

Appellate Issues

June 2010



MESSAGE FROM THE CHAIR

by Ben Mesches, Haynes and Boone, LLP
2323 Victory Avenue, Suite 700, Dallas, TX 75219
Ben.Mesches@haynesboone.com

The Publications Committee has been hard at work on some important projects this year. This issue of *Appellate Issues* represents our first effort in bringing a topic-focused publication to our membership. This issue focuses on bankruptcy appeals and is the result of the tremendous efforts of our authors and editor, Crystal Rowe. As you have probably seen by now, the ABA has launched a revamped website platform, and our website (which you can view visit at <http://new.abanet.org/divisions/Judicial/ajc/cal/Pages/default.aspx>) provides a much-improved vehicle for learning about CAL, upcoming events, publications, and a free webcast on federal preemption. Our website coordinator, Kim Demarchi, has also been spearheading a project to connect CAL with its members through social-media tools. And thanks to Dana Livingston, we have made tremendous progress on CAL's first-ever book. This book is an "insiders" guide of practical tips and procedure in the appellate courts of every state, circuit and the Supreme Court.

If you have any questions about CAL's Publications Committee, feel free to contact me at ben.mesches@haynesboone.com.

IN THIS ISSUE

Message From The Chair	1
An Introduction to Bankruptcy Appeals— Jurisdiction, the Rules and Threshold Concerns	1
Strategic Issues and Choices in Bankruptcy Appeals.....	10
Finality of Bankruptcy Court Decrees and Orders: Avoiding a Dismissal of Your Client's Appeal for Lack of Jurisdiction	19
Direct Bankruptcy Appeals: Five Years Later	24

An Introduction to Bankruptcy Appeals— Jurisdiction, the Rules and Threshold Concerns

Samara Kline and Ian E. Roberts¹
Baker Botts, LLP

INTRODUCTION

In light of the challenging and volatile economic climate of the past few years, it is unsurprising that the number of bankruptcy cases filed in the United States courts has increased dramatically.² In 2006, there were 28,322 business bankruptcy filings. In 2009, there were 60,837 such filings—approximately a 100% increase in just three years.³ Appellate and

¹ Ms. Kline is a partner and appellate specialist at Baker Botts L.L.P. in Dallas, Texas. She can be reached at samara.kline@bakerbotts.com. Mr. Roberts is an associate in the bankruptcy section of Baker Botts L.L.P. in Dallas, Texas and is a former law clerk to the Honorable Hayden Head, former Chief Judge of the United States District Court for the Southern District of Texas. He can be reached at ian.roberts@bakerbotts.com. The authors wish to thank Nicole Gordon for her assistance with this paper.

² For the twelve month period ending in June of 2009, there was a 35% increase over the previous year in the total number of bankruptcy cases filed in the United States federal courts. See Table F, U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2008 and 2009, http://www.uscourts.gov/Press_Releases/2009/bankrupt_ftable_jun2009.xls. A wide range of bankruptcy statistics are generated and published by the Administrative Office of the United States Courts, and are available at <http://www.uscourts.gov/bnrpctystats/statistics.htm>.

³ Tabulated business filings by quarter and year are available through the American Bankruptcy Institute at <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=60240&TEMPLATE=/CM/ContentDisplay.cfm>.

bankruptcy attorneys should reasonably expect increased bankruptcy filings to translate into increased numbers of bankruptcy appeals.⁴

This article provides an overview of the appeals process for bankruptcy matters and highlights some practice pointers and pitfalls. Part I is an overview of appellate jurisdiction for bankruptcy matters. Part II considers the logistics for initiating bankruptcy appeals as provided in the Federal Rules of Bankruptcy Procedure. Finally, part III considers threshold matters commonly at issue in bankruptcy appeals: standards of review, standing and equitable mootness.

I. Appellate Jurisdiction

Bankruptcy is generally a matter of federal jurisdiction. Cases commenced under the Bankruptcy Code rest on exclusive federal subject matter jurisdiction, which ultimately derives from the US Constitution.⁵ Original jurisdiction for bankruptcy cases resides in the district courts under 28 U.S.C. § 1334(a). Original (but not exclusive) jurisdiction for all civil proceedings arising under the Bankruptcy Code, or arising in or related to cases under the Bankruptcy Code, resides in the district courts under 28 U.S.C. § 1334(b). Cases and controversies, however, for which subject matter jurisdiction is based upon 28 U.S.C. § 1334 (i.e., bankruptcy jurisdiction) are generally and automatically referred to bankruptcy judges, who serve as units (or adjuncts) of the district court for the purposes of bankruptcy jurisdiction.⁶

District courts, bankruptcy appellate panels (discussed below), and the courts of appeals

have appellate jurisdiction under 28 U.S.C. § 158 over decisions and orders of bankruptcy judges. Section 158 of Title 28, which can seem rather byzantine at first glance, is discussed below.

A. Final Orders—Appeal by Right

Federal district courts have appellate jurisdiction under 28 U.S.C. § 158(a)(1) over “final judgments, orders and decrees” of bankruptcy judges. Outside the bankruptcy context, a “final order” is one that ends the merits of the litigation and leaves nothing for the court to do but execute its judgment. See, e.g., *Kendrick v. Deutsche Bank Nat’l Trust Co. (In re St. Clair)*, 380 B.R. 478, 480 (B.A.P. 6th Cir. 2008). For purposes of bankruptcy appellate jurisdiction, however, finality is a broader and more flexible concept than is understood in ordinary civil litigation. *In re Armstrong World Indus. Inc.*, 432 F.3d 507, 511 (3d Cir. 2005). Although based upon the same general principles, the approach to determining finality varies across circuits.

To be final in character and give rise to appellate jurisdiction, some courts require that an order by a bankruptcy court⁷ resolve “a discrete unit in the larger case.” See, e.g., *Path-Science Labs., Inc. v. Greene County Hosp. (In re Greene County Hosp.)*, 835 F.2d 589, 595 (5th Cir. 1988); see also *U.S. Tr. v. Bloom (In re Palm Coast, Matanza Shores Ltd. P’Ship)*, 101 F.3d 253, 256 (2d Cir. 1996) (“[O]rders in bankruptcy cases may be immediately appealed if they finally dispose of discrete issues within the larger case.”) In the Fifth Circuit a final order must “conclusively determine substantive rights.” *In re Greene County Hosp.*, 835 F.2d at 595 (internal citations omitted). Other circuit courts take a slightly different approach. For example, the Third Circuit approach to finality is framed in terms of a four-factor test that takes into consideration (1) the impact of the issue on the assets of the bankruptcy estate, (2) the necessity for additional fact finding on remand, (3) the preclusive effect of a decision on the

⁴ A 1998 study by the Administrative Office of the United States Courts unsurprisingly showed that the number of bankruptcy filings directly correlates with an increased number of bankruptcy appeals, particularly as it relates to increases in the number of cases filed under chapter 11, where the economic stakes often justify appellate litigation. See John R. Golmant, *AO Study Finds Chapter 11 Filings a Strong Predictor of Bankruptcy Appeals*, 17 JAN. AM. BANKR. INST. J. 14 (1999).

⁵ U.S. CONST., art. I, § 8, cl. 4 (empowering Congress to make “uniform Laws on the subject of Bankruptcies throughout the United States”).

⁶ 28 U.S.C. § 157. For a general discussion of the development of federal bankruptcy jurisdiction, see Katelyn Knight, *Equitable Mootness in Bankruptcy Appeals*, 49 SANTA CLARA L. REV. 253, 255-60 (2009).

⁷ The finality analysis is generally the same where the order is issued by the district court in an exercise of original jurisdiction after the withdrawal of the automatic reference to the bankruptcy court, pursuant to 28 U.S.C. § 157(d). *U.S. v. Nicolet, Inc.*, 857 F.2d 202, 204-05 (3d Cir. 1988). In such instances, however, the court of appeals’ appellate jurisdiction technically arises under 28 U.S.C. § 1291, rather than 28 U.S.C. § 158(d). *Id.* at 204.

merits, and (4) the furtherance of judicial economy. *In re Continental Airlines, Inc.*, 932 F.2d 282, 285 (3d Cir. 1991). Examples of final orders include a bankruptcy court's recognition of a creditor's security interest, a turnover order, an order allowing or disallowing an exemption, and an order granting relief from the automatic stay. *In re Greene County Hosp.*, 835 F.2d at 595 n.22; see also *Sonnax Indus., Inc. v. Tri Component Products Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1283 (2d Cir. 1990) (noting that "all seem to agree that orders lifting the automatic stay are final"). Because the test for finality differs across circuits, practitioners should consult the case law in their circuit when considering if a particular order is final.

When considering whether an order is (or will be) final for appellate purposes, a practitioner should also keep in mind that bankruptcy judges may only enter final orders and judgments in "core proceedings." See 28 U.S.C. § 157(b)(1). A non-exclusive list of core proceedings is found at 28 U.S.C. § 157(b)(2), and includes "orders in respect to obtaining credit," "motions to terminate, annul, or modify the automatic stay," "determinations of the validity, extent, or priority of liens," and "confirmation of plans." 28 U.S.C. § 157(b)(2)(D), (G), (K) and (L). Non-core proceedings heard by the bankruptcy judge are submitted to the district judge by proposed findings of fact and conclusions of law, and are not final until the district court enters an order or judgment, unless all parties consent to the bankruptcy judge entering final orders and judgment. 28 U.S.C. § 157(c). While not all orders in core proceedings are final for the purposes of appellate jurisdiction, bankruptcy court orders in non-core proceedings are not final, unless the parties have consented to a definitive ruling by the bankruptcy judge under 28 U.S.C. § 157(c)(2).

B. Interlocutory Orders—Appeals Require Leave of Court

Bankruptcy orders that "constitute only a preliminary step in some phase of the bankruptcy proceeding and that do not directly affect the disposition of the estate's assets [are] interlocutory . . ." *In re Greene County Hosp.*, 835 F.2d at 595; see also *Stewart v. Kutner (In re Kutner)*, 656 F.2d 1107, 1110-11 (5th Cir. 1981) ("[A]n interlocutory order is one that does not finally dispose of the entire case, but merely decides some incidental matter connected with the litigation."); *Providers Benefit Life Ins. Co. v.*

Tidewater Group, Inc. (In re Tidewater Group, Inc.) 734 F.2d 794, 796 (11th Cir. 1984) (An order is not final when it "merely disposes of an incidental procedural matter during the proceedings in bankruptcy court.") (internal quotations omitted). A significant example of an interlocutory bankruptcy order is one that approves a Chapter 11 disclosure statement. *Everett v. Perez (In re Everett)* 30 F.3d 1209, 1217 (9th Cir. 1994) (holding that a disclosure statement order was interlocutory); *In re Ionosphere Clubs, Inc.*, 179 B.R. 24, 27 (S.D.N.Y. 1995) (same). As a result, "the confirmation order—not the disclosure [statement] order—triggers the deadline for notice of appeal on 'adequate information' issues under section 1125(a)." *In re Everett*, 30 F.3d at 1217. Other examples of interlocutory orders include those appointing an interim trustee, requiring the winding up of a partnership, authorizing a special master to negotiate an asset sale, denying a trustee's conversion motion, and denying approval of a settlement agreement. *In re Greene County Hosp.*, 835 F.2d at 595 n.23.

Interlocutory orders may also be appealed, but only with leave of court.⁸ 28 U.S.C. § 158(a)(3). The decision whether to grant leave for an interlocutory appeal is within the discretion of the district court. *Stumpf v. McGee (In re O'Connor)*, 258 F.3d 392, 399-400 (5th Cir. 2001). Interlocutory appeals generally are disfavored because they interfere with the "expeditious resolution of pressing economic difficulties," an overriding goal of the bankruptcy system. *In re Hunt Int'l Res. Corp.*, 57 B.R. 371, 372 (N.D. Tex. 1985). Courts should grant leave to appeal an interlocutory bankruptcy order only where extraordinary circumstances justify overriding the general policy of disallowing such appeals. *Id.*; *Shimer v. Fugazy (In re Fugazy Express, Inc.)*, 163 B.R. 434, 434-35 (S.D.N.Y. 1994) (characterizing the granting of leave as appropriate only in "exceptional circumstances"). In deciding whether to accept an interlocutory appeal, courts look to the standard under 28 U.S.C. § 1292(b) for allowing interlocutory

⁸ There is one exception to this rule: interlocutory orders that increase or decrease the period of time in which a debtor has the exclusive right to propose and solicit acceptance of a Chapter 11 plan may be appealed by right. See 28 U.S.C. § 158(a)(2); 11 U.S.C. § 1121(d); *In re Adelpia Commc'ns Corp.*, 342 B.R. 122, 126 (S.D.N.Y. 2006).

appeals from district court orders. *Ichinose v. Homer Nat'l Bank (In re Ichinose)*, 946 F.2d 1169, 1177 (5th Cir. 1991); *First Am. Bank of N.Y. v. Century Glove, Inc.*, 64 B.R. 958, 961-62 (D. Del. 1986); *Crestview Capital Master, LLC v. Floyd (In re Red River Energy, Inc.)*, 415 B.R. 280, 284 (S.D. Tex. 2009). This standard requires that (1) a controlling issue of law must be involved, (2) the question must be one where there is substantial ground for difference of opinion, and (3) an immediate appeal must materially advance the ultimate termination of the litigation. *In re Red River Energy, Inc.*, 415 B.R. at 284 (citing *In re Ichinose*, 946 F.2d at 1177).

C. Bankruptcy Appellate Panels

In some circuits, bankruptcy appeals may be heard by a designated panel of three bankruptcy judges comprising a bankruptcy appellate panel, or “BAP,” unless one party to the appeal timely elects to have the appeal heard by the district court. See 28 U.S.C. § 158(c). The judicial counsel of each circuit is now⁹ required to establish a BAP for their circuit, unless the judicial counsel finds that there are insufficient judicial resources available, or the establishment of the BAP would result in undue delay or increased cost to parties in cases under the Bankruptcy Code. 28 U.S.C. § 158(b)(1). BAPs presently exist in the First, Sixth, Eighth, Ninth and Tenth Circuits.¹⁰ BAPs may only hear appeals from judicial districts whose district judges have, by majority vote, authorized the BAP to hear appeals from their district. 28 U.S.C. § 158(b)(6). Additionally, members of the BAP may not hear an appeal from the district

⁹ Under the Bankruptcy Act of 1978, BAPs were optional, and only the Ninth Circuit created one. 8 NORTON BANKR. L. & PRAC.3d § 170:50 (2009). The Bankruptcy Reform Act of 1994, however, amended Section 158 of Title 28 to require each judicial counsel to submit a report to the Judicial Conference of the United States explaining the factual basis for not establishing a BAP. See 28 U.S.C. § 158(b)(1). In response to the change, judicial counsels in other circuits established a BAP. See also Irene M. Milan, *History of the Sixth Circuit BAP*, http://www.ca6.uscourts.gov/lib_hist/courts/bankruptcy/BAP/BAPHistory.html.

¹⁰ The Judicial Counsel for the Second Circuit created a BAP in 1996, but terminated it in 2000. Jonathan Friedland, et al., *Structure of the Bankruptcy Appellate System*, 2 BANKRUPTCY LITIGATION § 9:2 (West 2009).

in which they sit as bankruptcy judges. 28 U.S.C. § 158(b)(5).

In addition to understanding where an appeal may be heard, appellate lawyers should also understand the precedential value of an opinion by a BAP. This is a matter of some debate. See *Rhiel v. OhioHealth Corp. (In re Hunter)*, 380 B.R. 753, 771-75 (Bankr. S.D. Ohio 2008) (surveying case law and commentary on the precedential value of BAP decisions); 8 NORTON BANKR. L. & PRAC.3d § 170:17 (2010); Anthony Michael Sabino, *The Precedential Effect of BAP Decisions*, 25 No. 10 BANKR. STRATEGIST 3 (2008). Do the opinions of the appellate panel—comprised of bankruptcy judges—bind the district courts? If a BAP renders an opinion in a case from one district, does that opinion bind the bankruptcy judges of another district in the circuit?

Under one approach, BAPs are considered units of the courts of appeals, and their decisions have the same weight as any other decision of the court of appeals. *In re Hunter*, 380 B.R. at 773. Other approaches basically equate the precedential weight of BAP decisions and district court opinions, depending upon whether the district in which the appeal is taken or the district in which the referenced decision arose, authorized the use of BAPs. *Id.* at 773-74. Another approach holds that BAP decisions have no precedential value at all. *Id.* at 774. In any case, attorneys arguing and briefing bankruptcy appeals should carefully consider how these various approaches to BAP decisions may help or hinder their case. Regardless of the approach taken, well reasoned opinions of judges with bankruptcy expertise are often very persuasive, even if not binding.

D. The Courts of Appeals

The federal courts of appeals have appellate jurisdiction under 28 U.S.C. § 158(d)(1) over the bankruptcy appellate decisions of the district courts and the bankruptcy appellate panels, and in some instances, over the decisions and orders of bankruptcy judges under 28 U.S.C. § 158(d)(2). Procedurally, appeals from final orders by district courts in bankruptcy cases are governed by the Federal Rules of Appellate Procedure. Note, however, that FRAP 6 provides special rules relating to bankruptcy appeals. For example, within 14 days after filing the notice of appeal, the appellant must file with the “clerk possessing the record assembled in

accordance with Bankruptcy Rule 8006”—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. FED. R. APP. P. 6(b)(2)(B). Within 14 days of being served with appellant’s designation, the appellee can designate additional parts to be included.

If the underlying bankruptcy court order is interlocutory, and the district court has refused to hear the discretionary appeal, the court of appeals generally lacks appellate jurisdiction to review that refusal. *Gibson v. Kassover* (*In re Kassover*), 343 F.3d 91, 92 (2d Cir. 2003); *Oliner v. Kontrabecki*, No. 04-15253, 2005 WL 3046363, at *2 (9th Cir. Nov. 15, 2005) (mem. op.); *Miller v. NationsBank, N.A.*, No. 98-7016, 1998 WL 545433, at *1 (D.C. Cir. July 20, 1998) (per curiam).

As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, under certain circumstances parties may now appeal bankruptcy court orders directly to the court of appeals. 28 U.S.C. § 158(d)(2); see *Ad Hoc Group of Timber Noteholders v. Pac. Lumber Co.* (*In re Scotia Pac. Co., LLC*), 508 F.3d 214, 219 (5th Cir. 2007) (explaining the development and procedure of direct certification). Section 158(d)(2)(A) vests the court of appeals with jurisdiction to review bankruptcy court orders if the bankruptcy court, the district court, or “all the appellants and appellees . . . acting jointly” certify that “(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal.” 28 U.S.C. § 158(d)(2)(A). In enacting this new provision in 2005, “Congress believed direct appeal would be most appropriate . . . to resolve a question of law not heavily dependent on the particular facts of a case.” *Weber v. U.S. Tr.*, 484 F.3d 154, 158 (2d Cir. 2007). “Congress did not expect that [this section] would be used to facilitate direct appeal of ‘fact-intensive issues.’” *Id.*

Appellate lawyers should note that in addition to filing a request for certification of a direct appeal, they also must file a timely notice of appeal or motion for leave to appeal, whichever is applicable. See FED. R. BANKR. P. 8001(f); *Weaver v. Harmon Law Offices, P.C.* (*In re Weaver*), 542 F.3d 257, 258-59 (1st Cir. 2008) (per curiam) (denying leave to appeal for failure to file notice of appeal); *Villarreal v. Showalter* (*In re Villarreal*), No. 08-70002, 2009 WL 2601298, at *1 (Bankr. S.D. Tex. Aug. 24, 2009) (granting leave to appeal when both parties filed timely notices of appeal). A request for certification under Section 158(d)(2) should be made to the bankruptcy court, unless an appeal has been docketed or a motion for leave to appeal has been granted, in which case the request should be made in the district court. FED. R. BANKR. P. 8001(f)(2). Bankruptcy Rule 8001(f) specifies additional requirements and direction for seeking direct certification to the courts of appeals.

The decision of a court of appeals in a bankruptcy matter may be reviewed by the Supreme Court after a grant of certiorari under 28 U.S.C. § 2101 and the Rules of the Supreme Court. While the granting of certiorari is exceptionally rare in any case, the Supreme Court has granted certiorari and rendered decisions in several bankruptcy cases in the past few terms.¹¹

II. The Bankruptcy Rules and Logistics

While the regular Federal Rules of Appellate Procedure will apply to appeals from a district court (or bankruptcy appellate panel) to the courts of appeals, appeals from orders and judgments of a bankruptcy court are governed by Part VIII of the Federal Rules of Bankruptcy Procedure.¹²

¹¹ See, e.g., *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Milavetz, Gallop & Milavetz, P.A., v. United States*, 130 S. Ct. 1324 (2010); *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195 (2009); *Schwab v. Reilly*, 129 S. Ct. 2049 (2009).

¹² The Bankruptcy Rules were amended, effective December 1, 2009; many of the former 10-day time periods are now 14-day time periods. For a discussion of these changes to the Bankruptcy Rules, see Leslie R. Masterson, *Federal Rules Update: The Times They Are A-Changin'*, 28-OCT AM. BANKR. INST. J. 20 (2009).

A. The Notice of Appeal

A bankruptcy appeal is commenced by filing a notice of appeal in the bankruptcy court. The substance and time limits for filing the notice of appeal are governed by Bankruptcy Rules 8001 and 8002. The notice itself must also substantially conform to Official Form 17.¹³

Generally, the notice of appeal must be filed within 14 days of the entry of the order to be appealed. FED. R. BANKR. P. 8002(a). The timely filing, however, of a motion to amend or make additional findings of fact, a motion to alter or amend judgment, a motion for a new trial, or a motion for relief from a judgment or order under Bankruptcy Rule 9024 (the bankruptcy analog to Federal Rule 60), extends the time to file a notice of appeal, which begins to run when the court disposes of such motion. FED. R. BANKR. P. 8002(b).

When appealing from an interlocutory order, you must file both a notice of appeal and a motion for leave to appeal. A motion for leave to appeal should be filed in the bankruptcy court, the clerk of which then transmits the motion, any responses, and any related notice of appeal to the district court. FED. R. BANKR. P. 8003(b). A motion for leave to appeal an interlocutory order should contain a statement of facts, a statement of legal issues and the relief sought, a statement as to why an appeal should be granted, and should contain a copy of the order or opinion at issue. FED. R. BANKR. P. 8003(a). Responses to a motion for leave to appeal are due within 14 days. *Id.*

The filing of a motion for leave to appeal an interlocutory order does *not* toll the 14-day deadline for filing a notice of appeal. When appealing an interlocutory order, file a notice of appeal and a motion for leave to appeal within 14 days of entry of the order. FED. R. BANKR. P. 8001(b), 8002(a), 8003(a). If you only file a notice of appeal when a motion for leave is proper, the district court can grant leave to appeal, direct you to file a motion for leave, or treat the notice of appeal as a motion for leave and deny leave to appeal. FED. R. BANKR. P. 8003(c). The filing of request for direct certification to the court of appeals under 28 U.S.C. § 158(d)(2) also does *not* toll the 14-day

¹³ The Official and Procedural Bankruptcy Forms are available at <http://www.uscourts.gov/bkforms/index.html>.

period. So, when appealing a bankruptcy court order, be it final or interlocutory, whether to the district court, BAP or through direct certification to the court of appeals, **file the notice of appeal within 14 days**, unless you have filed one of the motions specified in Bankruptcy Rule 8002(b).

If you miss the 14-day deadline by less than 21 days, the bankruptcy court may extend the time to file the notice of appeal upon a showing of excusable neglect,¹⁴ unless the order at issue deals with matters listed at Bankruptcy Rule 8002(c)(1), which include orders granting relief from the automatic stay, authorizing the sale of property or confirming a plan of reorganization. FED. R. BANKR. P. 8002(c)(2).

B. Docketing and Briefing Schedule— Things Moves Fast!

Things move fast in bankruptcy appeals. Within 14 days after the notice of appeal is filed or leave to appeal is granted, the appellant must file and serve a designation of items to be included in the record and a statement of the issues to be presented. FED. R. BANKR. P. 8006. The appellee can designate additional record items within 14 days after service of appellant's designation. *Id.* Rule 8006 also requires that "[a]ny party filing a designation of the items to be included in the record shall provide to the [bankruptcy court] clerk a copy of the items designated"

The briefing schedule is likewise abbreviated. The appellant's brief is due within 14 days after the appeal is docketed. FED. R. BANKR. P. 8009(a). The appellee's brief is due 14 days after service of the appellant's brief. *Id.* The appellant's reply brief is due 14 days after service of the appellee's brief. *Id.* Principal briefs shall not exceed 50 pages; reply briefs shall not exceed 25 pages. FED. R. BANKR. P. 8010(c).

¹⁴ The bankruptcy court may generally enlarge the time provided for in the Bankruptcy Rules, even after the expiration of the deadline from which relief is sought, upon a showing of excusable neglect. FED. R. BANKR. P. 9006(b). Excusable neglect under Bankruptcy Rule 9006 is generally examined under the requirements set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). The factors are (1) the danger of prejudice to the debtors; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Id.* at 395.

When calendaring deadlines, note that Bankruptcy Rule 9006 provides rules for computing deadlines. A 14-day deadline means fourteen days. To compute the deadline, you exclude the day that triggers the event, and count every day, including weekends and holidays. If the fourteenth day is a weekend or holiday, the deadline is the next working day.

C. Local Bankruptcy Rules and General Orders

Appellate lawyers working on a bankruptcy appeal should of course become familiar with the local rules of the district court or court of appeals that govern their case. But they should not forget that each bankruptcy court also has its own local rules and standing orders that may impact the mechanics and finer points of initiating an appeal. The Southern District of New York, for example, has specific rules addressing the posting of a supersedeas bond and the transmission of the record on appeal. See S.D.N.Y. Local Bankruptcy Rules 8005-1 and 8007-1.

D. Stay Pending Appeal

The stakes for obtaining a stay of an order or judgment pending appeal are high in the bankruptcy context. This is because of the relevance of a stay to the application of the principles of equitable and statutory mootness in bankruptcy appeals. The availability of appellate review may turn on seeking and obtaining a stay pending appeal. See, e.g., *A & K Endowment, Inc., v. General Growth Props., Inc.*, (*In re General Growth Prop., Inc.*) 423 B.R. 716, 721-23 (S.D. N.Y. 2010) (dismissing, based upon section 364(e) of the Bankruptcy Code, an appeal of an order authorizing debtor in possession financing and granting liens because of the appellant's "failure even to seek a stay").

Stays pending appeal of a bankruptcy court order are governed by Bankruptcy Rule 7062 (which applies Federal Rules of Civil Procedure 62 to adversary proceedings)¹⁵ and Bankruptcy Rule 8005. Under Rule 8005, motions for stay ordinarily should be presented to the bankruptcy court first. Motions filed in the district court to stay a bankruptcy court order "shall show why

the relief . . . was not obtained from the bankruptcy judge." FED. R. BANKR. P. 8005. Like other matters of injunctive relief, a bond or other appropriate security may be required, unless the appellant is the U. S. government. *Id.*

The standard for granting a stay pending appeal—which is not spelled out in Bankruptcy Rule 8005—is generally expressed in terms of the traditional equity principles that apply in other matters of injunctive relief. *In re First S. Sav. Ass'n*, 820 F.2d 700, 709 (5th Cir. 1987) (reviewing a district court's denial of a stay pending a bankruptcy appeal); *Haskell v. Goldman, Sachs & Co.* (*In re Genesis Health Ventures, Inc.*), 367 B.R. 516, 519 (Bankr. D. Del. 2007). The four criteria are (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *In re First S. Sav. Ass'n*, 820 F.2d at 709; *In re Genesis Health Ventures, Inc.*, 367 B.R. at 519.

Some courts have used a slightly lower standard for the likelihood of success element, which comes from the standard that governs stays of district court orders pending appeals to the courts of appeals. See, e.g., *In re General Credit Corp.*, 283 B.R. 658, 660 (S.D.N.Y. 2002); *In re Adelpia Commc'ns Corp.*, 333 B.R. 649, 659 (S.D.N.Y. 2005). Under this view, the movant must show, so far as strength-of-the-case is concerned, "a substantial possibility, although less than a likelihood, of success on appeal," as opposed to the "strong likelihood of success" element of traditional injunctive relief. *In re General Credit Corp.*, 283 B.R. at 659 (internal quotations and citations omitted). This second standard seems more logical because "the district court stands in the same relation to the bankruptcy court as does the circuit court to the district court when a party seeks a stay of a district court order under Appellate Rule 8," and the preliminary injunction standard does not assume a prior judicial ruling. *In re Adelpia Commc'ns Corp.*, 333 B.R. at 659; see also Richard S. Kanowitz and Michael A. Klien, *The Divergent Interpretations of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders*, 17 J. BANKR. L. & PRAC. 4 ART. 3 (2008).

¹⁵ Unless the Court orders otherwise, Bankruptcy Rule 7062 does not apply to contested matters in the main bankruptcy case. FED. R. BANKR. P. 9014(c); *In re Anderson*, 390 B.R. 812, 814 (Bankr. D.S.C. 2007).

The Bankruptcy Rules automatically stay certain orders for 14 days. Rule 6004(h), for example, provides for a 14-day stay of orders authorizing the use, sale or lease of the debtor's property (other than cash collateral). Rule 6006(d) does the same for orders authorizing the assignment of a contract or lease assumed by the chapter 11 debtor or bankruptcy trustee. Rule 4001(a)(3) automatically stays orders granting relief from Bankruptcy Code section 362(a) (i.e., the automatic stay). Finally, Rule 3020(e) stays orders confirming a chapter 11 plan. Each of these rules, however, also expressly allows the court to order otherwise, which happens often.

Judgments of the district court and the BAP are automatically stayed until the expiration of 14 days after entry, unless otherwise ordered. FED. R. BANKR. P. 8017(a). The district court and the BAP can also stay the judgment pending further appeal, but the stay cannot extend beyond 30 days unless it is extended "for cause shown." FED. R. BANKR. P. 8017(b). If the party who obtained the stay appeals to the court of appeals before the stay expires, "the stay shall continue until final disposition by the court of appeals." *Id.* A bond or other security may be required as a condition to the stay. *Id.*

III. Threshold Matters

A. Standard of Review on Appeal

Bankruptcy Rule 8013 provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Depending upon the type of decision embodied by the bankruptcy court order, the standard of review may vary. Many bankruptcy court decisions are subject to a deferential abuse-of-discretion standard of review. Generally, legal conclusions are reviewed de novo. *Reconstituted Comm. of Unsecured Creditors of the United Healthcare Sys., Inc., v. N.J. Dep't of Labor (In re United Healthcare Sys. Inc.)*, 396 F.3d 247, 249 (3d Cir. 2005). Where there are mixed questions of fact and law, the appellate court must accept the trial court's finding of historical or narrative facts unless clearly erroneous, but exercises plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts. *Mellon Bank N.A. v. Metro Commc'ns.*

Inc., 945 F.2d 635, 641-42 (3d Cir. 1991) (citations and quotations omitted).

B. Standing

A "person aggrieved" by a bankruptcy court order has standing to appeal it.¹⁶ See *Gibbs & Bruns LLP, v. Coho Energy Inc. (In re Coho Energy, Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004); *In re Ray*, 597 F.3d 871, 874 (7th Cir. 2010); *Century Indemnity Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675, 685 (3d Cir. 2005). The "person aggrieved" test differs from the traditional constitutional standing analysis under Article III. *In re Congoleum Corp.*, 426 F.3d at 685; *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 210 & n.18 (5th Cir. 1994). It is a more exacting standard, demanding a higher causal nexus between act and injury; to be a "person aggrieved," a party must show that it was "directly and adversely affected pecuniarily by the order of the bankruptcy court," or that the order diminished its property, increased its burdens, or impaired its rights. *In re Coho Energy, Inc.*, 395 F.3d at 202-03; see also *In re Ray*, 597 F.3d at 874, *In re Congoleum Corp.*, 426 F.3d at 685. An "indirect financial stake" in another's claims is insufficient for standing. *Rohm & Hass Tex., Inc.*, 32 F.3d at 208. A "remote possibility" does not constitute injury under the "person aggrieved" test. *In re Coho Energy, Inc.*, 395 F.3d at 203. Further, "conjectural injury . . . is too tenuous to support 'aggrieved person' standing." *Id.* Standing is not "dispensed in gross, but rather is determined by the specific claims presented." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 215 (3d Cir. 2004).

The additional limits to justiciability in bankruptcy appeals are prudential. Because bankruptcy cases usually involve numerous parties indirectly affected by every bankruptcy order, the more exacting standard helps insure that "bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy court order to appeal." *Id.* at 215 (quoting *In re DuPage Boiler Works*,

¹⁶ The "persons aggrieved" standard appeared originally in Section 39(c) of the Bankruptcy Act of 1898. See 11 U.S.C. § 67(c) (1976) (limiting appellate standing in bankruptcy cases to "persons aggrieved by an order of a referee"); see also *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 n.20 (3d Cir. 2004) (discussing the origins of the standard).

Inc., 965 F.2d 296, 297 (7th Cir. 1992)). Courts recognize “a public policy interest in reducing the number of ancillary suits that can be brought in the bankruptcy context so as to advance the swift and efficient administration of the [bankruptcy] estate.” *In re Ray*, 597 F.3d at 875 (quoting *In re Cult Awareness Network*, 151 F.3d 605, 600 (7th Cir. 1998)).

Bankruptcy lawyers should note that standing in bankruptcy appeals is different than standing in bankruptcy court. Section 1109(b) of the Bankruptcy Code provides that “[a] party in interest,¹⁷ including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” Appellate courts have rejected, however, the argument that this statute confers standing for the purposes of an appeal. See *In re Combustion Eng’g, Inc.*, 391 F.3d at 217; *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1502 (10th Cir. 1994).

C. Equitable Mootness

A business bankruptcy often culminates in the sale of substantially all the debtors’ assets or equity interests through a Chapter 11 plan or a sale motion under Section 363 of the Bankruptcy Code. Prior to the sale, the bankruptcy process itself moves fast and involves the participation of many parties. After the consummation of a bankruptcy sale, fashioning appellate relief that respects the rights and reliance of third parties can be problematic, which is recognized in the doctrine of equitable mootness.¹⁸

¹⁷ Though not infinitely expansive, the term “party in interest” in section 1109(b) is broadly construed. *Valucci v. Glickman, Berkovitz, Levinson & Weiner, P.C. (In re Glickman, Berkovitz, Levinson & Weiner, P.C.)*, 204 B.R. 450, 453 (E.D. Pa. 1997) (“courts interpret § 1109(b) broadly in order to enable parties affected by a bankruptcy to protect their interests.”). The precise contours of the definition may depend on the purposes of the Code provisions at issue. See *In re Kutner*, 3 B.R. 422, 424 (Bankr. N.D. Tex. 1980) (concluding that a chapter 13 trustee is a “party in interest” for the purposes of section 706 but not for the purposes of section 1302).

¹⁸ Practitioners should also take note of the statutory mootness provisions of Sections 363(m) and 364(e) of the Bankruptcy Code. Section 363(m) protects a good faith purchaser of property of the estate by insulating the purchaser from the effects of an

Equitable mootness is entirely separate from the justiciability doctrine of mootness, which ultimately comes from the case or controversy requirement of Article III. Mootness in the constitutional sense requires that an actual controversy exist at all stages of federal court proceedings. If events transpire that make it impossible for the court to grant any relief whatsoever, then the proceeding is moot. Equitable mootness, on the other hand, is a broader doctrine grounded in pragmatism and policy concerns; in some circumstances, unwinding bankruptcy transactions and orders on which numerous third parties have relied becomes impractical and unfair. Whereas Article III mootness depends on whether a court is *able* to fashion relief, equitable mootness is more about whether the court *should* fashion relief. *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (discussing the difference between traditional and equitable mootness). In applying the doctrine of equitable mootness, courts seek to “strik[e] the proper balance between the equitable considerations of finality and good faith reliance on a judgment and competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him.” *Bank of N.Y. Trust Co. v. Official Unsecured Creditors’ Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 241 (5th Cir. 2009) (quoting *First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992)).

Although the exact formation of the equitable mootness standard varies across the circuits, courts generally consider (1) whether the order on appeal has been stayed, (2) whether the plan has been substantially consummated, and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *In re Pac. Lumber Co.*, 584 F.3d at 241; *Focus Media, Inc. v. NBC, Inc. (In re Focus Media, Inc.)*, 378 F.3d 916, 922-23 (9th Cir. 2004); *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993); *Nordhoff Invs., Inc., v. Zenith Elecs. Corp.*, 258 F.3d 180, 185 (3d Cir. 2001); *In re Club Assocs.*, 956 F.2d at 1069 n.11.

Two recent decisions from the Fifth Circuit may suggest a narrowing of the equitable mootness

appellate court’s subsequent reversal of the sale order. Section 364(e) protects those who extend post-petition financing to a debtor, and who receive related liens, in good faith.

doctrine, or an increasing reluctance to apply it broadly. See *In re Pac. Lumber Co.*, 584 F.3d at 241; *Schaefer v. Superior Offshore Int'l, Inc. (In re Superior Offshore Int'l)*, 591 F.3d 350, 353-54 (5th Cir. 2009).

CONCLUSION

Success in bankruptcy appeals requires careful attention to detailed procedural rules, short deadlines, and an expansive body of case law regarding appellate jurisdiction. Practitioners intending to participate in the growing number of

bankruptcy appeals should become familiar with local case law on bankruptcy appellate standing, obtaining a stay pending a bankruptcy appeal, and the doctrine of equitable mootness. The procedural rules for bankruptcy appeals and the importance (at times) of obtaining a stay pending appeal make it especially important for appellate practitioners to become involved as early as possible in the bankruptcy appellate process.

STRATEGIC ISSUES AND CHOICES IN BANKRUPTCY APPEALS

David R. Weinstein¹
Danelle G. Kelling²
Holme Roberts & Owen, LLP

I. Introduction

Virtually all bankruptcy practitioners have been, or soon will be, affected by an appeal from a bankruptcy court order or judgment. Increasingly more civil litigators are now having similar experiences. This article provides a window into the interesting and sometimes wacky world of bankruptcy appeals.

A. The Bankruptcy Appellate System

¹ Mr. Weinstein is a partner in HRO Los Angeles' Complex Commercial Litigation Group. His practice specializes in the area of bankruptcy law, insolvency work-outs and reorganization proceedings. Mr. Weinstein has represented clients across the entire spectrum of a specialized bankruptcy practice and has extensive experience in reorganization matters and complex bankruptcy litigation, with particularly unique experience in bankruptcy appeals. He can be reached at david.weinstein@hro.com or 213-572-4328.

² Ms. Kelling is a senior associate in the HRO Phoenix's Real Estate Practice Group. Ms. Kelling has extensive experience with bankruptcy, reorganization and creditor rights. She can be reached at danelle.kelling@hro.com or 480-624-4500.

Bankruptcy court orders are appealed through a system like no other. The bankruptcy appellate system in place today is the evolved result of efforts by Congress and the judiciary to deal with fallout from *Northern Pipeline*³ which held unconstitutional the then-recently enacted pervasive scheme for bankruptcy court jurisdiction that came into being as part of the Bankruptcy Reform Act of 1978.⁴

1. Bankruptcy Courts

Bankruptcy courts are "adjuncts" or "units" of the United States District Court ("USDC"). 28 U.S.C. § 151 (bankruptcy judges in regular service constitute a unit of the district court known as the bankruptcy court for that district). At the same time, the USDC also sits as an appellate court, "over" the bankruptcy court. 28 U.S.C. § 158(a) (district courts have jurisdiction to hear appeals from final and interlocutory orders of bankruptcy judges). Appeals to the district court can only be taken to the district court for the district in which the bankruptcy court sits. *Id.*

2. Bankruptcy Appellate Panels

In an effort to create a system that would more efficiently handle bankruptcy appeals and would, hopefully, lead to more uniform and predictable

³ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 485 U.S. 50 (1982).

⁴ The Bankruptcy Reform Act of 1978 repealed the Bankruptcy Act of 1898 and replaced it with the now familiar Bankruptcy Code.

judicial treatment of the bankruptcy laws, beginning with the Bankruptcy Reform Act of 1978 Congress authorized the creation of bankruptcy appellate panels (each, a "BAP"). In the current statutory scheme the decision whether to create a BAP is made on a circuit-by-circuit basis. See 28 U.S.C. § 158(b) (the circuit judicial council shall establish a BAP, unless certain negative findings are made by the council, such as "insufficient judicial resources available in the circuit" or that such establishment "would result in undue delay or increased cost to parties . . ."). A circuit implementation order containing such factual findings is required, although a judicial council may reconsider its findings at any time. 28 U.S.C. § 158(b)(1), (2).

A BAP panel consists of three bankruptcy judges. 28 U.S.C. § 158(b)(5). BAPs receive appeals from any district in the circuit, but BAP panels will not include a judge from the same district from which the given appeal emanates. 28 U.S.C. § 158(b)(5).

Currently the First, Sixth, Eighth, Ninth and Tenth Circuits have a BAP. The Ninth Circuit first established a BAP in 1979 in accordance with the 1978 Bankruptcy Reform Act's provision for such panels and has maintained it continuously since. The First Circuit followed the Ninth Circuit and established its own BAP in the early days of the 1978 Reform Act but it was terminated in 1984, in the aftermath of *Northern Pipeline*. It was reinstated in 1996, following enactment of the Bankruptcy Reform Act of 1994. The Sixth, Eighth, and Tenth Circuits also created their panels in the mid-1990s. The Second Circuit formed a BAP in 1996 but the judicial council allowed it to expire on July 1, 2000.

Where a BAP exists, an appeal from a bankruptcy court goes to the BAP unless an election to the USDC is made. 28 U.S.C. § 158(c). NOTE: The time to file a notice of appeal in bankruptcy is very short: 14 days.⁵ An election to the USDC by the appellant must be made at the time of filing the notice of appeal. The appellant must file a separate Notice of Election. 28 U.S.C. § 158(c)(1)(A); Bankruptcy Rule 8001(e). The appellee can elect to direct the appeal to the USDC too. An appellee's election to the USDC must be made within 30

days of the notice of appeal and by a separate Notice of Election. 28 U.S.C. § 158(c)(1)(B).

3. *Circuit Appeals; Certiorari to U.S. Supreme Court, etc.*

An appeal to the BAP or USDC is, most likely, an interim step only respecting final orders because there is a second appeal of right to the circuit court of appeals. See 28 U.S.C. § 158(d)(1) (circuit court has jurisdiction over "all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section"). Appeals from interlocutory orders stop at the BAP or USDC, as applicable. 28 U.S.C. § 158(a) (district court has jurisdiction over final orders and interlocutory orders (leave to appeal usually required)). This raises obvious issue about the value of precedent and predictability.

4. *2005 Amendments*

The 2005 Amendments to the Bankruptcy Code ("BAPCPA 2005") made significant amendments to 28 U.S.C. § 158. After converting the old § 158(d) into subsection (d)(1), it created new subsection (d)(2). The general purpose of new subsection (d)(2) is to create the possibility of direct appeals from the bankruptcy courts to the circuit courts of appeal. However, as is the case with most other features of BAPCPA 2005, most informed judges and practitioners have found that these amendments actually facilitate little of what they are ostensibly designed to foster. However, a recent example in the widely publicized *Circuit City* case may change this reality.⁶

The new opportunities for "direct appeals" apply both to final orders and to interlocutory orders. In that respect, BAPCPA 2005 creates a sea change in circuit court bankruptcy jurisdiction because as is noted elsewhere, old § 158(d) [now § 158(d)(1)] did not permit the circuit courts to hear interlocutory appeals at all.⁷

⁶ See *In re Circuit City Stores, Inc.*, 2010 Bankr. LEXIS 571 (Bankr. E.D. Va. 2010) The *Circuit City* appeal involves the interaction between §§ 502(d) and 503(b)(9) and focuses on the issue whether administrative claims under the latter statute, created by BAPCPA 2005, can be disallowed under § 502(d) if the claimant separately received an avoidable transfer (or a potentially avoidable transfer).

⁷ The direct appeal opportunities under BAPCPA 2005 exist only with respect to appeals in bankruptcy cases filed on or after October 17, 2005. *Berman v.*

⁵ Fed. R. Bankr. P. 8002(a)

Direct appeals can now exist if there is an appropriate certification that the order in question:

(a) involves an issue of law as to which there is no controlling precedent in the circuit (or at the U.S. Supreme Court) or is an issue of “public importance”;

(b) involves an issue of law requiring resolution of conflicting decisions (without comment about what the source(s) of the “conflicting decisions” might be); or

(c) is such that resolution of it may materially advance the proceeding.

It does not appear that satisfying at least one of these tests should be difficult, and courts have already addressed some of the issues regarding direct appeals, most notably due to the lack of controlling precedent as a result of the significant changes to the Bankruptcy Code by BAPCPA 2005.⁸

Maney (In re Berman), 344 B.R. 612 (BAP 9th Cir. 2006).

⁸ For example, there exist several circuit decisions accepting direct appeals regarding other fallout from BAPCPA 2005, specifically, the “hanging paragraph” following 11 U.S.C. § 1325(a)(9), including *DaimlerChrysler Fin. Servs. Ams., L.L.C. v. Waters*, 2007 U.S. Dist. LEXIS 52119, 4-5 (W.D. Va. 2007) (noting, “the court finds as least one circumstance compelling certification related to creditor’s argument that a question of law and interpretation of the BAPCPA for which there is no controlling Fourth Circuit or Supreme Court precedent: whether an unnumbered “hanging paragraph” the BAPCPA added to 11 U.S.C. § 1325(a) has the effect of allowing debtors to surrender their vehicle to the creditor in full satisfaction of the creditor’s claim even though the creditor’s claim is greater than the vehicle’s value.”). See also, *Nuvel Fin. Services Corp. v. Dean*, 537 F.3d 1315 (11th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (6th Cir. 2008); *Wachovia Dealer Services v. Jones*, 530 F.3d 1284 (10th Cir. 2008); *Americredit Fin. Service v. Long*, 519 F.3d 288 (6th Cir. 2008); *Wright v. Santander Consumer USA Inc.* (In re Wright), 492 F.3d 829 (7th Cir. 2007). See also, *In re Jones*, 352 B.R. 813, 826 (Bankr. S.D. Tex. 2006) (noting certification would be granted if requested due to conflicting interpretations between judges in the same district. Specifically, “Judge Isgur and I both believe that the statute can be interpreted either way. We differ on what we think is the correct interpretation. We both believe that appellate guidance is imperative,

If the certification is made, the circuit court still decides whether to accept the matter for direct appeal.⁹ No standards for that decision are provided in the statute, but one can reasonably assume the circuit court would assess how intensely the matter meets the referenced criteria for the certification in the first instance. That is, how badly does it appear that the circuit court should advance the matter and “get on with it.”

How the certification is generated is another matter. For one thing, the involved bankruptcy court, district court or BAP can act on its own motion. What would stimulate this and how it might integrate with the general appellate sequencing is evolving, but still uncertain. Also uncertain is exactly what options exist if, for example, the bankruptcy court rules on a direct appeal certification question as part of its trial-level ruling. Can the BAP or district court then address that ruling? Via appeal? Or can the BAP or USDC even consider the issue only if the bankruptcy court did not?

The involved bankruptcy court, district court or BAP also can act on “the request of a party to the . . . order.” 28 U.S.C. § 158(d)(2)(A).¹⁰ Note, however, as is pointed out elsewhere, in bankruptcy matters, particularly ones arising in the general case and not in an adversary proceeding, exactly who is “a party to the order”

and we would suggest direct appeal to the Circuit to resolve the issue for a number of districts instead of for a single district. The majority of this opinion has been dedicated to exploring the points of disagreement with Hubbard/Salazar/Allison to try to assure that those differences are clear to the appellate court. If the parties request, I will certify the matter for direct appeal.”)

⁹ *Frye v. Excelsior College (In re Frye)*, 389 B.R. 87, 88 (B.A.P. 9th Cir. 2008) (noting brightline rule results from the first sentence of § 158(d)(2)(A), which confers jurisdiction upon courts of appeals to entertain a direct appeal “if the bankruptcy court, the district court, or the bankruptcy appellate panel involved” certifies that the appeal is appropriate for direct appeal. The problem was how to determine which of those three courts is the court “involved” for purposes of making the certification. Parties need to know the correct place to file papers. More importantly, courts need unambiguous authority so as not to get in each other’s way.”

¹⁰ The Ninth Circuit BAP has adopted interim rules that provide the bankruptcy court is to determine a direct appeal certification request until after the appeal is docketed or until leave to appeal is granted by the BAP or USDC. *In re Berman, supra*.

may be less than self-evident.¹¹ Or, all appellants; and all appellees—if any, per the statute—can, acting jointly, issue the certification. The statute does not say to whom the certification is issued, or where it is filed.

The involved bankruptcy court, district court or BAP appears to have limited discretion over the certification. If any one of the three alternative criteria in paragraph 1(a) above exist, the court “shall make the certification.” 28 U.S.C. § 158(d)(2)(B). While one suspects there is room for discretion in determining whether the criteria are satisfied in the first place, something like “may materially advance the proceedings” would seem to exist any time parties or a court can dispense with an intermediate level of litigation.

Of even greater curiosity, the bankruptcy court, district court or BAP shall make the certification (above) if a majority of appellants and a majority of appellees ask it too. § 158(d)(2)(B)(ii). This is apparently to be distinguished from the certification that all appellants and all appellees can make on their own under § 158(d)(2)(A). But if a majority of appellants and a majority of appellees can compel the court to make a certification, the provision for all litigant constituents to issue the certification on their own seems superfluous. Or, it makes one believe something additional is intended, to justify the two competing provisions.

Section 158(d)(2)(c) authorizes, but does not compel, the parties to supplement a certification “in a short statement of the basis for the certification.”

Section 158(d)(2)(D) says a direct appeal does

¹¹ See *Travelers Ins. Co. v. H.K. Porter Co., Inc.*, 45 F.3d 737, 741 (3d Cir. 1995) (only a “person aggrieved” by a bankruptcy court order has standing to appeal it); *Travelers Casualty & Surety v. Corbin (In re First Cincinnati, Inc.)*, 286 B.R. 49, 51-52 (BAP 6th Cir. 2002) (not all “marginally interested parties” are “parties in interest” with standing to appeal); *In re Mid-Valley, Inc.*, 305 B.R. 425 (Bankr. W.D. Pa. 2004); *Squire v. Scher*, 2006 U.S. Dist. LEXIS 98222 (S.D. Ohio 2006) (“In order to have standing to appeal a bankruptcy court order, an appellant must have been ‘directly and adversely affected pecuniarily by the order.’ ‘This principle, also known as the ‘person aggrieved’ doctrine, limits standing to persons with a financial stake in the bankruptcy court’s order.’ Pursuant to the doctrine, ‘a party may only appeal a bankruptcy court order when it diminishes their property, increases their burdens or impairs their rights’”).

not stay proceedings from which the appeal is taken absent issuance of a stay by the affected court. This may make sense as to a bankruptcy court, wherein many other matters could be pending in the case. It is not at all clear what would remain unstayed at the BAP or USDC (acting as an appellate court) if a direct appeal of the same matter is authorized at the circuit.

A request for certification must be made within 60 days of entry of the subject order. Apparently, *sua sponte* certification and certification by all the appellants and all the appellees can be made at any time—although one wonders if this is so and whether delay alone would influence the circuit’s decision whether to accept the direct appeal.

To the extent a direct appeal depends upon a party’s consent, there appear to be many more situations where strategic refusal to consent will benefit at least one litigant, than where all parties will strategically benefit by agreeing to accelerate the appellate processes. When taken together with the uncertainty inherent in the direct appeal provisions, it appears unlikely that direct appeals will become common.

II. The Practitioner’s Choice of Alternate Appellate Paths

Where BAPs exist, practitioners on both sides of the ruling below have strategic decisions to make. Unfortunately, little exists beyond instinct to inform the decision whether to direct the appeal to the BAP or the USDC.

A. USDC Sitting as an Appellate Court Is an Odd Judicial Creation

Because the bankruptcy court is a “unit” of the USDC, but the USDC also sits as a “higher” court “over” the bankruptcy court, a rather counter-intuitive series of conundra is regularly encountered as to how the two courts interact with each other. The puzzling begins with the threshold fact that an appeal is not the only way a bankruptcy matter can land on the USDC’s docket.

First, bankruptcy appeals to the USDC are to be distinguished from withdrawal of the reference, which also results in bankruptcy proceedings before the district court. 28 U.S.C. § 157(d). *Withdrawal of the reference* is a term of art that refers to the district court’s right, and sometimes its obligation, to “withdraw” a bankruptcy matter

(the whole bankruptcy case, or one or more of its constituent proceedings—still another topic from its “adjunct” bankruptcy court.¹²

Bankruptcy appeals to USDC are also to be distinguished from trial of non-core matters, which also results in bankruptcy proceedings before the district court. 28 U.S.C. § 157(c). Core matters are matters, really proceedings or issues, that are indigenous to the bankruptcy process such as granting or denying a discharge of debts, assuming or rejecting a contract or confirming a plan of reorganization. Non-core matters are general civil matters that happen to arise in or affect a bankruptcy case, such as where a debtor owns breach of contract claims against a non-debtor. In core matters, bankruptcy courts generally handle the matter from the outset through trial, as a federal trial court. In non-core matters, the bankruptcy court can handle the matter, even through trial, but cannot enter a true, final judgment, unless the parties consent to it doing so. Absent consent, the bankruptcy court “proposes” findings to the USDC who is entitled to conduct a trial *de novo* if it chooses to. 28 U.S.C. § 157(c).

Bankruptcy appeals to the USDC are also to be distinguished from tort claim issues which also can result in bankruptcy proceedings before the district court. Section 157(b)(5) of Title 28 mandates referral of such issues to the USDC where they are presumably handled as a conventional USDC matter.

B. Bankruptcy Appeals Seem Unsited to Generalist Judges

Bankruptcy is recognized as a specialist's discipline and the existing system of district court appellate review is counter-productive. Worse, the larger the district, the more serious the problem because the more district judges there are available for assignment to bankruptcy appeals, the less exposure to them any one judge obtains. This is further exacerbated where there are BAPs, which attract some of the bankruptcy appeals. That is, the creation of a

¹² A matter is considered “withdrawn” because bankruptcy matters are, in the first instance, automatically referred to the adjunct bankruptcy court by a standing order of USDC that exists in every district. See e.g., *FTC vs. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.)*, 282 B.R. 894, 901-02 (C.D. Cal. 2001); *Brook v. Sutherland & Wilcox, Inc. (In re Harman Mktg. Group, Inc.)*, 2003 Bankr. LEXIS 1952 (Bankr. M.D. Fla. 2003).

BAP, which is designed to enhance the bankruptcy appellate process (and in most practitioners' views, does so where the election is made), also can have the unfortunate and entirely unintended effect of undermining the quality of other proceedings in the same circuit.

Bankruptcy is not exclusively a discipline of the law. Of necessity, bankruptcy envelops a broad scope of affairs including oversight and integration of business operations, finance and accounting, site relocations and approval and supervision of the employment and activities of professionals, in addition to more purely “legal” activities such as discovery and motion practice. And the effect of the United States Trustee's pervasive presence and regulations brings still another dimension to bankruptcy practice that is hard to analogize to, much less duplicate anywhere else.

This is not new. It has been widely accepted for decades that it is quite appropriate to assign bankruptcy matters to specialist judges at the trial level.¹³ And few specialist bars are as identifiable, active and organized as the bankruptcy bar, especially the commercial bankruptcy bar. Witness such visible organizations as the National Bankruptcy Conference, the American Bankruptcy Institute and the Bankruptcy & Insolvency Committee and the Business Bankruptcy Committee of the American Bar Association's Sections of Litigation and Business Law, both of which oversee numerous active subcommittees and task forces that draw the best bankruptcy counsel from coast to coast. Every year more than 2,000 people attend the annual meeting of the National Conference of Bankruptcy Judges and hundreds if not thousands more attend regional and state-level conferences, learning institutes and meetings in the pursuit of continuing education and networking opportunities. Few would suggest that serious and sophisticated bankruptcy law can be successfully practiced by generalists.

Yet when it comes to deciding bankruptcy appeals at the first tier, which often are, or at least ought to be, the most important and influential decisions on current bankruptcy law and practice, we intentionally assign them to

¹³ See e.g., *Bussel, Power, Authority and Precedent in Interpreting the Bankruptcy Code*, 41 U.C.L.A. L.Rev. 1063, 1086 (April 1994).

generalists.¹⁴

C. BAPs May “Feel” More Like an Appellate Court

The practitioner's decision whether to route an appeal to a BAP or USDC is one almost entirely of instinct and “feel”. As such, how each experience feels probably matters, maybe a lot.

BAPs sit in three-judge panels in appellate courtrooms. Arguments are timed and no other proceedings distract the participants. In contrast, at the USDC, bankruptcy appeals are usually heard on a motion calendar. There is only one judge, not three, and the solemnity of the experience is demonstrably different. The USDC regular clerks also serve as appellate clerks for bankruptcy appellate matters.

Real world: Procedural rules are not as clear at the USDC, while each of the BAPs have their own separate rules, as well as the Federal Rules of Appellate Procedure to fall back on.¹⁵ All of this can give lawyers a sense that USDC and its staff are not comfortable with these cases. This is often characterized as dislike for bankruptcy matters, but it is just as likely that the “dislike” practitioners perceive is actually a discomfort resulting from the fact that the district court is treading on unfamiliar ground. This can be attributed, at least in part, to the frequency—

¹⁴ The Ninth Circuit reports that the BAP “historically has handled between 49-60% of the total number of Ninth Circuit bankruptcy appeals under 28 U.S.C. § 158(a), with an “opt-out” rate of between 40% and 51%. . . [During 2008] 164 bankruptcy appeals were filed at the Court of Appeals for second-level appellate review; 63 from decisions of the Bankruptcy Appellate Panel and 101 from decisions of the district courts. Thus, of the 372 appeals closed by the Bankruptcy Appellate Panel during this time period, roughly 83% were fully resolved, with only about 17% seeking second-level review.” *Appeals before the Bankruptcy Appellate Panel of Ninth Circuit*, 2009 Edition. The Tenth Circuit reported that for 2008-2009, of the 105 appeals filed, 75 elected to initially appear before the BAP, 30 initially elected to be heard by the District Court. Of the 75 that initially elected to appear before the BAP, 10 of those subsequently were transferred to the District Court on subsequent election. *Annual Report of Bankruptcy Appeals in Participating BAP Districts for Statistical Year July 1, 2008-June 30, 2009* prepared by BAP Clerk’s Office on behalf of the United States Bankruptcy Appellate Panel of the Tenth Circuit.

¹⁵ www.uscourts.gov/rules/bap-localrules.html

infrequency—with which USDC sees bankruptcy appellate matters. In large districts, each district judge may see only two or three bankruptcy appeals each year, perhaps fewer.¹⁶

Perhaps of even greater import, but even more difficult to measure, trial judging and appellate judging command different skill sets. Consequently, the inherent uncertainty that accompanies an occasional venture outside one’s skill set may subtly affect the USDC’s support infra-structure in a similar way—as well as the USDC itself.

D. Strategic Factors in the Practitioner’s Election

Bankruptcy lawyers must make informed recommendations to clients, if not decisions, about how to direct and manage bankruptcy appeals. Where the matter is so much one of judgment, there may be comfort in knowing a wrong answer is unlikely. On the other hand, so is a right answer.

For example, how does one treat the perceived issue of a BAP’s familiarity with bankruptcy matters and the USDC’s assumed unfamiliarity? And how does one factor in the assumption that the USDC is not used to thinking like an appellate court? Does this result in a “rubber stamp” of the bankruptcy court’s ruling? Or does it take us to an uncertain and unpredictable land of “considered misapprehensions”? And how do you factor in whether it is better to proceed to a three-judge court, where you only need two votes?

And most unknown of all: how do BAPCPA 2005’s direct appeal options affect any or all these?

The author believes it has become commonplace in the Ninth Circuit (which has, by far, the longest history and most extensive experience with a BAP and hence reflects the greatest number, by far, of such decisions by counsel) to opt out of the BAP when one is on the side of an issue that is less than sympathetic to what may be characterized as the bankruptcy community’s side of the issue. For example, in strong-arm power disputes, where the contest is between the collective body of creditors

¹⁶ See generally, McKenna and Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AMER. BANKR. L.J. 625 (Fall 2002).

comprising the estate and a single creditor who appears to have an equitable position but a weaker one under bankruptcy law, the latter will often opt for district court review. And while this bias operates perhaps more often to divide litigants along a trustee/debtor axis versus a creditor axis, such is not always the case. Consider the sympathetic secured creditor who proposes to provide post-petition financing or support for a plan of reorganization that will prop up the estate.¹⁷

These observations should not be interpreted as criticisms of district judges. Instead, they are acknowledgments of the fact that district judges are being asked to perform functions and make important decisions for which they are poorly situated and in an institutional infrastructure that does not afford them the support necessary to do the job well. How this reality is taken into account in the challenges faced by practitioners charged with making important strategic decisions is at best imprecise.

III. A Different Challenge: Are Interlocutory Appeals From A Bankruptcy Court Ever Worth It?

Any experienced litigator knows that numerous important decisions are made on an interlocutory basis. The examples seem endless. In “regular” litigation, a decision in a discovery dispute could materially affect the course of a lawsuit, even one with years left to run. Granting summary adjudication of facts (“partial summary judgment”, to some) or denying a motion to dismiss can effectively dictate the major course of a case, maybe even its outcome.

The same is true in bankruptcy litigation, perhaps even more prominently so. Consider the example of a professional's employment. An employment order of the bankruptcy court is generally held to be an interlocutory order, effectively limiting review of such orders (*i.e.*, whether a conflict of interest existed or not) until the end of a bankruptcy case.¹⁸ If employment

is denied, which would ordinarily occur near the outset of a case, the client's right to choose counsel and the lawyer's ability to earn a fee cannot be addressed until the case is otherwise over. In the real world, that could well mean the professional is simply out, from the start.

It is widely recognized that interlocutory appeals are disfavored.¹⁹ Nonetheless, they are available and in “regular” civil litigation, if the lawyer can demonstrate justification for an interlocutory appeal, at least she will obtain an effectual ruling. That is, interlocutory appeals are governed by 28 U.S.C. § 1292(b) and where allowed, the circuit court of appeals will hear and resolve the matter. Its decision is definitive and final, at least as a practical matter. The litigants, counsel and the trial court will all give it due regard.

Not so in litigation emanating from the bankruptcy courts. Since circuit courts can entertain appeals only from final orders, appeals from interlocutory orders must stop at the BAP or USDC, as applicable. 28 U.S.C. § 158(a) (district court has jurisdiction over final orders and interlocutory orders (leave to appeal usually required) § 158(d)(1) (circuit court has jurisdiction over “all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section”).

One could ask: why allow interlocutory appeals at all, if it is known that the issue cannot be finally resolved? Is not that the rationale behind authorizing an interlocutory appeal in the first place?

The 2005 Amendments allowing direct appeals to the circuit in certain circumstances may change this. However, as is discussed above, it seems unlikely that there will be a large number

Shield Claimants v. A.H. Robins Co., 828 F.2d 239, 241 (2d Cir. 1987).

¹⁹ *TierOne Bank v. DLH Master Land Holding LLC*, 2010 U.S. Dist. LEXIS 24837 (N.D. Tex. Mar. 16, 2010) (noting the court finds that there is no reason to allow an interlocutory appeal in this case given that such appeals can be disruptive and are disfavored.) See also, *Dupree v. Kaye*, 2008 U.S. Dist. LEXIS 7993 (N.D. Tex. 2008) (Interlocutory appeals are disfavored because they ‘interfere with the overriding goal of the bankruptcy system, expeditious resolution of pressing economic difficulties.’ citing to *In re Hunt Int'l Res. Corp.*, 57 B.R. 371, 372 (N.D. Tex. 1985)).

¹⁷ See *e.g.*, *Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co., Inc.)*, 963 F.2d 1490 (11th Cir. 1992) (“cross-collateralization” of pre-petition debt financing; financing order reversed).

¹⁸ *Security Pacific Bank Washington v. Steinberg (In re Westwood Shake & Shingle, Inc.)*, 971 F.2d 387 (9th Cir. 1992). *Contra, In re BH&P, Inc.*, 949 F.2d 1300, 1306-07 (3d Cir. 1991); *Committee of Dalkon*

of new, direct appeals.

In the meantime, one must wonder about ever taking—trying to take—an interlocutory appeal from a bankruptcy court order.²⁰ The process itself is arduous and discretionary, meaning it also is expensive and time-consuming. Furthermore, interlocutory orders can (almost) always be revisited, without a significant threshold showing.²¹ Hence, if an interlocutory appeal is secured and a ruling obtained, that ruling is fragile and of uncertain value anyway. It thus seems that only in the instances where the early result in a case will definitively cast the case on a set path and where it can be predicted that the interlocutory appeal will be accepted and result in a new ruling should one ever bother to try.

IV. Conclusion

Bankruptcy law and procedures are generally considered by most civil litigators to be curious zones best left to specialists. Bankruptcy appeals take the concept to another level, literally and figuratively. Short deadlines, unique rules and an infrastructure found nowhere else in the law lay traps not only for the unwary but the prudent practitioner as well.

²⁰ See e.g., *Boyce v. Zeilinger (In re Boyce)*, 2008 U.S. Dist. LEXIS 68217, 2-3 (E.D. Mich. 2008) (“Interlocutory bankruptcy appeals should be the exception, rather than the rule.”); *Sanderson Farms v. Gasbarro*, 2007 U.S. Dist. LEXIS 86659 (S.D. Ohio 2007) finding “interlocutory appeals are very rarely permitted and generally only in extraordinary circumstances. Further, doubts regarding appealability should be resolved in favor of finding that the interlocutory order is not appealable”).

²¹ See e.g., *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996); *Pintlar Corp. v. Fidelity and Casualty Co. of New York (In re Pintlar Corp.)*, 124 F.3d 1310 (9th Cir. 1997); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1470 (4th Cir. 1991) (noting a revision of an interlocutory order is not subject to the restrictive provisions of Rule 60(b)).

**Finality of Bankruptcy Court Decrees and
Orders:
Avoiding a Dismissal of Your Client’s Appeal
for Lack of Jurisdiction**

Nicolette E. Mendenhall¹

I. Introduction

Appellate jurisdiction over bankruptcy court orders, judgments, and decrees is taken under one of three sections of the United States Code: primarily pursuant 28 U.S.C. § 158 and, less frequently, under 28 U.S.C. §§ 1291 or 1292. In bankruptcy appeals, the bankruptcy court is designated effectively as the initial, trial level; the first level of appeal would normally be to a district court or the bankruptcy appellate panel (“BAP”), and the second level of review would be to the court of appeals. The Supreme Court would be the final avenue for an appeal. The following two events may vary this norm: (1) when the reference referring a bankruptcy case or matter to the bankruptcy court is withdrawn, the district court will become the first level of appeal, or (2) when a bankruptcy court’s order or judgment is certified for direct appeal to the court of appeals.

Outside of bankruptcy appellate practice, the issue of finality is a prime concern when appealing a matter from a district court to a court of appeals pursuant to 28 U.S.C. § 1291. Courts of appeals only have jurisdiction over the “final decisions” of district courts pursuant to § 1291. *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203-04 (1999). A failure to raise jurisdiction does not prevent an escape of review, as appellate courts have an inherent duty to take up the issue on their own accord. *In re Pratt*, 524 F.3d 580, 586 (5th Cir. 2008). Due to the nature of the multiple levels of available

¹ Nicolette E. Mendenhall is an Associate at Hostetler & Kowalik, P.C. in Indianapolis, Indiana and primarily practices in bankruptcy-related matters, handling business reorganizations, individual bankruptcies, and bankruptcy litigation on behalf of debtors, creditors, trustees, and creditor committees. She is a member of the American Bar Association and the American Bankruptcy Institute. She is also highly active in the Indianapolis Bar Association and the Indiana State Bar Association. She can be reached by phone at (317) 262-1001 or by email at nem@hostetler-kowalik.com.

appeals courts, finality becomes an even more complicated issue in bankruptcy appeals, since most courts of appeals have determined that the court cannot take jurisdiction unless all levels of appellate review properly had a final order. See generally, *In re Sandy Ridge Oil Co., Inc.*, 807 F.2d 1332, 1334 (7th Cir. 1986).²

II. The Finality of Lower Court’s Judgment or Order

A. Finality under 28 U.S.C. § 1291

The purpose of appeals is to give a higher court the power to review a decision rather than the power to intervene in a matter. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949). As “long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.” *Id.* Under § 1291, appellate jurisdiction only exists where the district court has issued a decision that “ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). The policy behind this finality rule is to prevent piecemeal litigation and to eliminate delays, *id.*; the policy essentially requires a party to “raise all claims of error in a single appeal following final judgment.” *Van Cauwenbergh v. Biard*, 486 U.S. 517, 522 n.3 (1988).

In certain circumstances, a court of appeals may review decisions that do not terminate the litigation “but are sufficiently important and collateral to the merits that they should ‘nonetheless be treated as final.’” *Will v. Hallock*, 546 U.S. 345, 347 (2006), citing, *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). This doctrine is referred to as the collateral order doctrine and is not considered to be an “exception to the final decision rule laid down by Congress in § 1291, but [rather] a practical construction of it.” *Id.* at 349 (internal quotation marks and citations omitted).

The doctrine is to be applied when an appellant asserts rights that are “too important to be denied review and too independent of the cause

² See Part III.A, for a discussion on the analysis of need for a final order for each level of review and contrary law.

itself to require that appellate consideration be deferred until the whole case is adjudicated. *Van Cauwenberghe*, 486 U.S. at 522. To successfully assert this doctrine, the following three conditions must be met: the order must “(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.” *Will*, 546 U.S. at 349 (citations omitted).

B. Finality under 28 U.S.C. § 158

Due to the ongoing nature of bankruptcy court proceedings, the finality of orders and decrees of a bankruptcy court is construed differently than that of the typical appeal from a district court. From start to finish, a bankruptcy proceeding could last from a few months to several years, and can involve a wide variety of litigation such as, litigation related to a debtor’s exemptions, the automatic stay of 11 U.S.C. § 362, professional fee applications pursuant to 11 U.S.C. § 330, an objection of a creditor’s claim filed under 11 U.S.C. § 501, litigation within an adversary proceeding, and much more. For this reason, bankruptcy proceedings are considered an “aggregation of controversies and suits.” *In re Donovan*, 532 F.3d 1134, 1137 (11th Cir. 2008)(internal citations and punctuation omitted). Since the “only ‘true’ final judgments in bankruptcy matters are the closing of the cases or proceedings,” many cases would be rendered moot if the traditional standard of that under 28 U.S.C. § 1291 with district courts was employed.³

The issue of finality is not overlooked on the basis of the nature of bankruptcy proceedings. Although jurisdiction over an interlocutory appeal can be taken with leave of the bankruptcy court, jurisdiction for the district courts, BAPs, and courts of appeals must otherwise be obtained pursuant to 28 U.S.C. § 158(a)(1), which requires that the “judgments, orders, and decrees” be final. To determine finality, the circuits have modified their approach, looking to determine whether the particular adversary proceeding or controversy has been resolved rather than the entire bankruptcy proceeding.

³ Judy Beckner Sloan, *Appellate Jurisdiction of Interlocutory Appeals in Bankruptcy 28 U.S.C. Section 158(d): A Case of Lapsus Calami*, 40 CATH. U. L. REV. 265, 276 (Winter 1991).

Id. The test for finality in bankruptcy appeals is more liberal than the test applied in non-bankruptcy proceedings. *In re Sandy Ridge Oil Co., Inc.*, 807 F.2d 1332, 1334 (7th Cir. 1986), *In re Bonner Mall Partnership*, 2 F.3d 899, 903 (9th Cir. 1993), *In re Tri-Valley Distributing*, 533 F.3d 1209, 1214 (10th Cir. 2008).⁴ Ultimately, where an “order terminates a discrete dispute ... the order will be considered final and appealable. *In re Rimsat*, 212 F.3d 1039, 1044 (7th Cir. 2000). A dispute must be finally resolved “and leave nothing more for the bankruptcy court to do.” *Donovan*, 532 F.3d at 1137.

Although most circuits merely look to the discrete issue or order on appeal, applying a traditional meaning of finality that is limited to the distinctly appealed order or decree, the Eighth Circuit has gone a step further than the other circuits and developed a balancing test that is used to determine finality of the lower courts’ orders. In this test, the Eighth Circuit looks to “the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding.” *In re Koch*, 109 F.3d 1284, 1287 (8th Cir. 1997).⁵

C. District Court as First Level Court in Bankruptcy Proceeding

In rare cases, a court of appeals may be required to take jurisdiction over a bankruptcy matter pursuant to 28 U.S.C. § 1291, rather than

⁴ The Sixth Circuit Court of Appeals has taken positions on bankruptcy appellate jurisdiction that differs from the other circuits and, in addition to reviewing for finality, the Court will also review to determine if the order or judgment on appeal was properly certified. The certification issue has frequently arisen in the Sixth Circuit opinions. *Settembre v. Fidelity & Guranty Life Insurance Co.*, 552 F.3d 438 (6th Cir. 2009) (discussing the Court’s limiting of a previous decision that was more lenient on appellate jurisdiction and its current requirements for appellate jurisdiction.)

⁵ For a list of various types of standard bankruptcy court orders that have been reviewed for finality, see 9E AM. JUR.2D *Bankruptcy* § 3786 and 9E AM. JUR.2D *Bankruptcy* § 3785.

§ 158. Although some court of appeals on occasion have analyzed their jurisdiction over the proceeding under § 1291 simultaneously with their jurisdiction under § 158, so as to ensure a full review of jurisdictional possibilities, see *In re Vylene Enterprises, Inc.*, 968 F.2d 887, 899-95 (9th Cir. 1992), the jurisdiction in the court of appeals will most likely be a true issue, thereby necessitating jurisdiction pursuant to § 1291 rather than § 158, in a proceeding where a district court operated in a bankruptcy proceeding as the lower level court, the first court to hear the bankruptcy proceeding, rather than as an appellate court.⁶ This occurs when a district court has withdrawn the reference that has referred a case to the bankruptcy court.⁷

28 U.S.C. § 158 does not account for the possibility of the district court being the lower level court rather than the appellate court; a strict reading of §§ 1291 and 1292 would prevent a court of appeals from taking jurisdiction over an interlocutory appeal that normally would have been considered on appeal if the proceeding had been brought before a bankruptcy court. Both the Fifth and Third Circuits have chosen to apply the liberalized rules of §§ 158 to 1291 when using § 1291 as jurisdiction for over bankruptcy matters first heard in a district court. *In the Matter of Cajun Electric Power Cooperative, Inc.*, 119 F.3d 349, 353-54 (5th Cir. 1997); *US v. Pelullo*, 178 F.3d 196, 200 (3d Cir. 1999). The Third Circuit, when taking jurisdiction, held that its “appellate jurisdiction under § 1291 mirrors that under § 158(d)” and that the liberal standards of finality used for bankruptcy court appeals under § 158 were to be employed when analyzing under § 158. *Pelullo*, 178 F.3d at 200. Although the Ninth Circuit has traditionally been one of the

⁶ See Sloan’s article, *supra* note 1, for an early discussion on the topic, as well as a discussion by Vickers in the Bankruptcy Developments Journal. Sarah E. Vickers, *Interlocutory Appeals in Bankruptcy Cases: the Conflict between Judicial Code Sections 158 and 1292*, 8 BANKR. DEV. J. 519, 543-51 (1991). Both of these articles were written prior to the Supreme Court’s *Germain* case, discussed below, which determined that 28 U.S.C. § 158 is not the sole source of jurisdiction in a bankruptcy matter.

⁷ For a discussion on a bankruptcy court’s jurisdiction over bankruptcy matters and the district court’s referral of this jurisdiction, see 1-3 Collier on Bankruptcy P 3 (2010), specifically Sections 3.02 and 3.04.

most liberal when it comes to taking jurisdiction over bankruptcy matters, it has specifically held that the more liberalized standards under § 158 do not apply “to appeals from district judges sitting in bankruptcy,” out of concern that Supreme Court precedence prevents a reading of § 1291.⁸ *Vylene Enterprises*, 968 F.2d at 893.

III. Finality Issues Raised by the Multiple Levels of Appeal

Pursuant to 28 U.S.C. § 158(a), a district court has jurisdiction over final judgments, orders and decrees, but also over interlocutory orders and decrees where leave has been granted by the bankruptcy court. A court of appeals, by contrast, only has jurisdiction from final decisions, judgments, and decrees issued by a district court or BAP unless one of the lower courts certified an issue for direct appeal. 28 U.S.C. § 158(d).

Issues arise when a court of appeals is asked to take jurisdiction over a matter that is interlocutory, and some courts have refused to take jurisdiction over an interlocutory appeal unless the collateral order doctrine applies, see generally, *In re F.D.R. Hickory House, Inc.*, 60 F.3d 724 (11th Cir. 1995). The Supreme Court, in *Connecticut National Bank v. Germain*, issued its decision as to whether 28 U.S.C. § 1292 could provide a source of jurisdiction over interlocutory appeals, finding that 28 U.S.C. § 158 does not preclude a court of appeals from having jurisdiction pursuant to § 1292. 503 U.S. 249, 254 (1992). Use of § 1292 is difficult in the context of bankruptcy proceedings, as it has significant limitations and requires that the district court judge give leave for an appeal in the order, but despite § 1292’s availability, many courts of appeals have failed to take into consideration § 1292 in their analysis whether it was possible source of jurisdiction. *Lewis v. United States*, 992 F.2d 767 (8th Cir. 1993)(noting that although a district court has discretion to hear an interlocutory appeal, the court of appeals only has jurisdiction over final decisions of the district court in a bankruptcy appeal), *In re F.D.R. Hickory House, Inc.*, 60 F.3d 724 (11th Cir. 1995)(leaving out a

⁸ See below for details on the Supreme Court case, *Connecticut National Bank v. Germain*.

discussion of whether 28 U.S.C. § 1292 applied as a possible source of jurisdiction).⁹

Although courts of appeals do not have a statutory basis for jurisdiction over interlocutory appeals outside of 28 U.S.C. § 1292, there are other foundations, including traditional doctrines relating to final orders, that can provide a court of appeals with jurisdiction over a decision issued by a district court sitting as an appeals court.

A. Timing of the Appeal

Most of the circuits have determined that, in order to exercise jurisdiction over a bankruptcy appeal from a district court, a court of appeals must first determine that there had been a final order in both the bankruptcy court and the district court. See generally, *Sandy Ridge*, 807 F.2d at 1334, contra, *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982).¹⁰ The fact that the bankruptcy court order or decree was not final at the time of the appeal to the district court or BAP does not prevent the order or decree from becoming final later, as some circuits apply the doctrine of cumulative finality, allowing “an appeal to be ‘saved’ by subsequent events that establish finality.” *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000).

An appeal can also move forward when a district court, hearing an interlocutory appeal, issues an order that makes the bankruptcy court’s decision final, curing the issue of appellate jurisdiction for the court of appeals; on such a basis, the court of appeals may take jurisdiction over the matter as if both levels had issued final orders. *In re*

⁹ Recently, the Ninth Circuit Court of Appeals in *In re Bender* began a discussion in dicta as to whether the Supreme Court’s 1992 holding in *Germain* required a modification of the Ninth Circuit’s finality standard, despite the fact that the Ninth Circuit has issued numerous appellate issues regarding interlocutory appeals in the thirteen years since the *Germain* opinion was issued. In *Bender*, the Ninth Circuit concluded that a determination of *Germain*’s effect was unnecessary for the purposes of the appeal at hand. 586 F.3d 1159, 1163-64 (9th Cir. 2009).

¹⁰ A discussion on the Third and Ninth Circuits’ decisions that looked primarily to the bankruptcy court’s decision to determine finality, as well as these Circuits later narrowing of their application of these precedents, can be found in Norton’s Bankruptcy Law and Practice. 8 NORTON BANKR. L. & PRAC.3D § 170:24 (April 2010).

Tri-Valley Distributing, Inc., 533 F.3d 1209, 1214-1215 (10th Cir. 2008). An instance of where this situation frequently occurs is with reversals of motions to dismiss a debtor’s bankruptcy case. If a creditor or trustee has filed a motion to dismiss a bankruptcy case and the bankruptcy court denies the motion, the bankruptcy case would be allowed to proceed, making the order on the motion to dismiss a non-final order. If the order of the bankruptcy court is reviewed as an interlocutory appeal and wholly reversed by the BAP or district court, the bankruptcy case would effectively be dismissed (as there would be nothing for the bankruptcy court to do except issue the notice of dismissal and close the bankruptcy case). In such circumstances, a court of appeals will take jurisdiction to review all underlying orders relating to the dismissal as if all were final orders.

B. Issues of Remand: Final But-For “Ministerial Tasks”?

By reversing a bankruptcy court’s final order and remanding the matter to the bankruptcy court for additional fact-finding, a district court or BAP effectively turns a final order into a non-final order. This raises issues of jurisdiction for the courts of appeals, because a court of appeals’ jurisdiction over bankruptcy interlocutory matters is limited. The circuit courts have split regarding the proper test to determine whether an order involving a remand requires that they decline jurisdiction. A majority of the circuits have determined that “such an order is not final and appealable unless the remand is for only ministerial proceedings. *In re Holland*, 539 F.3d 563, 565 (7th Cir. 2008)(providing an overview of the circuit split and the cases on each side.) Two circuits, the Third and the Ninth, have a balancing test that is used to determine whether an order should be considered final and appealable. *Id.*

For those that require only ministerial proceedings be left for remand, “ministerial proceedings” can have a varying meaning, but ultimately, the courts look to the tasks left for the bankruptcy court. The issue to determine is largely based upon whether the remand requires significant further proceedings in the bankruptcy court. *In re Pratt*, 524 F.3d 580, 584-85 (5th Cir. 2008). Significant further proceedings are those proceedings that would require “the bankruptcy court to perform judicial functions, such as additional fact-finding.” Or those that would require an “exercise of considerable discretion”

by the bankruptcy judge. *Id.* Where requested of the bankruptcy court by the district court or the BAP, the majority of the courts of appeals will decline jurisdiction. Specific examples of ministerial functions that do not prevent appellate jurisdiction include tasks such as the calculation of attorney fees,¹¹ the calculation of interest rates,¹² or the dismissal of the bankruptcy case¹³ or adversary proceeding.

C. The Alternate Remand-Related Doctrines of Finality

The Ninth Circuit, when a district court or BAP has reversed a bankruptcy court and ordered a remand, applies a four-pronged policy test to address the issue of finality; if, under the test, the Court's policy is in favor of a review, the Ninth Circuit will take jurisdiction even if the remand required significant further proceedings on an issue intertwined with the issue on appeal. In its four-pronged test, the Ninth Circuit weighs "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause irreparable harm." *In re Fowler*, 394 F.3d 1208, 1211 (9th Cir. 2005). The Ninth Circuit has historically used a second test as well for the purpose of determining whether the case qualifies as an exception to the finality rule. This second test has sometimes been used by the Court in the place of the first test, but more recently, the Ninth Circuit has required that both tests be passed. *In re Bender*, 586 F.3d 1159, 1164-165 (9th Cir. 2009). In this second test, the Court must determine "whether the central issue raised on appeal "is legal in nature and its resolution either (1) could dispose of the case or proceedings and obviate the need for fact finding; or (2) would material aid the bankruptcy court in reaching its disposition on remand." *Fowler*, 394 F.3d at 1211.¹⁴

¹¹ *Pratt*, 524 F.3d at 584-85. If the remand requires more than a mere calculation, but also a consideration of whether the award of fees is warranted or reasonable, then the remand will be more than ministerial.

¹² *In re Pransky*, 318 F.3d 536, 540 (3d Cir. 2003).

¹³ *In re Ficken*, 2 F.3d 299, 300 (8th Cir. 1993).

¹⁴ In late-2009, a Ninth Circuit Panel expressed disagreement with the Ninth Circuit tests and expressed concerns that the Ninth Circuit balancing test(s) should be reevaluated in light of *Germain*.

The Third Circuit has a balancing test which it uses when a district court has remanded a controversy. This test is employed when the remand requires more than ministerial functions from the bankruptcy court. This test considers: "(1) the effect of the disputed issue on the assets of the bankruptcy estate; (2) the necessity for additional fact-finding on remand; (3) the preclusive effect of [the Court of Appeal's] decision on the merits of subsequent litigation; and (4) judicial economy." *In re Pransky*, 318 F.3d 536, 541 (3d Cir. 2003).

D. Cohen Doctrine Applied to Non-Final Orders

Although most circuit courts have determined that they cannot take jurisdiction over an interlocutory appeal—whether the appeal is interlocutory due to a remand by the lower appellate court or interlocutory due to the original nature of the appeal—most circuit courts have allowed consideration of the collateral order doctrine as a jurisdictional basis for the appeal. *In re Castillo*, 297 F.3d 940, 946 (9th Cir. 2002), *In re Popkin & Stern*, 289 F.3d 554, 556 (8th Cir. 2001), *In re Riggsby* 745 F.2d 1153, 1157 (7th Cir. 1984). As jurisdiction cannot be asserted under this doctrine without demonstrating that the appeal has the requisite elements for jurisdiction under the doctrine, it is difficult to obtain jurisdiction under the doctrine. *Id.* Efforts to argue that the collateral order doctrine applies have generally been rejected, and unless the doctrine does specifically apply to a dispute, other arguments for jurisdiction will have more sway with the courts of appeals. *Id.*

IV. Conclusion

The circuit courts have been in general agreement that the concept of finality is modified for purposes of bankruptcy appeals due to necessity; the traditional standard of finality under 28 U.S.C. § 1291, as applied to standard district court judgments, would create harsh results, possibly preventing an appeal until the entire bankruptcy proceeding has been terminated. Despite the more liberal standard, most circuits require a review of finality at each level of the appeal. Even if the district court had

Bender, 586 F.3d at 1163-65. Despite the issues raised in *Bender*, the two tests appear to still be the standard for review in the Ninth Circuit.

jurisdiction over a final order, if it reverses and remands the bankruptcy court's order, the court of appeals cannot take jurisdiction unless specific exceptions apply. The circuits are not in agreement regarding the meaning of finality for remand issues from a district court or BAP to a bankruptcy court. The Ninth Circuit, more than any other circuit, has developed its own case law relating to the determination of finality, so as to effectively take jurisdiction over what the other

circuits would determine interlocutory, but the majority of the circuits will only take jurisdiction over an appeal involving a remand if the remand is limited to ministerial tasks. Although the bankruptcy appellate process has evolved, much of its own case law, more traditional concepts, such as the collateral order doctrine, can provide the basis of jurisdiction in a bankruptcy appeal.

* * * * *

Direct Bankruptcy Appeals: Five Years Later

Ben L. Mesches¹
Haynes and Boone, LLP

I. The 2005 Bankruptcy Code Amendments Authorizing Direct Appeals

In 2005, as a part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BACPA"), Congress amended Section 158(d) (the jurisdictional statute for bankruptcy appeals brought in the court of appeals) to provide for a *discretionary* direct appeal from the bankruptcy court to the Circuit Court of Appeals. This new provision took effect 180 days after enactment (October 17, 2005) and applies only to bankruptcy cases filed on or after October 17, 2005. BACPA, § 1501(a); *In re McKinney*, 457 F.3d 623, 624 (7th Cir. 2006) (dismissing attempted direct appeal under BACPA because the amendments do not apply "to bankruptcy proceedings filed before the effective date of the provision, which was October 17, 2005"); *In re Blumeyer*, No. 4:06CV1681 CDP, 2007 U.S. Dist. LEXIS 5037, at *4 (Bankr. E.D. Mo. Jan. 24, 2007) (same); *In re Berman*, 344 B.R. 612, 615 (B.A.P. 9th Cir. 2006) (same).

One of the principal reasons for this change was "widespread unhappiness with the paucity of settled bankruptcy-law precedent." *Weber v. United States Trustee*, 484 F.3d 154, 158 (2d Cir. 2007). Congress also enacted the direct

appeal provision because (i) of "the time and cost factors attendant to the present appellate system," and (ii) "decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value." H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005); see also *Weber*, 484 F.3d at 158-59 (observing that direct-appeal provision designed to resolve legal—not fact-intensive—questions and that "Congress hoped that [this provision] would permit us to resolve controlling legal questions expeditiously and might foster the development of coherent bankruptcy-law precedent").

Under 28 U.S.C. § 158(d)(2)(A), the Circuit Court has jurisdiction over appeals "described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel" or the parties jointly certify that (i) the judgment "involves a question of law as to which there is no controlling decision of the court of appeals of the circuit or of the United States Supreme Court, or involves a matter of public importance," (ii) the judgment "involves a question of law requiring resolution of conflicting decisions," or (iii) "an immediate appeal [would] . . . materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. 158(d)(2)(A)(i)-(iii). Only one of the three certification requirements must be met for the lower court to certify a direct appeal to the court of appeals.

The bankruptcy court, district court, or Bankruptcy Appellate Panel "shall" make the certification if (i) on its own or on a party's motion the court determines that *any* of the above circumstances are satisfied, or (ii) the court receives a request by a majority of appellants and majority of appellees to make the

¹ Ben L. Mesches is a Partner in the Appellate Practice Group at Haynes and Boone, LLP in Dallas, Texas (haynesboone.com) and can be reached at ben.mesches@haynesboone.com.

certification. Thus, the lower courts have no discretion to decline to certify an appeal if one of the certification requirements is satisfied or a majority of appellants and appellees agree that certification is appropriate.

II. Procedural Rules

A party seeking certification under this provision must file such a motion within 60 days of the judgment. 28 U.S.C. § 158(d)(2)(E). The notice of appeal, however, is due within 14 days—not 60 days. See FED. R. BANKR. P. 8002; See *In re Virissimo*, 332 B.R. 208, 208 n.1 (Bankr. D. Nev. 2005) (certification without perfection of appeal does not allow a party to obtain direct-appeal review by the circuit court); Fed. R. Bankr. P. 8001(f), Committee Note (noting that a notice of appeal is required in direct appeals of bankruptcy court orders). An appeal under Section 158(d) “does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective [court] . . . issues a stay of such proceeding pending the appeal.” 28 U.S.C. § 158(d)(2)(D).

Review at the circuit court is discretionary. 28 U.S.C. § 158(d)(2)(A). To obtain direct appellate review, the appellant must file a petition for permission to appeal in the court of appeals under Federal Rule of Appellate Procedure 5. Fed. R. Bankr. P. 8001(f)(5). That petition must—in addition to complying with Rule 5—be filed “no later than 30 days after a certification has become effective as provided in subdivision (f)(1).” *Id.* Section 158(d)(2) does not create any standards applicable to the appellate court’s decision to dispose of the petition for permission to appeal.

Additional procedural rules have now been adopted that address the unique procedural issues that stem from appeal of a bankruptcy court order to the district court, on the one hand, and seeking to bypass district court review, on the other.

- Under Rule 8001(f)(1), certification by the bankruptcy court is not effective until a notice of appeal is filed. Because of the “short time limit to file the petition with circuit clerk [10 days], subdivision (f)(1) provides that entry of a certification on the docket does not occur until an effective appeal is taken under Rule 8003(a) or (b).” Committee Note.

- Rule 8001(f)(2) addresses where the certification is to be made: If the case is pending in the bankruptcy court, only the bankruptcy court can certify the case for direct appeal. Likewise, if the case is pending in the district court, only the district court can certify the case for direct appeal. This rule “adopts a bright-line test for identifying the court in which the matter is pending.” Committee Note.

- Rule 8001(f)(2) outlines the procedure for a joint certification by the appellants and appellees, urging parties to use the official form.

- Rule 8001(f)(3) sets forth the requirements, in terms of form, contents, service, and filing, for a party’s certification request and any response to that request.

- Rule 8001(f)(4) addresses the court’s power to certify on its “own initiative.”

- Rule 8003(d) “solve[s] the jurisdictional problem that could otherwise ensue when a district court or bankruptcy appellate panel has not granted leave to appeal under 28 U.S.C. § 158(a)(3).” Committee Note. Under the rule, if the court of appeals authorizes a direct appeal, that authorization is “deemed to satisfy the requirement for leave to appeal.” *Id.*

III. Guidance from the Circuit Courts on the Application of the Direct-Appeal Provision

Although many circuit courts have considered appeals under 28 U.S.C. § 158(d)(2), the Second Circuit has given the most detailed treatment of the statute and the standards courts should apply in determining whether to grant leave to permit a direct appeal.

In *Weber v. United States Trustee*, 484 F.3d 154, 158 (2d Cir. 2007), the Second Circuit was presented with a case involving New York’s homestead exemption the bankruptcy court had certified for direct appeal. The Second Circuit set forth a comprehensive analysis of the purpose and application of § 158(d)(2) and declined to accept the appeal. The Court focused on three issues—the text of the statute, its purpose, and what it termed “jurisprudential considerations.” 484 F.3d at 158.

The Court began by noting that “this court ‘shall have jurisdiction of appeals’ from a bankruptcy court if the bankruptcy court certifies that either

'(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision . . . or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case.'" *Id.* at 157 (quoting 28 U.S.C. § 158(d)(2)(A)(i)-(iii)).

The *Weber* Court then turned to the legislative history of the direct-appeal provisions and observed that the purpose of the statute to (i) "facilitate our provision of guidance on pure questions of law," (ii) stem the "widespread unhappiness at the paucity of settled bankruptcy-law precedent," and (iii) allow appeals "where a judgment of [the appellate] court would 'materially advance the progress of the case.'" *Id.* at 158. On this final point, the Court emphasized that an appeal might materially advance the case in the following circumstances:

[W]here a bankruptcy court has made a ruling which, if correct, will essentially determine the result of future litigation, the parties adversely affected by the ruling might very well fold up their tents if convinced that the ruling has the approval of the court of appeals, but will not give up until that becomes clear. Where that ruling is manifestly correct or manifestly erroneous, the parties would profit from its immediate review in this court.

Id.

In determining the purpose of the direct-appeal provision, the Second Circuit also compared this statute to other discretionary interlocutory-appeal provisions addressing appeals from class-action certification decisions and interlocutory orders on controlling legal questions. *Id.* at 159-60 (synthesizing the standards under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f)).

The *Weber* Court thus concluded that the direct-appeal provision "would permit us to resolve controlling legal questions expeditiously and might foster the development of coherent bankruptcy-law precedent." *Id.* at 159.

The Court also emphasized that there are

countervailing factors in determining whether to accept a direct appeal. It noted, for example, that allowing issues to percolate in the lower courts would enhance the circuit court's ultimate resolution of important legal questions:

In many cases involving unsettled areas of bankruptcy law, review by the district court would be most helpful. Courts of appeals benefit immensely from reviewing the efforts of the district court to resolve such questions. Permitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law.

Id. at 160. The Court also recognized that "in most cases, even without certification, the parties will have an opportunity to appeal both to the district court and to this court before the termination of the entire bankruptcy proceeding, thereby satisfying many of the objectives here that also underlie" other discretionary-appeal provisions. *Id.* at 161.

The Court concluded with the following guidance on when it would be most likely to accept a direct appeal or opt not to accept the case on direct appeal because there was no conflict in the lower courts and an immediate review would not "lead to a more rapid resolution of the case:"

We will be most likely to exercise our discretion to permit a direct appeal where there is uncertainty in the bankruptcy courts (either due to the absence of a controlling legal decision or because conflicting decisions have created confusion) or where we find it patently obvious that the bankruptcy court's decision is either manifestly correct or incorrect, as in such cases we benefit less from the case's prior consideration in the district and we are more likely to render a decision expeditiously, thereby advancing the progress of the case. On the other hand, we will be reluctant to accept cases for direct appeal when we think that percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision.

Weber, 484 F.3d at 161.

IV. Decisions Under the New Direct Appeal Provision

This section catalogs decisions from across the country addressing the direct-appeal provision and explores the circumstances in which direct appeals have been permitted and those in which courts declined to allow a direct appeal to go forward.

A. Cases Certified for Direct Appeal

1. Second Circuit

***In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006)**: The bankruptcy court certified its order striking—but not dismissing—debtors’ Chapter 7 and 13 bankruptcy cases based upon their failure to obtain credit counseling before seeking bankruptcy protection, as required by BACPA. Because the bankruptcy court’s decision was “at odds” with the results reached in other bankruptcy courts within the Second Circuit, the bankruptcy court “determined that it is appropriate to certify these questions to the Second Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A)(ii) and Interim Fed. R. Bankr. R. 8001(f)(4).” 345 B.R. at 505. The bankruptcy trustee, however, declined the invitation to appeal the bankruptcy court’s refusal to dismiss directly to the Second Circuit and instead sought review from the district court in the first instance. *Adams v. Finlay*, 06 Civ. 6039 (CLB), 2006 U.S. Dist. LEXIS 81591, at *3 (S.D.N.Y. Nov. 3, 2006) (“The Bankruptcy Court certified three related questions directly to the Court of Appeals for the Second Circuit, but the Trustee did not pursue the certification, seeking instead appellate review in the first instance in the District Court.”) (appeal dismissed for lack of standing).

2. Fourth Circuit

***Tidewater Fin. Co. v. Kenney*, 531 F.3d 312, 315 (4th Cir. 2008)**: The Fourth Circuit granted a petition for permission to appeal because “a direct appeal . . . presents, among other things, a question of law as to which there is no controlling decision of this Court or of the United States Supreme Court and which requires resolution of conflicting decisions among bankruptcy courts in various circuits.”

3. Fifth Circuit

***Bank of New York Trust Co. v. Official Unsecured Creditors’ Committee (In re Pacific Lumber Co.)*, 584 F.3d 229, 241-42**

(5th Cir. 2009): The Fifth Circuit initially noted that Congress enacted § 158(d)(2) for two narrow purposes—(i) “to expedite appeals in significant cases” and (ii) “to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy.” *Pacific Lumber* was a massive Chapter 11 case that was of “prominence . . . to the citizens of California, of Humboldt County, and of the town of Scotia and by the plan’s effect on ‘one of the nation’s most ecologically diverse forests.’” In addition to the public interest at stake, the Court faced a unique set of circumstances that also warranted an immediate appeal. First, there was a substantial risk that an appeal of the bankruptcy court’s unstayed confirmation order could be rendered moot if the ordinary appellate process were to run its course. *Id.* at 242. Second, the case presented a novel question of bankruptcy law involving a bankruptcy court’s authority to cramdown secured debt.

***Crosby v. Orthalliance (In re OCA, Inc.)*, 552 F.3d 413, 418 (5th Cir. 2008)**: “Since this is an appeal from an interlocutory order from the bankruptcy court regarding a question of law on which there is no controlling precedent, we will treat this appeal essentially as we treat certified questions from district courts.”

***Drive Fin. Serv., L.P. v. Jordan*, 521 F.3d 343 (5th Cir. 2008)**: The Fifth Circuit allowed direct review of another “hanging paragraph” issue and resolved the legal question of whether BAPCPA’s “hanging paragraph” superseded the United State’s Supreme Court’s cramdown decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004)

***Ad Hoc Group of Timber Noteholders v. Pacific Lumber Co. (In re Scotia Pacific Co. LLC)*, 508 F.3d 214 (5th Cir. 2007)**: The appellee asked the Fifth Circuit to revisit the motion panel’s decision to grant direct-appeal review because the case was pending in the bankruptcy court when the district court certified the case for direct appeal. The court agreed that the bankruptcy court—not the district court—should have certified the case for direct appeal because the appeal had not yet been docketed in the district court. Nevertheless, the Fifth Circuit concluded that “this procedural glitch” was not a jurisdictional defect and, therefore, did not deprive the court of jurisdiction: “[T]his error is technical in nature, does not affect the substantial rights of the parties, and prompts us

to exercise our discretion in favor of proceeding to the merits of this appeal.” 508 F.3d at 220.

***In re Salazar*, 339 B.R. 622 (Bank. S.D. Tex. 2006):** The bankruptcy court was presented with a novel Chapter 13 question—whether “ineligible” debtors who did not first seek credit counseling (as the revised Bankruptcy Code requires) are entitled to the protection of the Bankruptcy Code’s automatic-stay provision—and on its own certified the case for direct appeal to the Fifth Circuit. The bankruptcy court focused on the importance of the questions presented and the lack of authority on that question in the Fifth Circuit, in opting to certify a direct appeal under Section 158(d)(2)(A)(i):

Pursuant to 28 U.S.C. § 158(d)(2), the Court certifies this decision for direct appeal to the United States Court of Appeals for the Fifth Circuit. Based on a review of case law in this and other jurisdictions, as well as a consideration of the importance of this matter for many consumer debtors and their creditors, the Court believes that direct appeal of the present order is appropriate under § 158(d)(2)(A)(i). . . .

Id. at 634. The bankruptcy court, however, cautioned the parties that “certification in no way alters a party’s ordinary requirements in filing a notice of appeal” and also reminded the parties that a supplement, containing a short statement of the basis of the bankruptcy court’s certification may be appropriate. *Id.* The Fifth Circuit subsequently denied the petition for permission to appeal as moot because “Petitioners consented to an Agreed Order essentially settling the dispute.” *In re Salazar*, 193 Fed. Appx. 281, 283 (5th Cir. 2006).

***In re Jones*, 352 B.R. 813 (Bankr. S.D. Tex. 2006):** The bankruptcy court, on its own initiative, certified for direct appeal to the Fifth Circuit its order dismissing debtors’ bankruptcy petition for failure to complete a credit counseling course within 180 before filing for bankruptcy, acknowledging that its decision “creates a split between bankruptcy judges in this district.” 352 B.R. at 814.

4. Ninth Circuit

***Blausey v. U.S. Trustee*, 552 F.3d 1124, 1131-32 (9th Cir. 2009):** The Ninth Circuit concluded that the issue presented affected every Chapter 7 bankruptcy case, raised a question of law, and

lacked clear precedent in determining that direct appeal was appropriate.

***Gen. Elec. Capital Corp. v. Future Media Prods. Inc.*, 536 F.3d 969, 971, 973-74 (9th Cir. 2008):** The Ninth Circuit resolved an unsettled legal issue in the Circuit and ordering the lower courts to apply the majority rule adopted by the Fifth and Seventh Circuits.

***In re Virissimo*, 332 B.R. 208 (Bankr. D. Nev. 2005):** The bankruptcy court, again on its own, certified the following question to the Ninth Circuit: Do the 2005 revisions to the Bankruptcy Code, which limit the amount of the homestead available to those who have owned their homestead less than 1215 days, apply to Nevada debtors? 332 B.R. at 209:

This court fully recognizes and appreciates the work done by, and expertise of, the bankruptcy appellate panel and the district court in hearing and deciding appeals from the bankruptcy court. This court is also fully cognizant of the tremendous workload of the Ninth Circuit Court of Appeals. However, the issue presented in this case is one which will recur in Nevada as well as other districts in the Ninth Circuit and will impact the administration of bankruptcy estates until the issue is ultimately decided. As this involves the statutory construction of a hotly contested provision of BACPA and is a matter of first impression, there is no question that the Court of Appeals will ultimately be required to determine the question. Hence not merely one, but all three, of the criteria specified in § 158 exist and justify an immediate appeal in this case.

Id.

5. Tenth Circuit

***Affordable Bail Bonds, Inc. v. Sandoval (In re Sandoval)*, 541 F.3d 997, 998-99 & n.2 (10th Cir. 2008):** The Tenth Circuit granted a direct appeal to resolve “a question of first impression in this circuit.”

6. Eleventh Circuit

***DaimlerChrysler Fin. Servs. v. Barrett (In re Barrett)*, 543 F.3d 1239, 1241 (11th Cir. 2008):** The Eleventh Circuit agreed to accept a direct appeal on the issue of whether a claim that comes under the “hanging paragraph” of Section

1325(a)(9) of the Bankruptcy Code is an allowed secured claim, permitting payment in full, plus post-petition interest to the creditor.

B. Decisions Declining to Certify for Direct Appeal

1. First Circuit

In re Berman, No. 04-45436, 2007 Bankr. LEXIS 65 (Bankr. D. Mass. Jan. 5, 2007): The bankruptcy court denied a request to certify because “the Court does not find that any of the circumstances enumerated in clause (i), (ii), or (iii) exist here.”

In re Marrama, 345 B.R. 458 (Bankr. D. Mass. 2006): The bankruptcy court refused to certify its order dismissing a debtor’s Chapter 13 case because he had an already-pending Chapter 7 case in which he was denied a discharge. The bankruptcy court analyzed the Section 158(d)(2) factors as follows:

I granted the motion to dismiss because I determined that the Debtor could not meet the eligibility requirements. I did not address what constitutes a contingent debt because none of the debts which I used in my calculation were debts that the Debtor described as contingent. It appears that the Debtor’s issue with the decision is that I could not look to the amounts of the outstanding nondischargeable debts set forth in his pending Chapter 7. While there is no controlling case law in this circuit, the case law above reflects that there is no significant dispute regarding the applicable standard for looking at pending cases. This is not an issue of significant proportion or one that is certain to arise repeatedly. Therefore, I cannot conclude that the Debtor has met the first criteria. As for the second, I am not convinced that the purpose behind certification is to enable a litigant to obtain a binding decision from a circuit court on every adverse ruling from this court. As for the third prong, I cannot determine that a ruling from the First Circuit, as opposed to an appeal to the BAP or the district court would materially advance this appeal. Accordingly, I will not certify the matter to the First Circuit.

345 B.R. at 474.

2. Second Circuit

Weber v. United States Tr., 484 F.3d 154 (2d Cir. 2007): Despite certification by the bankruptcy court, the Second Circuit declined to exercise its discretionary jurisdiction to decide whether an increase in the New York homestead exemption should apply retroactively because the Court did not “perceive a conflict of such a nature that creates uncertainty in the bankruptcy courts.” *Id.* at 161 (observing that “all three of the courts within this circuit to have considered the question have held that New York’s homestead exemption applies retroactively”). This decision contains an extensive discussion of the legislative history and purpose of the direct-appeal provision and provided the guidance quoted at the end of Part III, *supra*, concerning when the Second Circuit would be most likely to accept a direct appeal.

3. Third Circuit

In re Fields, Case No. 05-60595/JHW, 2006 Bankr. LEXIS 4090 (Bankr. D. N.J. Oct. 24, 2006): The bankruptcy court declined to certify a question related to the violation of the automatic-stay provision because: “The question of law involved in this case is directly answered by the statutory provisions cited above. I am not aware of conflicting decisions regarding the termination of the automatic stay by operation of law following abandonment of property by the trustee. The material advancement of the progress of the case is not implicated.”

Simon & Schuster, Inc. v. Adv. Mktg. Serv., Inc., 360 B.R. 429 (Bankr. D. Del. Feb. 27, 2007): This decision explores an issue that arises when the underlying order is interlocutory in nature and the only way to effectively prosecute an appeal is to request certification under Section 158(d)(2) and file a motion for leave to appeal under Section 158(a)(3) and Rule 8003. That is precisely what Simon & Schuster did here in seeking review of an order denying its motion for a temporary restraining order. 360 B.R. at 431 (noting the simultaneous filing of a notice of appeal, motion for leave to appeal, and request for certification). The motion for leave to appeal was transmitted to the district court for disposition. The request for certification remained pending in the bankruptcy court. *Id.* at *9 (stating that under Interim Rule 8001(f)(2), a matter remains pending in the bankruptcy until the district court grants leave to appeal under section 158(a)(3)). The bankruptcy court ultimately deferred

consideration of the request for direct appeal certification so that the district court could decide whether (i) an interlocutory appeal should be permitted under Section 158(a)(3), and (ii) direct appeal was available. *Id.* at 434-35.

The *Simon & Schuster* Court reached this conclusion apparently based upon its assessment that standards for both a Section 158(a)(3) motion and Section 158(d)(2) certification are “*virtually identical.*” *Id.* at 434 (emphasis in original); *id.* at 434 (requiring the bankruptcy court “to perform the same analysis generally reserved for the district court”). That is, there is no reason for the bankruptcy court to step on the district court’s toes and decide the certification question before the district court has that opportunity (after first granting leave to appeal). *Id.* at 434 (asserting that ruling otherwise “is contrary to the hierarchy of the court system”).

4. Sixth Circuit

***In re Davis*, 512 F.3d 856 (6th Cir. 2008):** The Sixth Circuit declined to accept a certified appeal regarding whether—in the Chapter 13 context—a vehicle ownership expense is an allowable expense if the debtor has no loan or lease payment. The court noted that “material advancement” was not a factor and that the “extent of the conflict is unclear.” Therefore, the court declined to “exercise [its] discretion” to decide the appeal. The court also noted at least two procedural infirmities: (i) the failure to attach the bankruptcy court’s order to the petition as required under Federal Rule of Appellate Procedure 5; and (ii) the failure to file a notice of appeal to the district court or bankruptcy appellate panel as required by Interim Rule 8001(f)(1).

5. Eleventh Circuit

***In re Waczewski*, Case No. 6:06bk-00620-KSJ, 2006 Bankr. LEXIS 1234 (Bankr. M.D. Fla. May 5, 2006):** Although concluding that Section 158(d)(2) did not apply, the court nevertheless addressed the availability of direct appeal and concluded that it would not certify its order for direct appeal, noting “a party seeking a direct appeal certainly must show something more than that a direct appeal would expedite the resolution of the appellate issues.”

V. Conclusion

Five years ago Congress adopted an important provision that allows parties to seek immediate appellate review of bankruptcy court decisions in the circuit courts. The purpose of this provision was to expedite appeals when a direct appeal would materially advance the progress of the case and to generate binding appellate precedent in bankruptcy—a longstanding problem that resulted from the dual appellate review process applicable in bankruptcy. Although many of the circuits have utilized this procedure to resolve legal questions (e.g., statutory construction issues and conflicts in the caselaw), few courts have developed a comprehensive approach to analyzing whether a direct appeal is appropriate. As the caselaw continues to develop, courts and practitioners should continue to assess whether direct appeals are employed for the narrow purposes intended by Congress or whether courts and parties broaden the use of such appeals to address discretionary and fact-intensive issues.

* * * * *