

**APPEALS, REMOVALS, AND WITHDRAWALS:
HOW TO GET INTO OR OUT OF DISTRICT COURT**

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Complex Bankruptcy, Corporate and Mediation



Appeals, Removals, and Withdrawals: How to Get Into or Out of District Court



Appeals to the District Court or Bankruptcy Appellate Panel

Following the Path Most
Traveled



Who Hears the Appeal

- 28 U.S.C. §§ 158(c)-(d): the district court in the judicial district in which the bankruptcy judge is serving.
- Unless:
 - The judicial council of a circuit has established a Bankruptcy Appellate Panel (“BAP”); and
 - Neither the appellant (at the time of filing the appeal) or any other party (within 30 days of service of the notice of appeal) elects to have the appeal heard by the district court.
- The court of appeals for the circuit has jurisdiction over appeals from both the district court and the BAP.

Standing To Appeal

- The Appellant bears the burden of proof on the standing issue.
- The standard for Bankruptcy standing is much more limited than general standing to file an appeal and requires a higher causal nexus between act and injury.

Standing To Appeal (cont.)

- As stated by the 5th Circuit, a party must satisfy the “person aggrieved” test¹ and show direct financial injury in order for that party to have standing to appeal.² “The injury or threat of injury must be both ‘real and immediate’ not ‘conjectural’ or ‘hypothetical.’”³

¹ *In re Coho Energy Inc.*, 395 F.3d 198 (5th Cir. 2004).

² *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994)(citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)).

³ *Id.*

Standing To Appeal (cont).

- As noted by the Eleventh Circuit, the person aggrieved standard was developed because failure to limit who could appeal would cause “bankruptcy litigation [to] become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order.”⁴

⁴ *In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1327 (11th Cir. 2014).

Standing To Appeal (cont.)

- In general, actual creditors do have standing to appeal but parties with contingent claims do not.

Standing To Appeal – Chapter 7 Debtors

- Chapter 7 debtors have very limited standing to appeal because the chapter 7 Trustee is the representative of the estate pursuant to section 323 of the Bankruptcy Code.
- Debtor has no standing to appeal an order approving a litigation funding agreement because Debtor could not show that the order “directly, adversely and financially affected him.”
 - *In re the Matter of William Berry Dean*, 18 F.4th 842 (5th Cir. 2021)

Standing To Appeal – Exceptions

- There are two exceptions to the general rule that Chapter 7 Debtors do not have standing. To form the basis of a standing argument, the Debtor must show that a successful appeal will generate a surplus, thus entitling the debtor to a distribution, or that the appeal affects the debtor's discharge.

Standing To Appeal – Parties Can Lose Standing

- District Court, Judge Starr, held that the Appellate lost standing to appeal because he had withdrawn his claims in the bankruptcy case so he no longer had a direct pecuniary interest.

– *Dondero v. Highland Capital Management, L.P.*, (2022 WL 837208 (March 18, 2022))

Standing To Appeal – Parties Can Lose Standing

- Holding an administrative expense claim is not sufficient to maintain standing for an appeal because the holder of an administrative expense claim will be paid in full and will not be adversely affected by the appeal.
 - *In re Highland Capital Management, L.P.*, 2022 WL 270862 (N.D. Tex., Jan. 28, 2022) (Judge Fitzwater, appeal pending)
 - *In re Highland Capital Management, L.P.*, 2022 WL 1457971 (N.D. Tex., May 8, 2022) (Judge Kinkeade)(holder of an administrative expense claim has no standing to appeal fee orders)

Interlocutory vs. Final

- Can appeal from final judgment, order or decree or interlocutory orders under Section 1121(d).
 - 28 U.S.C. § 158(a).
- Appeals from all other interlocutory orders require leave of court.
 - 28 U.S.C. § 158(a)(3)
 - Fed. R. Bankr. P. 8004

Interlocutory v. Final (cont.)

- How do you know if an order is final?
 - Makes a final determination on a discrete issue
 - Grants final relief requested by a party
 - Does not leave contingencies or unresolved issues
- What if you are wrong and file a notice of appeal without a motion?
 - Court can enter an order for you to file a motion or treat the notice as a motion.
 - Fed. R. Bankr. P. 8004(d)

Interlocutory v. Final

Recent Supreme Court Cases

- *Ritzen Group, In, v. Jason Masonry, LLC*, 140 S.Ct. 682 (2020) held that the order denying relief from stay is a final immediately appealable order.
- *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015) held that an order denying confirmation of a chapter 13 plan with leave to amend is not final.

Final Order


- Court has the duty to examine the basis of its jurisdiction, and on its own motion if necessary. So a Court can determine on its own that an order is not final and deny the appeal.

Final Order


- A final order resolves a discrete portion of the case which is truly over versus an order which is a preliminary step in the overall process.

Final or Not?

- An order denying a motion for withdrawal of the reference.




2.




Final or Not?

- An order denying remand of a case removed to federal court.




2.




Final or Not?

- Order denying recusal of judge.




2.




Final or Not?

- Orders Appointing Counsel for the Trustee




2.




Final or Not?

- Order denying a motion to dismiss concerning eligibility to be a Debtor




2.




Final or Not?

- Order denying approval of the Disclosure Statement




2.




Final or Not?

- Order approving a settlement under 9019



2.





*Never Too Late To Raise An Issue on
Finality of An Order Because the
Issue is Jurisdictional*



- Jurisdictional issue raised for the first time after appellate briefing was concluded but before oral argument was not untimely and was considered by the court.

See *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 527-528 (5th Cir. 1996) (see footnote 3).

Exception to the Final Order rule is the Collateral Order Exception

- That doctrine allows review of collateral orders that “ ‘(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from a final judgment.’ ”

Liberty Synergistics Inc. v. Microflo Ltd., 718 F.3d 138, 146 (2d Cir.2013)

Notice of Appeal Deadlines

- Notice of Appeal must be filed with the bankruptcy court within 14 days of entry of the challenged order. FRBP 8002(a)
- Cannot really file too early –
 - A Notice of Appeal filed after the announcement of a decision but before the entry of the order is treated as filed on the day of the and after the entry of the order. FRBP 8002(a).
- Or FRBP 8002(b) may extend the date on which the claimant must file a Notice of Appeal.

8002(b) Extended Deadline

- If a party filed motion:
 - (1) to amend or make additional findings of fact under FRBP 7052;
 - (2) to alter or amend the judgment under FRBP 9023;
 - (3) for a new trial under FRBP 9023; or
 - (4) for relief under FRBP 9024 if the motion is filed no later than 14 days after the entry of judgment
- time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding.

Notice of Appeal Requirements

- FRBP 8003(a)(3):
 - Conform substantially to the appropriate Official Form - Contain the names of all parties to the order appealed from and the names, addresses, and telephone numbers of their respective attorneys.
 - Be accompanied by the prescribed fee, and
 - Be filed with a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with FRBP 8004.
- Clerk serves Notice of Appeal under FRBP 8004.

Motion for Leave to Appeal – Rule 8004

- Motion for Leave must contain (Rule 8004(b)(1)):
 - (A) the facts necessary to understand the question;
 - (B) the question itself;
 - (C) the relief sought;
 - (D) the reasons why leave to appeal should be granted; and
 - (E) a copy of the interlocutory order or decree and any related opinion or memorandum.
- Within 14 days after service of the motion, an adverse party may file an answer in opposition. FRBP 8004(b)(2).
- Motion for Leave and any answer are transmitted by bankruptcy clerk to district court (or BAP) for decision without oral argument.

Discretionary Extension

- Judge may extend deadline for filing Notice of Appeal under Rule 8002(d)(1), except for orders under 8002(d)(2) that:
 - (A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;
 - (B) authorizes the sale or lease of property or the use of cash collateral under § 363;
 - (C) authorizes the obtaining of credit under § 364;
 - (D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;
 - (E) approves a disclosure statement under § 1125; or
 - (F) confirms a plan under § 943, § 1129, § 1225, or § 1325.
- Extension request requires written motion filed before deadline expires or within 21 days of expiration if party shows excusable neglect. FRBP 8002(d)(1)

Steps after Noticing Appeal

- Appellant Designation of Record and Statement of Issues on Appeal –
 - Due 14 days after notice of appeal is filed or when appeal becomes effective
 - Fed. R. Bankr. P. 8009
- Appellee Counter Designation -
 - Due 14 days after appellate files its designation

Steps after Notice (cont.)

- Without the transcript, the Bankruptcy Court's findings of fact must be accepted as true.¹¹

¹¹ *Worthington v. Anderson*, 386 F.3d 1314 (10th Cir. 2004) (findings of fact must be accepted as correct, when the record was not supplied). See also, *In re Solomon*, 129 F.3d 608 (5th Cir. 1997) (in absence of a transcript, the fact findings are presumed to be correct).

Steps after Notice (cont.)

- After the clerk has the complete record, the record is transmitted to the district court and the appeal is docketed.

Briefing Schedule – Rule 8018

- Unless extended by local rule:
 - Appellant’s brief - 30 days after docketing
 - Appellee’s brief - 30 days after service of Appellant’s brief
 - Reply brief - 14 days after service of Appellee’s brief
 - Further briefs require leave of court.
 - Briefs must contain items in FRBP 8014
 - Unless otherwise provided by local rule:
 - principal briefs = no more than 30 pages*
 - reply briefs = no more than 15 pages*
 - Exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material. FRBP 8015(a)(7)
- *unless it complies with type-volume limitation and contains certificate of compliance

Oral Argument

- FRBP 8019 - Oral argument shall be allowed in all cases unless the court determines that oral argument is not needed.
- Oral argument will not be allowed if:
 - (1) the appeal is frivolous;
 - (2) dispositive issue(s) recently authoritatively decided; or
 - (3) briefs are sufficient and decisional process not aided by oral argument.

Dismissal of Appeal

- Voluntary Dismissal – FRBP 8023(c)

The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

Local Rules

- Be sure and check the local rules for both the bankruptcy court and district court
- Example: N.D. Tex. – rules vary timing of briefs and producing items in designation of record.



Direct Appeal to United States Circuit Court

Ditching the District Court



Basic Information

- Applies to cases filed after Oct 17, 2005.
- Controlled by Section 157 of title 28 of the United States Code, Federal Rule of Bankruptcy Procedure 8006.
- Certification will do no good unless you timely file a notice of appeal.

Jurisdiction

- Court of Appeals has jurisdiction over
 - Final orders - 28 U.S.C. §§ 158(a)(1), (d)(2)
 - **IF** (i) the bankruptcy court, the district court, or the bankruptcy appellate panel or (ii) the parties certify that the direct appeal:
 - Involves a question of law with no controlling decision of the court of appeals of the circuit or of the United States Supreme Court;
 - Involves a matter of public importance;
 - Involves a question of law requiring resolution of conflicting decisions; or
 - Would materially advance the progress of the case or proceeding in which the appeal is taken.
 - **AND IF** the court of appeals authorizes the direct appeal of the order. 28 U.S.C. § 158(d)(2)(A).

When and Where to file

- Must file a request for certification within 60 days of the order. 28 U.S.C. § 158(d)(2)(E)
- Notice of Appeal Due in 14 days, not 60. Notice of appeal must occur first. FRBP 8002
- Request for certification should be made in the court where the matter is pending at the time certification is requested. Where the matter is pending is determined on docketing of the appeal. FRBP 8006(b).
- If appeal has not yet been docketed in district court, matter is pending in bankruptcy court.

Mandatory Certification

- The bankruptcy court, district court, or the BAP shall make the certification if
 - on its own or on a party's motion the court determines that *any* of the 3 previously described circumstances are satisfied; or
 - the court receives a request by a majority of appellants and majority of appellees to make the certification.
- Thus, these courts have no discretion to decline to certify an appeal if one of the certification requirements is satisfied or a majority of appellants and a majority of appellees agree that certification is appropriate.
- 28 U.S.C. § 158 (d)(2)

Request for Certification

- Request for Certification must include:
 - Facts to understand question presented
 - Question presented
 - Relief sought
 - Statutory and/or other basis for appeal (including statutory basis for authorization)
 - Attach copy of order and any related opinion or memorandum
 - FRBP 8006(f)(2)

Important Note

- Just like an appeal to the district court, a direct appeal under 28 U.S.C. § 158(d) “does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective [court] . . . issues a stay of such proceeding pending the appeal.” 28 U.S.C. § 158(d)(2)(D).

Local Rules

- Make sure to check the bankruptcy, district, and court of appeals rules when pursuing a direct appeal

Removal

- Fed. R. Bankr. P. 9027
 - What to file?
 - Where to file?
 - When to file?
- Local rules
 - Where to file?
 - How to file?

Rule 9027- What to file?

Notice of removal shall:

- Contain a short and plain statement of the facts which entitle the party filing the notice to remove
- Contain a statement that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge
- Be signed pursuant to Rule 9011
- Be accompanied by a copy of all process and pleadings

Where to file?

Check:

- Statute - Jurisdictional
- Bankruptcy Rules - Procedural
- Local Rules – Procedural
- ECF Rules – Procedures, fees

28 U.S.C. § 1452

- “a party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.”

28 U.S.C. § 1334

- “the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11”

Rule 9027 – Where to file?

Where filed:

- “A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending.”

Rule 9027 - Where to file?

9001(3) “Clerk” means bankruptcy clerk, if one has been appointed, otherwise clerk of the district court.

So first filed in the bankruptcy court.

Rule 9027 - Where to file?

9027(c) In the non-bankruptcy court-

Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of the notice of removal.

Rule 9027 - When to file?

If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the **longest** of

Rule 9027 - When to file?

- 90 days after the order for relief in the case under the Code
- 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under section 362 of the Code, or
- 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief

Rule 9027 - When to file?

Civil Action initiated after commencement of the case under the Code, notice of removal may be filed with the clerk only within the **shorter** of

- 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim, or
- 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons

Texas – N.D. L.B.R. 9027-1

(a) Filing.

A removed claim or cause of action related to a bankruptcy case shall be filed in the bankruptcy court as an adversary proceeding and assigned directly to a bankruptcy judge. The filing shall contain a completed Adversary Proceeding Cover Sheet.

(b) Filing Fee.

The adversary proceeding filing fee is due upon the filing of the notice of removal. A fee is not required if the party removing the case is the debtor, or child support creditor. If the party removing the case is the trustee or debtor in possession, a motion to defer filing fee may be filed along with a proposed order.

(c) Attachments.

A notice of removal shall include a copy of the docket sheet, and shall be accompanied by a copy of all pleadings from the court from which the claim or cause of action is removed. The plaintiff(s) and defendant(s) shall be identical to the plaintiff(s) and defendant(s) in the court from which the claim or cause of action is removed.

Texas – S.D. L.R. 9027

What to file? 9027(a)

Notice must

- Comply with Fed. R. Bankr. P. 9027
- List all names and addresses of the parties
- Designate on which parties service of process has been accomplished
- List the name, address, and telephone number of the counsel for every party

Texas – S.D. L.R. 9027

What to file? 9027(b)

- Copy of all papers that have been filed in the court from which the case is removed
- Statements Regarding Consent 9027-2 by party filing removal
- Statements Regarding Consent 9027-3 by other party filing pleading

Texas – S.D. L.R. 9027

Where to file?

- 9027(c) Bankruptcy Court
- Removals under 28 U.S.C. 1452 must contain caption

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
_____ DIVISION

Texas – E.D. LRBP 9027

What to file?

- Notice of Removal
- Attachments as **separate** documents:

Texas – E.D. LRBP 9027

Attachments:

- Complete docket sheet;
- Operative petition or complaint
- All operative answers to the petition or complaint;
- All operative counterclaims or cross-claims;
- All operative answers to pending counterclaims or cross-claims
- Any pending motion and any objection or replies thereto.

Texas – E.D. LRBP 9027

Where to file?

- Pursuant to Fed. R. Bankr. P. 9027(a)
- Bankruptcy Court

Texas – W.D. L.R. 9027

What to file? 9027(b)(2)

- Notice of Removal under 28 U.S.C. 1452 shall include a copy of the docket sheet, and all pleadings, orders, and writs

Texas – W.D. L.R. 9027

Where to file? 9027(b)

- Notice of Removal under 28 U.S.C. §1452(a) shall be filed with the Bankruptcy Court
- Notice of Removal under any other federal provision shall be filed with the District Court

Texas – W.D. L.R. 9027

Remand

When to file? 9027(b)(3)

- Motion for remand must be filed no later than 30 days after the date of filing of the notice of removal

Motion to Withdraw the Reference

- Where to file?
- When to file?

Fed. Rule Bankr. P. 5011

“A motion for withdrawal of a case or proceeding shall be heard by a district judge.”

Fed. R. Bankr. P. 5011(a)

Texas-N.D. L.B.R. 5011.1

Where to file?

- A motion to withdraw the reference of a case or proceeding shall be directed to the district court, but shall be filed with the clerk of the bankruptcy court.
- Court will then hold a status conference on the motion.

N.D. Texas-Check Judge-specific procedures on website

What to file? Motion for Withdrawal must be accompanied by

- Filing fee.
- Separate notice of hearing, requiring movant to obtain a self-calendar date for the status conference before the bankruptcy judge.
- Hearing date and time must be included on the face of the motion.

TEXAS-S.D. L.R. 5011

Where to file? Bankruptcy Court

- A motion to withdraw a case, contested matter, or adversary proceeding must be filed with the clerk.
- “Clerk” means bankruptcy clerk, if one has been appointed, otherwise clerk of the district court. Fed. R. Bankr. P. 9001(3)

TEXAS-S.D. L.R. 5011

Where to file?

- Bankruptcy Court
- “Unless the district court orders otherwise, the matter will first be presented to the bankruptcy judge for recommendation.”



Texas-E.D.

No Local Rule



Texas-W.D. L. Rule 5011

Where to file?

- A motion to withdraw the reference of a case or proceeding and responses “shall be filed under the style and number of the bankruptcy case or adversary proceeding in which the reference is sought to be withdrawn and shall be filed with the Clerk of the Bankruptcy Court.”

Texas-W.D. L. Rule 5011

Where to file?

- The Clerk of the Bankruptcy Court will transmit the motion to withdraw the reference and any timely filed responses to the District Court.

Texas-W.D. L. Rule 5011

What to file?

- Motion to withdraw the reference shall list all pleadings which may be relevant to the Court's disposition of the motion, including docket entry numbers.
- Form of order for entry by the District Court

Texas-W.D. L. Rule 5011

When to file response?

- Responses or objections shall be filed within 14 days of date of service

Corporate Statement

- Fed. R. Bankr. P. 1007(a)
- If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1.
- supplement promptly upon change in circumstances that renders statement inaccurate

Rule 7007.1

- Who files?

any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit

Rule 7007.1

- What to file?
- 2 copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporations; equity interests, or states that there are no entities to report under this subdivision

Rule 7007.1

When to file?

- With the party's first appearance, pleading, motion, response, or other request addressed to the court.
- A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.



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