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## THE PROPER FORM OF A FINAL ORDER/JUDGMENT ENTRY

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A CLE Presentation

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## **Introduction**

In general, a final decision is one that terminates the litigation on the merits, and leaves nothing for the court to do but execute the judgment. *9E Am. Jur. 2d Bankruptcy* § 3492. While “each civil action in a federal court has traditionally been regarded as a ‘single judicial unit’ from which only one appeal would lie, such rule does not apply in a bankruptcy case.” *Id.*

In contrast to actions in federal litigation, a bankruptcy proceeding is often “a conglomeration of separate adversary proceedings that, but for the status of the bankrupt party which enables them to be consolidated in one proceeding, would be separate, stand-alone lawsuits.” *In re James Wilson Assoc.*, 965 F.2d 160, 166 (7<sup>th</sup> Cir. 1992). The parties to these separate proceedings “should not have to wait for the end of the entire bankruptcy proceeding before they can appeal.” *Id.* As a result, finality in bankruptcy has been interpreted to embrace the final decision in any adversary proceeding that, but for its bankruptcy setting, would be a separate suit.” *Id.*

There is no statute that defines the term “final judgment,” therefore it has been left to common law to determine the definition. *1 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P 5.07.* The Supreme Court has not been able to shed a light on this problem, and has stated, that no “verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.” *Id.* (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 229, 233 (1974)). Further, there are problems in applying the final judgment rule as used in federal civil litigation to bankruptcy litigation, because there are multiple parties in interest, adversary proceedings, and contested matters, all which make the “question of finality in bankruptcy appeals...a thorny one.” *1 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P 5.07.*

## **Statutes and Rules**

### **28 U.S.C. § 158**

- (a) The district courts of the United States shall have jurisdiction to hear appeals
- (1) from final judgment, orders, and decrees;
  - (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
  - (3) with leave of the court, from other interlocutory orders and decrees

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 USCS § 157]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

### **Rule 5003(a) of Federal Rules of Bankruptcy Procedure**

The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States. The entry of a judgment or order in a docket shall show the date the entry is made.

### **Rule 7054(a) of Federal Rules of Bankruptcy Procedure**

- (a) Judgments. Rule 54(a)-(c) F.R.Civ.P. applies in adversary proceedings.

### **Rule 8002 of Federal Rules of Bankruptcy Procedure**

- (a) Ten-day period. The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of this date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. A notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

### **Rule 9001(7) of Federal Rules of Bankruptcy Procedure**

- (7) “Judgment” means any appealable order.

### **Rule 9021 of Federal Rules of Bankruptcy Procedure**

Except as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a *separate document*. A judgment is *effective* when entered as provided in Rule 5003. The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these rules.

### **Rule 54 of Federal Rules of Civil Procedure**

(a) "Judgment" as used in these rules includes a *decree* and *any order from which an appeal lies*. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment*. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties

### **Rule 58 of Federal Rules of Civil Procedure**

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

- (A) for judgment under Rule 50(b);
- (B) to amend or make additional findings of fact under Rule 52(b);
- (C) for attorney fees under Rule 54;
- (D) for a new trial, or to alter or amend the judgment, under Rule 59; or
- (E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

- (i) the jury returns a general verdict,
- (ii) the court awards only costs or a sum certain, or
- (iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

- (i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or
- (ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

- (A) when it is set forth on a separate document, or
- (B) when 150 days have run from entry in the civil docket under Rule 79(a).

### **Rule 79(a) of Federal Rules of Civil Procedure**

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the judicial Conference of the United States and shall enter therein each civil action to which these rules are made applicable...

### **Appeal From a Final Order/Judgment.**

District Courts have jurisdiction of appeals from all final judgments, orders and decrees of the Bankruptcy Courts. 28 U.S.C. § 158(a)(1).

There are “two routes which a party can take in appealing a bankruptcy court’s ruling to a district court.” *Central Illinois Savings & Loan Assoc. v. Rittenberg Company, Ltd.* 85 B.R. 473, 476 (N.D. Ill. 1988). First, final judgments, orders and decrees may be appealed as of right, whereas interlocutory orders and decrees may only be appealed with leave of the district court. *Id.*

It is important to determine whether a particular order or judgment is final or interlocutory, and when the entry of judgment occurred, since this will start the time running for appeals. In addition, there are two reasons why it is necessary for the district court to determine whether the order is final or interlocutory in deciding whether to grant or dismiss an appeal. *Central Illinois Savings & Loan Assoc.*, 85 B.R., at 479. First, if the district court intends on dismissing the appeal, it needs to “make sure that the bankruptcy court’s order... does not fall within the ‘liberal’ definition of final orders in the bankruptcy context.” *Id.*, at 479-80. Second, if the court intends on granting the appeal, its basis for doing so “will be important should the parties decide to seek further appeal to the circuit court.” *Id.*, at 480.

### **What is a Final Order?**

The Seventh Circuit, along with many courts, takes a “relaxed view of ‘finality’ for bankruptcy orders as compared with district court orders.” *Rady v. Roberts*, 2003 U.S. Dist. LEXIS 8485, \*2 (S.D. Ind. 2003). Therefore, a bankruptcy order is “final” for purposes of appeal, when it “terminates a discrete dispute that, but for the bankruptcy, would be a standalone suit by or against the trustee.” *Rady*, 2003 U.S. Dist. LEXIS, at \*2. In addition, it has been held that an order is not a “final appealable order,” until the judgment or order have been both set out on a separate document (pursuant to Rule 9021), and entered on the docket sheet by the clerk (pursuant to Rule 5003(a)). *In re McKeown*, 2002 Bankr. LEXIS 1298, \*2 (Bankr. N.D. Ind. 2002).

When adversary proceedings are being appealed, Bankruptcy Rule 7054 states that Rule 54(a)-(c) of Federal Rules of Civil Procedure apply. *Fed. R. Bankr. P. 7054(a)*. Rule 54(b) states in relevant part, “the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an *express determination that there is no just reason for delay* and upon an *express direction* for the entry of judgment.” *Fed. R. Civ. P. 54(b)*. The Seventh Circuit has held, however, “that Rule 54(b) findings are not always necessary to make an order (or other form of decision) final for a § 158(a) appeal.” *Central Illinois Savings & Loan Assoc.*, 85 B.R., at 477. However, the Seventh Circuit has also held that Rule 54(b) has not been “obliterated” in the bankruptcy context. *Id.* The rule that Rule 54(b) findings are not always necessary for a final appealable order in adversary proceedings stems from “the same considerations that have long led bankruptcy judges to hold that certain orders rendered by bankruptcy judges in the course of administering bankruptcy cases are deemed final despite the fact that the orders often do not wrap up the cases.” *Id.* However, the “more an adversary proceeding looks like an independent lawsuit, attached to a bankruptcy case only because someone happens to be in bankruptcy,” the more the courts may insist on the “norms of finality” under Rule 54(b). *Matter of Morse Electric Co., Inc.*, 805 F.2d 262, 265 (7<sup>th</sup> Cir. 1986).

The following are orders that courts have held to be final for purposes of appeal:

- Order approving sale of property of the estate
- Order for relief
- Order allowing/disallowing a homestead exemption
- Order permitting rejection of executory contract
- Order dismissing compliant seeking nondischargeability of a debt as having been filed late
- Order directing turnover by a receiver to a bankruptcy estate
- Order fixing the amount of a creditor’s claim
- Order substantively consolidating two or more cases
- Order subordinating a claim
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1 *Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P 5.07.*

In the end, “the hard reality of the situation is that the courts will determine whether a bankruptcy order is final on what essentially amounts to an ad hoc basis.” *Commercial Bankruptcy Litigation* § 4:2. Therefore it is necessary to look to precedent to determine whether a particular order is final. *Id.* Determining what is “final” for purposes of appeal, is “an evolutionary one,” but there are certain kinds of orders which bankruptcy courts have come to some consensus on the issue of finality (see list above for examples). *Id.*

### **Interlocutory Orders**

An interlocutory order or decree is one that “does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and that requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.” *1 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P 5.07*. However, parties may appeal interlocutory orders with leave of the district court. *28 U.S.C. § 158(a)(3)*. The “exact parameters of the court’s discretion” are not defined in section 158, but “district courts have come to the consensus that review is proper only where the circumstances surrounding the bankruptcy court’s interlocutory order are similar to those surrounding an appealable order of a district court under *28 U.S.C. § 1292(b)*.” *In re Gouveia*, 228 B.R. 412, 413 (Bankr. N.D. Ind. 1998). As a result, the district courts have applied a three-part test in order to determine whether leave should be granted. *Id.* The district court will grant leave to appeal if: “(1) the order sought to be reviewed involves a controlling question of law; (2) as to which a substantial ground for difference of opinion exists; and (3) an immediate appeal may materially advance the ultimate termination of the case.” *Id.*

The following are orders or decrees that courts have held to be interlocutory for purposes of appeal:

- Order denying approval of settlement agreement
- Order denying summary judgment
- Order holding that Chapter 13 trustee does not have standing to move to convert the case to Chapter 7
- Order denying motion to dismiss
- Order extending time for filing an objection to discharge
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*1 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P 5.07*.

### **Entry of Order/Judgment**

The entry of judgment is important because it begins the running of the time to file a notice for appeal. Bankruptcy Rule 9021 states that Rule 58 of the Federal Rules of Civil Procedure, applies in cases under the Bankruptcy code, and further requires that, “[e]very judgment entered in an *adversary proceeding or contested matter* shall be set forth on a *separate document*.” *Fed. R. Bankr. P. 9021*. The Rule provides that a “judgment is effective when entered as provided in Rule 5003,” and notes that the “reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these rules.” *Fed. R. Bankr. P. 9021*. Note that Rule 9001(7) defines “judgment” as, “any appealable order.” *Fed. R. Bankr. P. 9001(7)*.

The judgment is effective when entered as provided in Rule 5003, which states that the clerk shall “keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case...” *Fed. R. Bankr. P. 5003(a)*. Further, the entry of judgment or order in the docket shall show the date the entry was made. *Id.* The “[e]ntry of judgment is to follow directly after the rendition of the judgment and the preparation and signing of separate written document.” *1 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P.9021.05*. This entry of judgment starts the 10 day period running for the notice of appeal to be filed with the clerk. *Fed. R. Bankr. P. 8002(a)*. Further, the filing of a notice of appeal divests the bankruptcy court of jurisdiction. *Weber v. United States*, 1990 U.S. Dist. LEXIS 8735, \*5 (S.D. Ind. 1990).

### **Separate Document Requirement**

According to Rule 9021, each judgment entered in an adversary proceeding or contested matter should be set forth on a separate document. *Fed. R. Bankr. P. 9021*. The separate document requirement serves a couple of purposes—the separate document determines when the time for appeal begins to run (*see Fed. R. Bankr. P. 8002(a)*), and facilitates the determination of the time period to make post-trial motions. *Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*. According to Rule 58(b)(2) of the Federal Rules of Civil Procedure, if the rules require a separate document, then a judgment is considered entered when it is entered in the “civil docket under Rule 79(a), and when the earlier of these events occurs: (A) when it is set forth on a separate document, or (B) when 150 days have run from entry in the civil docket under Rule 79(a).” *Fed. R. Civ. P. 58(b)*. Remember that under Bankruptcy Rule 9021, Rule 58 applies in cases under the Bankruptcy Code.

There are exceptions to the separate document requirement—it does not apply to orders disposing of the following motions:

- A motion for judgment under Civil Rule 50(b), incorporated by Bankruptcy Rule 9015(a)
- A motion to amend or make additional findings of fact under Civil Rule 52, incorporated by Bankruptcy Rule 7052
- A motion for a new trial or to alter or amend a judgment under Civil Rule 59, incorporated by Bankruptcy Rule 9023
- A motion for relief from judgment under Civil Rule 60, incorporated by Bankruptcy Rule 9024.

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*10 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*. In addition, when the separate document requirement does not apply, an order is considered “entered” when it is entered in the civil docket. *Fed. R. Civ. P. 58(b)(1)*.

The separate document requirement “can be waived by an appellate court if (1) the lower court clearly intended that the opinion and order from which the appeal was taken represented the final decision in a case; (2) the judgment was recorded in the clerk’s office; and (3) the parties do not object to the absence of the separate document judgment. All three facts must be present.” *10 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*.

Further, federal court decisions “strictly construing the separate document requirement,” have been adopted by the bankruptcy courts. *10 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*. In the Supreme Court case, *United States v. Indrelunas*, 411 U.S. 216 (1973), the Court held separate document requirement “must be mechanically applied.” *10 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*.

The Seventh Circuit has held that the separate document rule should be applied “mechanically” in bankruptcy courts, “notwithstanding that it had been policy of the bankruptcy court to enter a separate document on in cases affecting real property or the recovery of property or money.” *10 Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*. The Seventh Circuit saw no reason to deviate from *Indrelunas*, in the bankruptcy context. *Id.* In general, “[a]n opinion is not itself a judgment even though it contains findings of fact or conclusions of law and foreshadows how the judge intends to dispose of the case.” *Collier on Bankruptcy 15<sup>th</sup> Ed. Rev. P. 9021.04*. A document that is explicitly denominated “order” or “judgment,” and contains a single sentence detailing the history of the proceedings, is not disqualified as a separate order. *Id.*

### **Can you appeal an order denying the confirmation of a Chapter 13 plan?**

The U.S. District Court for the Southern District of Indiana held in *Rady*, that a bankruptcy order is “final” for purposes of appeal, when it “terminates a discrete dispute that, but for the bankruptcy, would be a standalone suit by or against the trustee.” *Rady*, 2003 U.S. Dist. LEXIS 8485, \*2. The court concluded that “[t]he issue of plan confirmation is neither a stand-alone dispute, nor does it resolve substantive rights of the parties, and thus is *not final*, even under the flexible view of finality taken in bankruptcy cases.” *Id.*, at \*2-3.

Although the Seventh Circuit has not addressed the issue of jurisdiction when a debtor's plan is not confirmed, but the bankruptcy proceeding has not been dismissed, most courts generally hold that when the bankruptcy court "denies or withholds confirmation of a Chapter 13 plan, without also dismissing the entire proceeding," the order is not considered "final" for purposes of appeal. *Id.*, at \*3. At this point, "the parties' rights have not yet been finally determined, and the process of plan confirmation is continuing." *Id.* In order to have an appealable final decision, the debtor has the "option of waiting until a plan is confirmed, then appealing that confirmation, or refusing to submit another plan and then appealing the dismissal of the bankruptcy proceeding." *Id.*