Pro Bono Appellate Practice: Good Job for a Retired Bankruptcy Judge?

By Eugene R. Wedoff

Before I was appointed a bankruptcy judge, I'd been a general litigation lawyer, and I had the experience of working on many appellate cases, in both state and federal court. My law firm, Jenner & Block, had a strong commitment to pro bono representation, and several of the appeals I was assigned to had been taken by the firm without charge. I enjoyed appellate work, particularly presenting oral argument. Perhaps not surprisingly, then, when I retired from bankruptcy judging after 28 years on the bench, I undertook a pro bono appellate bankruptcy practice. Now, six years after retiring from the bench, I've decided to retire from appellate practice and focus more on my family, but I'm hoping that other bankruptcy judges will consider taking on pro bono appellate work in their retirement. I'd like to set out some thoughts about my appellate experience that may be helpful.

Why Do It

Beyond being an enjoyable part of legal practice, there are several reasons why pro bono appellate bankruptcy work is particularly worthwhile.

- *The clients are in need*. Almost all consumer debtors, many business debtors, and even a number of bankruptcy creditors expend the funds they have available for legal representation during their bankruptcy court proceedings. Any appeal will require legal representation they simply can't afford. Apart from acting pro se—both difficult and unlikely to be effective—pro bono representation is the only way that these parties can either present an appeal or respond to an appeal brought against them.
- *Disputed issues need to be resolved*. As a bankruptcy judge, I repeatedly had to decide issues of law with no governing appellate authority, and these were the issues I worked on in retirement. Can a Chapter 13 debtor satisfy a mortgage claim by transferring a home worth less than the mortgage to the mortgage holder? Are a Chapter 13 debtor's 401(k) contributions disposable income that must be paid to creditors under the debtor's plan? Does the applicable state exemption law apply to property located outside that state? With unresolved issues like these, lawyers are likely to avoid taking positions that could help their clients but would risk prolonged litigation with an uncertain outcome. But if legal disputes are resolved at the circuit level, the lawyers in that circuit will know the applicable law and can give straightforward advice to their clients without risking difficult litigation.
- *More effective bankruptcy law can be advanced*. Compensated lawyers have an ethical obligation to advance their clients' interests by making proper legal arguments, even if the lawyer doesn't personally think the arguments are correct—or that the clients' interests are good for the broader community. A retired judge is in a different situation: in deciding whether to take on pro bono representation in a bankruptcy appeal, the judge can choose only representation that advances a position that the judge believes is both legally correct and constructive.
- *The service is a payback*. Many lawyers have enjoyed working on bankruptcy matters—the issues can be fascinating and socially significant—and serving as a judge, with no concern about billing, is often seen as a privilege. Because pro bono appellate work can be a benefit both to needy individuals and the bankruptcy system, that work can give retired judges the satisfaction of returning the benefits they've received as bankruptcy lawyers and judges.

Problems

However, for all of the good things about pro bono appellate representation, the practice can present some difficulties. Here are several:

- *The question of COLAs needs to be addressed*. All bankruptcy judges who retire under the Judicial Retirement System (JRS) must choose whether to practice law in retirement. If the judge opts to practice law, the judge foregoes cost-of-living increases in pension payments. However, the Administrative Office of the U.S. Courts has determined that pro bono legal practice is not the practice of law under JRS. Pro bono appellate work, then, presents another choice for retired bankruptcy judges: either work pro bono as only part of a legal practice that includes compensated service, and so give up pension COLAs, or, in order to receive COLAs, do *all* legal work with no compensation. I chose an exclusively pro bono practice, which presents some of the problems set out below, but the choice of combining pro bono and compensated legal work would have its own problems, including keeping an appropriate balance between the two.
- *Finding worthwhile appellate work may be challenging.* Making a living practicing bankruptcy law often requires marketing—joining legal organizations, attending conferences, making presentations, and drafting articles—in order to develop a reputation for expertise and effectiveness. Finding bankruptcy appeals for pro bono work may need a similar effort. A judge who is an active member of associations of bankruptcy lawyers—particularly associations that include consumer practitioners—and who speaks and writes on unsettled issues is likely to develop an expertise in advocacy, be seen as effective, and maintain contacts that can lead to worthwhile appellate work. Tara Twomey, the Executive Director for the National Consumer Bankruptcy Rights Center, was particularly helpful to me, both in suggesting appeals she was tracking and in discussing the best arguments for them. But pro bono representation shouldn't be limited to appeals that have already been filed. Debtors' attorneys who know that a retired judge is willing to take on pro bono appellate representation may well contact that judge to discuss whether to appeal an adverse ruling by the bankruptcy court, and if an appeal is appropriate, the judge can be involved from the outset.
- *Necessary support may be diminished or expensive.* Among the support given bankruptcy judges are personnel (a law clerk, a courtroom deputy, and either a judicial assistant or a second law clerk); equipment and supplies (computers, printers, scanners, and internet connections); and research access (a court library, a court librarian, and access both to all federal dockets and to computerized legal research through Lexis and Westlaw). A retired judge who decides to perform legal work exclusively pro bono does not have these resources. To some extent, replacements may be readily available—most retired judges have personal computers and printers—but others are probably not available unless the judge incurs substantial costs. Legal research and editing may present particular difficulties. The lawyers who worked on a case in the bankruptcy court may be supportive of an appeal, but they are not likely to be skilled in appellate research and writing, and in any event their time is largely consumed by their paying work. Unless the retired judge has lawyer friends willing to collaborate, researching and drafting briefs is likely to be done solo. (I did, though, find a very good volunteer editor in my non-lawyer wife.) And the Lexis and Westlaw services available to individual practitioners are expensive. At the time I wrote this article, Lexis was charging $190 monthly for a three-year subscription that

included federal cases, and Westlaw was charging $355 monthly for a service including bankruptcy cases. Heavy use of Pacer to file and retrieve court documents adds another expense.

- *The results of the work may be disappointing*. I've attached a chart of the appeals I've worked on. Just about half of the decisions were against my clients (in two others, there was no decision). This disappointment, in some sense, is no different than what lawyers may experience in any litigation. It may be a bit tougher for retired bankruptcy judges, though, because of their judicial experience, in which the vast number of their decisions were final, with no appeal. And even if there was an appeal, other lawyers would defend the judge's work, and any reversal could at least in part be attributed to them. With this experience, judges can develop a feeling of rectitude. That feeling is unlikely to survive appellate representation in retirement. In one appeal that I spent a lot of effort briefing, the Ninth Circuit issued a very short, unpublished opinion, cancelling oral argument after I'd made hotel and airline reservations to attend. And in the case I argued before the Supreme Court, *City of Chicago v. Fulton,* not a single justice accepted any of the debtors' arguments. Even though experiences like these are valuable learning experiences, they present the danger of disheartening feelings of personal defeat.
- *Finally, decisions of bankruptcy appeals can take a long time*. The Civil Justice Reform Act, 28 U.S.C § 476, requires publication of a list of all motions pending before district judges for more than six months, and this six-month rule has extended to pending bankruptcy appeals by the Judicial Conference. *See Jonathan B. Petkun*, *Nudges for Judges: An Empirical Analysis of the "Six-Month List," jbpetkun.github.io/pages/working_papers/Petkun_JMP_20210831.pdf,* at 17. The six-month rule, however, does not apply to circuit court judges, and it has had only a small effect on the speed of district court rulings. *Id.* at 62 (estimating a 4% reduction in time of ruling). So there is a potential for lengthy consideration before a ruling is issued, again as I experienced. In a student loan appeal, after remand from the 11th Circuit for further findings and after submission of proposed findings by both the debtor and creditor, the case was pending before the bankruptcy court for 42 months before judgment was entered, with a very careful opinion in favor of the debtor. (A subsequent appeal was dismissed, leaving the debtor's student loans discharged.) And a Seventh Circuit appeal, which I briefed and argued, has been pending in that court for an even longer time: 28 months for the initial decision and over 36 months thereafter, on petitions for rehearing that are still pending. Patience is required!

Lessons

For any bankruptcy judge who weighs the pros and cons of pro bono appellate work and decides to undertake it in retirement, there are several lessons I've learned that may be helpful.

One is that the interests of the client may override the goal of establishing the applicable law. Here's an example. My very first appeal in retirement, *Germeraad v. Powers*, was a dispute over the modification of a Chapter 13 plan. The trustee had sought to more than double the debtor's required plan payments, from $670 per month to $1,416, because her income had increased, but the debtor had counter-arguments, the bankruptcy judge accepted them, modification was denied, and the denial of modification was affirmed by the district court. My strongest argument on appeal was mootness: by the time of the district court affirmance, Ms. Powers had made all of her plan payments, and § 1329(a) allows modification of a plan only "before the completion of payments." The Seventh Circuit's opinion, 826 F.3d at 968, rejected this argument and held that modification is to be granted retroactively, as of the date of the trustee's modification motion. Under this rule, Ms. Powers had failed to make the full amount of her plan payments, and currently was in default over $17,000. Although the opinion suggested

that she could pay this amount after her plan concluded, that would be an open question on remand. Retroactive plan confirmation, I believed, was a bad decision for Chapter 13 practice, and I would have certainly been willing to challenge it, either through a petition for rehearing or for certiorari, but these approaches would have left Ms. Powers at risk. Unless further filings were successful, her discharge would remain conditioned on paying the default. The trustee proposed a different outcome: if she would forego further litigation, he would agree to her receiving a discharge with no additional payments. She understandably accepted these terms, but the unchallenged decision did not advance bankruptcy practice and remains binding precedent in the Seventh Circuit.

I have another example with a happier outcome. *In re Burciaga* dealt with a debtor's claimed exemption, under Illinois law, for unpaid wages. The bankruptcy court denied the objection, and I filed an appeal to the district court, which affirmed. I filed a further appeal to the Seventh Circuit, and a settlement conference was scheduled. I explained to Mr. Burciaga that the trustee would probably offer some portion of the disputed wages if the appeal was dismissed, and that, while I believed our arguments were correct, most Illinois bankruptcy courts had not accepted them. Somewhat to my surprise, Mr. Burciaga decided that he wanted the circuit court to decide the matter, and he declined to consider any settlement offer. The Seventh Circuit ultimately (and quickly!) upheld the exemption claim.

In retrospect, I think that at the outset of any appellate representation it may be wise to discuss the potential for settlement with the client.

A second, painful lesson has to do with the finality of district court orders. In *Bullard v. Blue Hills Bank,* 575 U.S. 496 (2015), the Supreme Court held that the decision of a bankruptcy judge to deny confirmation of a Chapter 13 plan was not a final order. One of my cases was an appeal from a bankruptcy judge's decision to grant confirmation of a plan that paid an underwater mortgage by transferring the mortgage property to the lender. The district court reversed, and I appealed to the Second Circuit. The mortgage company submitted its brief on the merits, and only afterward filed a motion to dismiss on the ground that the district court's decision was not final. The Second Circuit granted the motion, agreeing that the decision was not final and citing *In re Penn Traffic Co.,* 466 F.3d 75, 78 (2d Cir. 2006). Moreover, the court stated that "there is no other basis for interlocutory review." The only apparent method for generating finality in the Second Circuit would have been to allow the bankruptcy case to be dismissed for failure to file a confirmable plan and then appeal that dismissal on the ground that the debtors' original plan should have been confirmed. But by this time, though, the debtor's home value had risen to the point that the debtor was able to sell the property and no longer needed bankruptcy relief.

Of course, a motion for interlocutory appeal may be filed in the district court under 28 U.S.C. § 158(a)(3), but the district court has no obligation to grant the motion. Another approach to dealing with the finality of denial of confirmation is to (a) file a plan that comports with the rulings of the bankruptcy court, and (b) then object to confirmation of this new plan on the basis that the original one should have been confirmed. This approach has been accepted by the Eighth Circuit, *Zahn v. Fink (In re Zahn)*, 526 F.3d 1140, 1143-44 (8th Cir. 2008), and in one of my appeals, *Davis v. Helbling (In re Davis)*, 960 F.3d 346 (6th Cir. 2020), the Sixth Circuit accepted the debtor's appeal challenging the confirmation of a "test" plan. It decided, in the first circuit ruling on the issue, that the debtor's original plan, treating the debtor's 401(k) contributions as exceptions from disposable income, should have been confirmed.

The third lesson is perhaps the most obvious: appellate bankruptcy lawyers must keep in mind that most Article III judges do not have extensive familiarity with bankruptcy. Perhaps this was most significant to me in arguing *City of Chicago v. Fulton* in the Supreme Court. The issue was the proper interpretation of § 362(a)(3), part of which extends the automatic stay in bankruptcy to any creditor action to "exercise control" over property of the estate. There was no question that, while the debtors' bankruptcy cases were pending, the City had exercised control over the cars of the debtors that it had seized for nonpayment of vehicle tickets, but City argued that it did not violate a "stay." The City's argument was that it had seized the cars before the bankruptcy cases were filed, and that a "stay" only prohibits new, post-bankruptcy activity. To support this argument, the City cited authority dealing with common judicial stays, such as stays of judgment pending appeal. For the debtors to prevail, the Supreme Court would have had to recognize that the automatic stay in bankruptcy does more than maintain the pre-bankruptcy status, often requiring a change in the status quo to allow a debtor in reorganization to control the debtor's assets. The Supreme Court's decision in *Fulton*, in part, reflects our inability to convey this understanding.

My Supreme Court appeal raises a final lesson. There are many things about appellate work that a bankruptcy judge can learn individually—a careful review of the Federal Rules of Appellate Procedures and the local rules of the court hearing the appeal will provide most of the necessary guidance—but solo work on a Supreme Court case would be very difficult to engage in without guidance from others. There are simply too many unusual features of Supreme Court practice for an attorney to learn alone. One example is interaction with the Office of the Solicitor General in any case in which the government may be interested. I was very fortunate that Cathy Steege and the Jenner & Block firm were willing to be co-counsel with me in *Fulton.* Cathy had twice argued successfully before the Supreme Court, and the firm has an established Supreme Court appellate group. Their guidance was essential. They taught me a great deal, and we formed a good team. A retired pro bono appellate judge with a Supreme Court appeal should seek similar assistance.

Looking over my appellate work in retirement, I'm very glad that I took it on. It allowed me to do some good for the individuals I represented and to generate a clearer picture of some bankruptcy issues, even if not always with the rulings I would have preferred. I hope that there are judges now who will take up this opportunity for continued service.

Table of Appeals

Completed cases

Name	*Citation*	*Result for the client: "+" in favor", "-" against, "~" no decision*
Germeraad v. Powers	826 F.3d 962 (7th Cir. 2016)	- Bankruptcy court denial of Chapter 13 plan modification reversed, imposing higher monthly payments retroactively
Sheehan v. Ash	574 B.R. 585 (N.D.W. Va. 2017)	+ Bankruptcy court denial of exemption objection affirmed: state exemption law may be applied to out-of-state property
Sheehan v. Ash	889 F.3d 171 (4th Cir. 2018)	+ District court decision affirmed
CenTrust Bank v. Harper	No. 16 C 11394 (N.D. Ill. 2017)	+ Bankruptcy court plan confirmation affirmed; non-homestead real property can be stripped down in Chapter 13
In re Capretta	No. 16 C 11394 (6th Cir. BAP Sept. 26, 2016)	~ Appeal withdrawn (facts did not support proposed argument that a lien on a mortgage escrow is additional collateral, making the mortgage subject to strip-down)
In re Wilber (Title Max v. Wilber)	No. 16-17468-DD (11th Cir Feb. 14, 2018)	- Rehearing denied of a decision allowing an objection to confirmation made after a Chapter 13 plan was confirmed and enforcing automatic state title transfer postpetition
Nebel v. Warfield	No. 17-16350 (9th Cir. 2019)	- Bankruptcy court valuation of property used by debtor after filing at cost to debtor rather than value to trustee affirmed
HSBC Bank v. Zair	550 B.R. 188 (E.D.N.Y. 2016)	- Bankruptcy court confirmation of Chapter 13 plan providing for surrender of real property to secured creditor reversed
In re Zair (Zair v. HSBC Bank)	No. 16-1648 (2d Cir. Nov. 15, 2016)	~ Appeal from district court dismissed for lack of finality
Burciaga v. Moglia (In re Burciaga)	597 B.R. 426 (Bankr. N.D. Ill. 2019)	- Bankruptcy court denial of exemption for unpaid wages affirmed
In re Burciaga	944 F.3d 681 (7th Cir. 2019)	+ District court reversed; exemption for unpaid wages upheld.
In re Steenes	918 F.3d 554 (7th Cir. 2019)	- District court reversed; administrative claim status granted for vehicle tickets incurred during Chapter 13 case
Davis v. Helbling (In re Davis)	960 F.3d 346 (6th Cir. 2020)	+ Bankruptcy court reversed; deduction of 401(k) contributions from Chapter 13 projected disposable income is permissible
In re Cherry	963 F.3d 717 (7th Cir. 2020)	- Order of confirmation reversed; no right to vest estate property in a Chapter 13 debtor without specific justification
In re Fulton	926 F. 3d 916 (7th Cir. 2019)	+ Automatic stay rulings affirmed: § 362(a)(3) prohibits retention of collateral seized before a bankruptcy filing
City of Chicago v. Fulton	141 S. Ct. 585 (2021)	- § 362(a)(3) holding reversed
In re Acosta-Conniff	686 F. App'x 647 (11th Cir. 2017)	+ District court denial of student loan discharge reversed and remanded for additional findings
Acosta-Conniff v. ECMC (In re Acosta-Conniff)	**632 B.R. 322** (Bankr. M.D. Ala. 2021)	+ Student loan discharged

Active case

Name	*Citation*	*Result for the client*
Bush v. United States	**939 F.3d 839 (7th Cir. 2019)**	? Initial decision found bankruptcy jurisdiction over the amount of a nondischargeable tax penalty, but ordered abstention in favor of the Tax Court; rehearing petitions are pending