NEW BANKRUPTCY APPEAL RULES AND

A RECENT LESSON ON EXCUSABLE NEGLECT

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1. Effective December 1, 2014, the Federal Rules of Bankruptcy Procedure governing appeals were completely revised.
    a. The purpose was to bring the rules into conformity with the Federal Rules of Appellate Procedure.
    b. Following are the highlights of the changes (and information about what has stayed the same).

2. For complete information, check the Rules themselves (8001 – 8028).

3. Make sure you are using a current version of the Rules. The uscourts.gov website has a current copy of the rules at http://www.uscourts.gov/RulesAndPolicies/rules/current-rules.aspx

4. Not changed: the 14-day appeal period in Bankruptcy Rule 8002(a)(1).

    a. The appeal period runs from entry of the judgment or order.
    b. To count the days, drop the date of the entry of the judgment, and count 14 days starting with the next day, including Saturdays, Sundays and federal holidays.
    c. If the 14th day ends on a Saturday, Sunday or federal holiday, the 14-day period extends to the next day that is not a Saturday, Sunday or federal holiday.
    d. Extension of time for appeal CAN be granted except for certain Orders, e.g., granting relief from stay; authorizing sale of property; authorizing obtaining credit; authorizing assumption or assignment of executory contract, approving a disclosure statement, or confirming a plan.
        i. Motion for extension of other orders must be filed within the 14-day appeal period or within 21 days after that time, if the party shows excusable neglect.
        ii. No extension may exceed 21 days after the 14-day appeal period or 14 days after the order granting the motion to extend time, whichever is later.
        iii. Excusable neglect: See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993); In re Kmart Corp., 381 F.3d 709 (7th Cir. Ill. 2004).
        iv. In re Wigoda, 11 Fed. Appx. 624 (7th Cir. Ill. 2001) – no excusable neglect when attorney mistakenly relied on the 3-day mailbox rule in filing notice of appeal.

5. Not changed: certain motions, such as motion to alter or amend a judgment or motion for new trial, automatically extend the 14-day appeal period, as long as they are filed within the 14-day period.

6. Not changed: the notice of appeal is filed in the Bankruptcy Court, must be in the language of the official form and accompanied by the filing fee ($298 to district court; another $207 if direct appeal accepted by court of appeals).

7. Not changed: a cross-appeal may be filed within 14 days of a timely appeal.

8. **Changed**: the Bankruptcy Clerk immediately transmits the appeal to the District Court, and a file is opened there. (Under the old procedures, the appeal was not transmitted until the record was ready to go.)

9. Not changed: to appeal from an interlocutory order, file a motion for leave to appeal within 14 days of the interlocutory order. Response is due within 14 days.

10. Not changed: file with the Bankruptcy Court and serve on the appellee a designation of the items from the record to be included in the appeal and a statement of the issues.

    a. File these within 14 days of filing the notice of appeal or within 14 days of an order granting leave to appeal.
    b. Within 14 days of appellant's designation, appellee may file with the Bankruptcy Court and serve on appellant additional items to be included in the record.
    c. Within 14 days of appellant's designation, cross-appellee must file statement of issues for cross-appeal and may designate additional items.
    d. **Changed:** Rule 8009(a)(4) lists exact documents that must be included in record on appeal.

11. **Changed:** Transcripts

    a. Within 14 days of notice of appeal (or 14 days of order granting leave to appeal) appellant must order in writing from the reporter a transcript of any parts of the proceedings not already on file as the appellant considers necessary for the appeal and file a copy of the order with the Bankruptcy Court.
    b. Or file with the Bankruptcy Court a certificate stating that the appellant is not ordering a transcript.
    c. Within 14 days after appellant's transcript order or certificate, appellee may order any additional transcripts and file a copy of the order with the Bankruptcy Court.
    d. **Changed**: If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all relevant testimony and copies of all relevant exhibits.

12. **Changed:** New Rule 8009(d) provides that instead of the record on appeal designated by each party, the parties may prepare, sign, and submit to the bankruptcy court a

statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court.

a. The statement must set forth only those facts alleged and proved or sought to be proved that are essential to the court's resolution of the issues.
b. If the statement is accurate, it—together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal—must be approved by the bankruptcy court and must then be certified to the court where the appeal is pending as the record on appeal.

13. **Changed**: Sealed documents can form part of the record on appeal.

    a. Under Rule 8009(f), the party must identify the sealed document without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the District Court as part of the record.
    b. Instead, a party must file a motion with the District Court to accept the document under seal.
    c. If the motion is granted, the movant must notify the bankruptcy clerk, and the clerk must promptly transmit the sealed document to the District Court.

14. **Changed:** When the record is complete, the bankruptcy clerk must transmit to District Court either the record or a notice that the record is available electronically. The District Court must enter that information on its docket and promptly notify the parties.

15. **Changed**: Brief Timing

    a. The appellant's brief is due 30 days after the docketing of the notice that the record has been transmitted or is available electronically.
    b. If the appellant fails to file a brief on time or within any extension granted by the District Court, an appellee may move to dismiss the appeal, or the District Court, after notice, may dismiss the appeal on its own motion.
    c. The appellee must serve and file a brief within 30 days after service of the appellant's brief.
    d. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, but a reply brief must be filed at least 7 days before scheduled argument, unless the District Court allows a later filing.

16. **Changed: Brief Formatting** Rule 8014 contains the formatting requirements for briefs. The appellant's brief must contain the following under appropriate headings and in the order indicated:

    a. a corporate disclosure statement, if required by Rule 8012;
    b. a table of contents, with page references;
    c. a table of authorities – cases (alphabetically arranged), statutes, and other authorities, with references to the pages of the brief where they are cited;
    d. a jurisdictional statement, including:

i. the basis for the bankruptcy court's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
ii. the basis for the district court's jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
iii. the filing dates establishing the timeliness of the appeal; and
iv. an assertion that the appeal is from a final judgment, order, or decree, or information establishing the appellate court's jurisdiction on another basis;

e. a statement of the issues presented and, for each one, a concise statement of the applicable standard of appellate review;
f. a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record;
g. a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;
h. the argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies;
i. a short conclusion stating the precise relief sought; and
j. the certificate of compliance with the maximum word limitation, if required by Rule 8015(a)(7) or (b).

17. The appellee's brief must contain the same sections, except it need not contain the jurisdictional statement, statement of the issues and the applicable standard of appellate review or statement of the case, unless the appellee is dissatisfied with the appellant's statement.

18. **Changed**: Rule 8015 contains detailed requirements for the form and length of briefs. For example, paper copies of briefs must be reproduced with a clarity that equals or exceeds the output of a laser printer.

    a. A principal brief may not exceed 30 pages or a reply brief 15 pages, unless it complies with the type-volume limitations of F.R.B.P. 8015(a)(7)(B) and (C).
    b. Briefs must contain covers with a format specified by Rule 8015(a)(2).

19. **Changed**: Appendix required. Unless a local rule or order of the appellate court provides otherwise, the appellant must file and serve an appendix with its principal brief containing excerpts of the record.

    a. Rule 8018 gives the requirements for the appendix, including the relevant entries in the bankruptcy docket, the complaint and answer or equivalent filings and the judgment, order or decree from which the appeal is taken.
    b. The appellee may file an appendix with its brief containing material omitted by the appellant.

20. The District Court must accept briefs that comply with Rule 8015, but by local rule, a district court or B.A.P. may accept documents that do not meet all of the requirements of the rule.

21. **Changed:** Cross-appeals are governed by Rule 8016, and procedures for briefs of an amicus curiae are set out in Rule 8017.

22. **Changed**: Oral argument

    a. Under new Rule 8019, any party may file, or the District Court may require, a statement explaining why oral argument should, or need not, be permitted.
    b. The Rule includes a presumption that the court will allow oral argument unless the appeal is frivolous, the dispositive issue has been authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and record, and the court's decision would not be aided by oral argument.
    c. The District Court must advise all parties of the date, time and place for oral argument, and the time allowed for each side.

23. **Changed**: Motions

    a. If, before the record is transmitted, a party moves in the district court, B.A.P. or court of appeals for any intermediate order, such as:
    • leave to appeal;
    • dismissal;
    • a stay pending appeal; or
    • approval of a supersedeas bond, or additional security on a bond or undertaking on appeal,

    the bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

    b. Once the record has been transmitted, an extension of time, permission to file a longer brief, or any relief other than a request for a stay of the bankruptcy judge's decision should be requested by motion filed with the District Court.

    c. If the motion is a procedural motion, such as a motion for an extension of time, the court can act on it without giving the other party a chance for a response, but a party adversely affected by a procedural ruling may move to reconsider, vacate or modify it within 7 days after the procedural order is served.

    d. If the motion is not a procedural motion, the other parties will usually have seven days to respond. Oral argument on motions in appeals is unusual, although it could be allowed.

    e. Emergency motions can be filed, but must be identified as such, include an affidavit setting out the nature of the emergency, and contain the names, e-mail addresses, office addresses and phone numbers of all opposing counsel and unrepresented parties to the appeal.

f. Unless the appellate court orders otherwise, motions and responses to motions are limited to 20 pages, exclusive of the corporate disclosure statement and any accompanying documents; replies are limited to 10 pages.

24. New Rule 8013(g) provides the procedures for a party seeking to intervene in an appeal.

25. Rule 8020 governs frivolous appeals and other misconduct, and includes a provision for double costs being awarded to the appellee. Rule 8021 deals with costs. Rule 8022 governs motions for rehearing.

26. Rule 8027 contemplates that the appellate court may have a mediation procedure for bankruptcy appeals.

27. *Schlaack v. Bagley*, 2015 U.S. Dist. LEXIS 17223 (E.D. Wis. Feb. 12, 2015)

a. Court may extend deadline for filing brief based on "excusable neglect."

b. The determination of "excusable neglect" is "an equitable one, taking account all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

c. In evaluating whether excusable neglect exists, the Court holds a party responsible for the acts or omissions of its attorneys, and considers "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id*. at 395-97.

d. The Seventh Circuit in *United States v. Cates*, 716 F.3d 445 (7th Cir. 2013), determined that the <u>most heavily weighted factor</u> by the district court <u>should be the stated reason for the delay in requesting the extension</u>. Id. at 448. The *Cates* court noted that "neglect due to a busy schedule is generally not excusable." Id. at 449 (citing *Harrington v. City of Chi*., 433 F.3d 542 (7th Cir. 2006). Excusable neglect requires something more than a simple failure to meet a deadline due to a busy schedule. Cates, 716 F.3d at 449.

e. As to danger of prejudice to the non-moving party, the Court finds this factor to slightly weigh in favor against a finding of excusable neglect. Further delay and the requirement of further unanticipated briefing are inevitable if the Court were to grant Schlaack's motion. Those matters constitute prejudice to the non-moving party.

f. Brief due 6 months before filed – this significant delay weighs in favor of no excusable neglect.

g. Reasons for the delay are not excusable. Schlaack said the delay was an "honest error" and due to counsel's "unfamiliarity with the court." Schlaack's counsel

"missed the email notice of the clerk's briefing letter which would have told appellant counsel the correct time for filing appellant brief." In explaining the missed deadline, counsel notes "[i]t was a very busy time" and references his vacation during that time period along with an "unusually time consuming" caseload. Additionally, counsel notes he "was not sure exactly" when the brief was due. As stated above, neglect due to a busy schedule is generally not excusable, *Cates*, 716 F.3d at 448, nor is neglect due to unfamiliarity with the rules of the court. This factor weighs heavily against a finding of excusable neglect.

h. On the merits, Schlaack could not rely on the findings in the Decision and Order because Wisconsin law does not give preclusive effect to a plea of no contest, citing *Mrozek v. Intra Fin. Corp*., 2005 WI 73, 281 Wis. 2d 448, 699 N.W.2d 54 (2005).

i. The police officer's testimony did not provide proof of the Debtor's wrongful intent. For example, she stated that the Debtor admitted that he could not account for all of the money. She did not testify that the Debtor knew about the theft by contractor statute or his fiduciary obligations under that statute. A failure to account could result from mere negligence, not necessarily an intentional act. The Debtor pled no contest and was convicted of theft by contractor. As the Wisconsin Supreme Court noted in *Mrozek*, there can be many reasons for entering into such a plea that do not necessarily constitute an admission of wrongdoing.

j. Plaintiff's testimony likewise did not prove that the Debtor acted with "a mental state embracing intent to deceive, manipulate, or defraud," the heightened standard required by Bullock. Instead, the picture painted was of a remodeling job where the parties were not on the same page regarding the materials and change orders. While the Plaintiff made an ample showing that the Debtor breached the contract, there was little if any evidence that the Debtor's conduct constituted defalcation as defined by *Bullock*. Without such proof, the Plaintiff failed to carry his burden of proof.