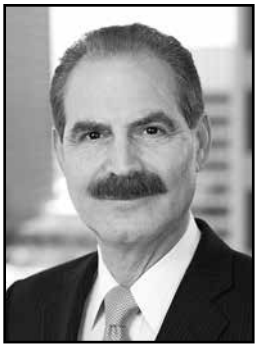
An Overview of the Ninth Circuit Bankruptcy Appellate Panel and its Reviewed Decisions During 2015

Peter J. Gurfein and Leib M. Lerner[1]



Peter J. Gurfein is an attorney with Landau, Gottfried & Berger, LLP. He specializes in Chapter 11 reorganization, related litigation, bankruptcy appeals, business and real estate transactions, and mediation. A past President of the LA Bankruptcy Forum and Chair of the Publications Subcommittee of the California State Bar Insolvency Law Committee, Mr. Gurfein received a B.A. from New York University and a J.D. from George Washington University School of Law.

Leib Lerner's practice is focused on representing franchisors, lenders, creditors' committees, avoidance action defendants, landlords, vendors, and investors involved in bankruptcy cases. He also represents insurance companies, corporations, and individuals in complex federal and state commercial litigation. Leib is a partner in Alston & Bird's Los Angeles office.

In 2015, 103 decisions rendered by the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") were further appealed to the Ninth Circuit Court of Appeals (the "Ninth Circuit"). Many of these appeals were dismissed, settled, or otherwise withdrawn from the appellate process by the litigants themselves. But of those BAP cases that were decided by the Ninth Circuit in 2015, ***all*** were affirmed.

This article provides a brief overview of the structure of bankruptcy appellate procedure, identifies some of the key legal issues under the Bankruptcy Code that were addressed by the Ninth Circuit in its further review of BAP decisions in 2015, and suggests some reasons for the high affirmance rates of BAP decisions by the Ninth Circuit.

Bankruptcy Appellate Structure

Appellate review of Bankruptcy Court decisions is governed by § 158 of title 28 of the United States Code.[2] Under § 158(a), the district courts of the United States have jurisdiction to hear appeals from judgments, orders, and decrees of bankruptcy judges. In addition, under § 158(b)(1), the judicial conference of each circuit is authorized to establish a bankruptcy appellate panel composed of bankruptcy judges of the districts in the circuit to hear and determine, with the consent of all parties, appeals from bankruptcy court judgments, orders, and decrees. As of this writing, BAPs have been established by the Circuit Courts of Appeal in the First, Sixth, Eighth, Ninth, and Tenth Circuits. All parties have to consent to having the BAP hear an appeal or the appeal will be heard by the district court.

The circuit courts of appeal have jurisdiction to hear appeals from the federal district courts or from the bankruptcy appellate panels. Direct appeals from the bankruptcy court to the circuit court may be had upon certification by the trial judge that the appeal meets certain criteria set forth in § 158(d)(2)(A) of title 28: (1) the judgment, order, or decree involves a question of law unresolved by courts of appeal or the Supreme Court and involves a matter of public importance; (2) the order, judgment, or decree involves a question of law requiring resolution of conflicting decisions; or (3) an immediate appeal to the circuit court may materially advance the progress of the case or proceeding in which the appeal is taken.

Accordingly, the parties to a bankruptcy case can determine the venue in which an appeal will be heard by agreeing that the appeal be heard by a panel of bankruptcy judges or opting to have the appeal heard by a single judge of the federal district court.

BAP Opinions as Precedent

The Ninth Circuit has long treated "the BAP's decisions as persuasive authority given its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law throughout the Ninth Circuit." Matter of Silverman, 616 F.3d 1001, 1005, fn. 1 (9th Cir. 2010) (citing *In re* Rosson, 545 F.3d 764, 772 n. 10 (9th Cir. 2008); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir.1990)). Indeed, Judge O'Scannlain proposed that the Judicial Council of the Ninth Circuit consider adopting an order requiring that BAP decisions bind all of the bankruptcy courts of the circuit. *Id*. However, the binding nature of BAP decisions remains "an open question in this circuit." *In re* Zimmer, 313 F.3d 1220, 1225 (9th Cir. 2002). The Judicial Council has not followed Judge O'Scannlain's suggestion. *In re* Grant, 423 B.R. 320, 321 (Bankr. S.D. Cal. 2010).

The BAP itself believes that its decisions should be binding on lower bankruptcy courts, under the doctrine of *stare decisis*.[3]

Bankruptcy courts themselves fall on both sides of the issue. Some judges have determined that *stare decisis* makes BAP decisions binding.[4] Other courts have reasoned that the doctrine of *stare decisis* is not meant to operate in a dual track system where decisions by BAP judges are not binding on district court judges, and decisions by district court judges are not binding on BAP judges.[5]

In fact, empirical studies have reflected that decisions from bankruptcy appellate panels generally have a greater incidence of affirmance on further appeal to the courts of appeal than bankruptcy orders, judgments, and decrees initially appealed to the district courts. *See* Jonathan R. Nash & Rafael I. Prado, *An Empirical Investigation Into Appellate Structure and the Perceived Quality of Appellate Review*, U. OF CHI. L. SCH., JOHN M. OLIN L. & ECON. WORKING PAPER NO. 367 (Oct. 2007) ("Nash and Prado"). In their empirical study of bankruptcy appeals, Nash and Prado found that "on average, a BAP disposition had an 83% chance of being affirmed by the court of appeals in contrast to 61% for district court dispositions. Put another way, the likelihood of affirmance by the court of appeals increased by 36% when it reviewed BAP disposition."[6] Among the factors identified by Nash and Prado as contributing to the higher affirmance rate is the increased quality of decisions by a panel rather than a single judge, the expertise of the appellate decision makers in the subject matter of the appeal, enhanced "lawfinding" ability during the appellate process, the appellate court's careful reasoning knowing that its decision will be binding under *stare decisis*, and judicial independence.[7]

A review of the cases in which the Ninth Circuit affirmed the BAP in 2015 suggests that the issues decided in the BAP are often key issues confronted by bankruptcy practitioners and are at the heart of bankruptcy jurisprudence.

Issues Addressed in 2015 in Appeals From the BAP to the Ninth Circuit

In re Davis, 778 F.3d 809 (9th Cir. 2015)

In re Davis addressed the eligibility requirements for a debtor to file for protection under chapter 12 of the Bankruptcy Code, the so-called Family Farmer provisions. In order to be eligible to file a chapter 12 case, a debtor must have "aggregate debts" under $3,792,650. The Ninth Circuit affirmed a BAP opinion holding that "aggregate debts" include unsecured portions of creditor claims, even those unsecured portions that were discharged in a prior chapter 7 bankruptcy, because the claims remain a debt that is enforceable against the debtor's property.[8]

Tamm v. U.S. Trustee (In re Hokulani Square, Inc.), 776 F.3d 1083 (9th Cir. 2015)

In re Hokulani addressed whether the trustee in a bankruptcy case may receive a fee on account of property sold through a secured creditor's credit bid. The Ninth Circuit affirmed the BAP's reversal of the bankruptcy court's compensation award to a chapter 7 trustee that included fees calculated on a secured creditor's credit bid on real property of the bankruptcy estate. The Ninth Circuit affirmed the BAP's holding that Bankruptcy Code § 326(a) allows reasonable compensation for "moneys" disbursed by the trustee, which does not include property disbursed to a secured creditor on a credit bid.[9]

America's Servicing Co. v. Schwartz Tallard (In re Schwartz-Tallard), 803 F.3d 1095 (9th Cir. 2015)

In re Schwartz-Tallard addressed whether a debtor may recover attorney's fees both to end a violation of the automatic stay but also to recover damages for the violation including time spent litigating the violation

and contempt proceedings. The Ninth Circuit, *en banc*, held that § 362(k) of the Bankruptcy Code authorizes an award of attorney's fees reasonably incurred in a debtor's prosecution of a suit for damages to provide redress for a violation of the automatic stay. In so holding, the Ninth Circuit overruled its prior decision in *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010), which limited the costs recoverable under § 362(k) to those incurred to end the stay violation itself. The Ninth Circuit affirmed the BAP decision based upon a clear reading of Bankruptcy Code § 362(k).[10] which, both courts held, did not limit the recovery of attorney's fees to those incurred to end the violation but also allowed recovery of fees incurred in prosecuting a damages action.

Pensco Tr. Co. v. Tristar Esperanza Props., LLC (In re Tristar Esperanza Props., LLC), 782 F.2d 492 (9th Cir. 2015)

In re Tristar Esperanza Properties addressed the issue of claim subordination in bankruptcy cases. The Ninth Circuit affirmed a bankruptcy court's summary judgment subordinating the claim of a debtor's minority member and creditor where the member obtained a pre-petition money judgment against the debtor based on the buy-out provisions of the debtor's operating agreement. The Ninth Circuit began its analysis with the language of Bankruptcy Code § 510(b), which states that "a claim arising from rescission of a purchase or sale of a security of the debtor . . . [or] for damages arising from the purchase or sale of such a security . . . shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security."

Conclusion

Individual bankruptcy judges may differ on the *stare decisis* effect to be afforded BAP decisions. Nonetheless, as BAP decisions are challenged upstream in the circuit court, empirical analysis and court records shows a higher affirmance rate for the BAP than bankruptcy court appeals that travel through the district courts. The statistically significant differential in BAP affirmances supports the assumptions made in the Nash and Prado study about the various factors that contribute to the higher affirmance rate, as well as the predictability of likely outcome on appeal from a BAP decision.

Endnotes

1 Peter J. Gurfein is a partner at Landau Gottfried & Berger LLP, Los Angeles, California. Leib M. Lerner is a partner at Alston & Bird LLP, Los Angeles, California. The authors thank Susan M. Spraul, Clerk of the U.S. Bankruptcy Appellate Panel for the Ninth Circuit, for her invaluable assistance in developing this article.

2 28 U.S.C. § 158.

3 *In re* Windmill Farms, Inc., 70 B.R. 618, 622 (B.A.P. 9th Cir. 1987), *rev'd on other grounds*, 841 F.2d 1467 (9th Cir. 1988) (*dicta*); Phila. Life Ins. Co. v. Proudfoot (*In re* Proudfoot), 144 B.R. 876 (B.A.P. 9th Cir. 1992) ("It is the position of this panel that BAP decisions originating in any district in the Ninth Circuit are binding precedent on all bankruptcy courts within the Ninth Circuit in the absence of contrary authority from the district court for the district in which the bankruptcy court sits.").

4 *In re* Globe Illumination Co., 149 B.R. 614, 621 (Bankr. C.D. Cal. 1993) (Judge Bufford); In re Barakat, 173 B.R. 672, 677-678 (Bankr. C.D. Cal. 1994) (Judge Mund).

5 Crain v. PSB Lending Corp. (*In re* Crain), 243 B.R. 75, 81 n.6 (Bankr. C. D. Cal. 1999) (Judge Zurzolo); Rinard v. Positive Invs., Inc. (*In re* Rinard), 451 B.R. 12 (Bankr. C.D. Cal. 2011) (Judge Clarkson); *In re* Arnold, 471 B.R. 578, 589 (2012) (Judge Kwan). Most interesting for this discussion, is that Judge Kwan in *In re Arnold* determined that he would not follow the BAP's decision in *Friedman v. P + P, LLC (In re Friedman)*, 466 B.R. 471 (B.A.P. 9th Cir. 2012), which held that the absolute priority rule does not apply in chapter 11 bankruptcy cases of individual debtors after the enactment of BAPCPA. Earlier this year, the Ninth Circuit in fact concurred, holding that *Friedman* was wrongly decided, and that the absolute priority rule does apply to individual debtors post-BAPCPA. *See* Zachary v. Cal. Bank & Tr., 811 F.3d 1191 (9th Cir. 2016).

6 *Id.* 41.

7 *Id*. 4-7.

8 The State Bar Insolvency Law Committee published an e-Bulletin on this case analyzing *In re Davis* on April 1, 2015, authored by George Schulman of Danning Gill Diamond & Kollitz, LLP with editorial assistance provided by Michael Gomez of Lang, Richert & Patch, P.C.

9 The State Bar Insolvency Law Committee published an e-Bulletin on this case analyzing *In re Hokulani* on February 17, 2015, authored by Leib Lerner of Alston Bird LLP with editorial assistance provided by John N. Tedford, IV of Danning Gill Diamond & Kollitz, LLP.

10 The State Bar Insolvency Law Committee published an e-Bulletin on this case analyzing *In re Schwartz-Tallard* on October 29, 2015, authored by Michael T. Delaney, of Baker & Hostetler LLP with editorial assistance from John N. Tedford, IV, of Danning Gill Diamond & Kollitz, LLP.