1 Bankruptcy Law Manual § 2:48 (5th ed.)

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Hon. Joan N. Feeney,* Hon. Michael G. Williamson,** and Michael J. Stepan, Esq.***

Chapter 2. Jurisdiction; Venue; Procedure; Jury Trials; Standing; Appeals

§ 2:48. Appeals—Where to appeal

References

West's Key Number Digest

West's Key Number Digest, Bankruptcy 2041.1
West's Key Number Digest, Bankruptcy 3761

Treatises and Practice Aids

Aaron, Bankruptcy Law Fundamentals §§ 3:20, 3:21
Steinberg, Bankruptcy Litigation § 9:47 (2d ed.)
Drake, Bankruptcy Practice for the General Practitioner § 4:14 (3d ed.)
Williams, Bankruptcy Practice Handbook § 19:8 (2d ed.)
Friedland, Commercial Bankruptcy Litigation § 12:1 (2d ed.)

At the first level of appeal from a bankruptcy court order or decision, the appellant has a decision to make, at least in some circuits. The appellant must decide whether to appeal to the district court in which the bankruptcy judge sits or to appeal to the Bankruptcy Appellate Panel if one is established in the circuit and the district court in which the bankruptcy court sits[1] has opted into the Bankruptcy Appellate Panel process. This first level of appeal is unique to bankruptcy appeals. An appellant needs to be familiar with the differences between appeal to the district court and appeal to the Bankruptcy Appellate Panel if one is available.

In the 1978 Bankruptcy Code, Congress provided for the establishment of Bankruptcy Appellate Panels but only the Ninth Circuit established one that continued to operate.[2] Thus, before 1994, all appeals from bankruptcy courts, other than those arising in the Ninth Circuit and for a brief period of time in the First Circuit, had to be heard in the district court in which the bankruptcy judge sat.[3] In 1994, in order to encourage more circuits to establish Bankruptcy Appellate Panels, Congress passed amendments to § 158(b) of Title 28. Section 158(b) was amended to state that the circuit council in each of the circuits "shall" establish a Bankruptcy Appellate Panel unless the circuit council determined that there were insufficient judicial resources available or that the establishment of the panel would result in undue delay or increased cost to parties in bankruptcy cases.[4]

Several circuit councils made the requisite findings and determined not to establish Bankruptcy Appellate Panels. However, Bankruptcy Appellate Panels were newly established in the First, Second, Sixth, Eighth, and Tenth Circuits.[5] The Second Circuit disbanded its Bankruptcy Appellate Panel soon thereafter, leaving functioning Bankruptcy Appellate Panels in only five of the 11 circuits. Further, the 1994 Amendments provided that, in order for a Bankruptcy Appellate Panel in a particular district to hear appeals, the district court within that district had to opt into the bankruptcy appellate panel process.[6] Many of them failed to do so, and, accordingly, even in circuits where appellate panels are established, there may be districts that are not participating, and the only route for the first level of appeal is to the federal district court.

If an appeal is to be taken in a circuit where there is a Bankruptcy Appellate Panel (and in a district which is participating in the appellate panel), the appellant has the right to make an election, either to have the case heard by the appellate panel or by the district court.[7] The statute and the rules provide clearly that, if a notice of appeal is filed and the appellant does not make an election to have the case heard by the district court, the appeal is docketed with the Bankruptcy Appellate Panel and will be heard by that panel and not by the district court.[8] Since both parties must consent to an appeal being heard by an appellate panel,[9] an appellee who does not wish to have the appeal heard by the Bankruptcy Appellate Panel has 30 days following the service of the notice of appeal to file a notice of election that the case be heard in the district court, in which case the appeal will be heard in district court.[10]

The Bankruptcy Appellate Panels, where they have been established, are made up of bankruptcy judges who are appointed for designated terms by the judicial councils in the circuits.[11] An appeal to the Bankruptcy Appellate Panel will be heard by a three-judge panel of the bankruptcy judges who are members of the appellate panel.[12] A bankruptcy judge may not sit on a panel considering the decision of a bankruptcy judge in that appellate panel member's district.[13] This, of course, is to avoid the appearance of impropriety of having a bankruptcy judge decide an appeal from a decision of a close colleague.

Three advantages of appealing to a Bankruptcy Appellate Panel are often cited. First, the appeal, especially on matters raising issues of bankruptcy law, will be heard by judges who are specialists in bankruptcy law and who are familiar with bankruptcy processes. Second, Bankruptcy Appellate Panels deal exclusively with bankruptcy appeals, unlike district courts which have a wide array of other matters to address. Thus, appeals to Bankruptcy Appellate Panels are generally more expeditious, although this can vary from district to district and from panel to panel. Third, all Bankruptcy Appellate Panels have established rules of procedure which are publicly available and they all have a designated administrative staff, which means that administration of the appeal will be expeditiously processed.[14]

Because less than half of the circuits have established Bankruptcy Appellate Panels, important districts within some circuits that have Bankruptcy Appellate Panels did not and do not participate, and an appeal to a Bankruptcy Appellate Panel can be taken only with the consent (express or implied) of all parties to the appeal, many appeals in bankruptcy cases are heard at the first level of appeal by the district courts where the bankruptcy judge is situated.[15] The rules and procedures relating to such appeals vary from district court to district court, and it is important to know the local culture with respect to district court bankruptcy appeals.[16]

In recognition that a two-step level of appeal, first to the district court or the Bankruptcy Appellate Panel, and then to the court of appeals, is often wasteful and can, in fact, render an appeal right a practical nullity, the 2005 Act amended 28 U.S.C.A. § 158(d) by adding subsection (2).[17] Whereas, subsection (1) still provides for appeal to the court of appeals from all final judgments, orders, and decrees "entered by a district court or a bankruptcy appellate panel," subsection (2) provides that a court of appeals has jurisdiction over appeals described in the first sentence of subsection (a) of § 158 if the bankruptcy court, the district court, or the Bankruptcy Appellate Panel, on its own motion or on request by a party, or all the appellants or appellees acting jointly, certify either that: (1) the decision involves a question as to which there is no controlling applicable circuit or Supreme Court precedent and involves a matter of public importance; (2) the decision involves a question of law requiring resolution

of conflicting decisions; or (3) an immediate appeal "may materially advance the progress of the case or proceeding."[18] The bankruptcy court, the district court, or the Bankruptcy Appellate Panel "shall" make the certification if the court or panel, on its own motion, or on a request of a party, determines one of the three alternative grounds exist, or receives a request from a majority of the appellants and a majority of the appellees, if any, to make the certification.[19] In any case, the court of appeals may decline to give its permission for a direct appeal.[20]

Section 158(d)(2) further provides that, once made, the parties may supplement the certification.[21] Any request for certification under 28 U.S.C.A. § 158(a)(2)(B) must be made within 60 days after entry of the decision, and there is no automatic stay of further bankruptcy court proceedings unless one of the involved courts issues a stay.[22] Some courts have certified questions especially relating to interpretation of provisions of the 2005 Act to the circuit courts for decision.[23]

Once the first level of appeal is completed and either the district court or the Bankruptcy Appellate Panel has ruled, a party may appeal as a matter of right in most cases to the court of appeals in the circuit where the bankruptcy court sits. Section 158(d)(1) of Title 28 states that "[t]he Courts of Appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by a district court or Bankruptcy Appellate Panel sitting as an appellate court in a bankruptcy case.[24] Section 158(d)(1) makes no mention of appeals from bankruptcy court orders which are interlocutory in nature. Thus, most courts of appeals initially held that courts of appeals had no jurisdiction to hear appeals in a bankruptcy case involving an interlocutory order unless the district court sat as a trial court (for example, after having withdrawn the reference) and not as an appellate court.[25] Section 158(d) was considered the exclusive source of court of appeals jurisdiction over orders of district courts reviewing a bankruptcy ruling. This changed when the Supreme Court decided the case of *Connecticut Nat. Bank v. Germain*.[26] *Germain* involved an appeal from a bankruptcy court order which denied a motion to strike a demand for a jury trial. That order was clearly interlocutory, but the district court nonetheless decided the appeal and affirmed. The Second Circuit dismissed the appeal from the district court decision, holding that the exclusive method of appeal in bankruptcy cases is by way of what is now § 158(d)(1).[27] A court of appeals could exercise jurisdiction over interlocutory orders in bankruptcy only when the district court issued an order after having withdrawn the reference and not when the district court acted in its capacity as an appellate court reviewing a decision of a bankruptcy court. The Supreme Court reversed and held that there is an alternative method of taking an appeal from a district court order affirming or reversing a bankruptcy court decision that was interlocutory in nature. Section 1292 specifically permits a court of appeals to accept an appeal from a decision of a district court that is interlocutory in nature if the district court makes a finding that the case involves a controlling question of law as to which there is substantial ground for difference of opinion and certifies that an immediate appeal from the order may materially advance the ultimate termination of the litigation.[28] In *Germain*, the Supreme Court held that § 1292 is an alternate route for accessing the court of appeals on appeal from a decision of the district court,[29] subject, of course, to the appellants making a timely application for interlocutory review and the district court having made the requisite findings set forth in § 1292 in its order.[30]

In the interest of avoiding extensive litigation on several particular issues, certain orders are never appealable to the court of appeals or to the Supreme Court. Any decision to abstain or not to abstain from hearing a proceeding under 28 U.S.C.A. § 1334(c)—other than a decision not to abstain where mandatory abstention under 28 U.S.C.A. § 1334(c)(2) is applicable—is not reviewable by the court of appeals or the Supreme Court.[31] A decision to abstain or not to abstain from hearing the bankruptcy case under § 305 of the Code is also not appealable to the court of appeals or the Supreme Court.[32] In addition, an order to remand, or a decision not to remand, a claim or cause of action that has been removed from a nonbankruptcy forum is not reviewable by the court of appeals or the Supreme Court.[33] That is, with respect to the foregoing, there is one level of appeal; either to the district court or the Bankruptcy Appellate Panel, but not beyond. In addition to these statutory limitations on the right to appeal, some courts suggest that a party can waive the right to appeal, specifically by not filing timely written objections to a bankruptcy court's proposed findings of fact and conclusions of law.[34]

Footnotes

* United States Bankruptcy Judge, District of Massachusetts. Chief Judge, United States First Circuit Bankruptcy Appellate Panel. Fellow, American College of Bankruptcy.

** Chief United States Bankruptcy Judge, Middle District of Florida. Fellow, American College of Bankruptcy.

*** Career Law Clerk to the Honorable Michael E. Ridgway, Chief United States Bankruptcy Judge, District of Minnesota and Former Career Law Clerk to the Honorable Nancy C. Dreher.

1 See 28 U.S.C.A. § 158(a) (requiring that an appeal be "taken only to the district court for the judicial district in which the bankruptcy judge is serving"). See also In re HealthTrio, Inc., 653 F.3d 1154, 55 Bankr. Ct. Dec. (CRR) 70 (10th Cir. 2011) (BAP lacks jurisdiction to hear an appeal from a post-transfer order of a bankruptcy court in another district).

2 See 28 U.S.C.A. § 158(b), pre-1994 Amendments. The First Circuit established a Bankruptcy Appellate Panel in 1979, but disbanded it soon thereafter in 1982.

3 See 28 U.S.C.A. § 158(a), pre-1994 Amendments.

4 28 U.S.C.A. § 158(b)(1), as amended in 1994 ("The judicial council of a circuit shall establish a bankruptcy appellate service … unless the judicial council finds that … "). Each federal circuit has a judicial council that consists of circuit judges, district judges, and in some cases, bankruptcy judges. The judicial council administers the business of the circuit under the umbrella of the Judicial Conference of the United States Courts. 28 U.S.C.A. § 332.

5 For information on the practices in the Bankruptcy Appellate Panels, see www.bap1.uscourts.gov, www.ca6.uscourts.gov/internet/bap/bap.htm, www.ca8.uscourts.gov/newbap/bapFrame.html, www.bap9.uscourts.gov, and www.bap10.uscourts.gov.

6 28 U.S.C.A. § 158(b)(6) provides that "[a]ppeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district court judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district." For example, the District of South Dakota did not participate in the Eighth Circuit Bankruptcy Appellate Panel until 2008, long after the Eighth Circuit Bankruptcy Appellate Panel was formed (see www.ca8.uscourts.gov). See the various circuit court websites cited in footnote 4 for information relating to the established Bankruptcy Appellate Panels.

7 28 U.S.C.A. § 158(c)(1).

8 28 U.S.C.A. § 158(c)(1). Prior to the amendments to the Bankruptcy Rules effective December 1, 2014, an election to have an appeal heard by the district court, rather than the bankruptcy appellate panel, required the filing of a statement of election contained in a separate writing. Fed. R. Bankr. P. 8001(e)(1). This resulted in unproductive litigation over the form of the statement of election and the dismissal of many appeals based on noncompliance with the Rule. See, e.g., In re Hupp, 383 B.R. 476 (B.A.P. 9th Cir. 2008) (debtor did not meet the separate document requirement when it asked for a direct appeal, but stated in the same document that, if the circuit court did not accept direct appeal, appellant sought review in the district court); In re Ioane, 227 B.R. 181, 33 Bankr. Ct. Dec. (CRR) 628 (B.A.P. 9th Cir. 1998) (statement of election filed after notice of appeal not timely even though notice of appeal was premature and was not deemed filed until date of judgment, which was after statement of election); In re Sullivan Jewelry, Inc., 218 B.R. 439, 441, 32 Bankr. Ct. Dec. (CRR) 185, 39 Collier Bankr. Cas. 2d (MB) 949, Bankr. L. Rep. (CCH) P 77662 (B.A.P. 8th Cir. 1998) (a statement in a notice of appeal that the appeal was "to the United States District Court" did not qualify as an election necessary for the appeal to be heard in the district court because it was not contained

in a separate writing; "By requiring such a separate document, the rule implements Congressional intent that appeals to the bankruptcy appellate panel be the default process and the statutory language that the right to proceed with an appeal to the district court be made by an actual 'election' knowingly and informatively made.")

Bankruptcy Rule 8005(a)(1) now provides that to elect to have an appeal heard by the district court, a party must file a statement of election that conforms substantially to the appropriate Official Form. Fed. R. Bankr. P. 8005(a)(1). The referenced Official Form is Form B 17A, titled "Notice of Appeal and Statement of Election." This form combines, in one form, the notice of appeal with the Bankruptcy Rule 8001(e)(1) election. The notice of appeal is filed with the clerk of the bankruptcy court within the time allowed by Bankruptcy Rule 8002. Fed. R. Bankr. P. 8003(a)(1). If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel is required to note the date on which it was received and then transmit the notice of appeal to the clerk of the bankruptcy court. The notice of appeal is deemed to have been filed with the clerk of the bankruptcy court on the date so noted. Fed. R. Bankr. P. 8002(a)(4).

9 28 U.S.C.A. § 158(c)(1) ("Subject to subsections (b) [re-election to the district court] and (d)(2) [re-certification for direct appeal], each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—(A) the appellant elects at the time of filing the appeal; or (B) any other party elects, not later than 30 days after service of notice of appeal; to have such appeal heard by the district court."). See In re Wade, 926 F.3d 447, 67 Bankr. Ct. Dec. (CRR) 79, Bankr. L. Rep. (CCH) P 83410 (7th Cir. 2019), cert. denied, 140 S. Ct. 1293, 206 L. Ed. 2d 374 (2020) (debtors' failure to file a petition for permission to take a direct appeal to the Court of Appeals required dismissal of debtors' appeal).

10 28 U.S.C.A. § 158(c)(1)(B).

11 28 U.S.C.A. § 158(b)(1), (3).

12 28 U.S.C.A. § 158(b)(5).

13 28 U.S.C.A. § 158(b)(5).

14 See the websites listed in note 4 to obtain information regarding local rules and the internal operating procedures of the Bankruptcy Appellate Panels.

15 Some district courts have referred bankruptcy appeals to magistrate judges for final decisions, but most courts have held this practice is not authorized. See Virginia Beach Federal Sav. and Loan Ass'n v. Wood, 901 F.2d 849, Bankr. L. Rep. (CCH) P 73339 (10th Cir. 1990) (magistrates are not permitted to enter final decisions in bankruptcy appeals); Minerex Erdoel, Inc. v. Sina, Inc., 838 F.2d 781, 17 Bankr. Ct. Dec. (CRR) 511, 18 Collier Bankr. Cas. 2d (MB) 510, Bankr. L. Rep. (CCH) P 72225 (5th Cir. 1988) (appeal of bankruptcy court decision referred to magistrate judge by the district court was unauthorized); Matter of Elcona Homes Corp., 810 F.2d 136, 15 Bankr. Ct. Dec. (CRR) 775, 16 Collier Bankr. Cas. 2d (MB) 327, Bankr. L. Rep. (CCH) P 71591 (7th Cir. 1987) (there is no authority for such a referral).

But see Hall v. Vance, 887 F.2d 1041, 19 Bankr. Ct. Dec. (CRR) 1641, Bankr. L. Rep. (CCH) P 73127 (10th Cir. 1989) (bankruptcy appeal may be referred to magistrate for advisory hearing, but district court must retain the power to make a final determination); In re Continental Airlines, Inc., 218 B.R. 324 (D. Del. 1997), aff'd, 134 F.3d 536, 32 Bankr. Ct. Dec. (CRR) 49, 30 Collier Bankr. Cas. 2d (MB) 391, Bankr. L. Rep. (CCH) P 77614 (3d Cir. 1998), as amended, (Mar. 23, 1998) (referral permitted where referral was merely for purpose of obtaining advisory report to aid the court's decision on the matter).

16 See local rules and the internal operating procedures of the district court where the appeal is pending. Many district courts post the information on their websites.

17 28 U.S.C.A. § 158(d)(2); Fed. R. Bankr. P. 8006. In re McKinney, 457 F.3d 623, Bankr. L. Rep. (CCH) P 80665 (7th Cir. 2006), held that provisions authorizing direct appeal to the court of appeals are inapplicable to bankruptcy cases filed before October 17, 2005. See also In re Berman, 344 B.R. 612, Bankr. L. Rep. (CCH) P 80656 (B.A.P. 9th Cir. 2006) (same holding). See also Official Form 24 (Certification By All Parties).

18 28 U.S.C.A. § 158(d)(1); (2)(A). The difference in wording between subsection (1), which refers to "final decisions, judgments, orders, and decrees" and subsection (2)(A), which refers to judgments, orders, and decrees referenced in the first sentence of § 158(a), was found to be significant in In re Ransom, 380 B.R. 809, 59 Collier Bankr. Cas. 2d (MB) 479, Bankr. L. Rep. (CCH) P 81087 (B.A.P. 9th Cir. 2007), where the Ninth Circuit Bankruptcy Appellate Panel decided an appeal from an interlocutory order on the merits and certified the bankruptcy court decision to the circuit court; the Ninth Circuit affirmed. In re Ransom, 577 F.3d 1026, Bankr. L. Rep. (CCH) P 81549 (9th Cir. 2009), aff'd, 562 U.S. 61, 131 S. Ct. 716, 178 L. Ed. 2d 603, 54 Bankr. Ct. Dec. (CRR) 34, 64 Collier Bankr. Cas. 2d (MB) 1123, Bankr. L. Rep. (CCH) P 81914 (2011). The BAP read § 158(d)(2)(A) as clearly permitting certification of an interlocutory order, and the Ninth Circuit accepted the interlocutory appeal without discussion of the certification issue. On certiorari to the Supreme Court, it also affirmed on the merits without mention of the certification issue. Ransom v. FIA Card Services, N.A., 562 U.S. 61, 131 S. Ct. 716, 178 L. Ed. 2d 603, 54 Bankr. Ct. Dec. (CRR) 34, 64 Collier Bankr. Cas. 2d (MB) 1123, Bankr. L. Rep. (CCH) P 81914 (2011). See also In re Pacific Lumber Co., 584 F.3d 229, 52 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81642 (5th Cir. 2009) (setting forth standards for certification of a direct appeal; accepting certification); Blausey v. U.S. Trustee, 552 F.3d 1124, 61 Collier Bankr. Cas. 2d (MB) 333, Bankr. L. Rep. (CCH) P 81405 (9th Cir. 2009) (accepted certification and decided, as a matter of first impression, important "means test" issue raised in the 2005 Act; also discussing at length procedure for obtaining direct review under 28 U.S.C.A. § 158(d)(2)); In re OCA, Inc., 552 F.3d 413, 421 (5th Cir. 2008) ("The text of the statute grants the courts of appeals 'jurisdiction of appeals described in the *first sentence* of subsection (a).' … The first sentence of section 158(a) grants district courts jurisdiction over bankruptcy appeals from interlocutory orders or decrees if granted leave by the district court … Since interlocutory orders are included in the first sentence of subsection (a) and all of the other jurisdictional prerequisites of section 158(d)(2) are met, this court has jurisdiction to hear OCA's direct appeal from [the interlocutory order of] the bankruptcy court."). But see In re Ortiz, 665 F.3d 906, 55 Bankr. Ct. Dec. (CRR) 255 (7th Cir. 2011) (court of appeals did not have jurisdiction to hear appeals from the bankruptcy orders as final judgments because the bankruptcy judge did not have authority to issue final judgments on the claims, which involved a state privacy law).

19 28 U.S.C.A. § 158(d)(2)(B). But see In re Wagstaff Minnesota, Inc., 2011 WL 5085100 (D. Minn. 2011) (certification for direct appeal denied where the "correctness or not of the Bankruptcy Court's decision … is not 'patently obvious'").

20 28 U.S.C.A. § 158(d)(2)(A). Given their heavy caseloads, circuit courts could have been expected to be extremely reluctant to accept direct appeals. See, e.g., In re Davis, 512 F.3d 856 (6th Cir. 2008) (citing Weber v. U.S., 484 F.3d 154, Bankr. L. Rep. (CCH) P 80915 (2d Cir. 2007)) (Sixth Circuit denies request for certification); Weber v. U.S., 484 F.3d 154, Bankr. L. Rep. (CCH) P 80915 (2d Cir. 2007) (taking guidance from other discretionary jurisdiction statutes and rules (i.e., 28 U.S.C.A. § 1292(b) and Fed. R. Civ. P. 23(f), the court found no conflict among the courts within its jurisdiction and determined that review by the district court would be beneficial); In re Berman, 2007 WL 43973 (Bankr. D. Mass. 2007) (court determines that none of the requisite findings can be made and refuses to certify, but reminds pro se litigants that certification can also be had at request of all parties). Nonetheless, the circuit courts have regularly accepted such cases for review. See, e.g., Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009) (accepting direct appeal via bankruptcy court's certification).

21 28 U.S.C.A. § 158(d)(2)(C). Bankruptcy Rules 8006 and 8004(e) implement the certification process and prescribe which court makes the required certification. "The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, the matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the

judgment, order, or decree for which direct review sought. The matter is pending in the district court or BAP thereafter." Fed. R. Bankr. P. 8006(b). Further, Bankruptcy Rule 8004(e) provides that "[i]f leave to appeal an interlocutory order or decree is required under 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) satisfies the requirement" for leave to appeal. Fed. R. Bankr. P. 8004(e). See also In re Weaver, 542 F.3d 257, 50 Bankr. Ct. Dec. (CRR) 156 (1st Cir. 2008) (stating that the request for certification was procedurally defective for two reasons: the appellant had not perfected the appeal by filing a notice of appeal as required by Bankruptcy Rule 8001(f)(1) [predecessor to Bankruptcy Rule 8006(a)] and no authorization for direct appeal had been sought or obtained pursuant to 28 U.S.C.A. § 158(d)(2)(A); the court of appeals cautioned that a direct appeal is governed by Fed. R. Bankr. P. 8001(f), 28 U.S.C.A. § 158, and uncodified § 1233(b) of the 2005 Act); In re Frye, 389 B.R. 87 (B.A.P. 9th Cir. 2008) (Bankruptcy Rule 8001(f)(2) [predecessor to Bankruptcy Rule 8006(b)] adopts a bright-line test to determine which court is involved: it is the bankruptcy court until an appeal is docketed in the district court or BAP; a petition for certification filed with the BAP before the appeal is docketed is erroneously filed); Simon & Schuster, Inc. v. Advanced Marketing Services Inc., 360 B.R. 429 (Bankr. D. Del. 2007) (discussing the interplay between 28 U.S.C.A. § 1292(b) and Fed. R. Bankr. P. 8001(f) [predecessor to Fed. R. Bankr. P. 8006(a)], addressing leave to appeal an interlocutory order, and 28 U.S.C.A. § 158(d); delaying ruling on the request for certification until the district court decided whether to grant the request for leave to appeal an interlocutory order).

In In re Scotia Pacific Co., LLC, 508 F.3d 214, 49 Bankr. Ct. Dec. (CRR) 12, 58 Collier Bankr. Cas. 2d (MB) 1508, Bankr. L. Rep. (CCH) P 81053 (5th Cir. 2007), the Fifth Circuit ruled the requirement that the court in which the case is pending grant the certification is purely technical, accepted certification, and decided an appeal on an important 2005 Act issue even though the district court had jumped the gun and certified the appeal while the case was still technically pending in the bankruptcy court. Because the appellee was relying on a rule and not a statute, the court said it could excuse the error. See Kontrick v. Ryan, 540 U.S. 443, 453, 124 S. Ct. 906, 157 L. Ed. 2d 867, 42 Bankr. Ct. Dec. (CRR) 100, 50 Collier Bankr. Cas. 2d (MB) 969, Bankr. L. Rep. (CCH) P 80031 (2004). See also In re Ransom, 380 B.R. 809, 59 Collier Bankr. Cas. 2d (MB) 479, Bankr. L. Rep. (CCH) P 81087 (B.A.P. 9th Cir. 2007), aff'd, 577 F.3d 1026 (9th Cir. 2009), aff'd, 131 S.Ct. 716 (2011) (BAP may certify appeal of interlocutory order notwithstanding its affirmance of bankruptcy court's decision).

22 28 U.S.C.A. § 158(d)(2)(D) (stay) and (E) (timeliness).

In accordance with Bankruptcy Rule 8006(g), within 30 days after the date the certification has been filed, a timely appeal has been taken under Bankruptcy Rule 8003 or 8004, and the notice of appeal has become effective under Bankruptcy Rule 8002, a request for permission to take a direct appeal to the Court of Appeals must be filed with the circuit clerk in accordance with Fed. R. App. P. 6(c). Fed. R. Bankr. P. 8006(g).

23 See, e.g., In re Virissimo, 332 B.R. 208, 54 Collier Bankr. Cas. 2d (MB) 1728, Bankr. L. Rep. (CCH) P 80385, Bankr. L. Rep. (CCH) P 80441 (Bankr. D. Nev. 2005) (certifying issue of whether limit on amount of homestead exception imposed by 11 U.S.C.A. § 522(p) applied to Nevada debtor).

24 28 U.S.C.A. § 158(d)(1) and(d)(2). See, e.g., In re McKinney, 610 F.3d 399, Bankr. L. Rep. (CCH) P 81793 (7th Cir. 2010) (appeal from a district court order affirming bankruptcy court order overruling an objection to debtor's Chapter 13 plan, ordering a further hearing to determine the amount of a creditor's claim, and not confirming the plan; appeal dismissed for lack of jurisdiction; the order was not final within the meaning of 28 U.S.C.A. § 158(d)(1)); In re Comdisco, Inc., 538 F.3d 647, 50 Bankr. Ct. Dec. (CRR) 102, 60 Collier Bankr. Cas. 2d (MB) 14 (7th Cir. 2008) (bankruptcy court order denying defendants' motion to terminate a trust (which would have resulted in dismissal of the action) was not a final order; appeal dismissed).

25 See, e.g., In re Colon, 941 F.2d 242, 244, 21 Bankr. Ct. Dec. (CRR) 1632, Bankr. L. Rep. (CCH) P 74210 (3d Cir. 1991) ("Thus we may entertain appeals only from final orders of the district courts exercising appellate jurisdiction over final decisions of the bankruptcy courts."); In re Lomas Financial Corp., 932 F.2d 147, 150, Bankr. L. Rep. (CCH) P 73933 (2d Cir. 1991) (court of appeals lacks jurisdiction over nonfinal orders

originating in bankruptcy court by reason of 28 U.S.C.A. § 158(a),(b), and(d)); Matter of Behrens, 900 F.2d 97, 20 Bankr. Ct. Dec. (CRR) 623, 23 Collier Bankr. Cas. 2d (MB) 483, 16 Fed. R. Serv. 3d 705 (7th Cir. 1990) (on appeal, district court held that bankruptcy court order finding violation of discharge injunction was not final; thus, district court's affirmance was not appealable); In re Allen, 896 F.2d 416, 20 Bankr. Ct. Dec. (CRR) 437 (9th Cir. 1990) (the court of appeals has appellate jurisdiction only when both the district court and the bankruptcy court orders are final). But see Matter of First Financial Development Corp., 960 F.2d 23, 26, 22 Bankr. Ct. Dec. (CRR) 1388, 26 Collier Bankr. Cas. 2d (MB) 1423 (5th Cir. 1992) ("Because the orders of the bankruptcy court, and hence the district court, are clearly interlocutory, we have no jurisdiction under § 158(d). Because the district court did not certify its decision on appeal, we have no jurisdiction under § 1292(b).").

26 Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

27 Germain v. Connecticut Nat. Bank, 926 F.2d 191, 21 Bankr. Ct. Dec. (CRR) 661, 24 Collier Bankr. Cas. 2d (MB) 1236, Bankr. L. Rep. (CCH) P 73824 (2d Cir. 1991), judgment rev'd, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

28 28 U.S.C.A. § 1292(b). See also In re Marvel Entertainment Group, Inc., 140 F.3d 463, 470, 32 Bankr. Ct. Dec. (CRR) 479, 39 Collier Bankr. Cas. 2d (MB) 1315, Bankr. L. Rep. (CCH) P 77670 (3d Cir. 1998) ("Because this is an appeal from a district court exercising original jurisdiction in bankruptcy, our jurisdiction stems from 28 U.S.C.A. § 1291, not from 28 U.S.C.A. § 158(d).").

29 Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

30 28 U.S.C.A. § 1292(b) (application for interlocutory review must be made within 10 days after entry of the order). See In re Firstmark Corp., 46 F.3d 653, 657, 26 Bankr. Ct. Dec. (CRR) 804, Bankr. L. Rep. (CCH) P 76384 (7th Cir. 1995) ("In the bankruptcy context, courts of appeals have jurisdiction over three types of appeals: in our discretion, questions certified for appeal by the district court under 28 U.S.C.A. § 1292(b); appeals from all final decisions pursuant to 28 U.S.C.A. § 158(d); or collateral orders under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1225–26, 93 L. Ed. 1528 (1949), doctrine.").

31 28 U.S.C.A. § 1334(c) and (d). Before the Bankruptcy Reform Act of 1994, a decision not to abstain when the right to mandatory abstention under 28 U.S.C.A. § 1334(c)(2) was alleged was not reviewable by the court of appeals or by the Supreme Court. The 1994 Amendments made these decisions not to mandatorily abstain fully appealable. See discussion of appeals from abstention orders on a mandatory basis, § 2:20.

32 11 U.S.C.A. § 305(c). See discussion of appeals from an order abstaining from bankruptcy cases, § 2:20.

33 See 28 U.S.C.A. § 1452(b). But see Mt. McKinley Ins. Co. v. Corning Inc., 399 F.3d 436, 44 Bankr. Ct. Dec. (CRR) 67 (2d Cir. 2005) (where the decision to remand is based on mandatory abstention, circuit court can review the order). See discussion of appeals from orders to remand in § 2:15.

34 In re Nantahala Village, Inc., 976 F.2d 876, 23 Bankr. Ct. Dec. (CRR) 1025, Bankr. L. Rep. (CCH) P 74944, 18 U.C.C. Rep. Serv. 2d 1027 (4th Cir. 1992). The decision is based on the provisions of Fed. R. Bankr. P. 9033, which require a party to object to a bankruptcy court report and recommendations in a noncore proceeding. In *Nantahala*, the Fourth Circuit held that a party cannot simply ignore the report and recommendations of the bankruptcy court, not object to them at the district court level, and then challenge them on appeal to the court of appeals after the district court adopts them.

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