Should You Rely on the BAP? Analyzing the Impact and Authority of Bankruptcy Appellate Panels

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When drafting a motion or a brief, how much weight should you give an opinion of a Bankruptcy Appellate Panel (BAP)? This article discusses the variation between circuits about the BAP and highlights a selection of cases that analyze the limits of the BAP's authority.

28 U.S.C. § 158(b) directs each circuit court to establish a BAP, composed of bankruptcy judges of the districts in the circuit, to hear and determine appeals unless there are insufficient judicial resources available in the circuit or the establishment of the panel would result in undue delay or increased cost to parties.

Five circuit courts have established BAPs: First, Sixth, Eighth, Ninth and Tenth. In the circuits that have adopted BAPs, appeals will only be heard by the panel if "the district court judges for the district have authorized the referral of appeals and if the parties to the appeals consent or are deemed to consent through inaction or failure to follow the rules." [1]

Because BAPs are composed of Article I judges, decisions of a BAP cannot bind Article III courts, such as a district court. [2] Beyond this widely accepted limit on the binding nature of BAP decisions, decisions from the applicable circuits are not uniform regarding the precedential or binding effects of panel decisions on the bankruptcy courts within a given circuit, on the bankruptcy courts in the district from which an appeal is taken, or whether BAP decisions are binding on any other cases at all. [3]

Despite the various historical opinions of courts within the Ninth Circuit regarding the precedential effect of BAP decisions, in 2010 the Court of Appeals for the Ninth Circuit made clear in *In re Silverman* that decisions of its appellate panel do not bind bankruptcy courts within the circuit but are "persuasive authority given its special expertise in bankruptcy issues." [4] Shortly after the *Silverman* decision, the U.S. Bankruptcy Court for the Central District of California issued an opinion specifically focused on Congress's intent upon the passage of BAPCPA, and held that Congress determined that BAP decisions have no authoritative or precedential effect. [5]

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In 2016, the U.S. Court of Appeals for the Tenth Circuit provided guidance for practitioners regarding the weight of BAP decisions when it held in *In re Expert South Tulsa LLC* that it "treat[s] the BAP as a subordinate appellate tribunal whose rules may be persuasive but not entitled to deference." [6]

Taking a different approach, the Sixth Circuit has adopted a local bankruptcy rule that provides, albeit somewhat indirectly, that BAP decisions are precedential until the panel states otherwise. The rule leaves unanswered the question regarding whether panel decisions are *binding*. [7] The U.S. Bankruptcy Court for the Western District of Michigan held that BAP decisions are only binding in the case being decided and "are not generally binding within the circuit, across district lines, or even in the bankruptcy courts located in the district in which the appeal arose." [8] However, somewhat ironically given the issue at hand, the Sixth Circuit BAP held that its own opinion was binding on the bankruptcy court in a given circuit and had to be followed. [9]

In a 2005 case, *In re Farmland Indus. Inc.*, the U.S. Court of Appeals for the Eighth Circuit declined to examine the issue of whether a BAP decision was binding precedent. [10] The U.S. Bankruptcy Court for the Southern District of Iowa, however, has stated that "[w]hile the rulings

of the Bankruptcy Appellate Panels are entitled to appropriate respect, those rulings are not binding on the Bankruptcy Court." [11]

Finally, in the First Circuit, the U.S. Bankruptcy Courts for the Districts of Maine and Massachusetts have determined that a decision of the BAP is persuasive authority but is not binding on the bankruptcy court. The Massachusetts Bankruptcy Court has concluded that if district court judges do not bind each other, neither do bankruptcy judges, even when empaneled on a bankruptcy appellate panel. [12] Recently, in a 2017 opinion, the U.S. Bankruptcy Court for the District of Maine stated that "The BAP's decision must be given consideration as significant and persuasive authority, but there is no law definitively establishing that the decisions of the BAP are binding on bankruptcy courts within the First Circuit." [13] In that case, the Maine Bankruptcy Court disagreed with the interpretation of § 362(c)(3)(A) adopted by the First Circuit BAP nearly 11 years earlier. [14]

As a general rule, when looking to BAP decisions as authority, keep in mind that they may carry weight as well reasoned and more persuasive than other authority, but a bankruptcy court in most circuits will not be bound and may disagree with a BAP decision.

[1] 1 *Collier on Bankruptcy* ¶ 5.02[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013).

[2] *See, e.g., Bank of Maui v. Estate Analysis Inc.*, 904 F.2d 470, 472 (9th Cir. 1990) ("[I]t must be conceded that BAP decisions cannot bind the district courts themselves. As article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction.").

[3] In the circuits that have established BAPs, the jurisprudence on the precedential weight of BAP decisions is lengthy and, in some circuits, complex. The purpose of this article is to highlight opinions reached in the circuits after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) became law.

[4] *In re Silverman*, 616 F.3d 1001, 1005 (9th Cir. 2010).

[5] *In re Rinard*, 451 B.R. 12, 21 (Bankr. C.D. Cal. 2011) ("If Congress believed that decisions of BAPs across the nation were authoritative and precedential (which would then grant BAPs more authoritative/precedential value than Article III district courts surely possess), there w have been no need to include BAPs with the power to certify direct appeals from bankruptcy courts to Circuit Courts of Appeals. The B simply take the appeal, forget certification, and provide authoritative pronouncements, *tout de suite*.… BAP decisions are not binding o bankruptcy courts, as district court decisions are not.… Congress, in 2005, finished the argument.").

[6] *In re Expert S. Tulsa LLC*, 842 F.3d 1293, 1296 (10th Cir. 2016) (quoting *Alderete v. Educ. Credit Mgmt. Corp.* (*In re Alderete*), 412 F.3d 1200, 1204 (10th Cir. 2005)).

[7] Local Rules Bankruptcy Appellate Panel of the Sixth Circuit R. 8024-1(b).

[8] *In re Cormier*, 382 B.R. 377, 408 (Bankr. W.D. Mich. 2008) (court went on to state, however, that "[a]ll opinions should be treated as extremely persuasive and generally followed. However, when a bankruptcy court has a deeply considered and well-reasoned analysis, the court is free to disagree with the BAP or the district courts. This is healthy for the system: it nurtures the growth of the law.").

[9] *In re Hunter*, 380 B.R. 753, 775 (Bankr. S.D. Ohio 2008) ("[F]ailure to follow a BAP decision that is directly on point … would seriously undermine the BAP's role in promoting the law in this circuit and waste valuable judicial resources.").

[10] *In re Farmland Indus. Inc.*, 397 F.3d 647, 653 (8th Cir. 2005) ("The Committee does not ask us to review ... the unsettled question [of] whether BAP decisions are binding precedent.").

[11] *In re Hatch*, 519 B.R. 783, 788 (Bankr. S.D. Iowa 2014) (adopting the approach discussed in *In re Williams,* 257 B.R. 297, 301 n. 5 (Bankr. W.D. Mo. 2001)).

[12] *In re Virden*, 279 B.R. 401, 409 n.12 (Bankr. D. Mass. 2002); *see also LBM Fin. LLC v. Shamus Holdings Inc.*, Case No. 09-11668-FDS, 2010 WL 4181137 at *2 n.2 (D. Mass. Sept. 28, 2010) ("This Court is not bound by the decisions of a BAP, although such decisions may have persuasive authority.").

[13] *In re Smith*, 573 B.R. 298 (Bankr. D. Me. 2017), *aff'd sub nom. Smith v. Maine Bureau of Revenue Servs.*, No. 1:17-CV-00340-JAW, 2018 WL 2248586 (D. Me. May 16, 2018).

[14] *See In re Jumpp*, 356 B.R. 789, 797 (B.A.P. 1st Cir. 2006).

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