BANKRUPTCY APPEALS

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I. Introduction

An appeal of a bankruptcy court order or judgment involves unique procedural and jurisdictional considerations. Bankruptcy appeals are different from an ordinary federal court appeal because of the unusually quick time frame for perfecting and briefing the appeal and the likelihood that such an appeal may be subject to substantive[1] review by two appellate courts (the district court or Bankruptcy Appellate Panel[2] and the court of appeals). In approaching a bankruptcy appeal, practitioners must consider a bankruptcy-specific jurisdictional statute, a liberalized view of finality, and a different set of rules depending on whether the appeal is to the district court or the court of appeals. This paper sets forth a nuts-and-bolts approach for handling a bankruptcy appeal and considers some of the more complex jurisdictional issues.

The dramatic changes to the Bankruptcy Code in 2005 included an expansion of the court of appeals' jurisdiction over bankruptcy court decisions. Congress gave the lower courts power to certify bankruptcy court decisions (whether final or interlocutory) for direct appeal to the court of appeals. One of the principal reasons for this change was concern – by both advocates and members of Congress – that bankruptcy appeals frequently "languished" in the district court and that the circuit courts were not deciding a number of critical bankruptcy issues – and was therefore not establishing precedent in these cases. This paper provides a comprehensive overview of this new direct appeal provision, including the standard for obtaining certification, the mechanics of taking an appeal directly to the court of appeals, and discusses the first set of decisions to construe this new provision. Appellate lawyers are well-suited to providing guidance in determining whether to seek a direct appeal and persuading both the lower court and the court of appeals to permit a direct appeal to go forward.

This paper provides a guide to the rules governing an appeal to the district court and the court of appeals. The most important issue with respect to these relatively straightforward rules is that the deadlines in bankruptcy appeals are much shorter than in ordinary federal court appeals. This paper also addresses two additional issues – the relaxed standard for finality, providing a broader range of orders subject to appeals, and the jurisdictional statute. Although bankruptcy appeals frequently involve technical and specialized issues (much like intellectual property cases), an appellate lawyer's involvement in a bankruptcy appeal can nevertheless be quite valuable – from providing guidance on timing and procedural requirements to strategic assessments regarding direct appeals, interlocutory appeals, and finality.

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[1] However, bankruptcy appeals "often languish in the district courts until they become moot" making dual appellate review illusory in some instances. *See* Testimony of Hugh Ray, Former Chair of Business Bankruptcy Committee of the Business Law Section of the American Bar Association, 1999 WL 1079983 (Nov. 2, 1999).

[2] Bankruptcy court orders may be appealed in the first instance to the district court or the Bankruptcy Appellate Panel. In the Fifth Circuit, district courts decide bankruptcy appeals. Only the First, Sixth, Eighth, Ninth, and Tenth Circuits have Bankruptcy Appellate Panels, and, other than in the Ninth Circuit, Bankruptcy Appellate Panels are rarely used. *Judicial Business of the United States Courts*, at Table B-10 (stating that, of the 989 bankruptcy appeals decided by a Bankruptcy Appellate Panel in 2004, 645 of those appeals took place in the Ninth Circuit). "In the 12-month period that ended March 31, 2004, district judges nationwide received 2,838 bankruptcy appeals and [Bankruptcy Appellate Panels] received 1,006." David R. Weinstein, *What's a BAP and Why Did I Go There?* at 4, Section of Business Law, American Bar Association (Aug. 8, 2005). Even when a Bankruptcy Appellate Panel is in place, a party may elect to appeal to the district court instead. 28 U.S.C. § 158(c)(1) (2006); FED R. BANKR. P. 8001(e). As a result, the focus of this paper is on appeals to the district court.

II. Jurisdictional Statutes

A. Jurisdiction under section 158(a)

The jurisdictional basis for an appeal of a bankruptcy court order is contained in 28 U.S.C. § 158(a). Under section 158(a), the district court has jurisdiction over appeals of final orders, interlocutory orders altering the time in which the debtor has the exclusive right to propose a plan of reorganization, and with leave of the district court, other interlocutory orders.[3]

The court of appeals has jurisdiction over all appeals of final judgments entered under section 158(a) and (b).[4] Before the 2005 amendments to the jurisdictional statute, a party wishing to appeal a non-final district court order was forced to rely on 28 U.S.C. § 1292(b) to appeal such an order to the court of appeals.[5]

B. The Direct-Appeal Provision

In 2005, as a part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), 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.[6]

One of the principal reasons for this change was "widespread unhappiness at the paucity of settled bankruptcy-law precedent."[7] 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."[8]

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 for the

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[3] 28 U.S.C. § 158(a)(1)-(3) (2006); FED. R. BANKR. P. 8001(a) (describing appeals under section 158(a)(1) & (2) as appeals "of right"); FED. R. BANKR. P. 8001(b) (setting forth the procedure for taking an appeal from an interlocutory order under section 158(a)(3)).

[4] 28 U.S.C. § 158(d).

[5] *See* 28 U.S.C. § 1292(b) (2006).

[6] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1501(a), 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.); *In re* McKinney, 457 F.3d 623, 624 (7th Cir. 2006) (dismissing attempted direct appeal under BAPCPA 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).

[7] Weber v. U.S. Tr., 484 F.3d 154, 158 (2d Cir. 2007).

[8] H.R. REP. NO. 109-31, pt. 1, at 148 (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").

circuit or of the Supreme Court of the United States, 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."[9] 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 certification.[10] 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.

1. *Procedural Rules*

A party seeking certification under this provision must file such a motion within sixty days of the judgment.[11] The notice of appeal, however, is due within fourteen days—not sixty days.[12] 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."[13]

Review at the circuit court is discretionary.[14] 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.[15] 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)."[16] 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.

Before the recent amendments, the court of appeals could not review an interlocutory bankruptcy court order absent a section 1292(b) certification from the district court.[17] Congress 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."[18]

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[9] 28 U.S.C. § 158(d)(2)(A)(i)-(iii) (2006).

[10] 28 U.S.C. § 158(d)(2)(B).

[11] 28 U.S.C. § 158(d)(2)(E).

[12] *See* FED. R. BANKR. P. 8002; *see In re* Virissimo, 332 B.R. 208, 208–09 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 advisory committee's note (2008 Amendments, Subdivision (f)) (noting that a notice of appeal is required in direct appeals of bankruptcy court orders).

[13] 28 U.S.C. § 158(d)(2)(D).

[14] 28 U.S.C. § 158(d)(2)(A).

[15] FED. R. BANKR. P. 8001(f)(5).

[16] *Id*.

[17] *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 252–54 (1992); *In re* Tex. Extrusion Corp., 844 F.2d 1142, 1156 n.18 (5th Cir. 1988).

[18] H.R. REP. NO. 109-31, pt. 1, at 148 (2005); for a comprehensive discussion of the legislative history and purpose of the direct appeal provision, *see* Hon. Dennis Montali, *Revised Bankruptcy Appellate Procedures under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (presented to the Section of Business Law, American Bar Association Aug. 8, 2005).

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.[19]

- 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.[20] This rule "adopts a bright-line test for identifying the court in which the matter is pending."[21]

- Rule 8001(f)(2) outlines the procedure for a joint certification by the appellants and appellees, urging parties to use the official form.[22]

- 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.[23]

- Rule 8001(f)(4) addresses the court's power to certify on its "own initiative."[24]

- 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)."[25] Under the rule, if the court of appeals authorizes a direct appeal, that authorization is "deemed to satisfy the requirement for leave to appeal."[26]

2. *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*,[27] 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 section 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."[28]

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[19] FED. R. BANKR. P. 8001(f)(1); FED. R. BANKR. P. 8001 advisory committee's note (2008 Amendments, Subdivision (f)).

[20] FED. R. BANKR. P. 8001(f)(2).

[21] FED. R. BANKR. P. 8001 advisory committee's note (2008 Amendments, Subdivision (f)).

[22] FED. R. BANKR. P. 8001(f)(2)(B).

[23] FED. R. BANKR. P. 8001(f)(3).

[24] FED. R. BANKR. P. 8001(f)(4).

[25] FED. R. BANKR. P. 8003(d); FED. R. BANKR. P. 8003 advisory committee's note (2008 Amendments).

[26] FED. R. BANKR. P. 8003(d).

[27] 484 F.3d 154 (2d Cir. 2007).

[28] *Id.* 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.'"[29]

The *Weber* Court then turned to the legislative history of the direct-appeal provisions and observed that the purpose of the statute is 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.'"[30] 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.[31]

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.[32]

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."[33]

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.[34]

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

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[29] *Id*. at 157 (quoting 28 U.S.C. § 158(d)(2)(A)(i)-(iii)).

[30] *Id*. at 158.

[31] *Id*.

[32] Weber v. U.S. Tr., 484 F.3d 154, 159–60 (2d Cir. 2007) (synthesizing the standards under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f)).

[33] *Id*. at 159.

[34] *Id*. at 160.

underlie" other discretionary-appeal provisions.[35]

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 court 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.[36]

3. *Decisions Under the 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.

C. Cases Certified for Direct Appeal

Second Circuit

***In re Elmendorf*:**[37] 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)."[38] 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.[39]

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[35] *Id*. at 161.

[36] *Id.*

[37] 345 B.R. 486 (Bankr. S.D.N.Y. 2006).

[38] 345 B.R. at 505.

[39] Adams v. Finlay, No. 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).

Fourth Circuit

***Tidewater Finance Co. v. Kenney*:**[40] 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."

Fifth Circuit

***Compton v. Anderson* (*In re MPF Holdings US LLC*):**[41] This case addressed whether a confirmed plan of reorganization sufficiently retained preference claims to be pursued on a post-confirmation basis.

***CRG Partners Group, L.L.C. v. Neary* (*In re Pilgrim's Pride Corp.*):**[42] The question in this case is whether *Perdue v. Kenny A. ex rel Winn*[43] applied to prohibit fee enhancements for professionals employed under section 330 of the Bankruptcy Code.

***Spicer v. Laguna Madre Oil & Gas II, L.L.C.* (*In re Tex. Wyo. Drilling, Inc.*):**[44] This case further addressed the *United Operating* standard for a debtor to retain post-confirmation claims.

***Mesdag v. Nancy Sue Davis Trust* (*In re Davis Offshore, L.P.*):**[45] This case affirmed a bankruptcy court's decision rejecting post-confirmation fraud claims because release and exculpation provisions of the plan barred such claims.

***Bank of New York Trust Co. v. Official Unsecured Creditors' Committee* (*In re Pacific Lumber Co.*):**[46] The Fifth Circuit initially noted that Congress enacted section 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."[47] *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.'"[48] 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.[49] Second, the case presented a novel question of bankruptcy law involving a bankruptcy court's authority to cramdown secured debt.[50]

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[40] 531 F.3d 312, 315 (4th Cir. 2008).

[41] 701 F.3d 449 (5th Cir. 2012).

[42] 690 F.3d 650 (5th Cir. 2012).

[43] 559 U.S. 542 (2010).

[44] 647 F.3d 547 (5th Cir. 2011).

[45] 644 F.3d 259 (5th Cir. 2011).

[46] 584 F.3d 229 (5th Cir. 2009).

[47] *Id.* at 241–42.

[48] *Id.* at 242.

[49] *Id.*

[50] *Id.* at 242–43.

***Crosby v. Orthalliance* (*In re OCA, Inc.*)**:[51] "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 Financial Services, L.P. v. Jordan*:**[52] 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 Corporation*.[53]

***Ad Hoc Group of Timber Noteholders v. Pacific Lumber Co.* (*In re Scotia Pacific Co., LLC*):**[54] 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.[55] 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.[56] 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."[57]

Ninth Circuit

Blausey v. U.S. Trustee:[58] 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.

***General Electric Capital Corp. v. Future Media Productions Inc.*:**[59] The Ninth Circuit resolved an unsettled legal issue in the Circuit and ordered the lower courts to apply the majority rule adopted by the Fifth and Seventh Circuits.

***In re Virissimo*:**[60] 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?

> 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

[51] 552 F.3d 413, 418 (5th Cir. 2008).

[52] 521 F.3d 343, 346–48 (5th Cir. 2008).

[53] 541 U.S. 465 (2004).

[54] 508 F.3d 214 (5th Cir. 2007).

[55] *Id.* at 218–19.

[56] *Id.* at 219.

[57] *Id.* at 220.

[58] 552 F.3d 1124, 1131–32 (9th Cir. 2009).

[59] 536 F.3d 969, 971, 973–74 (9th Cir. 2008).

[60] 332 B.R. 208, 209 (Bankr. D. Nev. 2005).

> 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.[61]

Tenth Circuit

***Affordable Bail Bonds, Inc. v. Sandoval* (*In re Sandoval*):**[62] The Tenth Circuit granted a direct appeal to resolve "a question of first impression in this circuit."

Eleventh Circuit

***Daimler Chrysler Financial Services Americas LLC v. Barrett (In re Barrett)*:**[63] 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.

D. Decisions Declining to Certify for Direct Appeal

First Circuit

***Nickless v. Kessler* (*In re Berman*):**[64] 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*:**[65] 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 his 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

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[61] *Id*.

[62] 541 F.3d 997, 998–99 & n.2 (10th Cir. 2008).

[63] 543 F.3d 1239, 1241 (11th Cir. 2008).

[64] No. 04-45436, 2007 Bankr. LEXIS 65, at *5 (Bankr. D. Mass. Jan. 5, 2007).

[65] 345 B.R. 458, 460 (Bankr. D. Mass. 2006).

> 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.[66]

Second Circuit

***Weber v. United States Trustee*:**[67] 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."[68] 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.

Third Circuit

***In re Fields*:**[69] 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.[70]

***Simon & Schuster, Inc. v. Advanced Marketing Services, Inc.*:**[71] 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 & Shuster did here in seeking review of an order denying its motion for a temporary restraining order.[72] The motion for leave to appeal was transmitted to the district court for disposition. The request for certification remained pending in the bankruptcy court.[73] 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.[74]

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[66] *Id.* at 474.

[67] 484 F.3d 154 (2d Cir. 2007).

[68] *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").

[69] No. 05-60595/JHW, 2006 Bankr. LEXIS 4090 (Bankr. D. N.J. Oct. 24, 2006).

[70] *Id.* at *7–8.

[71] 360 B.R. 429 (Bankr. D. Del. 2007).

[72] *Id*. at 431 (noting the simultaneous filing of a notice of appeal, motion for leave to appeal, and request for certification).

[73] *Id*. at 432 (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)).

[74] *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*."[75] 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).[76]

Fifth Circuit

***Stansbury v. Holloway* (*In re Holloway*):**[77] The Fifth Circuit initially dismissed this appeal because the appellant did not obtain a certification from either the bankruptcy court or district court authorizing a direct appeal to the Fifth Circuit. The parties asked for and procured a certification from the bankruptcy court after the appeal was dismissed. The Fifth Circuit dismissed yet again because the requirement to seek certification within sixty days of the order under section 158(d)(2)(E) was held to be jurisdictional, and the parties did not ask for certification from the bankruptcy court within that window.[78]

***Gomez v. Kamper Investments, L.L.C.,* (*In re Gomez*):**[79] In an opinion providing a comprehensive overview of appellate review options in the context of an interlocutory order, the Court addressed whether a district court's decision to remand the case to the bankruptcy court for further proceedings on whether a foreclosure sale could be avoided under the Bankruptcy Code. After the decision on remand refusing to avoid the sale, the bankruptcy judge suggested that the parties pursue a direct appeal to the Fifth Circuit to more efficiently resolve the case.[80] The appellants never filed the required certification for direct appeal either in the bankruptcy court or district court, although they did file a notice of appeal to the Fifth Circuit. The Fifth Circuit dismissed for want of jurisdiction because of the appellants' failure to file a certification request—a statutory requirement under section 158(d)(2).[81]

Sixth Circuit

***In re Davis*:**[82] 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."[83] Therefore, the court declined to "exercise [its] discretion" to decide the appeal.[84] 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).[85]

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[75] *Id*. at 434 (emphasis in original); *id*. at 434 (requiring the bankruptcy court "to perform the same analysis generally reserved for the district court").

[76] Simon & Schuster, Inc. v. Advanced Mktg. Servs. Inc., 360 B.R. 429, 434 (Bankr. D. Del. 2007) (asserting that ruling otherwise "is contrary to the hierarchy of the court system").

[77] 425 Fed. App'x 354 (5th Cir. 2011).

[78] *Id.* at 357–58.

[79] 404 Fed. App'x 850 (5th Cir. 2010).

[80] *Id.* at 851–52.

[81] *Id.* at 855.

[82] 512 F.3d 856, 857 (6th Cir. 2008).

[83] *Id.* at 858.

[84] *Id.*

[85] *Id.* at 857.

Eleventh Circuit

***In re Waczewski*:**[86] 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."

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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 case law), few courts have developed a comprehensive approach to analyzing whether a direct appeal is appropriate. As the case law 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.

III. Finality

Determining finality is a threshold question and is often overlooked in the frenzy following an adverse ruling by the bankruptcy court. Frequently, there is a little time to engage in a comprehensive analysis of finality after a decision has been issued (remember, you only have fourteen days to perfect the appeal). This is an area where an appellate lawyer can be of great assistance to the bankruptcy team. The initial decision will be whether to file a notice of appeal or—if the order is merely interlocutory—to file a motion for leave to appeal.[87]

Finality in the bankruptcy context involves a different inquiry than in an ordinary federal appeal.[88] The Fifth Circuit has explained the "unique" considerations at play in a bankruptcy appeal warranting a more flexible view of finality:

> [T]he unique nature of bankruptcy proceedings, combined with the public policy interest in promoting successful reorganizations, often favors tolerance of greater procedural flexibility in bankruptcy cases. Concepts of finality, for example, are less concrete in the bankruptcy context and, thus, principles disfavoring appeal of orders that do not dispose of an entire case are often less rigorously adhered to in bankruptcy cases.[89]

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[86] No. 6:06bk-00620-KSJ, 2006 Bankr. LEXIS 1234, at *22 (Bankr. M.D. Fla. May 5, 2006).

[87] *See infra* pp. 122–23 (discussing the procedure for pursuing an interlocutory appeal).

[88] *See In re* Orr, 180 F.3d 656, 659 (5th Cir. 1999) ("There is, therefore, a lower threshold for meeting the 'final judgments, orders, and decrees' appealability standard under 28 U.S.C. § 158(a) than there is for the textually similar 'final decisions' appealability standard under 28 U.S.C. § 1291."); the Fifth Circuit has made clear that a bankruptcy appeal from the district court in which the district court has withdrawn the reference from the bankruptcy court—even though governed by section 1291 as opposed to section 158—is subject to the same finality analysis as any other bankruptcy appeal. *In re* Cajun Elec. Power Coop., Inc., 69 F.3d 746, 747–48 (5th Cir. 1995).

[89] *In re* Transtexas Gas Corp., 303 F.3d 571, 580 (5th Cir. 2002).

In rejecting the usual rule for finality, the Fifth Circuit has made the following observations about the needs of the bankruptcy system and the preservation of the resources of the judicial system and the parties:

> [A] determination that appellate jurisdiction arises only when the bankruptcy judge enters an order which ends the entire bankruptcy case, leaving nothing for the court to do but execute the judgment, would substantially frustrate the bankruptcy system. This is so particularly when, as here, one independent decision materially affects the rest of the bankruptcy proceedings. Separate and discrete orders in many bankruptcy proceedings determine the extent of the bankruptcy estate and influence creditors to expend or not to expend effort to recover monies due them. The reversal of such an order would waste exorbitant amounts of time, money, and labor and would likely require parties to start the entire bankruptcy process anew. This potential waste of judicial and other resources has influenced this Court and other courts of appeals to view finality in bankruptcy proceedings in a more practical and less technical light.[90]

To be final, the order "must constitute either a final determination of the rights of the parties to secure the relief they seek or a final disposition of a discrete dispute within the larger bankruptcy case."[91]

The Fifth Circuit has addressed whether particular orders are final in numerous cases.[92]

The Fifth Circuit has held that other types of orders do not satisfy even the relaxed finality standard.[93]

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[90] *In re* England, 975 F.2d 1168, 1171 (5th Cir. 1992).

[91] *In re* Bartee, 212 F.3d 277, 282 (5th Cir. 2000) (citations and internal quotations omitted); *see In re* Saco Local Dev. Corp., 711 F.2d 441, 444 (1st Cir. 1983) (containing a comprehensive discussion of finality for purposes of appeal).

[92] *See, e.g., In re* Orso, 283 F.3d 686, 690 (5th Cir. 2002) ("The bankruptcy court's denial of an objection to a debtor's claim of exemption is a final order, subject to immediate appeal."); *In re Bartee*, 212 F.3d at 283 ("Recognition that the denial of a Chapter 13 plan can be a final order is all but compelled by considerations of practicality."); *In re Orr*, 180 F.3d at 659 (order granting summary judgment based on contention that "the tax liens do not attach to . . . post-discharge income distributions from" a trust is final); *In re* Cajun Elec. Power Coop., Inc., 119 F.3d 349, 354 (5th Cir. 1997) (order approving settlement "brings to an end the protracted litigation over the River Bend nuclear project and various other claims among" the parties); *In re* Chunn, 106 F.3d 1239, 1241 (5th Cir. 1997) ("orders granting relief from a § 362 automatic stay are final and appealable"); *In re Cajun Elec. Power Coop., Inc.*, 69 F.3d at 748 (holding than an order appointing a trustee is a Chapter 11 case is final); *In re* Eagle Bus Mfg., Inc., 62 F.3d 730, 734 (5th Cir. 1995) ("[T]he order granting the motions to file untimely proofs of claim is final and appealable because, unlike the cases cited above, the bankruptcy court was left with no dispute or issue to resolve after entering the order."); *In re England*, 975 F.2d at 1172 ("An order which grants or denies an exemption will be deemed a final order for the purposes of 28 U.S.C. § 158(d)."); *In re* Moody, 849 F.2d 902, 904 (5th Cir. 1988) (holding that an order allowing a claim or priority that determines the amount due to a creditor is final); *In re* La. World Exposition Inc., 832 F.2d 1391, 1396 (5th Cir. 1987) (holding that an order finally determining an adversary proceeding is appealable); *In re* Lift & Equip. Serv., Inc., 816 F.2d 1013, 1015–16 (5th Cir. 1987) (explaining that an order recognizing a creditor's security interest is final).

[93] *See*, *e.g.*, *In re* Wood & Locker, Inc., 868 F.2d 139, 144 (5th Cir. 1989) ("We therefore hold that given the clear mandate of Bankruptcy Rule 7054, no appeal may be taken from a bankruptcy court order that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties in an adversary proceeding absent Rule 54(b) certification—even if the order would be considered final if it arose in another context."); *In re* Tex. Extrusion Corp., 844 F.2d 1142, 1155 (5th Cir. 1988) ("order approving a disclosure statement is not a final order for purposes of appeal but instead is an interlocutory order"); S.C. of Okaloosa, Inc. v. Sunnyside Timber LLC, 81 Fed. Appx. 840, 841 (5th Cir. 2003) ("The order granting the motion to enforce a settlement agreement was interlocutory.").

IV. Procedural Rules

The procedural rules governing an appeal from the bankruptcy court to the district court are contained in rules 8001-8020 in the Federal Rules of Bankruptcy Procedure.[94] Many federal district courts also have local rules applicable to bankruptcy appeals. Of note, the Judicial Conference of the United States' Advisory Committees on Bankruptcy Rules has proposed a substantial package of amendments designed to conform these rules to the Federal Rules of Appellate Procedure.

A. The Notice of Appeal

Bankruptcy appeals move quickly.[95] The expedited nature of these appeals begins with the time to file a notice of appeal—fourteen days.[96] The notice of appeal must (i) comply with the Official Form (Form No. 35), (ii) contain the names of the parties to the judgment and the names, addresses, and telephone numbers of the parties' attorneys, and (iii) be submitted with the required fee.[97] A notice of cross-appeal must be filed within fourteen days of the date on which the first notice of appeal is filed.[98] A premature notice of appeal is treated as if it were filed on the date of the entry of judgment.[99] The notice of appeal should be filed with the bankruptcy court clerk; however, if the notice of appeal is "mistakenly" filed with the district court, the notice of appeal is considered filed in the bankruptcy court on the date it is filed in the district court.[100]

As in an ordinary federal appeal, the time to perfect an appeal may be extended upon the filing of specific post-judgment motions. If a party files a motion to amend or make additional findings under Rule 7052, a motion to alter or amend the judgment or for new trial under Rule 9023, or for relief under Rule 9024, "the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding."[101] A prematurely filed notice of appeal is "ineffective" until the bankruptcy court enters an order disposing of the last outstanding post-judgment motion.[102]

The filing of a notice of appeal divests the bankruptcy court of jurisdiction over the matter being appealed.[103] If the appeal, however, involves an interlocutory order, the bankruptcy court is not divested of jurisdiction over the matter on appeal.[104]

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[94] To expedite an appeal, the district court may suspend any of the rules except Rule 8001, 8002, and 8013. FED. R. BANKR. P. 8019.

[95] *See* FED. R. BANKR. P. 8002 advisory committee's note ("The shortened time is specified to obtain prompt appellate review, often important to the administration of a case under the Code.").

[96] FED. R. BANKR. P. 8002(a).

[97] FED. R. BANKR. P. 8001(a).

[98] FED. R. BANKR. P. 8002(a).

[99] *Id*.

[100] *Id*.

[101] FED. R. BANKR. P. 8002(b).

[102] *Id*.

[103] *In re* Transtexas Gas Corp., 303 F.3d 571, 578–79 (5th Cir. 2002).

[104] *In re* U.S. Abatement Corp., 39 F.3d 563, 567 (5th Cir. 1994).

B. Interlocutory Appeals

To appeal an interlocutory order, a party must file a notice of appeal in compliance with Rule 8001(a) and a motion for leave to appeal.[105] A motion for leave to appeal must contain: (i) a statement of facts; (ii) a statement of the issues to be presented on appeal and the relief sought; (iii) a statement of why leave to appeal should be granted; and (iv) a copy of the order the party seeks to appeal.[106] The appellee has fourteen days to file an opposition to the motion for leave to appeal.[107] The clerk of the bankruptcy court will transmit "the notice of appeal, the motion for leave to appeal, and any answer" to the motion after the time to file an answer has passed.[108] The bankruptcy clerk may not necessarily follow this timing and may transmit the notice of appeal and motion for leave to appeal before the time to answer has passed. In that case, the appellee should file its answer in the district court within the fourteen-day window provided by Rule 8003(a). Neither section 158(a)(3) nor Rule 8003 require the bankruptcy court to certify the case for interlocutory appeal. The decision about whether an interlocutory appeal should go forward rests with the district court.

Rule 8003(c) provides a safety valve if the appellant files a notice of appeal but does not file the required motion for leave to appeal. Under Rule 8003(c), the district court may (i) grant leave to appeal even without a motion for leave to appeal on file, or (ii) order the appellant to file a motion for leave.[109]

Although section 158 does not specify the criteria for determining whether to grant leave to hear an interlocutory appeal in a particular case, many courts have adopted by reference the standard set forth in 28 U.S.C. § 1292(b), which dictates the circumstances under which courts of appeals may accept interlocutory appeals from district courts.[110] Under section 1292(b), an interlocutory appeal may be granted when (1) the order appealed from involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) an immediate appeal from the order would materially advance the ultimate termination of the litigation[111] In contrast to the new direct appeal provision, even if one of the section 1292(b) factors is satisfied, leave to appeal is not appropriate.[112]

District courts are guided by the basic policy that appellate review should be postponed until after the entry of final judgment, and that "exceptional circumstances" must exist that warrant an interlocutory appeal.[113] "Interlocutory appeals are not favored because

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[105] FED. R. BANKR. P. 8001(b).

[106] FED. R. BANKR. P. 8003(a).

[107] *Id*.

[108] FED. R. BANKR. P. 8003(b).

[109] FED. R. BANKR. P. 8003(c).

[110] *See* Ichinose v. Homer Nat'l Bank, 946 F.2d 1169, 1177 (5th Cir. 1991) (assuming without deciding that the section 1292(b) test applies).

[111] *See* 28 U.S.C. § 1292(b) (2006).

[112] *See* Atl. Textile Grp., Inc. v. Neal, 191 B.R. 652, 653–54 (E.D. Va. 1996) (all three parts of test must be satisfied for leave to be appropriate); *see also In re* IBI Sec. Serv., Inc. v. Nat'l Westminster Bank USA, 174 B.R. 664, 670–71 (E.D.N.Y. 1994) (an issue of first impression in the Second Circuit, which qualified under the second prong, was insufficient to warrant interlocutory review).

[113] Powers v. Montgomery, No. 3:97-CV-1736-P, 1998 U.S. Dist. LEXIS 4784, at *7 (N.D. Tex. Apr. 1, 1998) ("Leave to appeal a bankruptcy court's interlocutory order should be granted only in circumstances which justify overriding the general policy of not allowing such appeals."); *In re* Hunt Int'l Res. Corp., 57 B.R. 371, 372 (N.D. Tex. 1985).

they interfere with the overriding goal of the bankruptcy system, namely, the [expeditious] resolution of pressing economic difficulties."[114]

An order in an adversary proceeding disposing of less than all of the parties or claims is not final.[115] In that circumstance, using the interlocutory appeal procedure would be appropriate. However, a better approach may be the filing of Rule 7054 motion making the interlocutory order final "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[116]

C. Record and Issue Designations

Within fourteen days of filing the notice of appeal or the district court's granting of a motion for leave to appeal, the appellant must file "a designation of the items to be included in the record on appeal and a statement of the issues to be presented" on appeal.[117] The record and issue designations can be filed as a single document or separately. Within fourteen days of the filing of the appellant's record and issue designations, the appellee may file a designation of additional items to be included in the record on appeal.[118] In a cross-appeal, the appellee as cross-appellant must file issue and record designation within fourteen days of the filing of the appellant's record and issue designations.[119] The cross-appellee then has fourteen days to file a designation of additional items to be included in the record on appeal.[120]

The appellate record consists of the items designated by the parties, the notice of appeal, the judgment, order, or decree on appeal, any opinion, findings of fact or conclusions of law.[121] The record may only consist of items that were before the bankruptcy court.[122] The party designating items for inclusion in the record must provide a copy of those items to the bankruptcy clerk.[123] A party designating a hearing transcript for inclusion in the record must promptly make arrangements with the court reporter for the preparation and filing of the transcript.[124] Both parties are responsible for making sure the appellate record is complete.[125]

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[114] *Powers*, 1998 U.S. Dist. LEXIS 4784, at *5; *see also* Katchen v. Landy, 382 U.S. 323, 328 (1966); *In re* Durensky, 519 F.2d 1024, 1028 (5th Cir. 1975); *In re* Hayes Bankr., 220 B.R. 57, 59 (N.D. Iowa 1998) ("[D]istrict courts exercise this discretionary power of [interlocutory] review with care, and with an eye toward safeguarding the bankruptcy court's role as the initial and in some respects primary forum for the adjudication of bankruptcy disputes.").

[115] *See In re* Wood & Locker, Inc., 868 F.2d 139, 146 (5th Cir. 1989) (holding that "because the bankruptcy court's grant of summary judgment did not adjudicate all of the claims or the rights and liabilities of all of the parties in the adversary proceeding below, the parties' failure to obtain Rule 54(b) certification left the order interlocutory in nature").

[116] *See* FED. R. BANKR P. 7054; *In re Wood & Locker, Inc.*, 868 F.2d at 143–44 ("[N]o appeal may be taken from a bankruptcy court order that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties in an adversary proceeding absent Rule 54(b) certification—even if the order would be considered final if it arose in another context."); DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1034 & n.9 (5th Cir. 1982) (characterizing section 1292(b) as more demanding than Rule 54(b)).

[117] FED. R. BANKR. P. 8006.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *See In re* Saco Local Dev. Corp., 13 B.R. 226, 229 (Bankr. D. Me. 1981) (holding that matters not presented to the court prior to issuance of the order being appealed could not be included in the record).

[123] FED. R. BANKR. P. 8006.

[124] *Id*.

If a party fails to take the necessary steps to ensure that the record is complete, it cannot complain about the absence of particular items from the record.[126]

Once the appellate record is complete, the bankruptcy clerk is required to transmit the record to the district court.[127] Upon transmission of the record to the district court, the district clerk will docket the appeal and notify the parties that the appeal has been docketed.[128]

Parties may dispute record designations by filing a motion to strike the opposing party's record designations. It is unclear what authority the bankruptcy court has to rule on such motions. First, under Rule 8006, the bankruptcy court has no discretion in determining the scope of the record.[129] Second, under the divestiture rule, the bankruptcy court lacks jurisdiction over the appeal once the notice of appeal is filed.[130]

Noncompliance with Rule 8006 is not jurisdictional but may lead to dismissal of the appeal.[131] When a party fails to timely designate the issues on appeal but does designate the record and timely file its appellant's brief, the district court abuses its discretion in dismissing the appeal.[132] An issue on appeal is waived if not listed in the designation of issues.[133]

The Fifth Circuit recently addressed the significance of issue designations in the context of a direct appeal in *Smith v. H.D. Smith Wholesale Drug Co. (In re McCombs)*.[134] The Court began its discussion of issue designations reaffirming its prior holding that the failure to designate an issue under Rule 8006—even if that issue was raised in the bankruptcy court and included in appellate briefing at the district court—waives that issue on appeal to the Fifth Circuit.[135] Addressing that rule's application in the direct-appeal context for the first time, the Court held that because the procedural rules governing appeals apply with equal force to direct appeals, the issue-designation requirement likewise applies.[136] An appealing party must either

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[125] *In re* Ichinose, 946 F.2d 1169, 1173–74 (5th Cir. 1991).

[126] *Id*.

[127] FED. R. BANKR. P. 8007(b).

[128] *Id*.

[129] *See* FED. R. BANKR. P. 8006 ("The record on appeal shall include the items so designated by the parties. . . ."); *In re Ichinose*, 946 F.2d at 1173 ("The record on appeal will include the items designated by both parties.").

[130] *See In re* Transtexas Gas Corp., 303 F.3d 571, 579 (5th Cir. 2002); *but see In re* Carlson, 247 B.R. 754, 756 (Bankr. N.D. Ill. 2000) ("That [bankruptcy] judge does retain, however, some limited authority to act in aid of the appeal process. Questions concerning what items should be included in the designation of record can be resolved in aid of the appeals process."); *In re* Schwinn Bicycle Co., 204 B.R. 13, 16 (Bankr. N.D. Ill. 1997) ("some limited power is retained to determine issues concerning what items should be included in the designation of record"); *In re* Barrick Grp., Inc., 100 B.R. 152, 154 (Bankr. D. Conn. 1989) ("While the filing of a notice of appeal generally divests a bankruptcy court of jurisdiction to proceed with respect to matters raised by the appeal, . . . actions in aid of appeal are not beyond its [bankruptcy court's] authority. . . . Such actions include those intended to ensure that the district court is afforded a complete understanding of the proceedings in the bankruptcy court. I therefore conclude that the bankruptcy court should determine in the first instance whether a disputed item in a designation of record on appeal played any part in its deliberations. . . .").

[131] FED R. BANKR. P. 8001(a).

[132] *See In re* CPDC, Inc., 221 F.3d 693, 700–01 (5th Cir. 2000); *see also* Smoker v. Hill & Assocs., Inc., 204 B.R. 966, 970 (N.D. Ind. 1997) (declining to dismiss appeal in which appellant timely filed its brief but did not file its designation of record or issues).

[133] *See In re* GGM, P.C., 165 F.3d 1026, 1032 (5th Cir. 1999).

[134] 659 F.3d 503 (5th Cir. 2011).

[135] 659 F.3d at 510 (party identified different issues in its appellate briefing than contained in the Rule 8006 designation).

[136] *Id*. at 511.

timely file a Rule 8006 issue designation or file the issue designation required by Rule 6 within fourteen days of the Fifth Circuit's decision to allow the direct appeal to proceed.[137]

D. Briefing the Appeal

Under the Federal Rules of Bankruptcy Procedure, the appellant's brief is due within fourteen days of the docketing of the appeal.[138] The appellee's brief is due within fourteen days of service of the appellant's brief.[139] In a cross-appeal, the appellee's brief should contain the response to the appellant's brief as well as the arguments relevant to the cross-appeal.[140] The appellant's reply brief is due within fourteen days of service of the appellee's brief.[141] In a cross-appeal, the appellee may file a reply brief in support of the cross-appeal within fourteen days of the service of the appellant's reply brief.[142] Supplemental briefs may only be filed with leave of court.[143]

The appellant's brief must contain: (i) a table of contents and authorities; (ii) a statement regarding jurisdiction; (iii) a statement of issues presented and the standard of review; (iv) a statement of the case and statement of facts; (v) summary of argument; and (vi) argument and authorities.[144] The appellee's brief must include the same sections, except that a statement regarding jurisdiction, statement of the case, and a statement of the issues is not required "unless the appellee is dissatisfied with the statement of the appellant."[145] In preparing the appellate briefs, it is important to keep in mind that under Rule 8013, the district court cannot set aside factual findings unless they are clearly erroneous, and the district court must defer to the bankruptcy court with regard to the credibility of the witnesses. The principal briefs are limited to fifty pages, and any reply brief cannot exceed twenty-five pages.[146]

E. Stays Pending Appeal

Rule 8005 allows the bankruptcy court or district court to issue a stay pending appeal, approve a supersedeas bond, or grant "other relief pending appeal."[147] Any such motion must first be presented to the bankruptcy court.[148] In adversary proceedings, Federal Rule of Civil Procedure 62 automatically stays enforcement of the judgment for fourteen days.[149]

A district court's judgment on appeal is automatically stayed for fourteen days.[150] The district court may stay its judgment pending appeal for thirty days and may extend that

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[137] *Id*.

[138] FED. R. BANKR. P. 8009(a)(1).

[139] FED. R. BANKR. P. 8009(a)(2).

[140] *Id*.

[141] FED. R. BANKR. P. 8009(a)(3).

[142] *Id*.

[143] *Id*.

[144] FED. R. BANKR. P. 8010(a)(1)(A)–(E).

[145] FED. R. BANKR. P. 8010(a)(2).

[146] FED. R. BANKR. P. 8010(c).

[147] FED. R. BANKR. P. 8005.

[148] *Id*.

[149] FED. R. BANKR. P. 7062.

[150] FED. R. BANKR. P. 8017(a).

time period "for cause shown."[151] A stay pending appeal can continue until the case has been resolved by the court of appeals if the appellant notices an appeal to the court of appeals before a previously granted stay expires.[152] The district court has authority to require the posting of security as a condition of granting a stay pending appeal.[153] These rules do not affect the court of appeals' power to issue a stay or preserve the status quo pending appeal.[154]

F. Oral Argument

Rule 8012 states that oral argument will occur "in all cases unless the district judge ... determine[s] that oral argument is not needed."[155] If you think oral argument will be useful, it is advisable to include a statement regarding oral argument in your principal brief.[156] The court will decide the case on the briefs and record if "(1) the appeal is frivolous; (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."[157] As a practical matter, very few bankruptcy appeals to the district court will be argued orally.

V. Appeals to the Court of Appeals

In an ordinary (*i.e.*, nondirect) appeal to the court of appeals, refer to Federal Rule of Appellate Procedure 6. Rule 6 distinguishes cases in which the district court has exercised its original jurisdiction from those in which it has exercised its appellate jurisdiction under section 158.[158] When the district court has exercised its original jurisdiction, the appeal "is taken as any other civil appeal under these rules."[159] In contrast, when the district court has exercised its appellate jurisdiction, Rule 6 requires additional procedural steps and addresses issues unique to bankruptcy appeals from the district court or bankruptcy appellate panel.[160] You should not assume that the district clerk or the court of appeals' clerk is aware of these distinctions. The notice of appeal in either case is due within thirty days of entry of judgment.[161]

If a party files a timely motion for rehearing under Federal Rule of Bankruptcy Procedure 8015, the time to appeal runs from the entry of any order disposing of the motion for rehearing.[162] A premature notice of appeal is considered timely filed on the date the district court overrules the motion for rehearing.[163] In appeals from a district court judgment issued under the district court's appellate jurisdiction, the appellant must file – within fourteen days

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[151] FED. R. BANKR. P. 8017(b).

[152] *Id.*

[153] *Id*.

[154] FED. R. BANKR. P. 8017(c).

[155] FED. R. BANKR. P. 8012.

[156] *See id.* ("Any party shall have an opportunity to file a statement setting forth the reason why oral argument should be allowed.").

[157] *Id.*

[158] *See* FED. R. APP. P. 6.

[159] FED. R. APP. P. 6(a).

[160] *See* FED. R. APP. P. 6(b).

[161] FED. R. APP. P. 4(a)(1).

[162] FED. R. APP. P. 6(b)(2)(A)(i).

[163] *Id*.

of filing the notice of appeal – record and issue designations with the circuit clerk.[164] The appellee may file a designation of additional items to be included in the record on appeal within fourteen days of the service of appellant's record and issue designations.[165] The appellate record will contain: (i) the designated items; (ii) the district court proceedings; and (iii) a certified docket sheet from the district court.[166]

The court of appeals' jurisdiction (except in direct appeals and certified interlocutory appeals) is grounded in section 158(d)(1): "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section."[167] Thus, the court of appeals can only review final judgments from the district court unless (i) a party obtains certification under section 1292(b), or (ii) the court of appeals agrees to hear a direct appeal under section 158(d)(2).

The finality of the district court's judgment is affected by the relief ordered (*e.g.,* rendition versus remand). The flexible standard for finality discussed *supra* at pp. 119-20 likewise applies to appeals under section 158(d).[168] The Fifth Circuit uses a two-step inquiry to decide whether a judgment is final under section 158(d). First, the bankruptcy court's order must be final.[169] If the order is final, the court then turns to whether any remand by the district court requires "extensive further proceedings."[170] "[W]hen a district court sitting as a court of appeals in bankruptcy remands a case to the bankruptcy court for significant further proceedings, the remand order is not 'final' and therefore not appealable under § 158(d)."[171] Whether the district court's judgment is final turns on whether the remand requires ministerial (entry of judgment) or judicial functions (further fact finding).[172] "But an interlocutory appeal may gain finality at the district court level if the district court's order leaves nothing for the bankruptcy court to do but enter the final order."[173]

VI. Conclusion

This article has provided an overview of the unique procedural rules and some of the difficult jurisdictional questions that can arise in a bankruptcy appeal. These rules are generally designed to expedite the briefing and consideration of a wide variety of final and interlocutory bankruptcy court orders. These rules require swift action and careful consideration of requirements such as record and issue designations not required in other federal appeals. Congress has enacted a procedure that allows parties to seek direct appellate review in the courts of appeals when specified criteria are satisfied. This procedure is increasingly being used to resolve unsettled questions and to bring bankruptcy litigation to a more efficient conclusion. It is possible that in the coming years many of the Federal Rules of

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[164] FED. R. APP. P. 6(b)(2)(B)(i).

[165] FED. R. APP. P. 6(b)(2)(B)(ii).

[166] FED. R. APP. P. 6(b)(2)(B)(iii).

[167] 28 U.S.C. § 158(d)(1) (2006).

[168] *See In re* Orr, 180 F.3d 656 (5th Cir. 1999).

[169] *In re* Greene Cnty. Hosp., 835 F.2d 589, 595 (5th Cir. 1988).

[170] *Id*.

[171] *In re* Nichols, 21 F.3d 690, 692 (5th Cir. 1994).

[172] *In re* Aegis Specialty Mktg., 68 F.3d 919, 921 (5th Cir. 1995).

[173] *In re Greene Cnty. Hosp.*, 835 F.2d at 591 n.9.

Bankruptcy Procedure will be amended to conform these rules to the Federal Rules of Appellate Procedure.