

# OVERVIEW OF BANKRUPTCY APPEALS

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## Introduction to Bankruptcy Appeals

**The Appeals Process.** Appeals from Bankruptcy Court decisions may be made to the appropriate United States District Court or, in districts that have decided to participate in the bankruptcy appellate panel service, may be made to the appropriate United States Bankruptcy Appellate Panel (BAP). Currently, all districts in the Tenth Circuit participate in the BAP.

Appeals to the BAP require the consent of all parties to the appeal. If any party files a statement of election that complies with applicable rules, the appeal will be transferred to the appropriate United States District Court.

Appeals to the BAP and to the District Court are governed by Part VIII of the Federal Rules of Bankruptcy Procedure. Appeals to the BAP are also governed by the BAP's local rules. Appeals to a District Court are governed by applicable local rules of the District Court.

Appeals from decisions of the BAP or decisions of the District Court are made to the same Court: the United States Court of Appeals for the Tenth Circuit.

**Highlights of Practice Before the BAP.** Highlights of practice before the BAP include the following:

- **The BAP is accessible.** The BAP accepts fax filings for all papers except briefs and appendices to briefs, and a paper is considered timely filed if the fax is received before 12:00 midnight (mountain time) on the date the paper is due (Briefs and appendices are deemed filed on the date mailed). The BAP generally allows oral argument when a party requests it, generally schedules oral argument sessions in the district from which the appeal arose, and allows parties to present oral argument by telephone or (where available) videoconference. Finally, the staff of the BAP Clerk's Office is available by phone or e-mail to answer questions or provide an update about the progress of an appeal. The BAP Clerk's Office is dedicated to providing friendly and efficient quality service to the bench, the bar, and the public.
- **BAP appeals are processed and resolved quickly.** Because the BAP does not require a completed record on appeal to process an appeal, appeals to the BAP are transmitted by Bankruptcy Courts earlier than appeals to the District Court. In many cases the BAP is able to process an appeal and assign a case number on the same day that a notice of appeal is filed in the Bankruptcy Court. The BAP sets briefing deadlines as soon as an appeal is processed so the case can proceed quickly, and the BAP monitors deadlines to ensure that the appeal is being

prosecuted. BAP appeals are resolved quickly, with an average of less than 60 days from the time the appeal is submitted to a panel to the time that a decision is entered. The average time from the filing of the notice of appeal to the entry of decision is less than 150 days.

- **BAP appeals have the benefit of three specialized Judges.** Appeals to the BAP are decided by a panel of three Bankruptcy Judges, who have specialized expertise desirable for resolution of bankruptcy appeals. No appeal will be heard by a Bankruptcy Judge sitting in the same state as that from which the appeal arose.

## **Filing the Notice of Appeal**

**General Requirements: Form, Filing and Docketing Fees, and Deadlines.** Every appeal begins with the filing of a notice of appeal. The notice of appeal should be filed with the Bankruptcy Court Clerk.

The notice of appeal must conform to the appropriate official form (Official Form 17); must contain the names of all parties to the order or judgment along with the names, addresses, and telephone numbers of counsel for all parties to the order and judgment; and must be accompanied by the appropriate fee.

For all parties other than the United States government, the appropriate fee is a \$250.00 docketing fee and a \$5.00 filing fee, for a total of \$255.00 due at the time of filing the notice of appeal. For the United States government, a \$5.00 filing fee is due at the time of filing the notice of appeal. For trustees or debtors-in-possession, the \$250.00 docketing fee may be deferred until there are assets in the estate.

The appeal must be filed within **ten (10)** calendar days after entry of the Bankruptcy Court's order or judgment (weekends and holidays are **not** excluded from computation of the ten days). Reference: Fed. R. Bankr. P. 8001-8002; 28 U.S.C. § 1930(b) (fee schedule containing \$250.00 docketing fee); 28 U.S.C. § 1930(c) (\$5.00 filing fee).

**Cross Appeal.** After a party has filed a timely notice of appeal, any other party may file a notice of appeal within ten days after the date the first notice of appeal was filed. A cross-appeal is considered a notice of appeal and must be accompanied by the appropriate filing and docketing fees. Reference: Fed. R. Bankr. P. 8002(a).

**Interlocutory Appeal.** If the order or judgment being appealed is not a final order or judgment, it is interlocutory. An appeal of an interlocutory order or judgment may be made only with leave of Court. A party seeking review of an interlocutory order or judgment should file a notice of appeal accompanied by a motion for leave to appeal.

When an appellant seeks leave to appeal an interlocutory order, the appellant is initially required to pay only the \$5.00 filing fee. The remaining \$250.00 docketing fee is not due unless the appellate court grants leave to appeal. Reference: 28 U.S.C. § 158; Fed. R. Bankr. P. 8003.

**Premature Notice of Appeal.** Under certain circumstances, a notice of appeal is considered to be premature: (1) when the notice of appeal is filed after the decision of the Court has been announced, but before an order or judgment has been entered on the Court's docket, *see* Fed. R. Bankr. P. 8002(a); or (2) when a notice of appeal has been filed while a tolling motion (generally, a motion for rehearing) is still pending, *see* Fed. R. Bankr. P. 8002(b)(4).

An appeal is not invalid because it is premature; it is merely temporarily ineffective. After the Bankruptcy Court enters the order or judgment, or rules on the tolling motion, the notice of appeal becomes effective. *See* Fed. R. Bankr. P. 8002(a), (b)(4). The Bankruptcy Court's ruling on a tolling motion is not automatically part of the appeal; the appellant must amend the notice of appeal to include it. Fed. R. Bankr. P. 8002(b)(4).

**Bankruptcy Court Docketing of Appeal, Transmission to BAP.** When a notice of appeal is filed, the Bankruptcy Court Clerk must docket the notice of appeal and serve a copy on all parties identified in the notice of appeal. Fed. R. Bankr. P. 8004. The Bankruptcy Court Clerk must also send to the BAP a copy of the following papers, which constitute the "preliminary transmission":

- (1) The notice of appeal;
- (2) The Bankruptcy Court's order or judgment appealed, and any written findings and conclusions or opinion of the Bankruptcy Court;
- (3) Any motion to extend time to file the notice of appeal and the order disposing of the motion;
- (4) Any post-judgment motion regarding the appealed judgment or order and the order disposing of the motion; and
- (5) The Bankruptcy Court docket sheet(s) (the docket in the main case and the adversary proceeding docket where the appeal is from an adversary proceeding). Note: the docket sheets should contain the caption page.

10th Cir. BAP L.R. 8007-1(a). The preliminary transmission should be sent to the BAP by facsimile or by electronic transmission. 10th Cir. BAP L.R. 8007-1(c). If, after the preliminary transmission has been sent, a party files a motion regarding the appealed order or judgment, or a party files a statement of election, the Bankruptcy Court must send the motion or election, together with the relevant docket entries, to the BAP. This is the "supplemental transmission." 10th Cir. BAP L.R. 8007-1(b).

**Enforcement of Requirements.** If an appeal is not accompanied by the proper filing and docketing fee, the BAP will issue a notice of deficiency, and if the fee is not paid within the time specified, the BAP will dismiss the appeal. If an appeal is not timely filed, the BAP will issue an order to show cause why the appeal should not be dismissed for lack of jurisdiction, and unless the time for filing a notice of appeal is extended by the Bankruptcy Court, the BAP will dismiss the appeal. If an interlocutory appeal is filed without a motion for leave to appeal, the BAP will issue an order to show cause why the appeal should not be considered for dismissal as interlocutory. If an appeal before the BAP is premature, the appellant will be directed to notify the BAP when the order or judgment is entered or the tolling motion is ruled upon, and the Bankruptcy Court will also be requested to notify the BAP, to ensure that the appeal is promptly resumed.

## **Election to Have Appeal Heard by District Court**

**General Rule: Appeals Go to BAP.** All appeals are heard by the BAP unless a party timely files a proper statement of election for the appeal to be heard by the District Court. Reference: 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

**Appellant's Election: Where Filed; Requirements.** If the appellant wants the appeal to be heard by the U.S. District Court, the appellant must file an election with the Bankruptcy Court that meets the following requirements:

- (1) it must be filed at the time the notice of appeal is filed;
- (2) it must be a written statement separate from the notice of appeal; and
- (3) it must clearly state the election to proceed before the District Court.

28 U.S.C. § 158(c)(1)(2); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1. If the appellant does not file an election, or if the election does not meet all three requirements, the appeal is sent to the BAP.

**Appellee's Election: Where Filed; Requirements.** An appellee is allowed, within thirty days after the date the Bankruptcy Court serves the notice of appeal, to file an election to have the appeal heard by the District Court. This election must be filed with the BAP. 10th Cir. BAP L.R. 8001-1. Note that papers are not filed until they are received by the BAP. Fed. R. Bankr. P. 8008(a).

**Elections in Cross Appeals.** A cross-appellant seeking to have its cross-appeal and the appellant's appeal heard in the District Court must follow both rules, filing a separate statement of election with the Bankruptcy Court at the time the notice of cross-appeal is filed and filing a separate statement of election with the BAP within 30 days after service of the appellant's appeal. 10th Cir. BAP L.R. 8001-1.

## **Initial Steps in Prosecuting Appeal**

**Designation of Record and Statement of Issues.** An appellant must, within ten days after filing the notice of appeal, file with the Bankruptcy Court a designation of the record on appeal and a statement of issues to be presented on appeal. An appellee may designate additional items to be included in the record within 10 days after service of the appellant's designation. A cross-appellant must, within 10 days after service of the appellant's designation of record and statement of issues, file a designation of record and statement of issues to be presented on the cross-appeal. Fed. R. Bankr. P. 8006. Sample forms are available from the BAP's web page: [www.bap10.uscourts.gov](http://www.bap10.uscourts.gov). If an appeal is to the BAP, any party who files a designation of record or statement of issues with the Bankruptcy Court must also file a copy with the BAP within 10 days after the notice that the appeal has been docketed with the BAP. 10th Cir. BAP L.R. 8006-1(b). If an appellant or cross-appellant in a BAP appeal does not file a designation of record and statement of issues, after notice and order to show cause, the BAP will dismiss the appeal for failure to prosecute.

**Ordering a Transcript.** If a party wishes to include a transcript of a hearing as part of the record on appeal, that party must, immediately after filing the designation of record, file with the Bankruptcy Court and deliver to the Court Reporter a written request for the transcript. The party ordering the transcript must make satisfactory arrangements for payment of the cost of the transcript. The Court Reporter is required to complete the transcript within 30 days of receipt of a request for a transcript. If the Court Reporter will not be able to meet the deadline, the Court Reporter must file a request for an extension of time with the Bankruptcy Court. The Court Reporter must file the completed transcript with the Bankruptcy Court. Reference: Fed. R. Bankr. P. 8006, 8007.

**No Separate Record on Appeal; Include Items and Transcripts in Appendix.** If an appeal is to the BAP, the parties should not file with the Bankruptcy Court copies of the items designated as part of the record on appeal. The Bankruptcy Court will not send those items to the BAP. Instead, the parties must include the items, including transcripts or portions of transcripts, in the appendix to their brief required by Fed. R. Bankr. P. 8009(b) and 10th Cir. BAP L.R. 8009-1(b). Reference: 10th Cir. BAP L.R. 8006-1(a). Any item not included in an appendix may not be considered by the Court, and an appeal may be summarily affirmed if sufficient items are not included in the appendix.

### **Notice That Appeal Has Been Docketed; Deadlines**

**Notice.** As soon as the BAP receives the preliminary transmission from the Bankruptcy Court, the BAP will docket the appeal and will prepare a Notice That Appeal Has Been Docketed. The Notice will contain the BAP case number, general information about the BAP, and all applicable deadlines. The Notice will be mailed to all parties to the appeal

and sent to the Bankruptcy Court Clerk. Reference: Fed. R. Bankr. P. 8007(b).

**Deadlines.** The Notice will set forth all applicable BAP deadlines, such as the date that the Statement of Interested Parties must be filed with the BAP, the date that a copy of the designation of record and statement of issues must be filed with the BAP, and the date that briefs are due. Parties are required to prosecute the appeal in accordance with the deadlines stated in the Notice. If a party requires additional time to file a paper, that party must obtain an extension of time from the BAP.

**Statement of Interested Parties.** Within 10 days after the date of the Notice that the appeal has been docketed with the BAP, all parties to the appeal must file a statement disclosing any interested party who is not listed on the notice of appeal. An interested party includes all parties that have a financial interest in the outcome of the appeal. If there are no interested parties, a statement to that effect must be filed. A statement of interested parties is filed on the date it is received by the BAP. Reference: 10th Cir. BAP L.R. 8018-3.

**Briefing Schedule.** The appellant's opening brief is due 45 days from the date of the Notice that the appeal has been docketed with the BAP. 10th Cir. BAP L.R. 8009-1(a). The appellee is required to file its brief within 15 days after the date the appellant's opening brief is served, Fed. R. Bankr. P. 8009(a)(2), plus 3 days for mailing if the brief is served by mail, Fed. R. Bankr. P. 9006(f); 10th Cir. BAP L.R. 8018-10(a). The appellant may file an optional reply brief within 10 days after the date the appellee's brief is served, Fed. R. Bankr. P. 8009(a)(3), plus 3 days for mailing if the brief is served by mail, Fed. R. Bankr. P. 9006(f); 10th Cir. BAP L.R. 8018-10(a). A brief is deemed filed on the date it is mailed. Fed. R. Bankr. P. 8008(a).

## **Briefs and Appendix**

**Form of Briefs.** The form of a brief is set forth in Fed. R. Bankr. P. 8010 and 10th Cir. BAP L.R. 8010-1. An appellant's brief must contain the following:

- (1) A cover with the case caption; the title "Brief" and the filing party's name; counsel or a pro se party's name and address and, if available, telephone and facsimile number; and a statement of whether oral argument is requested;
- (2) A table of contents, with page references, and a table of authorities, with cases in alphabetical order, with page references;
- (3) A statement of the basis of appellate jurisdiction;
- (4) A statement of the issues presented and the applicable standard of review;
- (5) A statement of the case;
- (6) An argument, with citations to authorities;



- (7) A short conclusion stating the relief sought; and
- (8) An addendum with relevant parts of statutes, rules, or regulations necessary for the Court's review.
- (9) If oral argument is requested, a statement of the reasons why oral argument is necessary must follow the conclusion.
- (10) If there is a related case (substantially the same litigants and substantially the same fact pattern or legal issues) a statement listing the related case(s) must be included as the last page of the brief.

An appellee's brief must contain a cover with the filing party information and the statement regarding argument, a table of contents, a table of authorities, argument with citations to authorities, a short conclusion, an addendum, a statement of reasons for oral argument (if argument is requested on front cover), and a statement of related cases (if the appellee knows of any related cases). The appellee's brief may also contain the statement of appellate jurisdiction, statement of issues, and statement of the case, if the appellee is dissatisfied with the statements of the appellant.

**Page Limits.** The appellant's and the appellee's principal briefs are limited to 50 pages, and the appellant's reply brief is limited to 25 pages, exclusive of the table of contents, table of citations, addendum, statement of reasons for oral argument, and statement of related case(s). Word processor or typewriter text must be no smaller than 12-point font and, except for indented quoted material or footnotes, must be double-spaced. Each page must have 1" margins on all sides. Pages must be printed on only one side, and briefs must be firmly bound along the left margin.

**Briefs in Cross Appeals.** When the appeal includes a cross-appeal, the briefing schedule is combined as follows:

- (1) The appellant/cross-appellee files the first brief, which must comply with the requirements of an appellant's brief and address the issues presented in the appellant's appeal.
- (2) The appellee/cross-appellant files the second brief, which combines the appellee's response brief (addressing the issues presented in the appellant's appeal) and the cross-appellant's opening brief (complying with the requirements of an appellant's brief and addressing the issues presented in the cross-appeal).
- (3) The appellant/cross-appellee files the third brief, which combines the appellant's reply brief (addressing the appellee's response brief) and the cross-appellee's response brief (addressing the cross-appeal).
- (4) The appellee/cross-appellant files the fourth brief, which is a reply brief addressing the cross-appeal.

**Appendix.** The appellant is required to provide an appendix to the brief containing all papers necessary for the Court's review. Fed. R. Bankr. P. 8009(b). An appellee may file an appendix containing any papers that the appellant failed to provide. *Id.* The appellant's appendix must contain the following:

- (1) The complaint and answer or other equivalent pleadings;
- (2) Any pretrial order;
- (3) The judgment, order, or decree from which the appeal is taken;
- (4) Any other orders relevant to the appeal;
- (5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the Court and citations of the opinion if published;
- (6) Any motion and response on which the Bankruptcy Court rendered decision;
- (7) The notice of appeal;
- (8) The relevant entries in the bankruptcy docket; and
- (9) All transcripts, or portions of transcripts, that are necessary for the Court's review. Where the appellant seeks to overturn a finding of fact by the Bankruptcy Court, the entire transcript should be provided. *See Rubner & Kutner, P.C. v. United States Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321, 1323 (10th Cir. 1993).

**Form of Appendix.** The appendix must be bound separately from the briefs. The appendix must be consecutively paginated and must have a table of contents with the page number at which each item appears. When more than one party files an appendix, the parties should avoid including items already incorporated in a previous appendix and should incorporate items by reference. 10th Cir. BAP L.R. 8009-1.

**Number of Copies.** A party must file the original and three copies of a brief and an appendix to a brief.

## **Motions Practice**

**General Procedures.** If a party requests the Court to enter an order or grant a relief (for example, extend the time for filing a paper), the request must be made by motion. The general requirements for motions practice are set forth in Fed. R. Bankr. P. 8011 and 10th Cir. BAP L.R. 8011-1. The motion must contain the following:

- (1) A statement of the particular grounds on which the motion is based;
- (2) A statement of the order or relief sought;
- (3) A statement regarding whether the motion is opposed;
- (4) Proof of service on all parties to the appeal; and
- (5) Anything required to accompany the motion by a specific provision of the

Federal Rules of Bankruptcy Procedure or the Local Rules.

**Response to Motions, Reply.** Generally, a party is allowed seven days to respond to a motion. Fed. R. Bankr. P. 8011(a). The Court may shorten or extend this period. *Id.* The movant may file a reply to a response within 5 days after service of the response. 10th Cir. BAP L.R. 8011-1(c).

**Emergency Motion.** A moving party may request expedited relief when the relief is necessary to avoid immediate and irreparable harm. Such a motion must include the following:

- (1) The word “Emergency” preceding the title of the motion (Fed. R. Bankr. P. 8011(d));
- (2) An affidavit stating the nature of the emergency and when and how opposing counsel was notified of the motion; if opposing counsel was not notified, the affidavit must state why it was not practicable to do so (Fed. R. Bankr. P. 8011(d));
- (3) A statement as to whether all of the grounds presented to the BAP in support of the motion were presented to the Bankruptcy Court; if all the grounds were not presented to the Bankruptcy Court, the motion must also state why the motion should not be remanded to the Bankruptcy Court for reconsideration (Fed. R. Bankr. P. 8011(d));
- (4) The office addresses and telephone numbers of opposing counsel (Fed. R. Bankr. P. 8011(d)) and, if available, facsimile number of all parties to the appeal (10th Cir. BAP L.R. 8011-2(b)); and
- (5) An appendix containing a copy of (1) the notice of appeal, (2) the order or judgment appealed, and (3) any other paper filed with the Bankruptcy Court that is necessary to decide the motion (10th Cir. BAP L.R. 8011-2(c)).

Before filing an emergency motion, the moving party must give the Clerk of the BAP as much advance notice as possible. 10th Cir. BAP L.R. 8011-2(a). The moving party must also make every practicable attempt to notify opposing counsel in sufficient time to allow opposing counsel to respond to the motion. Fed. R. Bankr. P. 8011(d). The motion should be filed with the BAP and served on opposing counsel by the quickest method available. 10th Cir. BAP L.R. 8011-2(a).

**Motion for Stay Pending Appeal.** A motion for stay pending appeal should be filed with the BAP only after the Bankruptcy Court has denied the motion. Fed. R. Bankr. P. 8005. The motion must be accompanied by an appendix containing (1) a copy of the Bankruptcy Court’s order or transcript of order denying the motion for stay (unless the motion was not first made to the Bankruptcy Court, in which case the movant must explain why it was not); and (2) copies of all papers filed before the Bankruptcy Court

that are necessary to decide the motion. 10th Cir. BAP L.R. 8005-1(b). If the motion for stay is an emergency motion, the motion must also comply with Fed. R. Bankr. P. 8011(d) and 10th Cir. BAP L.R. 8011-2.

## **Oral Argument**

**General Procedure.** The BAP allows oral argument in all cases unless the Court determines that oral argument is not necessary after examining the briefs and appendices. *See generally* Fed. R. Bankr. P. 8012. Argument sessions will generally be scheduled in the district from which the appeal arose.

**Requesting Oral Argument.** The front cover of each party's opening brief must contain a statement of whether oral argument is requested. If oral argument is requested, the party must include in its brief, after the conclusion, a statement of reasons for oral argument.

**Notice of Oral Argument.** When a case has been placed on an oral argument calendar, the BAP will send all parties a Notice of Oral Argument, giving the time and place of the scheduled argument. The Notice of Oral Argument will also have an Oral Argument Acknowledgment Form attached. Each attorney or unrepresented party is required to return the Oral Argument Acknowledgment Form within 10 days, indicating whether the attorney or the party intends to appear for oral argument or to arrange for another attorney to appear in his or her place.

**Change of Date or Place of Argument.** After the date of the Notice of Oral Argument, the date or place of the argument will not be changed without leave of Court. 10th Cir. BAP L.R. 8012-1(b).

**Guidelines for Argument.** Cross appeals, consolidated appeals, or companioned appeals will be argued as one case. A cross-appellant is considered an appellee for purposes of oral argument. Argument time is limited to 15 minutes for the appellant and 15 minutes for the appellee, but may be reduced or expanded by the court at the time of the hearing. The appellant is entitled to open and conclude the argument, and may reserve part of the time accordingly. An appellee is generally not permitted to reserve time for rebuttal. The Judges on the panel will have reviewed the record and briefs and will be familiar with the facts and issues of the case. Argument should be devoted to key points, clarifying issues as needed, and responding to questions raised by the Judges.

**Telephone or Video Conference.** A party may request, or the Court may determine, that oral argument be conducted by telephone or videoconference. 10th Cir. BAP L.R. 8012-1(a).

## Decision by the Court

**General Procedure.** Once the BAP enters its decision on the appeal, the Clerk of Court will enter the judgment in the docket and send notice, together with a copy of the decision, to all parties, the U.S. Trustee, and the Clerk of the Bankruptcy Court. Fed. R. Bankr. P. 8016.

**Motion for Rehearing.** A party may file a motion for rehearing with the BAP within 10 days after the date the judgment was entered. Fed. R. Bankr. P. 8015. Timely filing of the motion tolls the time for filing a notice of appeal to the Tenth Circuit Court of Appeals. *Id.* The BAP will consider only one motion for rehearing from each party to the appeal. 10th Cir. BAP L.R. 8015-1(a).

**Stay Pending Appeal.** The judgment of the BAP is automatically stayed for 10 days from the date the judgment was entered. Fed. R. Bankr. P. 8017(a). On motion of a party, the Court may extend the stay to 30 days from the date the judgment was entered. Fed. R. Bankr. P. 8017(b). A stay of longer than 30 days may be granted for cause shown. *Id.* However, if the Court grants a 30-day stay, and a notice of appeal to the Tenth Circuit Court of Appeals is filed during the 30-day stay, the stay automatically continues until the Court of Appeals finally disposes of the appeal.

**Mandate.** After the time for filing a motion for rehearing has expired, the BAP will send to the Bankruptcy Court a certified copy of the decision, which constitutes the mandate. The mandate returns jurisdiction to the Bankruptcy Court. The mandate is automatically stayed while a timely-filed motion for rehearing is pending, while the Court is considering a motion for stay under Fed. R. Bankr. P. 8017(b), or during the period of a stay granted under Fed. R. Bankr. P. 8017(b).

## Appeals to the Tenth Circuit Court of Appeals

**General Procedure.** Appeals from decisions of the BAP are taken to the U.S. Court of Appeals for the Tenth Circuit. A notice of appeal should be filed with the Clerk of the BAP. The time for filing an appeal is 30 days from the date of entry of the judgment, or 60 days if the United States is a party. If a timely motion for rehearing is filed, the time to appeal runs from the entry of the order denying rehearing or the entry of a subsequent judgment. Fed. R. App. P. 4(a)(1) (made applicable by Fed. R. App. P. 6); 10th Cir. BAP L.R. 8015. The filing fee for an appeal from the BAP is \$455.00. No fee is charged for appeals filed by the United States. 28 U.S.C. § 1913 (fee schedule).

The Tenth Circuit Court of Appeals requires the appellant to file a docketing statement within ten days after the date of filing the notice of appeal. 10th Cir. R. 3.4. The docketing statement must include a copy of the BAP docket sheet, which parties may

obtain over the Internet by selecting the PACER option, or from the BAP by paying the copying cost of \$.50 per page.

## **Direct Appeals to the Tenth Circuit Court of Appeals**

**Effective Date.** The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, effective October 17, 2005, includes provisions allowing direct appeals from bankruptcy court orders to a circuit court of appeals under certain circumstances. The applicable provisions governing these "direct" appeals are 28 U.S.C. § 158(d)(2) and Interim Bankruptcy Rules 8001(f) and 8003(d). The direct appeals provisions apply only to appeals that arise from bankruptcy cases that are filed on or after October 17, 2005, BAPCPA's effective date.

**Effective Appeals.** The BAP may authorize a direct appeal only if an "effective" appeal has been docketed by the BAP. Otherwise, requests for direct appeal should be directed to the bankruptcy court, and not the BAP. A notice of appeal is considered ineffective if it is untimely, premature, or if the order appealed from is interlocutory. Until a notice of appeal becomes effective, only the bankruptcy court may grant a request for direct appeal. The BAP will provide written notice to the parties and the bankruptcy court if a notice of appeal appears to be ineffective.

**Parties Acting Jointly.** Parties acting jointly may certify an order for direct appeal under 28 U.S.C. § 158(d)(2)(A) at any time by filing the appropriate Official Form, and no involvement by the BAP is needed. Assuming the appeal has been docketed by the BAP and is effective, this certification for direct appeal is effective as soon as it is docketed by the BAP. The BAP will acknowledge docketing of joint certifications by letter informing parties of the docketing date. This docketing date triggers the parties' 10-day deadline to file their petition for direct appeal with the Tenth Circuit.

**Parties Not Acting Jointly.** In cases where parties do not act jointly, one or more parties to an appeal may file a request for certification pursuant to 28 U.S.C. § 158(d)(2)(B) no later than 60 days after the entry of the order appealed from. The BAP will serve a copy of such request on all parties. Untimely requests will be denied. If the request for direct appeal is filed by the majority of the Appellant(s) and Appellee(s), the BAP shall grant certification and will direct the parties to file their petition with the Circuit within 10 days. If the request for certification is filed by fewer than a majority of the Appellant(s) and Appellee(s), the BAP must determine whether any of the factors set forth in the statute and interim rules are met. If the BAP grants certification, the parties should file their petition for direct appeal with the Circuit within 10 days.

**Certification by the BAP for Direct Appeal.** The BAP may also, on its own initiative, certify an issue for direct appeal at any time. 28 U.S.C. § 158(d)(2). In such event, the parties must file a petition with the Circuit within 10 days after such certification is

docketed. This requirement is found in an uncodified section of the Act, § 1233(b)(4). The burden of filing a petition with the Circuit is solely on the parties; the BAP is not required to notify or transmit anything to the Circuit. *See* Fed. R. App. P. 5.

**Stays Pending Requests for Direct Appeal.** Certification does not stay a pending appeal. 28 U.S.C. § 158(d)(2)(D). Parties may wish to file a motion for stay of their BAP appeal pending the Circuit's response to their petition. Such motions for stay will be decided on a case-by-case basis. If the Circuit grants permission to appeal, the Circuit will notify the BAP thereof. The BAP will then file an order dismissing the BAP appeal. Note that authorization by the Circuit of a direct appeal pursuant to 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal when it is required by 28 U.S.C. § 158(a) but has not yet been granted. *See also* Interim Bankruptcy Rule 8003(d).

## General Information

**Rules of Practice.** Appeals to the BAP are governed by Part VIII of the Federal Rules of Bankruptcy Procedure and the Tenth Circuit BAP Local Rules. Copies of the Local Rules may be obtained in the following ways:

- \* downloaded from the Internet at [www.bap10.uscourts.gov](http://www.bap10.uscourts.gov); or
- \* obtained on request from the BAP Clerk's Office.

**Calculation of Time.** Time is calculated using Fed. R. Bankr. P. 9006. Intervening Saturdays, Sundays, and holidays are not counted toward deadlines of less than eight days; they are counted toward deadlines of eight days or more. Reference: 10th Cir. BAP L.R. 8018-10; Fed. R. Bankr. P. 9006.

**Filing Papers with the Court.** For all papers other than briefs and appendices to briefs, papers are not filed until they are received by the Court. Fed. R. Bankr. P. 8008(a). Briefs are deemed filed on the date mailed ("mail" includes first class mail, any other class of mail that is at least as expeditious as first-class mail, or dispatch to a third-party commercial carrier for delivery within 3 calendar days). Fed. R. Bankr. P. 8008; 10th Cir. BAP L.R. 8008-1(a).

**File-Stamped Copy.** Most papers other than briefs and appendices are imaged and posted to PACER (Public Access to Court Electronic Records). A party may obtain a file-stamped copy of a paper from PACER, which is available from the BAP web site ([www.bap10.uscourts.gov](http://www.bap10.uscourts.gov)).

**Fax Filing.** The BAP allows all papers except briefs and appendices to be filed by fax. A party need not follow up with an original; the faxed paper is considered the original. 10th Cir. BAP L.R. 8008-1(d).

**E-Mail Filing.** The BAP does not accept E-mail filings from parties to an appeal without advance authorization of the Clerk of Court. *See* 10th Cir. BAP L. R. 8008-1(e). E-mail from parties to an appeal will not be forwarded to the Judges and is not a valid means of requesting relief from the Court. Parties to an appeal may use E-mail to make a general inquiry of the Clerk’s Office or to obtain a copy of the Local Rules. The Clerk’s Office E-mail address is 10th\_Circuit\_BAP@ca10.uscourts.gov.

**Compact Disc (CD) Filing.** Any party may file copies of a paper with this Court on CD, upon compliance with the conditions below:

1. The party must file with this Court one (1) paper copy and four (4) CD copies of the paper.
2. All documents on the CD must be in Adobe Acrobat “pdf” format. The CD must contain an index or table of contents, listing the full name, date, and docket number of each document therein, exactly as it appears on each tab as set forth in paragraph 4(a) below.
3. The paper must comply with all applicable Federal Rules of Bankruptcy Procedure and this Court’s Local Rules, except as set forth in subsections (a) through (c) below.
  - (a) If paper filed is an appendix, the filing party may be excused from the requirement that the appendix be consecutively paginated if the party uses labeled tabs for each item in the paper copy of the appendix. Each tab must contain the full name and date of the document, as well as the docket number to which it corresponds.
  - (b) Each item in the appendix must have the same name on the paper tab as on the CD file. For example, a paper item labeled “June 11, 2001, Order Denying Plaintiff’s Motion for Summary Judgment – Docket No. 12345” must be matched by a .pdf file on the CD labeled “June 11, 2001, Order Denying Plaintiff’s Motion for Summary Judgment – Docket No. 12345.” A paper item labeled “June 11, 2001, Order Denying Plaintiff’s Motion for Summary Judgment – Docket No. 12345” must be matched by a .pdf file on the CD labeled “June 11, 2001, Order Denying Plaintiff’s Motion for Summary Judgment – Docket No. 12345.”
  - (c) The paper copy of the appendix must contain a table of contents, listing the full name, date, and docket number of each document therein, exactly as it appears on each tab.
4. Each CD must be identical to the paper copy. Each CD must be clearly labeled with the case caption of the appeal and must be in a protective case.
5. The party must scan each CD for viruses.
6. The party must file with this Court a statement certifying as follows:
  - (a) The CD copies are true copies of the paper copy filed with this Court;



- (b) The CDs have been scanned for viruses, specifying the software program used for the scan; and
  - (c) To the best of the party's knowledge, the CDs are free of viruses.
- 7. The party must serve each other party to the appeal with a "hard" (paper) copy of the paper unless the party to be served consents to receipt of a CD. If any party is served with a CD, the certificate of service must state that the party consented to receipt of the CD.

Any party who complies with all above conditions need not seek permission of the Clerk to file copies of the paper on CD. Any party who seeks to be excused from any of the above conditions must file a motion, which must comply with Fed. R. Bankr. P. 8011 and 10th Cir. BAP L.R. 8011-1.

The Court may, by order entered in a particular case, require a party to file additional paper copies.