Deans should have made their arguments before confirmation. The bankruptcy court also noted that the Deans had not appealed the order confirming plan.

The Deans filed a notice of appeal in the BAP to appeal the order denying the motion to dismiss. The debtor argued the order denying the motion to dismiss is not a final order and, because the Deans did not obtain leave to appeal an interlocutory order, their appeal was not ripe.

The BAP ruled the Deans met the first element under §158(a) i.e. the motion to dismiss was a "proceeding." The BAP further ruled that the order denying the motion to dismiss was not a "final order" because it did not alter the status quo. The case remained pending, the plan remained binding, the stay remained in effect, and the distribution and property rights were not affected.

Next, the BAP considered whether to treat the Deans' notice of appeal as a motion for leave to appeal. Under Fed.R.Bankr.P. 8004(d), an appeal of a party who mistakenly believes the order appealed from is final (and who files a notice of appeal) is not automatically dismissed. Under such circumstances, the BAP may require a motion for leave to appeal, or decide on the papers whether to grant or deny leave to appeal.

The 6th Circuit has a four-part test when it decides whether to grant leave to appeal: (1) is there a question of law; (2) is the question controlling; (3) is there substantial ground for a difference of opinion as to the correctness of the bankruptcy court's decision; and (4) would an immediate appeal materially advance the ultimate termination of the litigation.

In *Lane*, the BAP denied leave to appeal. The Deans failed to meet the third element as there was no substantial ground for a difference of opinion regarding the binding effect of the order confirming plan.

In *Wohleber v. Skurko (In re Wohleber)*, 2020 WL 6781237 (6th Cir. 2020) the 6th Circuit decided that a decision by the BAP on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not a final order. Therefore, the 6th Circuit dismissed the appeal for lack of jurisdiction.

The Debtor Wohleber filed a Chapter 13 bankruptcy case four days before a sentencing hearing on a contempt order for his failure to pay a property settlement in a domestic relations case. The state court sentenced the Debtor to 30 days in jail. He spent 10 days in jail before the state court, by agreement of the parties, held the rest of his sentence in abeyance pending the resolution of the bankruptcy case. The Debtor then dismissed his bankruptcy case and the opposing party Skurko filed a motion to reimpose the contempt sentence. The Debtor then filed a second bankruptcy case, and the state court stayed all proceedings.

The Debtor initiated a adversary case against Skurko that filed the motion for contempt, alleging a violation of the automatic stay. The bankruptcy court conducted a trial, and granted the motion for judgment on partial findings under Rule 52(c). The bankruptcy court concluded that the Debtor failed to demonstrate a violation of the automatic stay.

On appeal, the BAP held that the sentencing hearing was a continuation of a judicial proceeding against the Debtor to recover a pre-petition debt, and therefore a violation of the automatic stay. The BAP remanded to the bankruptcy court for completion of the liability portion of the trial and to direct the bankruptcy court to determine damages if Skurko failed to meet their duty to prevent the stay violation.

On appeal to the 6th Circuit, the Court determined that the BAP's order is not a final order. Based on prior 6th Circuit precedent, a decision by the BAP on appeal remanding the bankruptcy court's decision for further proceedings is not final, and not appealable to the 6th Circuit unless the further proceedings contemplated are of a purely ministerial character. The BAP's order did not finally resolve the dispute because it did not conclusively resolve the Debtor's adversary proceeding, and it is not final.

Therefore, the 6th Circuit dismissed the appeal for lack of jurisdiction.

8. FINALITY

In civil litigation, the determination of what is a final order is rather straightforward. Typically, there is an order disposing of all the claims that were made in the case. Generally stated, final orders are appealable as a matter of right.

The bankruptcy jurisdiction statute, 28 U.S.C. § 158(a), specifically contemplates that there are final orders not only in a "case," but in a "proceeding" as well. In bankruptcy, there are discrete proceedings during the course of a case which do not necessarily relate or coincide with

each other. A debtor may face multiple adversary proceedings for nondischaregability, each of which involve different parties and entirely different facts. An order seeking turnover of property is not necessarily related to, or dependent on, an objection to claim.

This disparity (civil versus bankruptcy) was discussed in *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015) where the Supreme Court explained:

> In ordinary civil litigation, a case in federal district court culminates in a "final decisio[n]," 28 U. S. C. §1291, a ruling "by which a district court disassociates itself from a case," *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995). A party can typically appeal as of right only from that final decision. This rule reflects the conclusion that "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)).
>
> The rules are different in bankruptcy. [2] A bankruptcy case involves "an aggregation of individual controversies," many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor. 1 Collier on Bankruptcy ¶5.08[1][b], p. 5-42 (16th ed. 2014). Accordingly, "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *Howard Delivery Service, Inc.* v. *Zurich American Ins. Co.*, 547 U. S. 651, 657, n. 3, 126 S. Ct. 2105, 165 L. Ed. 2d 110 (2006) (internal quotation marks and emphasis omitted). The current bankruptcy appeals statute reflects this approach: It authorizes appeals as of right not only from final judgments in cases but from "final judgments, orders, and decrees . . . in cases and proceedings." §158(a).

Bullard, at 501-02.

In *Ritzen Group, Inc. v. Jackson Masonry, L.L.C.*, 140 S. Ct. 582 (2020), the Supreme Court addressed when an order in a "proceeding" is final. *Ritzen* involved whether an order denying automatic stay relief was final. The debtor (Jackson) argued that the motion for relief was the discrete proceeding, and that once the motion was decided, the appellate time clock began to run. Ritzen argued that the motion to lift the stay was the "first step in the process of adjudicating a creditor's claim against the estate." *Ritzen*, at 589. The Supreme Court held that a motion for relief from the automatic stay was a discrete proceeding and the order denying such a motion was final.

But how thinly is a bankruptcy case to be split up? The *Ritzen* court provided some guidance on this point:

> Courts, we agree, should not define "proceeding" to include disputes over minor details about how a bankruptcy case will unfold. As we put it in *Bullard*, "[t]he concept of finality cannot stretch to cover, for example, an order resolving a disputed request for an extension of time."

Ritzen, at 590.

A. ORDERS THAT ARE FINAL

i. ATTORNEY COMPENSATION

- Order regarding attorney compensation. *In re Scarlet Hotels*, LLC. 392 B.R. 698 (B.A.P. 6th Cir. 2008); *In re Alda*, 2010 Banrk. LEXIS 4098 (B.A.P. 2010).

ii. AUTOMATIC STAY

- Order granting relief from automatic stay. *In re Sun Valley Foods Co.*, 801 F.2d 186 (6th Cir. 1986).

- Order denying relief from automatic stay. *Ritzen*.

- Order finding violation of the automatic stay. *Buckeye Check Cashing, Inc. v. Meadows (In re Meadows)*, 396 B.R. 485 (B.A.P. 6th Cir. 2008).

iii. CLAIMS

- Order overruling objections to claims. *Morton v. Morton (In re Morton)*, 298 B.R. 301 (B.A.P. 6th Cir. 2003); *Pilch v. Bareham*, 2008 U.S. Dist. LEXIS 53351 (W.D. Mich. 2008).

- Order disallowing a claim. *Greer v. O'Dell*, 305 F.3d 1297 (11th Cir. 2002); *Estate of Mingus v. Lombardo (In re Lombardo)*, 2005 Bankr. LEXIS 692 (B.A.P. 6th Cir. 2005).

- Order sustaining objection to proof of claim. *In re Bowers*, 506 B.R. 249 (B.A.P. 6th Cir. 2013); *Malden Mills Indus., Inc. v. Maroun (In re Malden Mills Indus. Inc.)*, 303 B.R. 688 (B.A.P. 1st Cir. 2004).

- Order determining that a claim is not entitled to priority status. *Mich. Unemployment Ins. Agency v. Boyd (In re Albion Heath Servs.)*, 360 B.R. 588 (B.A.P. 6th Cir. 2007).

- Order determining that a claim is or is not an administrative expense. *In re Appalachian Fuels, LLC*, 493 B.R. 1 (B.A.P. 6th Cir. 2013); *Peters v. Enterasys Networks, Inc. (In re Native Am. Sys.)*, 351 B.R. 135 (B.A.P. 10th Cir. 2006).

iv. CONFIRMATION AND CHAPTER 13 PLANS

- Order confirming a plan with prejudice and dismissing the case. See *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015).

- Order confirming a plan over the trustee's objections. *Burden v Seafort (In re Seafort)*, 437 BR 204 (B.A.P. 6th Cir. 2010).

- Order granting motion to modify a plan. *Storey v. Pees (In re Storey)*, 392 B.R. 266 (B.A.P. 2008).

v. CONVERSION

- Order granting or denying a request to convert from one chapter to another. *Condon v. Brady (In re Condon)*, 358 B.R. 317 (B.A.P. 6th Cir. 2007); *Results Sys. Corp. v. MQVP, Inc.*, 395 B.R. 1 (E.D. Mich 2008).

vi. DISMISSAL

- Dismissal of case. See *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015).

- Dismissal of complaint. *Murray, Inc. v. Agripool, SRI (In re Murray, Inc.)*, 392 B.R. 288 (B.A.P. 6th Cir. 2008).

- Dismissal of a civil case without prejudice is a final order. *Card v Principal Life Ins Co*, 17 F.4th 620 (CA 6, 2021)

vii. EXEMPTIONS

- Order denying debtor's claim of exemption. In re Zingale, 451 B.R. 412 (B.A.P. 6th Cir. 2011).

viii. INJUNCTIVE RELIEF

- Order granting a preliminary injunction that effectively grants all the relief requested. *Peabody Coal Co. v. United Mine Workers*, 484 F.2d 78, 83 (6th Cir. 1973).

ix. NONDISCHARGEABILITY / DENIAL OF DISCHARGE

- Determinations of nondischargeability under 11 U.S.C. §523(a). *Colvin v. Raffeld (In re Raffeld)*, 2006 Bankr. LEXIS 3032 (B.A.P. 6th Cir. 2006).

- Order denying a discharge. *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718 (B.A.P. 6th Cir. 1999)

- Order determining discharge of student loan. *Oyler v. ECMC (In re Oyler)*, 300 B.R. 255 (B.A.P. 6th Cir. 2003), rev'd on other grounds, 397 F.3d 382 (6th Cir. 2005).

x. PROCEDURAL ISSUES

- Order denying motion for reconsideration. *Hamerly v. Fifth Third Mortg. Co. (In re J & M Salupo Dev. Co.)*, 388 B.R. 795 (B.A.P. 6th 2008).

- Order *granting* motion for summary judgment. See *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 651 Fed.Appx. 386 (6th Cir. 2016); *Drown v. Nat'l City Bank (In re Ingersoll)*, 420 B.R. 414 (B.A.P. 6th Cir. 2009).

- Order denying the Chapter 7 trustee's final report. *United States Trustee v. Ste-Bri Enterprises, Inc.*, 579 B.R. 448 (N.D. Ohio 2017).

xi. REOPENING CASE

- Order granting or denying motion to reopen bankruptcy case. *In re Blair*, 2006 U.S. Dist. LEXIS 38880 (E.D. Mich. 2006); *Bonner v. Sicherman (In re Bonner)*, 2005 Bankr. LEXIS 1683 (B.A.P. 6th Cir. 2005).

- Order denying motion for extension of time to file a notice of appeal. *Belfance v. Black River Petroleum (In re Hess)*, 209 B.R. 79 (B.A.P. 6th Cir. 1997).

xii. SETTLEMENT

- Order approving a settlement. *In re Wright*, 566 B.R. 457 (B.A.P. 6th Cir. 2017).

xiii. TURNOVER

- Order requiring turnover of property. *In re Moody*, 817 F.2d. 365 (9th Cir. 1987); *In re Cash Currency Exch.*, 762 F.2d 542, 546 (7th Cir. 1985).

B. INTERLOCUTORY ORDERS THAT ARE NOT FINAL

- Order substituting Trustee in personal injury action was interlocutory. *In re Cottrell*, 876 F.2d 540 (6th Cir. 1989).

- Order denying confirmation of a chapter 13 plan that gives the debtor the opportunity to amend the plan. *Bullard*.

- Where BAP remanded case to bankruptcy court, BAP ruling was not a final order. *Wohleber v Skurko (In re Wohleber)*, 833 F App'x 634 (CA 6, 2020)

- Order *denying* motion for summary judgment. *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 651 Fed.Appx. 386 (6th Cir. 2016); *Fieger & Fieger, P.C. v. Nathan (In re Romanzi)*, 2017 U.S. Dist. LEXIS 11954 (E.D. Mich. 2017)

- Order denying government motion to dismiss or abstain is not a final order. *In re Hayes*, 453 B.R. 270, 274 (E.D. Mich. 2011);

- Order denying motion to settle malpractice lawsuit. Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 Fed.Appx. 386 (6th Cir. 2016).

- Order denying motion to dismiss for lack of subject matter jurisdiction. *Simon v. Lis (In re Graves)*, 483 B.R. 113 (E.D. Mich. 2012) (applying the holding of *Catlin v. United States*, 324 U.S. 229, 236, 65 S. Ct. 631, 635, 89 L. Ed. 911 (1945) to bankruptcy court rulings).

- Order denying motion to dismiss for improper venue. *Gold v. Bandman (In re Harvey Goldman Co.)*, 2012 U.S. Dist. LEXIS 79716 (E.D. Mich. 2012).

- Order granting motion to compel party to produce documents and appear at Rule 2004 exam. *In re Gray*, 447 B.R. 524 (E.D. Mich. 2011).

- Order denying motion to compel payments under lease agreement. GE Capital Corp. v. *Collings & Aikman Corp. (In re Collins & Aikman Corp.)*, 351 B.R. 459 (E.D. Mich. 2006)(holding that "it is not enough that an appealing party identify some particular subissue that has been 'finally" decided by the court below.")

- Order denying petitioner's demand for jury trial, recusal and to summon a grand jury. *In re Pitcher*, 2010 U.S. Dist. LEXIS 52689 (E.D. Mich. 2010).

9. STANDARD OF REVIEW IN APPEALS

A. TRIAL COURT REACHES CORRECT DECISION ALBEIT FOR A DIFFERENT REASON

If counsel believes that the trial court wrongly decided an issue, counsel must be aware that a reviewing court may still uphold a trial court's decision if there is an alternative reason to do so. A trial court's judgment will be affirmed "'if correct for any reason, including a reason not considered' by the district court." *Allen v. Collins*, 529 Fed. Appx. 576, 582 (6th Cir. 2013).

In such a case, an appellate court might actually "reverse" the decision of the trial court on the particular issue, correcting the court's error, *but nevertheless uphold* the trial court decision on a different basis.

B. HARMLESS ERROR

Bankruptcy Rule 9005 incorporates F.R.C.P. 61. Under F.R.C.P. 61 and F.R.E. 103, no error in admitting evidence, or any other error by the court or a party is grounds for setting aside a judgment or decision unless the error affects the party's "substantial rights."

As an example, it was harmless error for a trustee to file a *motion* for declaratory relief instead of an adversary proceeding where the appellant conducted no discovery. *Tully Constr Co v Cannonsburg Environmental Assoc (In re Cannonsburg Environmental Assoc)*, 72 F3d 1260, 1264 (6th Cir. 1996). See also *Reed v. Nathan*, 558 B.R. 800, 822 (E.D. Mich. 2016).

C. CONCLUSIONS OF LAW

Conclusions of law are reviewed de novo. *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994). De novo means that the reviewing court is "deciding the issue as if it had not been heard before with no deference being given to the trial court's conclusions of law." *In re Falvo*, 227 B.R. 662, 664 (B.A.P. 6th Cir. 1998).

- Issues of statutory construction are reviewed de novo. *Board of Education v. L.M.*, 478 F.3d 307, 317 (6th Cir. 2007).

- Dismissal of suit due to lack of subject matter jurisdiction reviewed de novo. *Lovely v. United States*, 570 F.3d 778, 781 (6th Cir. 2009)

- Dismissal of suit for failure to state a claim reviewed de novo. *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004).

D. FINDINGS OF FACT

Both F.R.B.P. 7052 and 9014(c) incorporate F.R.C.P. 52 into adversary and contested proceedings. Under F.R.C.P. 52(a)(6), findings of fact are not to be set aside unless clearly erroneous. A finding of fact is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 436 (6th Cir. 1998) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948)).

E. ABUSE OF DISCRETION

When a matter is subject to the court's discretion, it is reviewed on appeal for abuse of discretion. As described by the Sixth Circuit:

> An abuse of discretion occurs when a district court 'commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact.'

King v. Harwood, 852 F.3d 568, 579 (6th Cir. 2017) (quoting *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008)).

The court will find an abuse of discretion "when our review leaves us with a definite and firm conviction that the trial court committed a clear error of judgment." *Franklin v. Jenkins*, 839 F.3d 465, 472 (6th Cir. 2016).

The abuse of discretion must be more than harmless error. *Tompkin v. Phillip Morris USA, Inc.*, 362 F.3d 882, 897 (6th Cir. 2004).

- Evidentiary determinations are reviewed for abuse of discretion, but the legal conclusions of such determinations are reviewed de novo. As the Sixth Circuit explained, this is because it is an abuse of discretion to make errors of law and clear factual errors. *U.S. v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005).

- Court's decision to dismiss a case with prejudice is reviewed for abuse of discretion. *Ernst v. Rising*, 427 F.3d 351, 366 (6th Cir. 2005) (en banc). Furthermore, "errors of law" invariably establish an abuse of discretion and the court applies de novo review in interpreting an order to determine whether it dismisses claims with prejudice. *Id.*

- Court's decision whether to permit a plaintiff to amend its complaint reviewed for abuse of discretion. *United States ex rel Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 644 (6th Cir. 2003). However, when the district court bases its denial of a motion to amend on the legal conclusion that the proposed amendment would not survive a motion to dismiss, the decision is reviewed de novo. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999).

- Abuse of discretion to make legal errors regarding interpretation of the Constitution. *U.S. v. Blackwell*, 459 F.3d 739, 752 (6th Cir. 2006). Consequently, review of constitutional interpretation is de novo. *Id.*

- Imposition of sanctions reviewed for abuse of discretion. *In re Fordu*, 201 F.3d 693 (6th Cir. 1999).

- Bankruptcy court's denial of attorney fees reviewed for abuse of discretion. *Mapother & Mapother v. Cooper (In re Downs)*, 103 F.3d 472, 478 (6th Cir. 1996).

10. OTHER ISSUES

A. MOOTNESS

"A case is found moot when the issues presented are 'no longer 'live' or the parties lack a legally cognizable interest in the outcome.'

Mootness is found only after determining if an actual controversy between the parties exists in light of intervening circumstances. A controversy is no longer 'live' if the reviewing court is incapable of rendering effective relief or restoring the parties to their original position. 'For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed.'" In re Asmar, Inc., 2013 U.S. Dis. LEXIS 22646 at *7 (E.D. Mich. 2013)(internal citations omitted).

A party who argues the issue on appeal is moot has the burden of showing "that the outcome of the appeal could not affect the legal interests of the parties." Riverview Trenton R.R. v. DSC, Ltd. (In re DSC, Ltd.), 486 F.3d 940, 945-946 (6th Cir. 2007)(quoting Ohio v. Madeline Marie Nursing Homes Nos. 1 and 2, 694 F.2d 449, 463 (6th Cir. 1992).

There is also a "statutory" or "bankruptcy" mootness provision under 11 U.S.C. §363(m), which extends beyond the mootness analysis requiring a case or controversy under Article III. Pursuant to §363(m), a reversal or modification on appeal of an order authorizing a sale or lease of property shall not affect the validity of the sale or lease to an entity who purchases in good faith unless the order, the sale or lease were stayed pending appeal. For an appeal on a bankruptcy court's decision to authorize the trustee to sell property, the appeal will be moot if the trustee sells to a BFP and the appellant fails to obtain a stay from the bankruptcy court's order. In addition, a party alleging mootness under §363(m) must prove that reviewing court on appeal will be unable to grant effective relief without impacting the validity of the sale. Brown v. Ellmann (In re Brown), 851 F.3d 619, 623 (6th Cir. 2017)(holding that the Chapter 7 trustee failed to meet his burden of proving mootness because the court could grant relief regarding the proceeds of the sale without disturbing the validity of the sale).

B. LAW OF THE CASE DOCTRINE / MANDATE RULE

If a case has previously been appealed, and the case has been remanded back to a trial court for further proceedings, you may now find yourself bound by the "law of the case" doctrine. As explained by the Sixth Circuit:

> The law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The doctrine precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition. Pursuant to the law of the case doctrine, and the complementary 'mandate rule,' upon remand the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court. The trial court is required to implement both the letter and the spirit of the appellate court's mandate, taking into account the appellate court's opinion and the circumstances it embraces.
>
> The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three 'exceptional circumstances' exists: (1) where substantially different evidence is raised on subsequent trial; (2)

> where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice.
>
> * * *
>
> [T]he law of the case doctrine is limited to those issues decided in the earlier appeal, and the district court may therefore consider those issues not decided expressly or impliedly by the appellate court.

Westside Mothers v. Olszewski, 454 F.3d 532, 538 (6th Cir. 2006).

Importantly, you should note that where *new evidence* arises in the course of the proceedings then it may be possible to avoid a potentially adverse decision.

C. COLLATERAL ORDER DOCTRINE

Under the collateral-order doctrine a limited set of district-court orders are reviewable "though short of final judgment." Ibid. The orders within this narrow category "are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' " Ibid.

11. APPELLATE RULES[5]

A. NOTICE OF APPEAL

- Fed. R. Bankr. P. 8002(b)(1): Authorized tolling motions
- Fed. R. Bankr. P. 8002(a): Notice to be filed with the bankruptcy court within 14 days after entry of the judgment, order, or decree being appealed.
- Fed. R. Bankr. P. 8002(d): Authorized extensions of time to file a Notice of Appeal in certain instances
- Fed. R. Bankr. P. 8003(a)(3): Contents of Notice of Appeal taken as of right
- Fed. R. Bankr. P. 8004(a): Contents of Notice of Appeal by leave

B. MOTION FOR LEAVE TO APPEAL

[5] These rules apply to appeals to the district court and BAP. If appealing to the circuit court of appeals, see Federal Rules of Appellate Procedure.

28 U.S.C. § 158(a)(3) (using the standards set forth at 28 U.S.C. § 1292(b) by analogy); Fed. R. Bankr. P. 8004(b) (contents of motion); and Fed. R. Bankr. P. 8007(b)(2) and (3) (showing or statement required and additional content).

- An appellant must show that the appealed order involves: "[i] a controlling question of law [ii] as to which there is substantial ground for difference of opinion and [iii] an immediate appeal […] may materially advance the ultimate termination of the litigation[;]" and (iv) a court should consider "whether denying leave to appeal would result in wasted litigation and expense." *Simon v. Brentwood Tavern, L.L.C. (In re Brentwood Golf Club, L.L.C.)*, 329 B.R. 239, 242 (E.D. Mich. 2005) (citing *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 521 (6th Cir. B.A.P. 2000).

C. ELECTION TO HAVE AN APPEAL HEARD BY THE DISTRICT COURT INSTEAD OF THE BAP

- Fed R. Bankr. P. 8005
- 6th Cir. BAP LBR 8005-1
- In the Western District of Michigan, appeals are heard by the BAP unless a party makes an election to the district court in the manner required by Fed R. Bankr. P. 8005 and in the time required by 28 U.S.C. § 158(c)(1).

D. STATEMENT OF ISSUES

- Fed. R. Bankr. P. 8009(a)(1): Appellant must file the Statement of Issues within 14 days after the appellant's notice of appeal as of right becomes effective under Rule 8002 or an order granting leave to appeal is entered.

- Generally, issues that are not specifically listed in a statement of issues to be presented on appeal, and that cannot be inferred from the issues that are listed, are deemed to be waived and should not be considered on appeal. *K. Jin Lim v. DiMercurio (In re DiMercurio)*, No. 12-12539, 2012 U.S. Dist. LEXIS 142385, at *8 (E.D. Mich. Oct. 2, 2012) (citing *In re Freeman*, 956 F.2d 252, 255 (11th Cir. 1992).

E. DESIGNATION OF ITEMS FOR INCLUSION IN THE RECORD ON APPEAL

- Fed. R. Bankr. P. 8009(a)(1): Appellant must file the Designation within 14 days after the appellant's notice of appeal as of right becomes effective under Rule 8002 or an order granting leave to appeal is entered.

- Fed. R. Bankr. P. 8009(a)(2): Appellee may file a Designation within 14 days after being served with Appellant's Designation.

- Fed. R. Bankr. P. 8009(a)(4): Items which must be included.

- The general rule for designation of the record is that only items considered by the bankruptcy court in reaching a decision should be included. Courts have allowed the inclusion of other pleadings in a case even though they were not made exhibits and were not considered by the court if the pleading to be added is closely related to the matter at issue. *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 559 B.R. 692, 700-01 (B.A.P. 6th Cir. 2016) (citations omitted).

12. APPELLATE MOTION PRACTICE

A. MOTION TO STAY PENDING APPEAL - FED. R. BANKR. P. 8007

- Must be filed in bankruptcy court first. Fed. R. Bankr. P. 8007(a)(1).

- In determining whether a stay should be granted, the court weighs the following four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Miller v. Sullivan (In re Wylie)*, 635 B.R. 291, 295 (Bankr. E.D. Mich. 2021) (citing *Michigan Coalition of RadioActive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991))

- Generally, the most important of the four requirements is the moving party's likelihood of success on the merits of its appeal, and the court must ordinarily find that the appealed decision would likely be reversed. Even if the other factors weigh heavily in favor of the stay, the movant is still required to show, at a minimum, "serious questions going to the merits.". *In re Skymark Props. II, LLC*, 597 B.R. 619, 624-25 (Bankr. E.D. Mich. 2019) (citing *Griepentrog* at 945 F.2d at 153–154).

B. MOTION TO STRIKE/CORRECT/MODIFY/CONFORM THE RECORD ON APPEAL

- Fed. R. Bankr. P. 8009(e)(1) and 8013: "If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item." Fed. R. Bankr. P. 8009(e)(1).

C. MOTION TO SUPPLEMENT THE RECORD ON APPEAL

- Fed. R. Bankr. P. 8009(e)(2) and 8013: "If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted: (A) on stipulation of the parties; (B) by the bankruptcy court before or after the record has been forwarded; or (C) by the court where the appeal is pending." Fed. R. Bankr. P. 8009(e)(2)

D. MOTION TO SEAL ITEMS IN THE RECORD ON APPEAL.

- Fed. R. Bankr. P. 8009(f) and 8013: "A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending." Fed. R. Bankr. P. 8009(f)

13. APPELLATE BRIEFS

A. RULES FOR APPELLATE BRIEFS

The rules for serving and filing briefs and appendices are set forth at Fed. R. Bankr. P. 8018. But see flexibility given to the district court. District Court for the Eastern District of Michigan generally issues a scheduling order.

- Fed. R. Bankr. P. 8018(a)(1): Appellant's Brief must be filed within 30 days after the docketing of notice that the record has been transmitted or is available electronically.

- Fed. R. Bankr. P. 8018(a)(2): Appellee's Brief must be filed within 30 days after service of the Appellant's Brief.

- Fed. R. Bankr. P. 8018(a)(3): Appellant's Reply Brief may be filed within 14 days after service of the Appellee's Brief (at least 7 days before scheduled argument unless the appellate court for good cause allows a later filing).

- Fed. R. Bankr. P. 8014(a) and (c): Contents of Appellant's Brief and Reply Brief

    - 6th Cir. BAP LBR 8014-1: additional content and format requirements; extensions of time

- Fed. R. Bankr. P. 8014(b): Contents of Appellee's Brief

    - 6th Cir. BAP LBR 8014-1: additional content and format requirements; extensions of time

- Fed. R. Bankr. P. 8015: Form and Length of Briefs; Form of Appendices and Other Papers

- Fed. R. Bankr. P. 8018(b) and (c): Requirements for the Appendix to the Brief

In general, the appeal briefs must include: a corporate disclosure statement for corporate parties; a table of contents; a table of authorities; a jurisdiction statement; a statement of issues presented and standard of review; a statement of the case; a summary of the argument; the argument; a short conclusion; a certificate of compliance.

In addition, the appeal briefs must be on 8 ½ by 11 inch paper, the text must be double-paced but quotations more than two lines long may be indented and single-spaced, headings and footnotes must be single-spaced, margins must be at least one inch on all sides, the font must be 14-point or larger. A principal brief must not exceed 30 pages unless the word limit is no more than 14,000 words for appeals before the BAP/district court and no more than 13,000 words for appeals before the U.S. Court of Appeals. A reply brief must not exceed 15 pages unless the word limit is less than half the volume allowed for the principal brief.

B. ORAL ARGUMENT

- Fed. R. Bankr. P. 8019.
- L.R. BAP 6th Cir. 8019-1

If you want oral argument, your brief must include a statement explaining why the court should hear oral argument. If you fail to make the request, the court may deem oral argument to have been waived. 6th Cir. Rule 34.

C. POST-RULING MOTIONS

- Fed. R. Bankr. P. 8020(a): Motion for Damages & Costs for Frivolous Appeal

- Fed. R. Bankr. P. 8022: Motion for Rehearing. *See, e.g., In re Fundamental Long Term Care, Inc*., No. 8:19-cv-02082-SDM (M.D. Fla. Dec. 18, 2020) (motion for rehearing filed 28 days after affirmance of bankruptcy order and entry of judgment untimely).

14. APPELLATE TIMELINE

Document Filed /Action Taken	**Deadline to File / Serve / Take Action**	**Which Court to File / Take Action In**
Notice of Appeal* FRBP 8002	14 days after entry of order being appealed or order on motion for reconsideration	Bankruptcy Court
Motion for Leave to Appeal FRBP 8004	14 days after entry of order being appealed or order on motion for reconsideration	Bankruptcy Court
Response in opposition to Motion for Leave to Appeal FRBP 8004	14 days after service of the Motion for Leave to Appeal	BAP/District Court as elected
Statement of Election to appeal to district court vs. BAP FRPB 8005; 28 USC §158(c)(1)	For appellant- at time of filing Notice of Appeal. For any other party- 30 days after service of Notice of Appeal. *If a party other than appellant files a document other than Notice of Appearance in the BAP, said party waives the remainder of the 30-day election period. 6th Cir. BAP LBR 8005-1(a).	Bankruptcy Court
Motion for Stay of bk proceedings pending appeal to BAP/District Court FRBP 8007	Either before or after Notice of Appeal is filed.	Bankruptcy Court (as a general rule) or the BAP/District Court as elected if moving first in bk court would be impracticable
Designation of Items to be included in the record on appeal** & Statement of Issues to be Presented FRBP 8009(a)	For appellant- within 14 days after Notice of Appeal or entry of Order granting leave to appeal. For appellee- within 14 days after being served with appellant's Designation of Items & Statement of Issues	Bankruptcy Court

Ordering transcripts** (written request required) or Certificate that no transcripts will be ordered FRBP 8009(b)	For appellant- within 14 days after Notice of Appeal or entry of Order granting leave to appeal. For appellee- within 14 days after being served with appellant's Designation of Items & Statement of Issues	Bankruptcy Court
Corporate Disclosure Statement FRBP 8012	Upon filing the first pleading/document in the BAP/District Court as elected	BAP/District Court as elected
Appellant's brief FRBP 8018	Within 30 days after the docketing of the notice that record was transmitted unless BAP/District Court issues a briefing schedule	BAP/District Court as elected
Appellee's brief FRBP 8018	Within 30 days after service of the appellant's brief unless BAP/District Court issues a briefing schedule.	BAP/District Court as elected
Appellant's reply brief FRBP 8018	Within 14 days after service of appellee's brief	BAP/District Court as elected
Motion for Rehearing by BAP/District Court FRBP 8022	Within 14 days after entry of order sought to be reconsidered	BAP/District Court as elected
Notice of Appeal of decision of BAP/District Court to the US Court of Appeals. Fed.R.App.P.4 and Fed.R.App.P.6	Within 30 days after entry of order being appealed or entry of order on motion for rehearing. If the appellant is the federal government, the deadline extends to 60 days	BAP/District Court as elected
Designation of Items to be included in the record on appeal/ Statement of Issues for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P.6	For appellant- within 14 days after Notice of Appeal. For appellee- within 14 days after being served with appellant's Designation	BAP/District Court as elected
Corporate Disclosure Statement Fed.R.App.P.26.1	Upon filing the first pleading/document in the US Court of Appeals	US Court of Appeals

Appellant's brief for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P.31	Within 40 days after the record is filed, unless Court of Appeals issues a briefing schedule	US Court of Appeals
Appellee's brief for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P. 31	Within 30 days after the appellant's brief is served, unless Court of Appeals issues a briefing schedule	US Court of Appeals
Appellant's reply brief for appeal from BAP/District Court to US Court of Appeals Fed.R.App.P.31	Within 14 days after service of the appellee's brief but at least 7 days before argument, unless Court of Appeals issues a briefing schedule	US Court of Appeals
Civil Appeal Statement of Parties and Issues (in relation to conferences/mediations scheduled by the court) 6th Cir. R. 33	To be filed by appellant as directed by the US Court of Appeals	US Court of Appeals

*Notice of Appeal - Failure to timely file notice of appeal is a jurisdictional defect which bars appellate review of the bankruptcy court's order. In re Jackson, 585 B.R. 410 (B.A.P. 6th Cir. 2018)(appeal dismissed because notice of appeal was filed after the deadline); Genoak Const. Co. v. Joseph Inv. Group, L.L.C.(In re Joseph Inv. Group, L.L.C.) , 2005 U.S. Dist LEXIS 42229 (E.D. Mich. 2005)(appeal dismissed because notice of appeal was prematurely filed before both the announcement and entry of the bankruptcy court's decision).

**** Record on Appeal - You may lose on appeal if you fail to ensure the relevant parts of the lower court record are included in the record on appeal. Colvin v. Raffeld (In re Raffeld), 2006 Bankr. LEXIS 3032 (B.A.P. 6th Cir. 2006)(the panel has no basis on which to determine whether the bankruptcy court's finds of fact are erroneous because the trial transcript and documentary evidence admitted at trial are not part of the record on appeal); Armour v. First Heritage Credit of Tenn., LLC, 2015 U.S. Dist. LEXIS 37930 (W.D. Tenn. 2015)(Appellant must file designation of items and order required transcripts in ten days or her appeal will be dismissed).