CENTRE DE DROIT
BANCAIRE ET FINANCIER

Bankruptcy and Unauthorized Activity

Confirmation of the Right to Appeal by Dismissed Officers

Par Lionel Jeanneret le 14 April 2026

In the decision 5A_988/2025 of March 3, 2026, which is scheduled for publication, the Federal Supreme Court (FSC) ruled that the former officers of a company whose powers of representation have been revoked by FINMA retain standing to appeal the bankruptcy ruling on behalf of the company, even when the bankruptcy is declared by an ordinary court and not by FINMA itself. This extension of existing case law ensures effective access to justice (Art. 29*a* Cst.) in the context of the transfer of jurisdiction over the bankruptcy of unlicensed institutions to ordinary civil courts effective January 1, 2023 (Art. 173*b* para. 2 LP, see Message, 6202 ff.).

In this case, FINMA suspects a company of accepting deposits from the public on a professional basis without the required authorization. On August 13, 2024, FINMA appoints an investigator on a super-provisional basis with the authority to act in place of the company's governing bodies. The company and its governing bodies are prohibited from entering into legal transactions without the consent of the special administrator.

On May 22, 2025, the special administrator files for bankruptcy with the *Bezirksgericht* of Schwyz and requests the opening of bankruptcy proceedings, which the court orders on June 3, 2025. On June 13, 2025, the two members of the board of directors whose signing authority had been revoked by FINMA file an appeal on behalf of the company with the *Kantonsgericht* of Schwyz, seeking, as a preliminary injunction, a stay of execution and, on the merits, the revocation of the bankruptcy or, alternatively, the granting of a provisional moratorium. By decision of October 8, 2025, the *Kantonsgericht* declares the appeal inadmissible and orders the opening of bankruptcy proceedings once again.

On November 13, 2025, the company, acting through the two members of the board of directors, files a civil appeal with the Federal Supreme Court (TF), which grants suspensive effect.

The central issue is whether the removed members of the board of directors retain standing to appeal the bankruptcy ruling on behalf of the company, despite the withdrawal of their powers of representation following FINMA's appointment of an investigator.

The Federal Supreme Court answers in the affirmative. Relying on its established case law regarding bankruptcies declared by FINMA (ATF 132 II 382 para. 1.1 ; ATF 131 II 306 para. 1.2.1), it notes that the guarantee of access to the courts enshrined in Art. 29*a* of the Constitution would be violated if only the investigator appointed by FINMA were recognized as

authorized to act on behalf of the company, since one could not reasonably expect the investigator to challenge a proceeding that he himself initiated.

The Federal Supreme Court extends this principle beyond bankruptcies declared by FINMA to cases where, as in the present case, bankruptcy is opened by an ordinary court. It emphasizes that the transfer of jurisdiction over the bankruptcy of unauthorized financial institutions from FINMA to ordinary civil courts (effective as of January 1, 2023, pursuant to Art. 173*b* para. 2 LP) was not intended to eliminate the possibility for corporate bodies to challenge the bankruptcy ruling. The corporate bodies, even if removed from office, therefore retain the right to appeal a bankruptcy judgment under Art. 174 LP, acting on behalf of the company.

The Federal Supreme Court further rejects the *Kantonsgericht*'s subsidiary reasoning that a formal resolution of the board of directors would have been necessary to file the appeal. It holds that it is sufficient for the court to verify whether the appeal was signed by persons who had the power to represent the company prior to the revocation of their signing authority, without it being necessary to examine whether internal decision-making procedures were properly followed.

This ruling represents a step forward in terms of judicial protection in the context of financial supervision. Prior to January 1, 2023, FINMA had the authority to declare bankruptcy itself for institutions operating without authorization, and case law already recognized the standing to appeal of the removed bodies in such cases. The transfer of this authority to the ordinary civil courts (Art. 173*b* para. 2 LP) had created uncertainty regarding the continuation of this case law—uncertainty that the Federal Supreme Court has now clearly dispelled.

The reasoning is based on a compelling argument : the structural conflict of interest of the investigator remains the same, whether the bankruptcy petition was filed with FINMA or with a civil court. Requiring the approval of that same investigator to challenge the bankruptcy would amount to depriving the company of any effective remedy. It should be noted, however, that the suspensive effect was granted in this case under the general rules, as Art. 37*g*$^{\text{quinquies}}$ LB is not applicable in the absence of a banking license for the company in question—a provision which, in cases where FINMA invokes it, makes the success of an appeal virtually impossible in practice.

Finally, three important questions remain unresolved :

1. The duty to notify the court in the event of over-indebtedness constitutes a non-transferable and inalienable responsibility of the board of directors (Art. 716*a* para. 1 item 7 CO). Does the investigator (even if authorized to act in place of the corporate bodies) truly possess the authority not provided for by the CO to carry out this duty in place of the board of directors ?
2. To what extent can the removed members of the board of directors obtain reimbursement from the company for their expenses (court fees and attorneys' fees) when they appeal on behalf of the company against a bankruptcy ruling ?
3. When the investigator is ordered to pay costs (as in this case), can he obtain reimbursement from the company (or "charge" them to the company) for his services, or must he instead bear them personally ?

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