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## 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<sup>1</sup> review by two appellate courts (the district court or Bankruptcy Appellate Panel<sup>2</sup> 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 were 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

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<sup>1</sup> 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).

<sup>2</sup> 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); FED.R. BANKR.P. 8001(e). As a result, the focus of this paper is on appeals to the district 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.

## **I. 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. 28 U.S.C. § 158(a)(1)-(3); 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)).

The court of appeals has jurisdiction over all appeals of final judgments entered under section 158(a) and (b). 28 U.S.C. § 158(d). 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. *See* 28 U.S.C. § 1292(b).

### **B. The New Direct Appeal Provision**

In 2005, as a part of the Bankruptcy Abuse and Consumer Protect Act of 2005, Congress amended section 158(d) to provide for a direct appeal from the bankruptcy court to the court of appeals. This new provision took effect 180 days after the enactment (October 17, 2005) and applies only to bankruptcy cases filed after on or after October 17, 2005. Bankruptcy Abuse and Consumer Protect Act of 2005, § 1501(a). Section 158(d)(2) “will allow parties, under certain circumstances, to bypass intermediate appellate review by a district court or a bankruptcy appellate panel of a bankruptcy judgment or order, including an interlocutory order, and obtain direct circuit court review of the bankruptcy court decision.” 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); *id.* at 7 (stating that section 158(d) “expand[s] the jurisdiction of the circuit court to allow it to hear . . . interlocutory orders of the bankruptcy court”). 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. *See Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 252-54 (1992); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1156 n.18 (5th Cir. 1988). 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.”

H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005).<sup>3</sup>

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

The bankruptcy court, district court, or Bankruptcy Appellate Panel “shall” make the certification if (i) on its own or on a party’s motion the court determines that *any* of the above circumstances are satisfied, or (ii) the court receives a request by a majority of appellants and majority of appellees to make the certification. Thus, these courts have no discretion to decline to certify an appeal if one of the certification requirements is satisfied or a majority of appellants and a majority of appellees agree that certification is appropriate. A party seeking certification under this provision must file such a motion within 60 days of the judgment. 28 U.S.C. § 158(d)(2)(E). Keep in mind that the notice of appeal is due within 10 days – not 60 days. *See* FED. R. BANKR. P. 8002.

Court of appeals level review is discretionary. The appellant, therefore, must obtain the court of appeals’ authority to pursue a direct appeal. 28 U.S.C. 158(d)(2)(A). To obtain review by the court of appeals, the appellant must file a petition for permission to appeal in the court of appeals under Federal Rule of Appellate Procedure 5. Bankruptcy Abuse and Consumer Protection Act of 2005, § 1233(b)(3). That petition must (i) “be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and (ii) have attached a copy of the certification.” *Id.*, § 1233(b)(4). Section 158(d) does not create any standards applicable to the court of appeals’ decision to dispose of the petition for permission to appeal. Accordingly, in seeking the court of appeals’ authorization to pursue a direct appeal, consult section 1292(b) decisions from the appropriate circuit.

In deciding whether to pursue a direct appeal, it useful to consider both the legislative history as well as the usual strategic considerations in requesting the court of appeals to decide an appeal subject only to the court’s *discretionary* review (including the court of appeals’ caseload and track-record in granting interlocutory-appeal requests). *See* H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005) (stating that “[t]he courts of appeals are encouraged to authorize direct appeals in these circumstances [where

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<sup>3</sup> 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).

grounds for certification exist]”). It is also useful to consider the relatively few number of bankruptcy appeals decided by the courts of appeals annually in determining whether the court will have any interest in taking the appeal. *See, e.g., Judicial Business of the United States Courts*, at Table B-6 (stating that as of September 30, 2004, only 75, or 1.5%, of all appeals pending in the Fifth Circuit were bankruptcy appeals).

One of the more interesting aspects of the new direct appeal provision is that it grants the court of appeals jurisdiction over direct appeals from interlocutory bankruptcy orders under a much less rigid standard than in interlocutory appeals in ordinary civil appeals. *See* 28 U.S.C. § 158(d)(2) (granting the court of appeals jurisdiction over appeals “described in the first sentence of subsection (a)”). Currently, the court of appeals’ jurisdiction over the appeal of a district court’s interlocutory order in a bankruptcy case is limited by section 1292(b). *See Connecticut Nat’l Bank*, 503 U.S. at 252-54.<sup>4</sup> Under 28 U.S.C. § 1292(b), the ordinary interlocutory appeal provision, a party must establish all of the following: (i) the order being appealed involves a controlling question of law; (ii) as to which there is substantial ground for difference of opinion; and (iii) an immediate appeal must materially advance the termination of the litigation. 28 U.S.C. § 1292(b). In contrast, under the bankruptcy direct appeal provision, only one of the three elements for certification must be satisfied, and the parties can jointly certify that one of those requirements is met. 28 U.S.C. § 158(d)(2)(A)-(B). The requirements for certification under section 158(d)(2) are arguably less restrictive as well.

One other inconsistency that may arise as a result of the enactment of the direct appeal provision involves appeals to the court of appeals from the district court when the district court has exercised its original, as opposed to appellate jurisdiction, under section 157(d). *See* 28 U.S.C. 157(d) (empowering the district court to withdraw the reference to the bankruptcy court). The new direct appeal provision applies only to appeals under section 158(d). When the district court has exercised its original jurisdiction, the court of appeals jurisdiction is grounded in either section 1291 (final judgment) or section 1292(b) (interlocutory appeals). *See* 28 U.S.C. §§ 1291, 1292(b); *In re Cajun Elec. Power Co-Op, Inc.*, 119 F.3d 349, 353 (5th Cir. 1997) (“Because the district court did not sit as a bankruptcy appeals court but heard the case itself as a court of bankruptcy, 28 U.S.C. § 158(d) does not confer appellate jurisdiction on this court. Instead, our jurisdiction is governed by 28 U.S.C. §1291.”). Thus, interlocutory appeals from the district court when the court has exercised its original jurisdiction must satisfy the more rigorous interlocutory appeal provision contained in section 1292(b). *See* 28 U.S.C. § 1292(b).

The new direct appeal provision also provides procedural guidance. A request for certification must be made no later than 60 days after the entry of the judgment, order, or decree sought to be appealed. 28 U.S.C. § 158(d)(2)(E). Keep in mind that while a party may have 60 days to seek direct appeal, any notice of appeal of a bankruptcy court order must be filed within 10 days of entry. FED. R. BANKR. P. 8001. Until formal rules are adopted, section 1233(b) of

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<sup>4</sup> In contrast, under current law, a bankruptcy appellate panel’s interlocutory order is not subject to review under section 1292(b). *See Lievsay v. Western Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 662 (9th Cir. 1997). Under the new direct appeal provision, any interlocutory bankruptcy court order (whether by the district court or the bankruptcy appellate panel) may be appealed directly to the court of appeals.

the Act establishes temporary procedural rules for direct appeals to the court of appeals. Bankruptcy Abuse and Consumer Protect Act of 2005, § 1233. These rules make clear that a court may certify an appeal “only with respect to matters pending in the respective [court].” *Id.*, § 1233(b)(2). An appeal under section 158(d) “does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective [court] . . . issues a stay of such proceeding pending the appeal.” 28 U.S.C. § 158(d)(2)(D).

Two courts have thus far applied the new statute. In *In re Salazar*, 2006 WL 827842 (Bank. S.D. Tex. 2006), the bankruptcy court was presented with a novel Chapter 13 question – whether “ineligible” debtors who did not first seek credit counseling (as the revised Bankruptcy Code requires) are entitled to the protection of the Bankruptcy Code’s automatic-stay provision – and on its own certified the case for direct appeal to the Fifth Circuit. The bankruptcy court focused on the importance of the questions presented and the lack of authority on that question in the Fifth Circuit in opting certify a direct appeal under section 158(d)(2)(A)(i):

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

2006 WL 827842, at \* 11-12. The bankruptcy court, however, cautioned the parties that “certification in no way alters a party’s ordinary requirements in filing a notice of appeal” and also reminded the parties that a supplement, containing a short statement of the basis of the bankruptcy court’s certification may be appropriate. *Id.* at 12. In *In re Virissimo*, 332 B.R. 208 (Bankr. D. Nev. 2005), the bankruptcy court, again on its own, certified the following question to the Ninth Circuit: Do the 2005 revisions to the Bankruptcy Code, which limit the amount of the homestead available to those who have owned their homestead less than 1215 days, apply to Nevada debtors? 332 B.R. at 209:

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

*Id.* Although the use of section 158(d) has thus far been limited to obtaining direct review of issues arising under the recent changes to the Bankruptcy Code, as time passes, parties will likely use this provision for direct appeals of long-standing, but unanswered questions, and other

important bankruptcy issues.

## II. 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 10 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. *See infra* at pp. 8-9 (discussing the procedure for pursuing an interlocutory appeal).

Finality in the bankruptcy context involves a different inquiry than in an ordinary federal appeal. *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.”).<sup>5</sup> 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.

*Texas Comptroller of Pub. Accounts v. Transtexas Gas Corp. (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

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<sup>5</sup> 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. Co-Op, Inc.*, 69 F.3d 746, 747-48 (5th Cir. 1995).

resources has influenced this Court and other courts of appeals to view finality in bankruptcy proceedings in a more practical and less technical light.

*England v. Fed. Deposit Ins. Corp. (In re England)*, 975 F.2d 1168, 1171 (5th Cir. 1992). 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.” *In re Bartee*, 212 F.3d 277, 282 (5th Cir. 2000) (citations and internal quotations omitted); see *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (containing a comprehensive discussion of finality for purposes of appeal).

The Fifth Circuit has addressed whether particular orders are final in numerous cases. 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 (5<sup>th</sup> Cir. 1999) (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.*, 119 F.3d at 154 (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. Co-Op, Inc.*, 69 F.3d at 748 (holding that 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).”); *Moody v. Empire Life Ins. Co. (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 Louisiana 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 (5th Cir. 1987) (explaining that an order recognizing a creditor’s security interest is final).

The Fifth Circuit has held that other types of orders do not satisfy even the relaxed finality standard. See, e.g., *Comm. of Unsecured Creditors v. Interfirst Bank Dallas, N.A. (In re Wood & Locker, Inc.)*, 868 F.2d 139, 144 (5th Cir. 1999) (“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 Texas 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 (5th Cir. 2003) (“The order granting the motion to enforce a settlement agreement was interlocutory.”).

### **III. 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.<sup>6</sup> Many federal district courts, such as the Northern District of Texas, also have local rules applicable to bankruptcy appeals.

#### **A. The Notice of Appeal**

Bankruptcy appeals move quickly. *See* FED. R. BANKR. P. 8002, Advisory Committee Note (“The shortened time is specified to obtain prompt appellate review, often important to the administration of a case under the Code.”). The expedited nature of these appeals begins with the time to file a notice of appeal – 10 days. FED. R. BANKR. P. 8002(a) (“The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from.”). 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. FED. R. BANKR. P. 8001(a). “Any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever last expires.” *Id.* A premature notice of appeal is treated as if it were filed on the date of the entry of judgment. *Id.* 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. *Id.* With a few limited exceptions, a party may obtain an extension of time to file the notice of appeal. FED. R. BANKR. P. 8002(c).

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.” FED. R. BANKR. P. 8002(b). A prematurely filed notice of appeal is “ineffective” until the bankruptcy court enters an order disposing of the last outstanding post-judgment motion. *Id.*

The filing of a notice of appeal divests the bankruptcy court of jurisdiction over the matter being appealed. *In re Transtexas Gas Corp.*, 303 F.3d at 578-79. If the appeal, however, involves an interlocutory order, the bankruptcy court is not divested of jurisdiction over the matter on appeal. *In re United States 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. FED. R. BANKR. P. 8001(b). A motion for leave

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<sup>6</sup> To expedite an appeal, the district court may suspend any of the rules except Rule 8001, 8002, and 8013. FED. R. BANKR. P. 8019.

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. FED. R. BANKR. P. 8003(a). The appellee has 10 days to file an answer to the motion for leave to appeal. *Id.* 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. FED. R. BANKR. P. 8003(b). 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 10-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. FED. R. BANKR. P. 8003(c).

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. *See Ichinose v. Homer Nat'l Bank*, 946 F.2d 1169, 1177 (5th Cir. 1991) (assuming without deciding that the § 1292(b) test applies). 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. *See* 28 U.S.C. § 1292(b). 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. *See Atlantic Textile Group, 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. Service, Inc.*, 174 B.R. 664, 670 (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).

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. *Powers v. Montgomery*, NO. CIV.A.3:97-CV-1736-P, 1998 WL 159944, at \*2 (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 Resources Corp.*, 57 B.R. 371, 372 (N.D. Tex. 1985). “Interlocutory appeals are not favored because they interfere with the overriding goal of the bankruptcy system, namely, the expeditions resolution of pressing economic difficulties.” *Powers*, 1998 WL 159944, at \*2; *see also Katchen v. Lundy*, 382 U.S. 323, 328 (1966); *In re Durenky*, 519 F.2d 1024, 1028 (5th Cir. 1975); *In re Hayes Bankruptcy*, 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.”).

An order in an adversary proceeding disposing of less than all of the parties or claims is not final. *See In re Wood & Locker*, 868 F.2d at 145 (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”). 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.” *See* FED. R. BANKR. P. 7054; *In re Wood & Locker*, 868 F.2d at 144 (“[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 Indu., Inc.*, 677 F.2d 1030, 1034 & n.9 (5th Cir. 1982) (characterizing section 1292(b) as more demanding than Rule 54(b)).

### C. Record and Issue Designations

Within 10 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. FED. R. BANKR. P. 8006. The record and issue designations can be filed as a single document or separately. Within 10 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. *Id.* In a cross-appeal, the appellee as cross-appellant must file issue and record designation within 10 days of the filing of the appellant’s record and issue designations. *Id.* The cross-appellee then has 10 days to file a designation of additional items to be included in the record on appeal. *Id.*

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. *Id.* The record may only consist of items that were before the bankruptcy court. *See In re Saco Local Dev. Corp.*, 13 B.R. 226, 229 (Bankr. D. Maine 1981) (holding that matters not presented to the court prior to issuance of the order being appealed could not be included in the record). The party designating items for inclusion in the record must provide a copy of those items to the bankruptcy clerk. *Id.* 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. *Id.* When a transcript has been designated, the party must provide the bankruptcy clerk a copy of the transcript within 5 days of the filing of the transcript. *Id.* Both parties are responsible for making sure the appellate record is complete. *In re Ichinose*, 946 F.2d at 1173. 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. *Id.*

Once the appellate record is complete, the bankruptcy clerk is required to transmit the record to the district court. FED. R. BANKR. P. 8007(b). Once the record is transmitted to the district court, the district clerk will docket the appeal and notify the parties that the appeal has been docketed. *Id.*

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. *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.”). Second, under the divestiture rule, the bankruptcy court lacks jurisdiction over the appeal once the notice of appeal is filed. *See In re Transtexas Gas Co.*, 303 F.3d at 579; *but see In re Carlson*, 247 B.R. 754, 756 (Bankr. N.D.Ill. 2000) (“That judge [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 appeal process.”); *In re Schwinn Bicycle Co.*, 204 B.R. 13, 16 (Bankr. N.D.Ill. 2000) (“some limited power is retained to determine issues concerning what items should be included in the designation of record”); *In re Barrick Group, 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 insure 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. . .”).

Noncompliance with Rule 8006 is not jurisdictional but may lead to dismissal of the appeal. FED R. BANKR. P. 8001(a). 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. *See In re CPDC, Inc.*, 221 F.3d 693, 701 (5th Cir. 2000); *see also Smoker v. Hill & Assocs., Inc.*, 204 B.R. 966, 970 (N.D. Ill. 1997) (declining to dismiss appeal in which appellant timely filed its brief but did not file its designation of record or issues). An issue on appeal is waived if not listed in the designation of issues. *See In re GGM, P.C.*, 165 F.3d 1026 (5th Cir. 1999). Accordingly, a party should err on the side of overinclusiveness in designating the issues for appeal.

#### **D. Briefing the Appeal**

Under the Federal Rules of Bankruptcy Procedure, the appellant’s brief is due within 15 days of the docketing of the appeal. FED. R. BANKR. P. 8009(a)(1). The appellee’s brief is due within 15 days of service of the appellant’s brief. FED. R. BANKR. P. 8009(a)(2). 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. *Id.* The appellant’s reply brief is due within 10 days of service of the appellee’s brief. FED. R. BANKR. P. 8009(a)(3). In a cross-appeal, the appellee may file a reply brief in support of the cross-appeal within 10 days of the service of the appellant’s reply brief. *Id.* Supplemental briefs may only be filed with leave of court. *Id.*

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. FED. R. BANKR. P. 8010(a)(1)(A)-(E). 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.” FED. R. BANKR. P. 8010(a)(2). 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. LBR 8010.2. The principal briefs are limited to 50 pages, and any reply brief cannot exceed 25 pages. FED. R. BANKR. P. 8010(c).

### **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.” FED. R. BANKR. P. 8005. Any such motion must first be presented to the bankruptcy court. *Id.* In adversary proceedings, Federal Rule of Civil Procedure 62 automatically stays enforcement of the judgment for 10 days. FED. R. BANKR. P. 7062.

A district court’s judgment on appeal is automatically stayed for 10 days. FED. R. BANKR. P. 8017(a). The district court may stay its judgment pending appeal for 30 days and may extend that time period “for cause shown.” FED. R. BANKR. P. 8017(b). 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. *Id.* The district court has authority to require the posting of security as a condition of granting a stay pending appeal. *Id.* These rules do not affect the court of appeals’ power to issue a stay or preserve the status quo pending appeal. FED. R. BANKR. P. 8017(c).

### **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.” If you think oral argument will be useful, it is advisable to include a statement regarding oral argument in your principal brief. *See* FED. R. BANKR. P. 8012 (“Any party shall have an opportunity to file a statement setting forth the reason why oral argument should be allowed.”). 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.” FED. R. BANKR. P. 8012. As a practical matter, very few bankruptcy appeals to the district court will be argued orally.

## **IV. 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. *See* FED. R. APP. P. 6. When the district court has exercised its original jurisdiction, the appeal “is taken as any other civil appeal under these rules.” FED. R. APP. P. 6(a). 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. *See* FED. R. APP. P. 6(b). 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 30 days of entry of judgment. FED. R. APP. P. 4(a)(1).

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. FED. R. APP. P. 6(b)(2)(A)(i). A premature notice of appeal is considered timely filed on the date the district court overrules the motion for rehearing. *Id.* In appeals from a district court judgment issued under the district court's appellate jurisdiction, the appellant must file – within 10 days of filing the notice of appeal – record and issue designations with the district clerk. FED. R. APP. P. 6(b)(2)(B)(i). The appellee may file a designation of additional items to be included in the record on appeal within 10 days of the service of appellant's record and issue designations. FED. R. APP. P. 6(b)(2)(B)(ii). The appellate record will contain: (i) the designated items; (ii) the district court proceedings; and (iii) a certified docket sheet from the district court. FED. R. APP. P. 6(b)(2)(B)(ii).

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.” 28 U.S.C. § 158(d)(1). 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 p. 6-7 likewise applies to appeals under section 158(d). *See In re Orr*, 180 F.3d at 656. 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. *In re Greene County Hosp.*, 835 F.2d 589, 595 (5th Cir. 1988). If the order is final, the court then turns to whether any remand by the district court requires “significant further proceedings.” *Id.* “[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).” *In re Nichols*, 21 F.3d 690, 692 (5th Cir. 1994). Whether the district court's judgment is final turns on whether the remand requires ministerial (entry of judgment) or judicial functions (further fact finding). *In re Aegis Specialty Mktg.*, 68 F.3d 919, 921 (5th Cir. 1995). “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.” *Greene County Hosp.*, 835 F.2d at 591 n.9.

## APPENDIX A

HOUSE OF REPRESENTATIVES

APRIL 8, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

**BANKRUPTCY ABUSE PREVENTION AND  
CONSUMER PROTECTION ACT OF 2005**

Mr. SENSENBRENNER, from the Committee on the Judiciary,  
submitted the following

**REPORT**

together with

DISSENTING VIEWS, ADDITIONAL DISSENTING VIEWS,  
AND ADDITIONAL MINORITY VIEWS

[To accompany S. 256]

*Sec. 1233. Direct Appeals of Bankruptcy Matters to Courts of Appeals.* Under current law, appeals from decisions rendered by the bankruptcy court are either heard by the district court or a bankruptcy appellate panel. In addition to the time and cost factors attendant to the present appellate system, decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value.

To address these problems, section 1233 of the Act amends section 158(d) of title 28 to establish a procedure to facilitate appeals of certain decisions, judgments, orders and decrees of the bankruptcy courts to the circuit courts of appeals by means of a two-step certification process. The first step is a certification by the bankruptcy court, district court, or bankruptcy appellate panel (acting on its own motion or on the request of a party, or the appellants and appellees acting jointly). Such certification must be issued by the lower court if: (1) the bankruptcy court, district court, or bankruptcy appellate panel determines that one or more of certain specified standards are met; or (2) a majority in number of the appellants and a majority in number of the appellees request certification and represent that one or more of the standards are met. The second step is authorization by the circuit court of appeals. Jurisdiction for the direct appeal would exist in the circuit court of appeals only if the court of appeals authorizes the direct appeal.

This procedure is intended to be used to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level, where the matter is one of public importance, where there is a need to resolve conflicting decisions on a question of law, or where an immediate appeal may materially advance the progress of the case or proceeding. The courts of appeals are encouraged to authorize direct appeals in these circumstances. While fact-intensive issues may occasionally offer grounds for certification even when binding precedent already exists on the general legal issue in question, it is anticipated that this procedure will rarely be used in that circumstance or in an attempt to bring to the circuit courts of appeals matters that can appropriately be resolved initially by district court judges or bankruptcy appellate panels.

## APPENDIX B

## **Jurisdictional Statute (28 U.S.C. § 158)**

- **Ordinary Appeals to the District Court or the Court of Appeals:**

(a) The district courts of the United States shall have jurisdiction to hear appeals

- (1) from final judgments, orders, and decrees;
- (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
- (3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(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.

- **“Direct Appeals” to the Court of Appeals:**

(d)(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that:

- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel

- (i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

**(ii)** receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

**(C)** The parties may supplement the certification with a short statement of the basis for the certification.

**(D)** An appeal under this paragraph 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 bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

**(E)** Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.