

An Idea Whose Time Has (sort of) Come: BAPCPA¹ Provides Direct Appeals from Bankruptcy Courts to Circuit Courts in Limited Situations

By ²

For years, many in the bankruptcy community have sought direct appeals from bankruptcy courts to circuit courts.³ Direct-appeal proponents have argued that the system of appeals by right from the bankruptcy court to the district court or bankruptcy appellate panel⁴ and then to the circuit court is inefficient for two reasons.⁵ First, decisions of district judges are not binding precedent, so there is increased uncertainty

¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 203 (2005).

² is of counsel to Connelly • Baker • Maston • Wotring • Jackson LLP in Houston, Texas, where he focuses his practice on appellate law and commercial litigation. He is board certified in civil appellate law by the Texas Board of Legal Specialization. He is a former law clerk to Judge Harold R. DeMoss, Jr. of the United States Court of Appeals for the Fifth Circuit and Judge Joe J. Fisher of the United States District Court for the Eastern District of Texas in Beaumont. He graduated with honors from Baylor Law School and received his Bachelor of Arts from Baylor University.

³REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION § 3.1.3 (1997), <http://govinfo.library.unt.edu/nbrcreport/17bjuris.html>; Letter from M.O. Sigal, Jr., Chair of the Business Bankruptcy Committee of the American Bar Association Business Law Section, to Orrin Hatch, Chairman of Senate Judiciary Committee (Sept. 10, 1999) (recommending direct appeals); Letter from Fifth Circuit Judge Edith H. Jones to Justice Byron R. White, Chair of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998), <http://www.library.unt.edu/gpo/csafca/report/comments/jones.htm> (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, creditors, and consumer groups."); <http://www.abanet.org/poladv/congletters/106th/bk91099.html> (supporting direct appeals from bankruptcy courts to circuit courts); Honorable Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 141-47 (1997).

⁴ In the First, Sixth, Eighth, Ninth, and Tenth Circuits, bankruptcy appeals can go to Bankruptcy Appellate Panels ("BAPs") instead of district courts. 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 117.02[2] n.24. Because the new direct appeal statute treats BAPs and district courts handling bankruptcy appeals the same, for simplicity this article will only refer to district courts instead of to both district courts and BAPs.

⁵ Letter from Judge Jones to Justice White, *supra* at note 3 ("These problems 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.").

regarding the state of bankruptcy law.⁶ Second, the two appeals by right add delay and expense to the bankruptcy system.⁷

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”)⁸ added direct review of bankruptcy court orders by circuit courts, but only in limited circumstances. Instead of abolishing district court review, BAPCPA allows a bankruptcy court (or district court or bankruptcy appellate panel handling a bankruptcy appeal) to certify an appeal directly to the circuit court.⁹ The circuit court can then decide whether to accept the direct appeal.¹⁰ Absent a certification by the lower court and acceptance of the direct appeal by the circuit court, the appeal still goes through the traditional process.

This article explains BAPCPA’s direct-appeal provisions and discusses the procedures that the courts are developing for direct appeals. Because direct appeals are only a few months old, the procedures are still developing. Practitioners should therefore consult the most-current procedures when pursuing direct appeals.

I. Lower court can certify direct appeal.

There are two ways for the lower court¹¹ to certify a direct appeal. The lower court, acting on its own motion¹² or a party’s request, can certify that:

- The judgment or order involves a question of law as to which there is no controlling authority from that circuit court or the Supreme Court;

⁶ *Fairchild Aircraft, Inc. v. Campbell (In re Fairchild Aircraft Corp.)*, 220 B.R. 909, 917 (Bankr. W.D. Tex. 1998) (“A district court’s ruling on a bankruptcy appeal enjoys little more precedential weight than does the original bankruptcy decision itself.”); JUDITH A. MCKENNA & ELIZABETH C. WIGGINS, FED. JUDICIAL CTR., ALTERNATIVE STRUCTURES FOR BANKRUPTCY APPEALS 28-39 (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); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 AM. BANKR. L.J. 525, 528-29 & nn.17-19 (1995).

⁷ *Fairchild Aircraft*, 220 B.R. at 918 (appeals by right to district court and then to circuit court “serve[] no practical purpose, and may actually be a detriment to the efficient administration of bankruptcy”).

⁸ BAPCPA § 1233 (codified at 28 U.S.C. § 158(d)(2)).

⁹ 28 U.S.C. § 158(d)(2)(A).

¹⁰ *Id.*

¹¹ Because direct appeals in bankruptcy matters can come from bankruptcy courts, district courts, or bankruptcy appellate panels, the legislative history uses the term “lower court” to refer to all three of those courts. H.R. REP. 109-31(I) (2005) *as reprinted in* 2005 U.S.C.C.A.N. 88, 206.

¹² 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, 209 (Bankr. D. Nev. 2005) (certifying direct appeal); Posting of David Rosendorf to ABI’s BAPCPA Blog, <http://bapcpa.blogspot.com/> (Nov. 28, 2005, 15:07 EST) (noting that no appeal was filed).

- 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.¹³

In addition, if both a majority of the appellants and a majority of the appellees request the lower court to certify a direct appeals, and they represent that the above-listed standards are met, then the lower court must certify the direct appeal.¹⁴

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 many bankruptcy courts have adopted,¹⁵ provide that while the case is pending in the bankruptcy court, the certification request must be made in the bankruptcy court.¹⁶ 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.¹⁷

A request for direct-appeal certification must be made within sixty days after the judgment or order is entered.¹⁸ Direct appeals do not stay the proceedings in the lower court unless the lower court or the circuit court stays the proceedings pending appeal.¹⁹

¹³ 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.” H.R. REP. 109-31(I) (2005) *as reprinted in* 2005 U.S.C.C.A.N. 88, 206.

¹⁴ 28 U.S.C. § 158(d)(2)(B).

¹⁵ *See, e.g., In re Adoption of Interim Bankruptcy Rules*, General Order No. 2005-6 (Bankr. S.D. Tex. Oct. 5, 2005), http://www.txs.uscourts.gov/bkforms/national_rules.pdf; *Adoption of Interim Bankruptcy Rules*, General Order No. 05-2 (Bankr. E.D. Tex. Sept. 22, 2005); <http://www.txeb.uscourts.gov/general%20orders/g.o.05-2.pdf>; *Standing Order Adopting Interim Bankruptcy Rules* (Bankr. W.D. Tex. Oct. 21, 2005), http://www.txwb.uscourts.gov/pdf/standing_order_interim_rules.pdf; *In re Adoption of Interim Bankruptcy Rules*, General Order No. 2005-04 (Bankr. N.D. Tex. Oct. 13, 2005), <http://www.txnb.uscourts.gov/orders/2005-04.pdf>.

¹⁶ INTERIM FED. R. BANKR. P. 8001(f)(2).

¹⁷ *Id.* 8001(f)(2).

¹⁸ 28 U.S.C. § 158(d)(2)(E).

¹⁹ *Id.* § 158(d)(2)(D).

II. Circuit court can then authorize direct appeal.

The process is two-fold and requires approval from both the lower court and the circuit court. If the lower court certifies a direct appeal, then the parties file a notice of appeal with the lower court²⁰ and a petition with the circuit court requesting permission to appeal.²¹ The circuit court then would have to grant the petition before a direct appeal is allowed.²² BAPCPA provides temporary direct-appeal procedures that are in effect until the Federal Rules of Appellate Procedure are amended.²³ Under the temporary rules, a party must file the petition requesting permission to appeal within ten days of the lower court's certification.²⁴ 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.²⁵

BAPCPA does not provide any standards for the circuit court to use when deciding whether to authorize a direct appeal, but the legislative history states that the circuit courts “are encouraged to authorize direct appeals” when the above-mentioned factors are met.²⁶ The standards will presumably become more defined as the caselaw develops.

III. Procedures for certification request and petition for direct appeal.

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

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

²⁰ FED. R. BANKR. P. 8001(a); INTERIM FED. R. BANKR. P. 8001(f)(1).

²¹ BAPCPA § 1233(b)(4)(A).

²² 28 U.S.C. § 158(d)(2)(A).

²³ BAPCPA § 1233(b)(1). The Federal Rules of Appellate Procedure apply to bankruptcy appeals to the circuit court. 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 117.02[3].

²⁴ *Id.* § 1233(b)(4)(A).

²⁵ *Id.* § 1233(b)(3).

²⁶ H.R. REP. 109-31(I) (2005) *as reprinted in* 2005 U.S.C.C.A.N. 88, 206.

²⁷ INTERIM FED. R. BANKR. P. 8001(f)(3)(C) (requirements for certification request); FED. R. APP. P.

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 circuit court within seven days of the original petition.²⁸

IV. Direct appeals of interlocutory orders.

While generally only final orders can be appealed as of right, interlocutory appeals of bankruptcy orders are allowed with the district court's permission.²⁹ If an appellant is seeking a direct appeal of an interlocutory order, it does not need to obtain separate permission for the interlocutory appeal. Instead, the interim bankruptcy rules provide that the circuit court's acceptance of a direct appeal also acts as permission for the interlocutory appeal.³⁰

V. Relationship between direct appeals to circuit court and 28 U.S.C. § 1292(b) permissive interlocutory appeals.

Federal law allows appeals by permission in several other contexts. Under 28 U.S.C. § 1292(b), a district court can certify an issue for interlocutory appeal when there is "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation."³¹ The circuit court can then choose whether to allow the § 1292(b) interlocutory appeal.³² In bankruptcy cases, district courts can allow interlocutory appeals from bankruptcy courts under 28 U.S.C. § 158(a). That statute does

5(b)(1) (requirements for direct-appeal petition). The direct-appeal petition to the circuit court must also contain a copy of the lower court's direct-appeal certification. FED. R. APP. P. 5(b)(1)

²⁸ INTERIM FED. R. BANKR. P. 8001(f)(3)(D) (certification request); FED. R. APP. P. 5(b)(2) (direct-appeal petition).

²⁹ 28 U.S.C. § 158(a).

³⁰ INTERIM FED. R. BANKR. P. 8003(d).

³¹ 28 U.S.C. § 1292(b) states that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

³² *Id.*

not provide standards for determining whether to allow interlocutory appeals, so district courts often use the 28 U.S.C. § 1292(b) standards as a guide.³³

There are similarities between BAPCPA's direct-appeal provision and the 28 U.S.C. § 1292(b) permissive-interlocutory-appeal provision, but BAPCPA's direct-appeal provision is much broader.³⁴ For example:

- BAPCPA direct appeals are not limited to cases where there is a disputed “controlling” legal issue, while permissive interlocutory appeals are.³⁵
- A BAPCPA direct appeal is allowed when it may materially advance a case’s “progress,” while a permissive interlocutory appeal is not allowed unless the appeal may materially advance the case’s “ultimate termination.”³⁶
- BAPCPA 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.³⁷ 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) resolving that difference may materially advance the case’s ultimate termination.³⁸ Under BAPCPA, a direct appeal is allowed if any one of the factors listed in section I above is met.

³³ 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 117.04; *Escondido Mission Village L.P. v. Best Products Co.*, 137 B.R. 114, 116 (S.D.N.Y. 1992) (“When determining whether to grant an interlocutory appeal from a decision of the bankruptcy court, this Court generally applies the standard governing interlocutory appeals from the district courts to the courts of appeals.”); *American Freight System, Inc. v. W.A. Walker & Assocs., Inc. (In re American Freight System, Inc.)*, 153 B.R. 316, 321 (D. Kan. 1993) (“[n]either Section 158(a) nor the Bankruptcy Rules specify the standards for granting leave, so the courts have borrowed those from 28 U.S.C. § 1292(b)”).

³⁴ 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 Posting of David Rosendorf to ABI’s BAPCPA Blog, <http://bapcpa.blogspot.com/> (Nov. 4, 2005, 16:58 EST).

³⁵ 28 U.S.C. § 1292(b); *Marlbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) (circuit court’s “appellate jurisdiction under § 1292(b) extends only to interlocutory orders involving a ‘controlling question of law’”).

³⁶ Compare 28 U.S.C. § 158(d)(2)(A)(iii) with 28 U.S.C. § 1292(b).

³⁷ Compare 28 U.S.C. § 158(d)(2)(A) with 28 U.S.C. § 1292(b).

³⁸ *Clark-Dietz & Associates-Engineers, Inc. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (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.”).

VI. Conclusion

Congress addressed the bankruptcy bench and bar's request when it allowed limited bankruptcy direct appeals to the circuit court in BAPCPA, although it did not go as far as many hoped. Under BAPCPA, direct appeals are not allowed in every case, but there are many situations in which they are allowed.

It is too soon to tell how effective the new procedures will be in practice, but it appears that BAPCPA's direct-appeals provision may make bankruptcy appeals more efficient and less expensive, while at the same time clarifying bankruptcy law by providing more circuit-court precedent.