

## **BANKRUPTCY APPEALS IN THE DISTRICT COURT**

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This outline is meant to be a summary of applicable statutes, court rules and procedures, any of which can be amended or modified from time to time. Counsel are cautioned that this outline cannot be cited, and reference should be made to the specific statutes, rules and applicable case law in effect when pursuing a bankruptcy appeal in any particular case. Any commentary or opinions expressed in this outline or during the accompanying presentation are solely those of the author and not the views of any particular judge, the clerk of court for the Eastern District of Wisconsin, or the clerk of court for the Bankruptcy Court of the Eastern District.

## I. GENERAL COMMENTS

- A. Bankruptcy appeals are rule-based
  - 1. Important deadlines—no jurisdiction if you miss your window to appeal. *In re Salem*, 465 F.3d 767, 774 (7th Cir. 2006) (stating that Fed. R. Bankr. P. 8002 is more than merely procedural; it is jurisdictional”); *In re Bond*, 254 F.3d 669, 673 (7th Cir. 2001) (stating that Fed. R. Bankr. P. “8002(a) describes conditions precedent that are ‘mandatory and jurisdictional’”).
  - 2. Automatic deadlines based on rules and court procedures
  - 3. Note December 2009 change to calculation of time (Fed. R. Civ. P. 6 and Fed. R. Bankr. P. 9006)—all days are calendar days
  
- B. Several sets of rules or preferences to note
  - 1. Federal Rules of Bankruptcy Procedure 8001 *et seq.*
  - 2. Federal Rules of Civil Procedure
  - 3. Local Rules
  - 4. Each judges’ preferences (Ex. H)
  
- C. Don’t assume the district judge or law clerk knows what has gone on in bankruptcy court
  - 1. Bankruptcy appeals are infrequent
  - 2. Judges and law clerks may not be conversant in bankruptcy terminology
    - a. Explain terms such as “cram-down” or “reaffirmation agreement”
  - 3. Start with the premise of Bankruptcy 101
    - a. Cite to the United States Code, not to the section of an act
    - b. If relevant, explain the effect of certain procedures in the bankruptcy court—proof of claim, meeting of creditors, confirmation of plan, etc.
  
- D. Separation of courts and clerk’s offices
  - 1. Bankruptcy court and district court share the same building but maintain completely separate clerk’s offices and staff
  - 2. Separate e-filing systems
    - a. Attorneys need a login and password from the district court clerk’s office for the district court’s CM/ECF system (separate from PACER and the bankruptcy court’s CM/ECF system).
      - (1) You may have three sets of logins and passwords: PACER, bankruptcy CM/ECF, and district court CM/ECF.
    - b. In E.D. Wis., attorneys can request a particular login name and then reset the assigned password

3. Admission to practice: When attorneys are admitted in the district court, they are also admitted to the bankruptcy court; only the district court admits attorneys.

## II. THE HOW, WHEN AND WHERE OF FILING A BANKRUPTCY APPEAL

- A. Appeals as of right from “final judgments, orders, and decrees” and interlocutory orders issued under 11 U.S.C. § 1121(d) increasing or reducing the time during which only the debtor has a right to file a plan of reorganization. 28 U.S.C. § 158(a)(1), (2); Fed. R. Bankr. P. 8001(a).
  1. Initiated by filing a notice of appeal. Fed. R. Bankr. P. 8001(a).
  2. Notice of appeal is filed in the bankruptcy court. Any notice mistakenly filed in the district court will be transmitted to the bankruptcy court. Fed. R. Bankr. P. 8002(a).
- B. Appeals with leave of court from interlocutory orders and decrees. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8001(b).
  1. Initiated by filing a notice of appeal plus a motion for leave to appeal and proof of service. Fed. R. Bankr. P. 8001(b).
  2. Notice of appeal, motion and proof of service are filed in the bankruptcy court. Any notice mistakenly filed in the district court will be transmitted to the bankruptcy court. Fed. R. Bankr. P. 8002(a).
- C. The notice of appeal *must*, per Fed. R. Bankr. P. 8001,
  1. Conform substantially to the official form (Ex. A—Bankruptcy Form 17)
  2. Contain the names of all parties to the judgment or order appealed from
  3. Contain the names, addresses, and telephone numbers of all parties’ attorneys
  4. Be accompanied by the prescribed fee.
- D. Motion for leave to appeal. Fed. R. Bankr. P. 8003.
  1. Must contain
    - a. statement of facts
    - b. the questions to be presented by the appeal and the relief sought
    - c. reasons why an appeal should be permitted
    - d. copies of the judgment or order and any opinion or memorandum on which appeal is sought
  2. Adverse party may file a response within 14 days after service of the motion

3. File motion with the bankruptcy court, which transmits the motion to the district court once response is filed or time for a response expires
  4. If a notice of appeal is filed but a required motion for leave to appeal is not, the district court may grant or deny leave to appeal or may direct that a motion be filed.
- E. Fee: \$255. 28 U.S.C. § 1930(b)(14), (c).
1. Parties filing a joint notice pay only one fee
  2. Cross-appeal incurs an additional fee
  3. If no fee is paid, a Notice of Fee Due is sent out by the Clerk of the Bankruptcy Court (Ex. B)
  4. Per information from the Clerk of the Bankruptcy Court and § 1930, the fee may be
    - a. waived for the United States
    - b. waived for a child support creditor who files a certain form
    - c. deferred for trustees and debtors-in-possession.
- F. Notice of appeal must be filed within 14 days of the entry of the judgment, order, or decree appealed from. Fed. R. Bankr. P. 8002(a).
1. “Entry” of judgment or an order is the date the document is entered on the docket. Fed. R. Bankr. P. 9021, 5003(a).
  2. A notice filed after announcement of a decision but before entry of the judgment or order is deemed filed on the day of the entry on the docket. Fed. R. Bankr. P. 8002(a).
  3. A motion listed in Rule 8002(b) (such as for a new trial or to alter or amend the judgment) delays the start of the appeal period until the date the last such motion is decided.
    - a. Only for those motions listed in Rule 8002(b).
    - b. A notice of appeal filed between the judgment and the disposition of these motions becomes effective when the last of these motions is decided.
    - c. A challenge to an amended judgment requires a notice of appeal or an amended notice filed within 14 days of the entry of the order. No additional fees are charged for an amended notice. Fed. R. Bankr. P. 8002(b).
  4. Extensions of time are permitted in some circumstances but barred in those listed in Rule 8002(c). A motion for extension of time should be made within the 14-day appeal window (or 21 days later upon a showing of excusable neglect) and the extension is short. See Fed. R. Bankr. P. 8002(c).

G. Bypass to Court of Appeals

1. Direct appeal to Seventh Circuit in certain circumstances under 28 U.S.C. § 158(d)(2):
  - a. a question of law with no controlling authority in circuit or involving a matter of public importance, or
  - b. a question of law requiring resolution of conflicting decisions, or
  - c. immediate appeal may materially advance the progress of the case.
2. File the notice of appeal with the bankruptcy court plus either a certification of the direct appeal or a request for the certification. Fed. R. Bankr. P. 8001(f).
3. Also can request certification from the district court after the case has been docketed there, but it must be filed within 60 days of entry of the judgment or order appealed from. 28 U.S.C. § 158(d)(2)(B), (E); Fed. R. Bankr. P. 8001(f).
  - a. Unless the district court issues a stay, the appeal in district court continues and the parties must file their briefs. 28 U.S.C. § 158(d)(2)(D).
4. File petition for permission to appeal, accompanied by the certification, with the court of appeals. 28 U.S.C. § 158(d)(2)(A); Fed. R. App. P. 5(a); Fed. R. Bankr. P. 8001(f)(5); Instructions for Notice of Appeal. See Fed. R. App. P. 5 for specifics on petition.
5. Pay an additional \$200 if the Seventh Circuit grants permission to appeal. 28 U.S.C. § 1930(b)(14).

III. NEXT STEPS

- A. The Clerk of the Bankruptcy Court sends a notice to the parties to order transcripts, if any. (Ex. C)
- B. Designation of the record and statements of the issues—Note: these are AUTOMATIC deadlines
  1. Appellant has 14 days from the filing of the notice of appeal in bankruptcy court (or entry of an order disposing of one of the Rule 8002 motions) to designate the record and file its statement of issues. Fed. R. Bankr. P. 8006.
  2. Appellee has 14 days after service of the appellant's statement to designate additional items in the record (if any) and, if it has filed a cross-appeal, to file its statement of issues for the cross-appeal. Cross-appellee may then designate additional items for record after another 14 days. Fed. R. Bankr. P. 8006.
  3. No notice of the need for this record designation is sent to the parties; they are expected to know this requirement.

- C. Order pertinent transcript(s), if any, before or immediately after designation of the record. Fed. R. Bankr. P. 8006.
1. Submit request to court reporter or transcription service pursuant to bankruptcy court's procedures. (Ex. D—also found at [www.wieb.uscourts.gov](http://www.wieb.uscourts.gov))
  2. File request in docket
  3. Make arrangements to pay the cost of the transcript
- D. After about 30 days (giving 28 days for designation of the record), the clerk of the bankruptcy court generates a Transmittal Sheet and transmits it to the district court. (Ex. E)
1. Transmittal Sheet includes an index of the record being transmitted.
  2. The record includes the notice of appeal, opinion of the bankruptcy court, and judgment or order appealed from, even if not designated. Fed. R. Bankr. P. 8006.
  3. The record includes a copy of each document designated plus a copy of the docket from the bankruptcy case.
    - a. The copies of documents are transmitted on a disk in PDF.
    - b. District court staff have access to bankruptcy court's CM/ECF system and can retrieve additional documents from bankruptcy case but much prefer to have documents in the district court record.
  4. Transmittal to district court may be delayed for one or two weeks if a transcript is late, but the clerk may transmit the appeal to the district court without the transcript and then transmit a supplemental record later.
- E. Clerk of the District Court
1. Dockets the appeal:
    - a. Assigns a case number and judge
      - (1) Always an Article III judge; no consent to magistrate judge jurisdiction
      - (2) Random assignment for Milwaukee division; Judge Griesbach is assigned bankruptcy appeals if the debtor lives in a county within the Green Bay division (Ex. F—also found at [www.wied.uscourts.gov](http://www.wied.uscourts.gov))
      - (3) Multiple appeals from the same bankruptcy case are usually noted on the Transmittal Sheet from the bankruptcy court; if so noted, they should be assigned to the same district judge
    - b. Dockets the Transmittal Sheet in the district court case
    - c. Attaches all transmitted documents to that initial entry
  2. Sends a briefing letter to the parties. (Ex. G)

- F. Filings after the docketing in district court are made in the Eastern District's CM/ECF system. See General L.R. 5(a) (requiring filing by electronic means unless exempted by the district court).
- G. Motions to stay pending appeal or for supersedeas bond
  - 1. Generally filed in and considered by the bankruptcy court before transmittal to district court. Fed. R. Bankr. P. 8005.
  - 2. Any motion made to the district court must show why relief was not obtained from the bankruptcy court. Fed. R. Bankr. P. 8005.

#### IV. BRIEFING, MOTIONS, AND HEARINGS IN DISTRICT COURT

- A. Briefing dates per Fed. R. Bankr. P. 8009(a): remember the "rule of 14"
  - 1. Appellant's opening brief filed and served within 14 days after entry of the appeal on the district court docket
  - 2. Appellee's response brief (to include cross-appeal issues, if any) filed and served within 14 days after service of the appellant's brief.
  - 3. Appellant's reply brief (to include any response regarding cross-appeal issues) filed and served within 14 days after service of appellee's brief.
  - 4. If cross-appeal filed, appellee may file and serve a reply brief on the cross-appeal within 14 days after appellant's reply brief.
- B. Length per Fed. R. Bankr. P. 8010(c):
  - 1. 50/50/25, exclusive of tables and addendum
  - 2. See General L.R. 5 (E.D. Wis.) (Ex. H) for size and type of font, line spacing.
- C. Content:
  - 1. Appellant's opening brief per Fed. R. Bankr. P. 8010(a) (see rule for particulars):
    - a. Table of contents
    - b. Table of authorities
    - c. Statement of basis for appellate jurisdiction
    - d. Statement of the issues presented and standard of review
      - (1) Frame the issues well; don't say merely that the bankruptcy court erred by ruling for the appellee; instead frame the specific substantive issue
    - e. Statement of the case including the nature of the case, description of the proceedings below, the bankruptcy court's decision, and a statement of relevant facts with citations to the record
    - f. Argument section
    - g. Short conclusion stating the precise relief sought.

2. Appellee's response brief:
    - a. All of above except the conclusion regarding relief
    - b. However, if the appellee is satisfied with appellant's statements, it can leave out any statements regarding jurisdiction, the issues, or the case.
  3. Any reference to a statute, rule, or regulation requires reproduction of the relevant part of the statute, rule or regulation in the brief or in an addendum. Fed. R. Bankr. P. 8010(b).
    - a. An addendum is helpful
    - b. Again remember to cite to the United States Code, not to the section of an act
  4. The Eastern District local rules permit citation of unreported opinions and orders unless prohibited by Seventh Circuit Rule 32.1, but a copy of the unreported decision or order must be provided to the district court. Civil L.R. 7(j) (E.D. Wis.).
    - a. Seventh Circuit Rule 32.1: No nonprecedential order of the Seventh Circuit "issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding."
- D. Civil L.R. 5 (E.D. Wis.) provides that no separate certificate of service is required for documents filed electronically if all parties are served through the CM/ECF system. If any party appears pro se, a certificate of service is required.
- E. Motions
1. If any are filed they should follow the guidelines of Fed. R. Bankr. P. 8011 and Civil L.R. 7, including
    - a. citation of the statute or rule pursuant to which it is made, and
    - b. either a memorandum in support or a certificate stating that no memorandum will be filed.
  2. Response time is 7 days per Fed. R. Bankr. P. 8011; probably trumps the 21 days of Civil L.R. 7(b).
- F. Oral argument on appeals is rare
1. Appeals are usually decided on the briefs; usually the facts and legal arguments are adequately presented by the briefs and record
  2. Hearings may be ordered for unusual situations
  3. But parties can request oral argument under Fed. R. Bankr. P. 8012.

## V. DECISION BY DISTRICT COURT

- A. Disposition: The district court “may affirm, modify, or reverse” the bankruptcy court “or remand with instructions for further proceedings.” Findings of fact made by the bankruptcy judge are not set aside unless “clearly erroneous.” Fed. R. Bankr. P. 8013.
- B. Costs: taxed against the losing party on appeal by the bankruptcy clerk. Fed. R. Bankr. P. 8014, advisory committee notes.
- C. Motion for rehearing is permitted under Fed. R. Bankr. P. 8015; 14-day time limit after entry of judgment in the district court. “Entry” is notation of a judgment in the docket. Fed. R. Bankr. P. 8016.
- D. Judgments in bankruptcy appeals are automatically stayed for 14 days after entry unless the district court orders otherwise. Fed. R. Bankr. P. 8017(a).
- E. Appeal to Seventh Circuit
  1. Appeal as of right taken as in other civil cases following final judgment.
  2. Commenced by filing a notice of appeal in the district court. See Fed. R. App. P. 3, 4.

## VI. PARTICULAR DISTRICT COURT RULES AND PREFERRED PRACTICES

- A. Fed. R. Civ. P. 5.2 regarding privacy protection under the E-Government Act (Ex. I)
- B. Specific Litigant Instructions for certain judges on E.D. Wis. website ([www.wied.uscourts.gov](http://www.wied.uscourts.gov)) (Ex. J)
- C. Tips for Litigating in District Court and Tips for Practicing in Bankruptcy Court (reprinted from the *In Motion* newsletter of the Association for Women Lawyers, September 2008 and December 2008) (Ex. K)