

DIRECT APPEALS FROM BANKRUPTCY COURTS TO THE COURTS OF APPEALS: THE EXPERIENCE AFTER TWO YEARS

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I. INTRODUCTION

Until recently, there was no way to appeal a bankruptcy case directly from a bankruptcy court to a court of appeals. Instead, the case had to be first appealed to the district court¹ or bankruptcy appellate panel.² Only after that court or BAP had ruled could the case be heard in the court of appeals.³ That changed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),⁴ which provides in some circumstances for direct review of bankruptcy court orders by the courts of appeals.⁵

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1. 28 U.S.C. § 158(a) (providing that district courts have jurisdiction to hear bankruptcy appeals) (available at <http://uscode.house.gov>).

2. 28 U.S.C. § 158(b) (providing for the establishment of Bankruptcy Appellate Panels) (available at <http://uscode.house.gov>). In the First, Sixth, Eighth, Ninth, and Tenth Circuits, bankruptcy appeals can go to BAPs instead of district courts. 6 *Collier Bankruptcy Practice Guide* ¶ 117.02[2] n. 24 (Asa S. Herzog & Lawrence P. King eds., Matthew Bender 2007). BAPs consist of bankruptcy judges from the bankruptcy court’s circuit. 28 U.S.C. § 158(b)(1). Because the majority of circuits handling bankruptcy appeals do not have BAPs, and because under the new direct appeal statute BAPs are treated the same as district courts handling bankruptcy appeals, this article will refer to district courts instead of to both district courts and BAPs.

3. 28 U.S.C. § 158(d)(1) (available at <http://uscode.house.gov>).

4. Pub. L. 109-8, 119 Stat. 23 (2005).

5. BAPCPA § 1233, now codified at 28 U.S.C. § 158(d)(2).

For years, many in the bankruptcy community sought direct appeals from bankruptcy courts to courts of appeals.⁶ Direct appeal proponents argued that the system of appeals by right from the bankruptcy court to the district court and then to the relevant court of appeals was inefficient for two reasons.⁷ First, district court decisions are not binding precedent, so there is increased uncertainty regarding the state of bankruptcy law. Second, the two appeals by right add delay and expense to the bankruptcy system.

Instead of abolishing district court review, BAPCPA, which was passed in 2005, added direct review of bankruptcy court orders by the courts of appeals, allowing a bankruptcy court (or a district court handling a bankruptcy appeal) to certify an appeal directly to the court of appeals.⁸ The appeals court can

6. See e.g. Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 Am. Bankr. L.J. 137, 141-47 (1997) (supporting a system of direct appeals); National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 719 (Oct. 20, 1997) (providing, in section 3.1.3, that “[t]he current system which provides two appeals . . . should be changed to eliminate the first layer of review”); Ltr. from Edith H. Jones, J., U.S. Ct. of Appeals for the 5th Cir., to Byron R. White, J., U.S. S. Ct. (ret.) & Chair, Comm. on Structural Alts. for the Fed. Cts. of App., *Bankruptcy Appeals and Fifth Circuit* (Nov. 6, 1998), <http://www.library.unt.edu/gpo/csafca/report/comments> (noting that the National Bankruptcy Review Commission’s recommendation of direct appeals was “strongly supported by every group in the bankruptcy community,” including “judges, lawyers, academics, [and] creditor and consumer groups”)[hereinafter Jones Letter]; Ltr. from M.O. Sigal, Jr., Chair, Bus. Bankr. Comm., ABA Bus. L. Sec., to Orrin Hatch, U.S. Sen., et al., *Bankruptcy Reform Act of 2001 (H.R. 333)—Direct Appeals Issue* (July 24, 2001) (indicating that ABA “strongly” supported direct appeals), <http://www.abanet.org/poladv/letters/107th/bankruptcy072401.html>.

7. See e.g. *Fairchild Aircraft, Inc. v. Campbell (In re Fairchild Aircraft Corp.)*, 220 B.R. 909, 917, 918 (Bankr. W.D. Tex. 1998) (recognizing that “[a] district court’s ruling on a bankruptcy appeal enjoys little more precedential weight than does the original bankruptcy decision itself,” and that appeals by right to district court and then to court of appeals “serve[] no practical purpose, and may actually be a detriment to the efficient administration of bankruptcy”); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 Am. Bankr. L.J. 525, 528-32 (1995) (discussing lack of precedential value for decisions and “troublesome” nature of two-appeal process); Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals* 28-39 (Fed. Jud. Ctr. 2000), [http://www.fjc.gov/public/pdf.nsf/lookup/BankrApp.pdf/\\$file/BankrApp.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/BankrApp.pdf/$file/BankrApp.pdf) (noting lack of binding precedent in bankruptcy law); Jones Letter, *supra* n. 6 (referring to “problems” that “involve the lack of *stare decisis* in bankruptcy, which leads to confusing and chaotic interpretations of the relevant law, and the high cost and delay imposed by multiple layers of bankruptcy appeals”).

8. 28 U.S.C. § 158(d)(2)(A).

then decide whether to accept the direct appeal.⁹ Absent a certification by the lower court and an acceptance by the court of appeals, however, the appeal still goes through the traditional two-tier process.

This article explains the direct appeal statute and considers how it has been applied in the two years since it was passed.

II. THE DIRECT APPEAL STATUTE DOES NOT APPLY TO BANKRUPTCIES FILED BEFORE OCTOBER 17, 2005.

BAPCPA was signed in April 2005, but most of its provisions—including the direct appeal provision—do not apply to bankruptcies filed before its October 17, 2005, effective date.¹⁰ The Seventh Circuit has held that this provision is jurisdictional.¹¹ So, even if the parties agree that a pre-October 17, 2005, case is subject to the direct appeal statute, the court of appeals cannot hear a direct appeal in that case.

Because bankruptcies can take years, not many bankruptcies filed after the effective date have been appealed. The number of cases involving the direct appeal statute is therefore relatively small. As more cases filed after the effective date are appealed, the direct appeal statute will likely be used more often.

III. LOWER COURT CERTIFICATION OF DIRECT APPEALS

There are two ways for the lower court¹² to certify a direct appeal. The lower court, acting on its own motion¹³ or a party's

9. *Id.*

10. *In re McKinney*, 457 F.3d 623, 624 (7th Cir. 2006); BAPCPA § 1501(a) (“Except as otherwise provided in this Act, this Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.”), now codified at 11 U.S.C. § 101 note.

11. *McKinney*, 457 F.3d at 624-25.

12. Because direct appeals in bankruptcy matters can come from bankruptcy courts, district courts, or BAPs, the legislative history uses the term “lower court” to refer to all three of those courts. H.R. Rpt. 109-31(1) (April 8, 2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 206 [hereinafter House Report].

13. In one of the first direct appeal cases, the court *sua sponte* certified a direct appeal of its order, but the parties never appealed the order. *See In re Virissimo*, 332 B.R. 208, 210 (Bankr. D. Nev. 2005) (certifying direct appeal); David Rosendorf, *No Appeal on*

request, can certify that

- The judgment or order involves a question of law as to which there is no controlling authority from the relevant court of appeals or the Supreme Court;
- The judgment or order involves a matter of public importance;
- The judgment or order involves a question of law requiring resolution of conflicting decisions; or
- An immediate appeal from the judgment or order may materially advance the case's progress.¹⁴

In addition, if both a majority of the appellants and a majority of the appellees request the lower court to certify a direct appeal, and they represent that the above-listed standards are met, then the lower court *must* certify the direct appeal.¹⁵

BAPCPA does not make clear whether the certification request should be made in the bankruptcy court or the district court. The interim bankruptcy rules, which most bankruptcy courts have adopted,¹⁶ provide that while the case is pending in the bankruptcy court, the certification request must be made in the bankruptcy court.¹⁷ After an appeal has been docketed in the district court, or the district court has allowed an interlocutory appeal under 28 U.S.C. § 158(a), the certification request must be made in the district court.¹⁸

Homestead Cap? ABI's BAPCPA Blog (Am. Bankr. Inst.), <http://bapcpa.blogspot.com> (Nov. 28, 2005, 3:07 p.m. EST) (noting that no appeal was filed in *Virissimo*).

14. 28 U.S.C. § 158(d)(2)(A). The statute says that if the requirements are met, the lower court "shall" certify the appeal, so it appears that the lower court does not have discretion to deny certification if the requirements are met. That is in keeping with the legislative history, which states that if the requirements are met, the "certification must be issued" by the lower court. House Report, *supra* n. 12, at 206.

15. 28 U.S.C. § 158(d)(2)(B).

16. *Berman v. Maney (In re Berman)*, 344 B.R. 612, 613 (9th Cir. BAP 2006).

17. Interim Fed. R. Bankr. P. 8001(f)(2).

18. *Id.*

A request for direct appeal certification must be made within sixty days after the judgment or order is entered.¹⁹ Direct appeals do not stay the proceedings in the lower court unless the lower court or the relevant court of appeals stays the proceedings pending appeal.²⁰

IV. PROCEDURES FOR REQUESTING CERTIFICATION AND PETITIONING FOR DIRECT APPEAL

The direct appeal process is two-fold, and requires approval from both the lower court and the court of appeals. If the lower court certifies a direct appeal, then the parties file a notice of appeal with the lower court²¹ and a petition with the court of appeals requesting permission to appeal.²² The appeals court then must grant the petition before a direct appeal is allowed.²³

BAPCPA provides temporary direct appeal procedures that are in effect until the Federal Rules of Appellate Procedure are amended.²⁴ Under the temporary rules, a party must file the petition requesting permission to appeal within ten days of the lower court's certification.²⁵ That could change under the amended Federal Rules of Appellate Procedure, so caution should be used. Until the federal rules are amended, current Federal Rule of Appellate Procedure 5—which governs appeals by permission in general—applies to BAPCPA direct appeals.²⁶

Both the certification request to the lower court and the petition for direct appeal to the court of appeals should include enough information to allow the court to determine whether to allow the direct appeal. The request and petition must include

19. 28 U.S.C. § 158(d)(2)(E).

20. *Id.* § 158(d)(2)(D).

21. Fed. R. Bankr. P. 8001(a); Interim Fed. R. Bankr. P. 8001(f)(1).

22. BAPCPA § 1233(b)(4)(A) (setting out procedural rules).

23. 28 U.S.C. § 158(d)(2)(A) (indicating that the appeal may proceed “if the court of appeals authorizes the direct appeal”).

24. BAPCPA § 1233(b)(1) (providing that the BAPCPA procedure is to apply “until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended”). The Federal Rules of Appellate Procedure apply to bankruptcy appeals at the courts of appeals. *Bankruptcy Practice Guide*, supra n. 2, at ¶ 117.02[3].

25. *Id.* at § 1233(b)(4)(A).

26. *Id.* at § 1233(b)(3).

- The facts necessary to understand the question presented;
- The question itself;
- The relief sought;
- Reasons showing why the direct appeal should be allowed and that it is authorized by a statute or rule; and
- A copy of the order complained of and any related opinion.²⁷

The other parties can oppose the request or petition, or they can file their own requests or petitions. These are due in the lower court within ten days of the original request and in the court of appeals within seven days of the original petition.²⁸

V. THE STANDARDS FOR A COURT OF APPEALS TO ACCEPT A DIRECT APPEAL

The direct appeal statute does not provide any standards for the court of appeals to use when deciding whether to accept a direct appeal, but the legislative history says that the appeals courts “are encouraged to authorize direct appeals” when the factors described above in Section III are met.²⁹ So far, only two circuits—the Second and the Seventh—have discussed the standards that they will apply in deciding whether to accept direct appeals. A summary of each approach follows.

27. Interim Fed. R. Bankr. P. 8001(f)(3)(C) (setting out requirements for certification request); Fed. R. App. P. 5(b)(1) (setting out requirements for direct appeal petition, which include a copy of the lower court’s direct appeal certification).

28. Interim Fed. R. Bankr. P. 8001(f)(3)(D) (relating to certification request); Fed. R. App. P. 5(b)(2) (relating to direct appeal petition).

29. House Report, *supra* n. 12, at 206.

A. *The Second Circuit's Approach*

In *Weber v. United States Trustee*,³⁰ the Second Circuit discussed at length when it would accept bankruptcy direct appeals. The court noted that this was a question of first impression among the circuits.³¹ To provide “guidance,”³² the court gave a detailed explanation of the policies behind the bankruptcy direct appeal statute and outlined its standards for accepting the appeals. The court admitted, however, that some of its discussion was dicta and that each Second Circuit panel is “free to authorize a direct appeal if they believe it would be consonant with Congress’s goals.”³³ While the Second Circuit’s opinion in *Weber* contains dicta and broad guidance, and is not binding on the other circuits, its detailed discussion of when bankruptcy direct appeals should be allowed will likely be considered—if not followed—by other circuits. So, it is worth examining the case in detail.

1. *The Facts in Weber*

In *Weber*, the question was whether a New York law that raised the homestead exemption applied retroactively.³⁴ The bankruptcy court held that the exemption was retroactive, and granted leave for a direct appeal.³⁵ The Second Circuit refused to accept the direct appeal, saying that, even if all of the statutory conditions for a direct appeal are met, it has “plenary authority to grant or deny leave to file a direct appeal.”³⁶

2. *The Analysis in Weber*

The *Weber* court looked to the statute’s text, the reasons why Congress passed the statute, and “jurisprudential

30. 484 F.3d 154 (2d Cir. 2007).

31. *Id.* at 157 (acknowledging that “[t]he scope of § 1233, which authorizes direct appeals under certain defined circumstances, is a matter of first impression”).

32. *Id.* at 158 (recognizing that “[l]egislative history confirms that Congress intended § 1233 to facilitate our provision of guidance on pure questions of law”).

33. *Id.* at 161.

34. *Id.* at 157.

35. *Id.*

36. *Id.* at 161.

considerations” to determine which standards to use when deciding whether to accept the appeal.³⁷

a. Analysis of the Text

Looking at the text, the court said that “[t]he focus of the statute is explicit: on appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation.”³⁸

b. Analysis of the Legislative History and the Rules

Looking to BAPCPA’s legislative history, the *Weber* court determined that Congress passed the direct appeal statute (1) to allow courts of appeals to give guidance on “pure questions of law” and (2) to allow appeals when the bankruptcy court’s judgment was “manifestly correct or manifestly erroneous.”³⁹

The court then considered cases interpreting two other provisions giving it discretionary jurisdiction: 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f).⁴⁰ The court said that § 1292(b), like the bankruptcy direct appeal statute, allows courts of appeals “to resolve controlling legal questions expeditiously” and “foster the development of coherent . . . precedent.”⁴¹ And the court noted that Rule 23(f) appeals are useful to review orders that, although not final judgments, “sound a ‘death knell’” for the case.⁴²

37. *Id.* at 158.

38. *Id.*

39. *Id.*

40. Section 1292(b) gives the courts of appeals discretion to accept interlocutory appeals if the district court certifies that the “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b) (available at <http://uscode.house.gov>). Rule 23, which addresses class actions, provides that a “court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order.” Fed. R. Civ. P. 23(f) (available at <http://uscode.house.gov>).

41. *Weber*, 484 F.3d at 159.

42. *Id.* (citing *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001)). Readers interested in the current state of the law in this area might consult Lori Irish

c. Analysis of Jurisprudential Considerations

In examining jurisprudential considerations, the *Weber* court said that, while “Congress emphasized the importance of expeditious resolution in bankruptcy cases, it did not wish us to privilege speed over other goals,” because “speed is not necessarily compatible” with its “ultimate objective” of “answering questions wisely and well.”⁴³ The court also noted that that courts of appeals often benefit from letting issues develop in the lower courts, and that “[p]ermitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law.”⁴⁴

3. *The Conclusion in Weber*

Taking all of the preceding considerations into account, the Second Circuit established broad guidelines for when it will accept direct appeals. It is “most likely” to accept a direct appeal when (1) there is uncertainty in the bankruptcy courts (either due to lack of controlling legal decisions or conflicting decisions) or (2) the bankruptcy court’s decision was “either manifestly correct or manifestly incorrect,” and the court of appeals would be able to “render a decision expeditiously.”⁴⁵ The court will be “reluctant” to accept a direct appeal when “percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision.”⁴⁶

Applying these principles, the Second Circuit refused to accept the direct appeal in *Weber*, noting that all three courts in the circuit that had considered the issue had decided that the exemption was retroactive.⁴⁷ So, there was not a conflict that created uncertainty in the bankruptcy courts.⁴⁸ The court also said that the bankruptcy court’s decision was neither manifestly correct nor manifestly incorrect, so allowing a direct appeal

Bauman, *Class Certification and Interlocutory Review: Rule 23(f) in the Courts*, 9 J. App. Prac. & Process 205 (2007).

43. *Weber*, 484 F.3d at 160.

44. *Id.*

45. *Id.* at 161.

46. *Id.*

47. *Id.*

48. *Id.*

would not resolve the case more rapidly.⁴⁹ The Second Circuit thus concluded that “prior consideration by the district court would be beneficial and there is no compelling reason for this court to address the issue in the first instance.”⁵⁰

B. The Seventh Circuit’s Approach

The Seventh Circuit has not provided detailed guidance like the Second Circuit, but it has at least indicated when bankruptcy direct appeals will be accepted. In *In re Wright*,⁵¹ the Seventh Circuit accepted a bankruptcy direct appeal that involved the question of when a consumer’s repayment plan could be confirmed in a Chapter 13 bankruptcy. The court allowed the direct appeal because the issue arose in “a large fraction of all consumer bankruptcy proceedings,” and had “divided the bankruptcy courts.”⁵² The court noted that, even though a clear answer to the question was needed, “this issue appears to be ‘stuck’ in the bankruptcy courts,” with no courts of appeals and only a few district courts addressing it.⁵³ The court said that, by granting the direct appeal, “[l]ower litigation costs for thousands of debtors and creditors may be achieved.”⁵⁴ So, it appears that the Seventh Circuit is likely to accept direct appeals when there is little precedent in the courts of appeals and the issue affects many other cases.

VI. THE RELATIONSHIP BETWEEN DIRECT APPEALS IN BANKRUPTCY AND PERMISSIVE INTERLOCUTORY APPEALS UNDER 28 U.S.C. § 1292(b)

As discussed above, the Second Circuit looked to section 1292(b) cases when deciding whether to allow a bankruptcy direct appeal. While there are many similarities between section 1292(b) and the bankruptcy direct appeal statute, the bankruptcy

49. *Id.*

50. *Id.* at 161-62.

51. 492 F.3d 829 (7th Cir. 2007).

52. *Id.* at 831.

53. *Id.*

54. *Id.* at 831-32.

statute is much broader.⁵⁵ For example,

- Bankruptcy direct appeals are not limited to cases where there is a disputed “controlling” legal issue, while permissive interlocutory appeals are.⁵⁶
- Bankruptcy direct appeals are allowed when they may materially advance the case’s “progress,” while a permissive interlocutory appeal is not allowed unless the appeal may materially advance the case’s “ultimate termination.”⁵⁷
- The bankruptcy direct appeal statute uses the disjunctive “or” when referring to the appeal materially advancing the case’s progress, while the permissive interlocutory appeal statute uses the conjunctive “and” when referring to the appeal materially advancing the case’s ultimate termination.⁵⁸ This means that under the permissive-interlocutory-appeal statute, the court must determine both (1) that there is a substantial difference of opinion about a controlling legal issue and (2) that resolving that difference may materially advance the case’s ultimate termination.⁵⁹ Under the bankruptcy

55. For a discussion of the differences between the bankruptcy direct appeal statute and the permissive-interlocutory-appeal statute in 28 U.S.C. § 1292(b), see David Rosendorf, *Nevada Homestead Decision Certified for Direct Appeal*, ABI’s BAPCPA Blog (Am. Bankr. Inst.), <http://bapcpa.blogspot.com/> (Nov. 4, 2005, 4:58 p.m. EST).

56. 28 U.S.C. § 1292(b); see e.g. *Marlbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) (pointing out that “appellate jurisdiction under § 1292(b) extends only to interlocutory orders that involve a ‘controlling question of law’”).

57. Compare 28 U.S.C. § 158(d)(2)(A)(iii) with 28 U.S.C. § 1292(b) (available at <http://uscode.house.gov>).

58. Compare 28 U.S.C. § 158(d)(2)(A) with 28 U.S.C. § 1292(b).

59. *Clark-Dietz & Associates-Engineers, Inc. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (noting that Section 1292(b) appeals “are permitted only when there is a substantial difference of opinion about a controlling question of law and the resolution of that question will materially advance, not retard, ultimate termination of the litigation.”).

direct appeal statute, a direct appeal is allowed if any one of the factors listed in the statute is met.

Thus, because the bankruptcy direct appeal statute is broader than the permissive interlocutory appeal statute, counsel should consider arguing that the direct appeal should be allowed even if a permissive interlocutory appeal would be denied.

VII. CONCLUSION

Even after two years, it is too soon to tell how the new direct appeal statute will play out. The picture will be clearer as more cases fall under the new law. But, it appears already that the direct appeal statute may make bankruptcy appeals more efficient and less expensive, while at the same time clarifying bankruptcy law by providing more precedent from the courts of appeals.