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Appellate Practice Report

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Citing Unpublished Opinions

It's well-understood that unpublished decisions don't have precedential value under the doctrine of stare decisis. The Michigan Court of Appeals has even cautioned against citing them, warning that "[c]onsideration of unpublished cases is disfavored."[1] But practitioners also know that there isn't always a controlling published decision. Indeed, one of the topics of discussion at the 2019 Michigan Appellate Bench Bar Conference was whether the Court of Appeals should be publishing more of its decisions.[2]

And, of course, there are times when an unpublished opinion contains a particularly helpful discussion of an issue—especially one that is fact-specific. In that situation, it may well be appropriate to cite the unpublished opinion. After all, it has long been recognized that unpublished decisions, while nonbinding, "may be persuasive or instructive."[3]

In all cases, citing an unpublished opinion requires attention to the rules followed by the court you're in. For Michigan practitioners, those rules differ depending on whether you're in the Michigan Supreme Court or Court of Appeals, or in the Sixth Circuit.

Sixth Circuit

The Sixth Circuit "permits citation of any unpublished opinion, order, judgment, or other written disposition."[4] But if such a decision is "not available in a publicly accessible electronic database, the party must file and serve a copy as an addendum to the brief or other paper in which it is cited."[5]

Michigan Supreme Court and Court of Appeals

The rule governing the citation of unpublished opinions in the Michigan Supreme Court and Court of Appeals is more restrictive. As an initial matter, MCR 7.215(C) cautions that "[u]npublished opinions should not be cited for propositions of law for which there is published authority."[6] If a party does cite an unpublished opinion, "the party shall explain the reason for citing it and how it is relevant to the issues presented."[7] In addition, "[a] party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears."[8]

The Automatic Stay, Debtor Standing, and Civil Appeals

A bankruptcy petition can affect an appeal in a civil action in a number of ways. This article focuses on just two of the issues that appellate counsel should evaluate: (1) the effect of the automatic stay imposed by 11 U.S.C. § 362 and (2) the debtor's standing to pursue an appeal in the wake of its bankruptcy petition.

The automatic stay

When a debtor files a bankruptcy petition, all litigation against the debtor must stop—including appeals. This rule is called the "automatic stay," and it's codified in 11 U.S.C. § 362.

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Although it's rare for the stay to apply to parties other than the debtor itself, it's important not to underestimate the stay's breadth. The Bankruptcy Code stays more than just actions against the debtor. For example, appellate counsel should be aware that the stay also applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." To be sure, the debtor is usually the subject of the automatic stay. But some cases may require a more careful examination of the text of the Bankruptcy Code and relevant case law—or, better yet, a consultation with experienced bankruptcy counsel.

It's equally important not to *over*estimate the breadth of the automatic stay. The automatic stay generally applies to claims against particular parties or property, not to actions as a whole. If your client is appealing a judgment entered in favor of two parties, only one of which is a debtor in bankruptcy, you may be able to continue your appeal against the non-debtor, even though claims against the debtor are stayed. As the Sixth Circuit Court of Appeals put it, "In the absence of unusual circumstances, the automatic stay does not halt proceedings against solvent codefendants."

As for how to notify a court about the potential impact of the automatic stay, start with the court's Internal Operating Procedures. When a case is before the Michigan Court of Appeals, *all* parties have an obligation to assess the potential impact of the automatic stay. The Michigan Court of Appeals' Internal Operating Procedures provide that "*any party* who becomes aware of a proceeding in bankruptcy that *may* cause or impose a stay of proceedings of a case in this Court should immediately file a written notice with the clerk's office." This filing with the clerk's office must "include an explanation why the bankruptcy proceedings impact the pending case." Opposing parties may file contrary statements.

The clerk's office then makes an initial determination and either notifies the parties by letter that it believes the stay does not apply or recommends that the court enter an order staying the appeal. If a party believes that the clerk erred in declining to stay an appeal, it may file a formal motion with the court. A party who believes the court erred in staying an appeal may file a motion for reconsideration. Once the stay is removed or lifted, parties may file a motion to reopen the case.

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The real party-in-interest

The automatic stay raises the issue of whether a party may continue pursuing an appeal against a debtor/appellee (a claim against property of the estate). When the debtor is the *appellant*, a related question arises: is the debtor/appellant still the real party-in-interest after filing a bankruptcy petition?

To answer this question, you'll need to start with the Bankruptcy Code. A bankruptcy estate is created when a debtor files a bankruptcy petition. The estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case" and therefore includes any claims or causes of action the debtor may hold when the bankruptcy petition is filed. Whether the debtor has standing to pursue that claim on behalf of the estate (not on its own behalf) often depends on which chapter of the Bankruptcy Code the debtor's petition invokes.

When an appellant files a petition under Chapter 7 of the Bankruptcy Code, the Chapter 7 trustee has sole authority to pursue any prepetition claims or causes of action that the debtor possessed. So an appellant no longer has standing to pursue an appeal once it files a bankruptcy petition.

The analysis likely differs when a debtor files under other chapters, including Chapters 11 and 13. Although the Sixth Circuit Court of Appeals has not yet addressed the issue, most courts have held that Chapter 13 debtors and Chapter 13 trustees have overlapping rights to pursue prepetition causes of action. Although there's some debate about the issue, it's likely that the debtor *or* the trustee can pursue an appeal after the appellant files a Chapter 13 petition.

A debtor under Chapter 11 will ordinarily have standing to continue pursuing its appeal. This conclusion follows from the fact that a debtor-in-possession under Chapter 11 has many of the powers ordinarily conferred on trustees, including the authority to pursue causes of action on behalf of the estate. This authority ends if the Bankruptcy Court appoints a Chapter 11 trustee. Until that time, a debtor-in-possession likely has standing to continue pursuing an appeal on behalf of its bankruptcy estate.

Conclusion

These issues are among the first that appellate counsel should consider when an opposing or related party files a bankruptcy petition while an appeal is pending. Violating the automatic stay can expose both an attorney and his or her client to actual and punitive damages. And failing to identify an appellant/debtor's lack of standing can expose a client to unnecessary costs and expenses. A thorough examination of other obligations—including those necessary to preserve a claim—is a good idea, too. So it's usually worthwhile to consult experienced bankruptcy counsel about the impact of a new bankruptcy case and the steps necessary to protect your client's rights.

Endnotes

1 *Shinn v Michigan Assigned Claims Facility*, 314 Mich App 765, 773; 887 NW2d 635 (2016).

2 MCR 7.215(B) provides that an opinion "must be published" if it: "(1) establishes a new rule of law; (2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule; (3) alters, modifies, or reverses an existing rule of law; (4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a reported decision since November 1, 1990; (5) involves a legal issue of significant public interest; (6) criticizes existing law; or [sic] (7) resolves a conflict among unpublished Court of Appeals opinions brought to the Court's attention; or (8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid."

3 *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

4 6th Cir R 32.1(a).

5 6th Cir R 32.1(a).

6 MCR 7.215(C)(1).

7 *Id.*

8 *Id.*