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JURISPRUDENCE AND JURISDICTION:
TOWARD A MORE FLEXIBLE APPROACH TO
BANKRUPTCY INTERLOCUTORY APPEALS

Kristin D. Kiehn*

INTRODUCTION

Bankruptcy law not only determines the rights of individual litigants in any given case or proceeding, but it regulates the commercial sector, the operation of businesses, and the financial relationships between people. Yet despite its fundamental importance in our society, bankruptcy law today is riddled with lack of uniformity and plagued by a much-criticized appellate system.

In 1984, Congress overhauled the structure of the bankruptcy courts in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, which declared the Bankruptcy Reform Act of 1978 unconstitutional. The changes included a revision of appellate procedures relating to bankruptcy court rulings. The 1984 amendments produced 28 U.S.C. §158(a), which governs interlocutory appeals between bankruptcy courts and district courts. The statute grants district courts discretion to hear interlocutory appeals from bankruptcy court rulings, but provides no statutory standard for those courts to consider in determining whether to grant leave to appeal. This absence has forced district courts and Bank-

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2. See Crabb, *supra* note 1, at 145.


9. See id. § 158(a)(3).
ruptcy Appellate Panels ("BAPs") to develop their own criteria for deciding whether to hear appeals from bankruptcy interim orders. This Note addresses the widespread adoption by district courts of 28 U.S.C. § 1292(b) as a surrogate standard. Section 1292(b) is the standard that district courts and courts of appeals are required to use when deciding whether to permit interlocutory appeals from district court rulings. This Note argues that while § 1292(b) offers an analytical starting point, a more flexible approach to its use is warranted in the bankruptcy context.

Part I of this Note discusses the final judgment rule governing litigants' ability to appeal as of right, and lays out several exceptions to the finality requirement. In particular, part I defines the jurisdiction of the courts of appeals to hear interlocutory appeals via 28 U.S.C. § 1292(b), the standard adopted by most district courts in the absence of a statutory standard in the bankruptcy context. Part I details the criteria set forth in § 1292(b) that district courts and courts of appeals must apply in considering whether to grant leave to appeal. In addition, this part discusses the criticisms levied against a strict application of the terms of § 1292(b) in the district court-court of appeals context, and outlines the arguments for a more flexible application of the statute in its ordinary context. Part II of this Note defines the jurisdiction of the bankruptcy courts in light of the Marathon decision, and describes the nature of bankruptcy litigation. Part II then focuses on the flexible approach to finality in bankruptcy for purposes of automatic appeal, and provides an overview of the current bankruptcy appellate structure. Part III analyzes the approaches district courts and BAPs have adopted in the absence of a clearly defined statutory standard for hearing interlocutory appeals from bankruptcy court rulings. This part demonstrates that while most courts have transported the criteria outlined in § 1292(b) as a surrogate standard, some courts have adopted a more flexible approach. Part IV argues that this more flexible approach to hearing bankruptcy interlocutory appeals is appropriate. Part IV recommends that a district court or BAP ground its analysis in § 1292(b), but that it not be limited by a rote application of that provision's terms absent a statutory mandate. Such a pragmatic, flexible approach to granting leave to appeal interim rulings emphasizes the unique concerns of bankruptcy litigants, and ensures that justice is served even when the appeal does not otherwise satisfy the criteria of § 1292(b).

I. Interlocutory Appeals

This part defines the final judgment rule governing litigants' right to appeal and discusses the policy bases underlying the rule. It then de-
scribes the various exceptions to the finality requirement, most notably interlocutory appeals.

A. The Finality Requirement for Appeals Generally

Appeals from trial court rulings to appellate courts are generally confined to final decisions and judgments. Final decisions and judgments are those that effectively end the litigation on the merits, requiring no further action by the court below save entering an order of judgment. This requirement of finality serves several purposes. Requiring that litigants wait to appeal until a final judgment has been entered ensures that the litigation will proceed without undue interruption. Consolidating all grounds for appeal into one tidy package serves the goals of judicial efficiency. Thus, the final judgment rule allows the appellate court a more complete record from which to work in considering the merits of an appeal, and avoids leading to the issuance of advisory opinions. The necessity for review may also disappear if later proceedings render the appealed issue moot. In addition, affording deference to a trial judge's interim findings of law and fact promotes respect for and independence of trial judges.

§ Accordingly, appeals from nonfinal judgments are heavily restricted, reflecting these policies against disruptive, piecemeal litigation.

Appeals from final rulings of federal district courts to the courts of appeals are governed by 28 U.S.C. § 1291. Section 1291 incorporates the legislative policy in favor of limiting review to final judgments and orders. The statute has been interpreted as forbidding appeal unless the order sought to be appealed from "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

Courts have noted in the federal context that the final judgment rule promotes a "healthy legal system," and that the

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13. See id. § 87, at 710.
14. See id. § 86, at 709.
15. See id.
16. See id. (stating that the finality requirement prevents appellate courts from speculating on issues yet to be developed below).
17. See Green v. Brantley, 895 F.2d 1387, 1391 (11th Cir. 1990), rev'd on other grounds, 941 F.2d 1146 (11th Cir. 1991).
20. 28 U.S.C. § 1291 (1994) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ").
21. See Johnson, 515 U.S. at 309 ("The statute recognizes that rules that permit too many interlocutory appeals can cause harm."); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (noting that the effect of § 1291 is to "disallow appeal from any decision which is tentative, informal or incomplete").
policy concerns behind the rule apply even in the face of substantial costs. While Congress and the courts have developed limited exceptions to the finality requirement, these exceptions are generally disfavored and narrowly construed.

B. Exceptions to the Finality Requirement

1. Judicial and Statutory Exceptions

There are judicial and statutory exceptions to the finality requirement that allow litigants to automatically appeal, as of right, certain interim orders. These exceptions exist apart from discretionary interlocutory appeals, which will be discussed in the next section. Under the judicially created collateral order doctrine, "final" decisions on matters collateral, or tangential, to the main cause of action are appealable under the theory that § 1291 allows appeal from all "final decisions." This doctrine was developed before passage of the statute permitting interlocutory appeals, and resulted from a recognition that some orders could be effectively reviewed only at an earlier stage in the litigation. The Supreme Court has set forth a three-pronged test to identify matters that can be appropriately appealed under the collateral order doctrine: the order must (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. Although the doctrine developed in response to the rigid requirements of the final judgment rule, it is nonetheless strictly construed and applied to only a "small class" of cases.

Other exceptions to the finality rule include the death knell and Forgay-Conrad doctrines. The death knell doctrine, developed by sev-


25. See Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986) (Feinberg, J., dissenting) (noting that despite the legislative enactment and judicial development of exceptions to the finality rule, "[i]t is axiomatic that litigants must ordinarily wait for final resolution of all issues submitted to a federal court before they can enforce a judgment or obtain appellate review.").

26. See 4 Am. Jur. 2d Appellate Review § 113, at 734 (1995). The collateral order doctrine was set forth by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), in which the Court gave § 1291 a "practical rather than a technical" interpretation. Id. at 546. The Court noted that orders qualifying under the collateral order doctrine are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id.


eral circuit courts,\textsuperscript{31} permits review of orders that would terminate a cause of action if otherwise left unreviewed.\textsuperscript{32} Applying this doctrine requires the court to consider the plaintiff's incentive to continue the litigation if the appeal is denied.\textsuperscript{33} The Supreme Court has criticized the doctrine as an authorization of indiscriminate interlocutory review of trial court decisions.\textsuperscript{34} Under the Forgay-Conrad doctrine, a court order compelling a defendant to return allegedly fraudulently obtained property is immediately appealable.\textsuperscript{35} This doctrine focuses on the chance of irreparable harm to the losing party if forced to await the final outcome of the litigation.\textsuperscript{36}

Congress has also enacted exceptions to the finality rule that are embodied in § 1292(a)—interlocutory orders relating to the grant or denial of injunctions, receiverships, and admiralty claims.\textsuperscript{37} Orders of these types are automatically appealable as of right, reflecting a legislative judgment that the overall benefits to be gained from immediate review outweigh the policies against piecemeal appeals.\textsuperscript{38} In addition, the availability of mandamus review\textsuperscript{39} and the ability of a district court to declare a ruling final in a multi-claim proceeding under Federal Rule of Civil Procedure 54(b)\textsuperscript{40} offer alternative, yet equally narrow, means of circumventing the final judgment rule.\textsuperscript{41} Barring these few narrow exceptions, a litigant seeking to appeal a nonfinal order bears

\textsuperscript{31} See, e.g., Peterson v. Nadler, 452 F.2d 754, 756 (8th Cir. 1971) (permitting appeal from an order delaying action until plaintiff-prisoner was released from prison); Fox v. City of West Palm Beach, 383 F.2d 189, 193-94 (5th Cir. 1967) (allowing appeal from an interlocutory order refusing an injunction); Amdur v. Lizards, 372 F.2d 103, 105-06 (4th Cir. 1967) (granting leave to appeal from an order staying proceedings pending termination of similar proceedings in another court); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966) (permitting appeal of dismissal of class action).


\textsuperscript{33} See Coopers & Lybrand, 437 U.S. at 471.

\textsuperscript{34} See id. at 474-75 (rejecting appealability of denial of class certification under the death knell doctrine).

\textsuperscript{35} See 4 Am. Jur. 2d Appellate Review § 115, at 738-39 (citing Forgay v. Conrad, 47 U.S. 201 (1848)).

\textsuperscript{36} See Growth Realty Cos. v. Regency Woods Apartments, Ltd. (In re Regency Woods Apartments, Ltd.), 686 F.2d 899, 902 (11th Cir. 1982).


\textsuperscript{39} See id. at 310.

\textsuperscript{40} See id.; see also Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1219-20 (5th Cir. 1990) (noting that the rule should be invoked where there is no just reason for delay, and that a district court's intent to declare the order final must be crystalline).

\textsuperscript{41} See \textit{Ex parte} Fahey, 332 U.S. 258, 259-60 (1947) (stating that the remedy of mandamus is drastic and extraordinary); Hooks v. Washington Sheraton Corp., 642 F.2d 614, 616 (D.C. Cir. 1980) (noting that Fed. R. Civ. p. 54(b) is a means of determining when an order is final, and thus is not a relevant exception to the final judgment rule).
the burden of establishing a right to a discretionary interlocutory appeal.

2. Interlocutory Appeals

An interlocutory appeal is one taken from a judge’s interim ruling in a matter. Such rulings do not typically dispose of the overall merits of an action, but rather involve intermediate rulings that affect the future course of the litigation. The federal statute governing discretionary interlocutory appeals from district courts to the courts of appeals is 28 U.S.C. § 1292(b).

Prior to the enactment of § 1292(b), there was no federal statute permitting discretionary interlocutory appeals between district courts and courts of appeals. Congress enacted § 1292(b) in 1958 in response to the perceived harm to litigants from orders incapable of being corrected on appeal from a final judgment, and due to displeasure with prolonged litigation that frequently ensued from a party’s inability to appeal immediately. The statute’s language was intended as a compromise between those who desired expanded interlocutory appellate jurisdiction for the courts of appeals and those who wanted no such jurisdiction whatsoever.

Critics of the current federal interlocutory appellate system have turned to an approach adopted in Wisconsin that is based on an American Bar Association proposal. See Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. Pitt. L. Rev. 717, 788 (1993) (advocating that the courts of appeals consider adopting the Wisconsin approach); John C. Nagel, Note, Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review, 44 Duke L.J. 200, 201 (1994) (same). This proposal eliminates all judicially created exceptions to the final judgment rule (e.g., the collateral order doctrine), and divides interlocutory appeals into two categories: a broad category of appeals in which appellate courts would retain discretion to grant leave based on the circumstances of each case, and a narrow category of specific types of orders that would be labeled presumptively appealable or nonappealable. See Nagel, supra, at 214-15, 229 (arguing that broad discretionary review “would provide the courts with the flexible power needed to respond to requests for interlocutory appeals”); see also Martineau, supra, at 777 (“The discretionary appeal thus provides the relief valve in those cases in which strict adherence to the final judgment rule would not serve the best interests of the parties or the public, but with an individualized balancing of interests made on a case by case basis.”).


Prior to 1891, no federal interlocutory appeals were available whatsoever. See Katz v. Carte Blanche Corp., 496 F.2d 747, 753 (3d Cir. 1974). Exceptions to this prohibition were later enacted for orders relating to injunctions, receiverships, admiralty claims, and patent infringements. See id.


See Katz, 496 F.2d at 753-54 (detailing the legislative history of § 1292(b)).

See Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1171-72 (1990) (noting that a prior proposal had called for permissive appeal when “necessary or desirable to avoid substantial injustice” (quoting Judicial Conference of the United States, Report of the Proceedings of a Special Session 203 (1952))); see also Katz, 496 F.2d at 754 (“[S]ection [1292(b)] probably was intended to include orders having . . . potential for harm to the litigant
An appeal under § 1292(b) must first be certified by the district judge, who must indicate that the order satisfies a three-pronged test: the order sought to be appealed from (1) presents 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 may materially advance the ultimate termination of the litigation.\(^{49}\) If the interlocu-

pendente lite or ... potential for causing a wasted protracted trial if it could early be determined that there might be no liability.

In the years immediately following passage of the statute, statistics showed that interlocutory appeals were certified under § 1292(b) approximately 100 times per year, and that about half of the applications were granted by the courts of appeals. See 16 Charles Alan Wright & Arthur R. Miller et al., Federal Practice and Procedure: Jurisdiction of the Courts of Appeals § 3929, at 363 (1996) [hereinafter Wright & Miller] (concluding that passage of § 1292(b) had not significantly expanded interim appeals). More recent statistics show that in the 1980s, while the number of certifications doubled, the number accepted by the courts of appeals hovered around 35%. See Solimine, supra, at 1174-75. Professor Solimine notes that interlocutory appeals comprise just over 10% of proceedings in federal appellate courts. See id. at 1166.

49. See 28 U.S.C. § 1292(b). The requirement that the order involve a controlling question of law is meant to ensure that the issue on appeal is one central to the case, though it need not be dispositive. See 4 Am. Jur. 2d Appellate Review § 125, at 750-51 (1995). To qualify, some argue that the issue presented should constitute reversible error. See id. But see Katz, 496 F.2d at 755 (noting that the legislative history of § 1292(b) suggests that the order need not necessarily constitute reversible error, and that "controlling" is better interpreted to mean "serious to the conduct of the litigation, either practically or legally"); 16 Wright & Miller, supra note 48, § 3930, at 426 (noting that the better approach is to find a question controlling "if interlocutory reversal might save time for the district court, and time and expense for the litigants"). The criterion that a substantial ground for difference of opinion exist limits appellate access to resolution of uncertain legal questions when the relevant circuit has not ruled on a particular issue. See 4 Am. Jur. 2d Appellate Review § 128, at 753-54 (stating that other appropriate instances may include a ruling contrary to those reached by the courts of appeals, foreign law questions, and novel legal issues of first impression). Wright and Miller argue that the degree of conflict should be adjusted according to the importance of the question in the individual case. See 16 Wright & Miller, supra note 48, § 3930, at 422. The necessity that resolving the issue on appeal now, rather than later, may materially advance the litigation aims at avoiding a lengthy trial or further proceedings if possible. See Katz, 496 F.2d at 755; 16 Wright & Miller, supra note 48, § 3930, at 432-34 (noting that appeal should be denied if "there is a good prospect that the certified question may be mooted by further proceedings, if the character of the trial is not likely to be affected, or if an essentially collateral matter such as attorney fees is involved" (footnotes omitted)). Section 1292(b) reads in full:

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 [sic] 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. 28 U.S.C. § 1292(b).
tory order is so certified, the court of appeals retains ultimate discretion to decide whether or not to hear the appeal. The requirement that both the district court and the court of appeals approve the interim appeal acts as a double screening device against wasteful and improper appeals.

Section 1292(b)'s criteria, if applied rigidly, are particularly onerous, reflecting the policy against piecemeal review of interim orders, which can lead to protracted litigation and judicial inefficiency. Courts and commentators generally urge that leave to appeal under § 1292(b) be granted sparingly, in keeping with the policy of discouraging disruption in the adjudicative process. On the other hand, the rights of the parties may demand interlocutory review. For instance, review may be warranted when a trial court's error can be quickly corrected, when the subsequent proceedings can be clarified or streamlined, or when parties can potentially conclude their role in the litigation altogether.

C. Criticisms of a Strict Application of § 1292(b)

Some have suggested that while courts pay lip service to the stringent requirements of § 1292(b), interlocutory appeals are sometimes heard that would not otherwise meet the three-pronged test set out in the statute. These commentators advocate a more flexible approach, viewing a restrictive, literal application of § 1292(b) as archaic.

50. See 28 U.S.C. § 1292(b); see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 & n.26 (1978) (holding that appellate courts may deny appeal for “any reason, including docket congestion,” and citing legislative history likening their authority to the Supreme Court’s ability to deny certiorari); Katz, 496 F.2d at 754 (interpreting the legislative history of § 1292(b) to allow courts of appeal to deny leave for reasons entirely unrelated to the three certification criteria, including an overcrowded appellate docket or the desire for a full and complete record before ruling).

51. See Coopers & Lybrand, 437 U.S. at 474-75.

52. See 4 Am. Jur. 2d Appellate Review § 118; see also McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984) (“[I]nterlocutory certification under . . . § 1292(b) should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.”); Span East Airlines, Inc. v. Digital Equip. Corp., 486 F. Supp. 831, 834 (D. Mass. 1980) (noting that district court certification is not a routine act).

53. See, e.g., White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994) (“It has . . . long been the policy of the courts to discourage piece-meal appeals because most often such appeals result in additional burdens on both the court and the litigants.” (citation omitted)); State ex rel. Howes v. W.R. Peele, Sr. Trust, 889 F. Supp. 849, 852 (E.D.N.C. 1995) (stating that “Congress intended that § 1292(b) be applied sparingly”); 4 Am. Jur. 2d Appellate Review § 118, at 743 (noting that discretionary review is “designed for exceptional cases where a decision on appeal may avoid protracted and expensive litigation” (footnote omitted)).


56. See 16 Wright & Miller, supra note 48, § 3929, at 368. Wright and Miller quote Hadjipateras v. Pacifica, S.A. as an example of the approach many courts take in practice:
and needlessly limiting. They urge instead a more pragmatic analysis that would evolve through the judicial process, drawing upon judges’ ability to interpret legislation that they themselves inspired and helped to pass. Further, they suggest that the possible negative effects of increased appeals, including appellate docket congestion, can be eased by equally modest reductions in full-scale briefing, oral argument, and lengthy appellate opinions. Concerns about the reduced legitimacy of district court rulings are overstated, these commentators observe, because the majority of interlocutory appeals result in affirmances, thus in fact buttressing respect for district courts. In addition, delays in proceedings will be offset by the potential for termination of litigation altogether.

According to this rationale, a more lenient attitude toward interlocutory appeals facilitates clarification of issues that frequently fail to reach appellate courts due to the overwhelming number of cases that terminate before appeal. By analyzing individual cases, guided by the criteria of § 1292(b), courts can effectively determine which ap-

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[T]here are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. . . . It is that general approach . . . that should guide us . . . .

Id. (citing Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702-03 (5th Cir. 1961)); see also Solimine, supra note 48, at 1196-1201 (conducting survey that showed that while most § 1292(b) appeals were certified after qualifying under the three-pronged test, many represented “ordinary, routine” matters).

57. See 16 Wright & Miller, supra note 48, § 3929, at 370 (“[A] flexible approach to § 1292(b) is far superior to blind adherence to a supposed need to construe strictly any permission to depart from the final judgment rule. The statute is not limited by its language to “exceptional” cases.” (footnote omitted)); Solimine, supra note 48, at 1193.

58. See 16 Wright & Miller, supra note 48, § 3929, at 370-71 (arguing that § 1292(b) should be used as a broad judicial device to limit expansion of other appealability concepts, and even to replace exceptions to the finality requirement such as the collateral order doctrine). Wright and Miller favor using the criteria in § 1292(b) as guiding principles, and worry that rote application of the test by some courts stymies the potential for more flexible analyses by other courts. See id. § 3930, at 415-16. Professor Solimine urges a similar approach, calling for a modest expansion of interlocutory appeals and the abandonment of § 1292(b)’s three-pronged test as an exclusive measure of appealability. See Solimine, supra note 48, at 1193. Professor Solimine notes that the benefits of interlocutory appeals include the opportunity to save costs and time via immediate correction of a ruling, the ability of circuit courts to supervise trial courts more effectively, the fact that complex, multi-party litigation can move forward while discrete issues are settled on appeal, and the chance for rulings important to the public or other cases to be issued without delay. See id. at 1169, 1176.

59. See Solimine, supra note 48, at 1178.

60. See id. at 1178-79.

61. See id. at 1179-80.

62. See id. at 1213.
peals warrant a hearing, and which would constitute a waste of judicial time and resources. 63

Despite these criticisms of a narrow application of § 1292(b) by district courts and courts of appeals, the statutory mandate is typically a burdensome one, and litigants face a difficult road in obtaining leave to appeal an interlocutory order. 64 The strict application of § 1292(b) is particularly significant in the context of bankruptcy interlocutory appeals, in which many courts have chosen to apply § 1292(b) in a similarly literal fashion in the absence of any statutory standard whatever. 65 The next part provides a brief summary of bankruptcy procedure and the bankruptcy appellate process, highlighting the confusion and uncertainty governing many areas of bankruptcy adjudication.

II. Bankruptcy and Its Appellate Structure

This part defines the jurisdictional relationship between bankruptcy courts and district courts and examines the unique nature of bankruptcy litigation. It then describes the flexible approach to the final judgment rule in the bankruptcy context and sets forth the structure governing the bankruptcy appellate process.

A. The Jurisdiction of the Bankruptcy Courts

Congress is empowered by the United States Constitution to establish “uniform Laws on the subject of Bankruptcies throughout the United States.” 66 The bankruptcy statutory scheme was overhauled by the Bankruptcy Reform Act of 1978 (the “Act”). 67 The primary

63. See id. at 1204-05 (arguing that § 1292(b) can operate as a “safety valve” against the floodgates of appeal, aided by the double screening device of district court certification and appellate permission, but noting that in any event, § 1292(b) is currently underused). Similarly, Wright and Miller state:

Ideally, § 1292(b) could be used to allow interlocutory appeals whenever the district court and court of appeals agree that immediate review is a good gamble. The difficulty and general importance of the question presented, the probability of reversal, the significance of the gains from reversal, and the hardship on the parties in their particular circumstances, could all be considered.

16 Wright & Miller, supra note 48, § 3930, at 442.

64. See, e.g., McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984) (noting that courts should allow appeal under § 1292(b) “sparingly and only in exceptional circumstances”); 4 Am. Jur. 2d Appellate Review § 118, at 743 (1995) (“Because of the strong policy against piecemeal review, statutes authorizing interlocutory appeals are to be strictly construed and do not leave the courts totally free to decide which interlocutory orders are appealable.” (footnotes omitted)).

65. See infra notes 150-60 and accompanying text.


thrust of the Act was to confer wide jurisdictional powers upon bankruptcy judges to hear and decide all cases and proceedings arising under title 11 of the United States Code. This grant of authority to bankruptcy courts was not limited to bankruptcy cases generally, but included all related proceedings arising in the adjudication, including state-law claims.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court found this grant of authority to non-Article III judges unconstitutional. The Court held that granting bankruptcy judges, who functioned as adjuncts to the district courts, jurisdiction over state-law claims unrelated to the bankruptcy proceeding was an unconstitutional exercise of jurisdiction over non-federally-created rights. In response to the *Marathon* decision, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984.

District courts now exercise original and exclusive jurisdiction over bankruptcy “cases,” along with original jurisdiction over civil “proceedings” arising in or related to bankruptcy cases. Bankruptcy courts continue to function as units of the district courts, and district courts accordingly possess the power to refer cases to bankruptcy judges, as well as to withdraw the reference. If the case is so re-

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68. *See 28 U.S.C. § 1471(a) (1978) (repealed by the 1984 Amendments); 16 Wright & Miller, supra note 48, § 3926, at 240.*
70. *See id. at 87. Article III judges, pursuant to the “good Behaviour” Clause of the United States Constitution, possess life tenure and are subject to removal only by impeachment. U.S. Const. art. III, § 1; see *Marathon*, 458 U.S. at 59. Bankruptcy “referees,” created by the 1898 Act, presided over bankruptcy cases in federal courts, obtaining more and more responsibility as time passed, until their titles were officially changed to bankruptcy “judges” in 1973. *See id.* at 171. For a brief history of bankruptcy statutes prior to the 1978 Act, *see id.* at 169-72.
71. *See Marathon*, 458 U.S. at 84. For a more detailed discussion of the *Marathon* decision, see *Freeman-Burney*, supra note 6, at 172-77.
73. *See id.* § 1334(a) (1994). Bankruptcy “cases” refers broadly to those cases “commenced when a petition for relief under title 11 is filed, [and which] encompass[ ] all the controversies as well as all matters of administration involved in liquidation or reorganization under title 11.” *Freeman-Burney*, supra note 6, at 180.
74. *See 28 U.S.C. § 1334(b).*
75. *See id.* § 151; Bertoli v. D’Avella (*In re Bertoli*), 812 F.2d 136, 139 (3d Cir. 1987).
76. *See 28 U.S.C. § 157(a).*
ferred, bankruptcy judges may hear and make all final determinations in core proceedings under title 11. As for noncore proceedings, bankruptcy judges submit proposed findings and conclusions to the district courts, and district judges exercise de novo review over those findings.

B. The Nature of Bankruptcy

The purpose of bankruptcy adjudication is to administer a ratable distribution of the debtor's assets between creditors and other claimants. Bankruptcy allows an eligible debtor access to an orderly administration of debt, relieving the debtor from collection attempts and other suits through the mechanism of the automatic stay, and affording the debtor a "fresh start" after liquidation or a chance to reduce

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77. See id. § 157(d); In re Bertoli, 812 F.2d at 139.

78. Core proceedings are those central to administration of the bankruptcy estate, such as matters relating to the automatic stay and creditors' claims. See 28 U.S.C. § 157(b)(2); David G. Knibb, Federal Court of Appeals Manual § 14.1, at 232 (3d ed. 1997); see also S. Elizabeth Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn. L. Rev. 967, 1007 (1988) (noting that rather than define "core proceeding," 28 U.S.C. § 157(b)(2) merely provides a nonexclusive list of matters covered by the term).


80. Noncore proceedings encompass matters peripheral to the bankruptcy adjudication, or the parties thereto, but not central to its administration. See Susan Block-Lieb, The Costs of a Non-Article III Bankruptcy Court System, 72 Am. Bankr. L.J. 529, 546-50 (1998) (discussing the uncertainty pervading the distinction between core and noncore proceedings, and noting that at the very least, noncore proceedings include those arising solely under state law and brought by a trustee or debtor-in-possession against a third party—the cause of action at issue in Marathon).

81. See 28 U.S.C. § 157(c)(1); see also Bertain v. Mitchell (In re Bertain), 215 B.R. 438, 441 (B.A.P. 9th Cir. 1997) (noting that while bankruptcy courts' conclusions of law are reviewed de novo, findings of fact are reviewed under a clearly erroneous standard); Knibb, supra note 78, § 14.1, at 233 (noting that district courts typically accept the bankruptcy judge's conclusions). For a brief overview of the procedures relating to bankruptcy courts' jurisdiction, see Daniel J. Bussel, Power, Authority, and Precedent in Interpreting the Bankruptcy Code, 41 UCLA L. Rev. 1063, 1065-71 (1994).


83. The automatic stay goes into effect upon filing of a bankruptcy petition. See 11 U.S.C. § 362(a) (1994). The stay operates in part to foreclose all creditors' attempts to collect on outstanding debts, requiring instead that they submit their claims to the bankruptcy court for adjudication. See Medicar Ambulance Co. v. Shalala (In re Medicar Ambulance Co.), 166 B.R. 918, 924 (Bankr. N.D. Cal. 1994) (noting that the automatic stay prevents a "race to the courthouse" (quoting David A. Skeel, Markets, Courts, and the Brave New World of Bankruptcy Theory, 1993 Wis. L. Rev. 465).

84. Chapter 7 allows a trustee to liquidate all of the debtor's assets as of the date of filing and distribute them to the claimants in order of priority, thus earning the
Bankruptcy cases are commenced when the debtor files a voluntary petition with the bankruptcy court or when the debtor's creditors file an involuntary petition with the court. Once the petition is filed, an estate is created consisting of the debtor's legal and equitable rights in the property, and a trustee is commonly appointed to represent the estate. As soon as these procedural mechanisms are in place, the trustee or debtor-in-possession can proceed to administer the estate.

Bankruptcy adjudications gather together any and all parties claiming a stake in the debtor's assets. Bankruptcy litigation differs from ordinary civil adversary proceedings in that it concerns primarily economic interests, and is frequently far more complex than even the most complicated civil proceedings. The lack of a complaint and of a traditional plaintiff and defendant renders uncertain the issues that will arise and the nature of the relief that will be sought. There are thus a large number of potential parties-in-interest in any bankruptcy case, and often a vast number of litigated matters.

Generally, claimants must file a proof of claim, which the debtor can contest by filing an objection. Resolution of claims are contested proceedings within the larger bankruptcy case, as opposed to the primarily one-on-one adversarial proceedings that comprise an ordinary civil case. There is no right to a jury trial in a claims dispute. Courts handle bankruptcy proceedings as expeditiously as possible, because many economic interests are at stake and the estate debtor a discharge of all accumulated debt, known as a “fresh start.” See Gaumer & Griffith, supra note 82, at 304-05.

Reorganization under Chapter 11 allows a corporate or individual debtor to continue business operations while repaying some debts and receiving a discharge of other debts. See id. at 306-07 (noting that Chapter 11 relief is complicated and time-consuming). Under Chapter 13, individual debtors can formulate a plan to make payments to creditors based on the debtor’s future disposable income. See id. at 309.

A debtor-in-possession continues to operate the debtor’s business in Chapter 11 cases, acting as a fiduciary on behalf of unsecured creditors. See Richard I. Aaron, Bankruptcy Law Fundamentals § 10.01 (1997).

The bankruptcy attorney not only represents the debtor-client, but to some extent also protects the interests of the claimants. See Prince & Faucher, supra, at 311-12.


The system is not structured like the standard adversarial model, where one party (and its attorney) squares off against the second party (and its attorney). Indeed, the bankruptcy attorney not only represents the debtor-client, but to some extent also protects the interests of the claimants. See Prince & Faucher, supra, at 311-12.

See Martin, supra note 91, at 447.

See Dreher, supra note 90, at 17.
must be administered as swiftly as possible before it dwindles to nothing. 97 Despite these efforts, bankruptcy cases often last for years. 98 Bankruptcy judges tend to be more intimately involved with the debtor and the debtor's business, 99 and the equitable nature of a bankruptcy judge's power renders the judge more able to intervene and to fashion remedies as needed. 100

Bankruptcy courts are increasingly becoming the type of court most often encountered by average citizens. 101 Individual debtors can liquidate their assets under Chapter 7, or they can file for reorganization and repay their nondisposable income to creditors under Chapter 13. 102 Further, corporations and individuals operating a business can reorganize under Chapter 11. 103 Many view the bankruptcy laws as having a rehabilitative effect for both individuals and corporations. 104 Indeed, the administration of large corporate bankruptcies can reduce the impact of financial disaster on the commercial sector. 105 Bankruptcy litigation is thus of special importance in two respects—as a means for the average consumer to take remedial action in pursuit of a "fresh start," and as a process of reducing the financial impact on the economy of large commercial debt.

C. A Flexible Approach to the Final Judgment Rule

The unusual posture of bankruptcy litigation affects the way courts formulate the final judgment rule for purposes of an automatic right to appeal. 106 While the rationale behind the finality requirement for automatic right of appeal focuses on disruptions in the adjudicative process, 107 bankruptcy litigation poses unique concerns that may

97. See id.
99. See Dreher, supra note 90, at 18.
101. See Prince & Faucher, supra note 92, at 310-11.
102. See id. at 317-19 (noting that individual reorganizations take place over a three-to-five year period).
103. See Gaumer & Griffith, supra note 82, at 306-08. The Supreme Court has held that individuals not operating businesses are also entitled to file in Chapter 11. See Toibb v. Radloff, 501 U.S. 157, 161 (1991).
104. See Martin, supra note 91, at 436.
105. See id.
106. For a discussion of the final judgment rule, see supra notes 12-19 and accompanying text.
render the finality requirement unfair.108 The administration of the estate can involve numerous preliminary and peripheral issues, frequently involving only some of the parties in any given dispute.109 As such, bankruptcy adjudications function as umbrella proceedings that resolve numerous discrete claims,110 and the ability to appeal successfully is often lost if the litigants are forced to wait until final resolution of the case, which may be years later.111 Strictly speaking, a final order in a bankruptcy adjudication would be one closing the entire case. Given this obvious unfairness, courts have tended to treat decisions on the merits in bankruptcy proceedings as final for purposes of appeal.112 This liberal approach to finality focuses on the resolution of disputes within the bankruptcy case as a whole, such as an order settling a creditor's claim.113 In addition to the development of the flexi-

Comment, Interlocutory Appeals in Bankruptcy Cases: The Conflict Between Judicial Code Sections 158 and 1292, 8 Bankr. Dev. J. 519, 523 (1991) (listing policy reasons behind the finality requirement for automatic appeal: efficiency of review; negation of need to appeal if the objecting party wins; rapid progress of litigation; preservation of respect for a bankruptcy judge's authority; and prevention of harassing delays).

108. See 16 Wright & Miller, supra note 48, § 3926.2, at 271 (noting that the 1898 Bankruptcy Act took these special needs into account by permitting interlocutory appeals in proceedings in bankruptcy, and that courts and commentators were quick to develop the flexible finality doctrine after the passage of the 1978 Act and its finality requirement for appeal as of right).


110. See Collier, supra note 7, § 3.03, at 3-184 to -185 ("[V]iewed realistically, a bankruptcy case is simply an aggregation of individual controversies, the resolution of which must be reached before bankruptcy distribution.").


112. See Collier, supra note 7, § 3.03, at 3-184 to -185; see also In re Saco Local Dev. Corp., 711 F.2d 441, 444 (1st Cir. 1983) ("Although Congress has defined appellate bankruptcy jurisdiction in terms . . . similar to those appearing in other jurisdictional statutes the history of prior federal bankruptcy law and the 1978 Act convinces us that Congress did not intend the word ‘final’ here to have the same meaning . . . ." (citation omitted)), But cf. John P. Hemmigan, Jr., For Regularizing the Appellate Process, 4 Am. Bankr. Inst. L. Rev. 524, 524 (1996) (criticizing the “unpredictable sui generis” approach to finality in bankruptcy appeals).

113. See In re Saco Local Dev. Corp., 711 F.2d at 444; see also Knibb, supra note 78, § 14.2, at 234-35 ("Various steps in the bankruptcy process are often so distinct and conclusive either to the rights of the parties or the ultimate outcome of the proceeding that final decisions as to them are appealable as of right."); 16 Wright & Miller, supra note 48, § 3926.2, at 284 (noting that other specific reasons necessitate a flexible rule of finality in bankruptcy, such as the fact that the value of the bankrupt estate can be enhanced by permitting immediate appeal from an order approving a sale). Wright and Miller comment, for example, that the finality analysis used by the Third Circuit “could lead almost anywhere,” id. at 287, and describe that analysis as invoking the following factors: “the impact upon the assets of the bankrupt estate, the necessity for further fact-finding on remand, the preclusive effect of our decision on the merits on further litigation, and whether the interest of judicial economy would be furthered.” Id. (quoting In re Meyertech Corp., 831 F.2d 410, 413-14 (3d Cir. 1987)).
ble finality doctrine, the collateral order and the Forgay-Conrad doctrines\textsuperscript{114} have been imported into the bankruptcy context.\textsuperscript{115}

D. Bankruptcy Appellate Structure

Prior to enactment of the 1978 Act, bankruptcy appeals were distinguished between those arising in “plenary” proceedings\textsuperscript{116} and those arising in “summary”\textsuperscript{117} proceedings.\textsuperscript{118} The two types of appeals were governed by different appeals provisions—the former by the general appeals statutes of title 28, the latter by § 24(a) of the Bankruptcy Act.\textsuperscript{119} Under § 24(a), interlocutory appeals were available as of right from orders entered in “proceedings” in bankruptcy, but not in “controversies” in bankruptcy.\textsuperscript{120} Essentially, matters relating to the administration of the estate constituted “proceedings,” and claims by or against outside parties represented “controversies.”\textsuperscript{121} Despite the literal language of § 24(a), courts tended to narrowly interpret litigants’ ability to appeal interlocutory rulings in bankruptcy proceed-

\textsuperscript{114} See supra notes 26-30, 35-36 and accompanying text.
\textsuperscript{115} See Trustee of Jartran, Inc. v. Winston & Strawn, 208 B.R. 898, 901-02 (N.D. Ill. 1997) (noting that the collateral order exception is appropriate only for a “small class of prejudgment orders that finally determine claims of right”); Collier, supra note 7, § 3.03, at 3-187 to -188. Indeed, the flexible finality doctrine is modeled on the collateral order doctrine, which affords immediate review to matters tangential to the main cause of action. See Knibb, supra note 78, § 14.4, at 241.
\textsuperscript{116} A plenary matter referred to an ordinary civil matter, regarding which the trustee or receiver could bring suit only in a state or federal court that had in personam jurisdiction over the matter in question. See Ralph Brubaker, Nondebtor Releases and Injunctions in Chapter II: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case, 72 Am. Bankr. L.J. 1, 24 (1998).
\textsuperscript{117} Summary proceedings were those relating to the assets of the debtor’s estate. See Susan Block-Lieb, Permissive Bankruptcy Abstention, 76 Wash. U. L.Q. 781, 797 n.91 (1998).
\textsuperscript{118} See 16 Wright & Miller, supra note 48, § 3926, at 228 (asserting that the distinctions between “summary” and “plenary” proceedings were vague).
\textsuperscript{119} See Bankruptcy Act of 1898, ch. 541, § 24(a), 30 Stat. 544, 553 (repealed 1978); 16 Wright & Miller, supra note 48, § 3926, at 228.
\textsuperscript{120} See 16 Wright & Miller, supra note 48, § 3926 at 229. Wright and Miller describe a functional approach to the conundrum of what should qualify as a proceeding in bankruptcy under the old act developed by Judge Hufstedler: “Appealability thus turns on a sensitive examination of the legal issues involved, the impact of the decision on future bankruptcy administration, the need for interlocutory review and its practical utility.” Id. at 233-34 (quoting In re Brissette, 561 F.2d 779, 782 (9th Cir. 1977)). For a contemporary case interpreting the former statute relating to interlocutory appeals, see Hoen v. McIntosh, 110 F.2d 199, 201 (6th Cir. 1940).
\textsuperscript{121} See 16 Wright & Miller, supra note 48, § 3926, at 230-31.
As to "controversies," 28 U.S.C. § 1292 governed interlocutory appeals.\textsuperscript{123}

Under the 1978 Act, Congress repealed section 24(a) and replaced it with a system that allowed each circuit to choose from two possible routes of appeal.\textsuperscript{124} If the circuit chose to establish a Bankruptcy Appellate Panel ("BAP"), that panel would have jurisdiction over all final orders of the bankruptcy courts; interlocutory appeals were available with leave of the panel.\textsuperscript{125} If the circuit chose not to establish a BAP, district courts had jurisdiction to hear appeals from final orders, and interlocutory appeals could be taken to the district court with leave of that court.\textsuperscript{126} Furthermore, the parties could agree to bypass the district court or BAP and appeal directly to the court of appeals from final orders of bankruptcy judges.\textsuperscript{127}

Under the 1984 Amendments, 28 U.S.C. § 158 governs appeals from bankruptcy court rulings.\textsuperscript{128} Section 158(a) confers jurisdiction on the district courts to hear appeals from "final judgments, orders and decrees"\textsuperscript{129} of the bankruptcy courts,\textsuperscript{130} as does § 1291's provision for appeals from district courts to courts of appeals.\textsuperscript{131} District courts have jurisdiction under § 158(a)(3) over interlocutory appeals\textsuperscript{132} in cases and proceedings referred to the bankruptcy court "with leave of

\textsuperscript{122} See id. at 229, 236 (noting that despite the language of the rule, courts refused to grant leave to appeal orders having little effect on the litigation under the "trivial order" doctrine, and sometimes required something very near to finality before leave would be granted); see also Triangle Elec. Co. v. Foutch, 40 F.2d 353, 355 (8th Cir. 1930) ("The consensus of opinion [as to the application of § 24(a)] is that appeals from purely intermediate and preliminary orders should be allowed, if at all, only in very exceptional cases."); Collier, supra note 7, § 3.03, at 3-197 (asserting that, under the 1898 Act, an interlocutory order must have "substantially determined some issue or decided some step in the course of the proceeding").

\textsuperscript{123} See 16 Wright & Miller, supra note 48, § 3926 at 234-35.

\textsuperscript{124} See id. at 242; see also id. at 244 (stating that the 1978 statute was a "drafting disaster," and that the new appellate provisions were internally confusing).

\textsuperscript{125} See id. at 242.

\textsuperscript{126} See id. at 243.

\textsuperscript{127} See id. One treatise notes that the standard for appeal under the 1978 Act was "undoubtedly somewhat more rigorous" than under § 24(a). Collier, supra note 7, § 3.03, at 3-197.


\textsuperscript{129} Id. § 158(a)(1).

\textsuperscript{130} Final orders in the bankruptcy context include those arising from core proceedings, noncore proceedings which the parties have agreed that the bankruptcy judge may hear, and noncore proceedings in which the defendant has failed to properly object to the procedures used by the bankruptcy judge. See Collier, supra note 7, § 3.03, at 3-167.

\textsuperscript{131} See 28 U.S.C. § 1291.

\textsuperscript{132} Such interlocutory rulings can arise in all civil proceedings in which the bankruptcy judge will render a final order, and in which the judge makes recommendations to the district court pursuant to 28 U.S.C. § 157(e)(1). See Collier, supra note 7, § 3.03, at 3-167.
the court." The statute, however, contains no other criteria or guidance to aid district courts that are considering whether or not to hear an interim appeal. Alternatively, interlocutory appeals can be taken to a BAP, if the circuit had established one. In order to appeal to a BAP, the district court must have authorized the referral, and all parties must consent.

The courts of appeals have jurisdiction over all final judgments, orders, and decrees entered by district judges under sections (a) and (b) of § 158. However, § 158 lacks a provision for appeal to the courts of appeals from interlocutory orders of district courts ruling on bankruptcy appeals; as might be expected, this initially led to much confusion. In Connecticut National Bank v. Germain, the Supreme Court addressed this problem and held that pursuant to § 1292(b), courts of appeals had jurisdiction to hear interlocutory appeals from rulings of district courts on interlocutory orders of bankruptcy courts. Thus, a

133. 28 U.S.C. § 158(a)(3). "[W]ith leave of the court" has been construed to refer to the district court, not the bankruptcy court judge. As such, it is not necessary that bankruptcy judges certify the appeal, as is required of district judges when parties wish to appeal an interlocutory order to the court of appeals. See Carlos J. Cuevas, Judicial Code Section 158: The Final Order Doctrine, 18 Sw. U. L. Rev. 1, 18-20 (1988) (arguing that the better interpretation in light of the authority of district courts over bankruptcy courts, and in view of the plain meaning of the statute, is that certification is not required); Knibb, supra note 78, § 14.4, at 240.

134. See In re Johns-Manville Corp., 42 B.R. 651, 652 (S.D.N.Y. 1984) ("The statutes and rules do not provide a standard for evaluating the merits of motions for leave to appeal interlocutory bankruptcy court orders."); Collier, supra note 7, § 3.03, at 3-196. 28 U.S.C. § 158(a) reads in full as follows:

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 appeals 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.


135. See 28 U.S.C. § 158(e)(1); Collier, supra note 7, § 3.03, at 3-165 to -167.
136. See 28 U.S.C. § 158(b)(1), (4), (6). The necessity that all parties consent was inserted as a result of the Marathon decision, due to congressional concern that an Article III judge be available should the parties wish. See Collier, supra note 7, § 3.03, at 3-170.
139. See id. at 254 ("So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction."); see also Collier, supra note 7, § 3.03 at 3-199 (summarizing the Germain decision); Robert M. Lawless, Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases, 47 Syracuse L. Rev. 1, 38-42 (1996) (criticizing the overly simplistic textual analysis in the Germain decision). In both
district court's interlocutory appellate ruling on an interlocutory appeal from a bankruptcy judge's order is not automatically appealable to the court of appeals under § 158(d). 140

The 1994 amendment to § 158(b) requires that each circuit establish a BAP. 141 These panels consist of three bankruptcy judges, 142 and serve as alternative routes of appeal for bankruptcy litigants. 143 The constitutionality of appeal to a non-Article III judicial panel has been questioned in the wake of the Marathon decision. 144 The Ninth Circuit has held that because appeal from a BAP decision to the court of appeals is available, BAPs function as adjuncts to the courts of appeals. 145 The Ninth Circuit has also held that district courts are not

140. See 16 Wright & Miller, supra note 48, § 3926.2, at 279-80 (rejecting the theory that a district court ruling on an interlocutory appeal is in a sense a "final" ruling).
141. See 28 U.S.C. § 158(b). The previous version of the statute rendered the decision whether or not to establish such panels optional. See 28 U.S.C. § 158(b)(1) (1988) (amended 1994). Under the current version, the judicial council of each circuit may decline to establish a BAP only if it finds that there are insufficient judicial resources available in the circuit to establish the panel, or if such establishment would result in undue delay or increased cost to the parties. See 28 U.S.C. § 158(b)(1)(A)-(B) (1994). The statute also outlines criteria for reconsideration of the council's conclusions. See id. § 158(b)(2)(A)-(D). Prior to the 1994 amendment, only the Ninth Circuit had established and retained a BAP. See Knibb, supra note 78, § 14.1, at 232 n.11. Advocates of BAPs claim that among their merits are "that decisions are rendered by judges with expertise in bankruptcy matters, that appellate decisions will be more coherent and consistent because of the greater quantity of bankruptcy appeals decided, and that there will be fewer appeals to the circuit court from BAP decisions than from district court decisions." Broome, supra note 3, at 545.
143. Under § 158(c)(1), appeals are routed automatically to the BAP, unless at the time of filing, the appellant elects to have the district court hear the appeal, or within thirty days following service of notice of the appeal another party objects to the BAP forum. See id. § 158(c)(1).
145. See Briney v. Burley (In re Burley), 738 F.2d 981, 986 (9th Cir. 1984); see also Coyne v. Westinghouse Credit Corp. (In re Globe Illumination Co.), 149 B.R. 614, 620 (Bankr. C.D. Cal. 1993) (citing with approval In re Burley). But see 6 Norton Bankr. L. & Prac. 2d § 148:17, at 148-67 n.57 (1997) (noting that In re Burley was decided before the 1994 Amendments, which grant BAPs jurisdiction to hear appeals only if the district court has so certified, and asserting that this requirement undermines the notion that BAPs are adjuncts of the circuit courts).
bound by BAP precedent in their circuit, because Article III judges cannot be made to defer to non-Article III judges. Similarly, BAPs are not technically bound by district court decisions, though they should in general afford deference to those decisions. Questions surrounding the precedential value of BAP decisions are of increasing concern as more and more circuits establish the panels in response to the 1994 amendment to § 158(b).

146. See Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990). Bankruptcy courts, however, should be bound by BAP precedent in their circuit in order to further judicial coherence and to fulfill the role of BAPs. See In re Windmill Farms, Inc., 70 B.R. 618, 622 (B.A.P. 9th Cir. 1987), rev'd on other grounds, 841 F.2d 1467 (9th Cir. 1988). But see Far W. Fed. Bank v. Vanasen (In re Vanasen), 81 B.R. 59, 62 (D. Or. 1987) (analogizing BAPs’ precedential role to those of district courts within a circuit, and finding that BAP decisions should be binding only on bankruptcy courts within the district from which an appeal arose). See generally Baisier & Epstein, supra note 1, at 531 (discussing the precedential value, or lack thereof, of BAP decisions); Brittenham, supra note 144, at 248-51 (asserting that BAP decisions should be afforded precedential value); Broome, supra note 3, at 541-43 (detailing the problems arising from uncertainty over the state of the law both for litigants and for parties structuring commercial transactions); Bussel, supra note 81, at 1071-99 (arguing that both district court and BAP decisions should bind bankruptcy courts).


In critiquing the current state of the bankruptcy appellate structure, some commentators have called for a three-judge panel of an Article III appellate court to hear all bankruptcy appeals. See Baisier & Epstein, supra note 1, at 537 (endorsing the approach developed by Professor Daniel J. Bussel, Nathan B. Feinstein, and the Honorable Steven W. Rhodes). Suggested avenues for direct appeals include a newly created United States Court of Appeals for Bankruptcy, or the currently existing Court of Appeals for the Federal Circuit. See id. at 538-39 (noting the danger of appellate specialization and resultant debtor favoritism inherent in an exclusive appellate court for bankruptcy). This proposal is founded in concern over the lack of precedential value of bankruptcy appellate decisions. See id. at 537-38. By instilling in such appellate panels the power to bind all courts, these commentators argue, uniformity in the laws governing commercial transactions can be achieved. See id. (noting that bankruptcy courts are the nation’s “most significant commercial courts,” and that bankruptcy decisions are the “principal source of case law regarding commercial credit transactions”). Others urge the availability of direct appeal to the courts of appeals, an approach which has been adopted by the Bankruptcy Review Commission. See 1 National Bankr. Review Comm’n, Bankruptcy: The Next Twenty Years ¶ 3.1.4, at 35 (1997); Broome, supra note 3, at 546-49 (proposing the availability of this option upon the parties’ consent); Crabb, supra note 1, at 141-47 (“The issues raised in bankruptcy appeals are as worthy of consideration by an appellate body as those raised in appeals from district court decisions. Having to undergo a preliminary review simply adds to the costs of appeal and extends the period of uncertainty for the parties . . . .”). These authorities propose that access to the courts of appeals be available as either a sole means of appeal, or as an option in cases in which a precedential ruling would be beneficial or when large amounts of money are involved. See Broome, supra note 3, at 548. Elimination of a second layer of appeal would reduce the costs both to litigants and to the system, as it would negate the need to establish BAPs. See Crabb, supra note 1, at 147.
The foregoing discussion illustrates the uncertainty that pervades much of the jurisdictional and appellate structure of the bankruptcy system. Questions of the scope of the flexible finality doctrine, litigants' rights in the appellate context, and the precedential value of BAP opinions are recurrent themes in this developing body of law. In the face of this legal morass, courts and commentators have attempted to hammer out interpretations of particularly vague and unhelpful statutes, and nowhere is this piecemeal approach more evident than in the standards that district courts have chosen to apply in determining whether to hear interlocutory appeals from bankruptcy court rulings.\(^{149}\)

### III. Bankruptcy Interlocutory Appeals

This part examines the decisions of most district courts and BAPs to import the strict criteria in 28 U.S.C. § 1292(b) into the bankruptcy context, requiring that litigants meet its three-pronged test to warrant interim appeal. This part also examines the decisions of several courts that have chosen to adopt a more flexible application of § 1292(b) in bankruptcy by focusing on the unique posture of bankruptcy proceedings and the potential harm to litigants from denial of an immediate right to appeal.

#### A. Widespread Adoption of the § 1292(b) Standard

In the absence of a statutory standard in 28 U.S.C. § 158(a)(3) delineating the criteria that district courts and BAPs should apply in determining whether or not to hear interlocutory appeals from bankruptcy court rulings, the majority of courts have turned to the criteria laid out in 28 U.S.C. § 1292(b).\(^{150}\) Courts often add an addi-
tional requirement to those of § 1292(b), stating that a bankruptcy inter-
term appeal will be heard only after a showing of “exceptional
circumstances.”151 Indeed, the pervasive practice of substituting
§ 1292(b) for the permissive language of § 158(a)(3) has developed
the force of a legal rule.152 This hostility toward hearing interlocutory

disqualification motion does not qualify as a controlling question of law, and hearing
such an appeal does not materially advance the litigation); Harlem-Irving Realty, Inc.
denying an appeal challenging a bankruptcy court’s decision to hold a hearing on the
appellant’s request for relief from an automatic stay; the determination of whether a
lease had been terminated before the debtor filed for bankruptcy is a core proceeding,
and the appellant will not be disadvantaged by the denial of leave to appeal); Bertoli
Cir. 1987) (granting leave to appeal a res judicata claim where its resolution in a
trustee’s favor could lead to the dismissal of the entire action); Robinson v. Silverman
(In re Johns-Manville Corp.), 47 B.R. 957, 960-61 (S.D.N.Y. 1985) (denying leave to
appeal a bankruptcy judge’s refusal to disqualify counsel for an alleged conflict of
interest). Other examples of interlocutory appeals that have been granted under the
criteria of § 1292(b) include orders determining whether a proceeding is core or
noncore, granting a motion to strike a demand for a jury trial made in the context of a
core proceeding, appointing a legal representative on behalf of potential future claim-
ants against a debtor, staying the United States Government from prosecuting the
debtor for antitrust violations, and awarding attorneys’ fees as a sanction. See 6 Nor-
ton Bankr. L. & Prac. 2d, supra note 145, § 148:15, at 148-53 to -54. Examples of
appeals that have been denied include orders that denied a motion to dismiss a Chap-
ter 11 case and granted a motion to convert a Chapter 11 reorganization case to a
Chapter 7 liquidation, denied motions to abstain from or dismiss an adversary pro-
ceeding for lack of subject matter jurisdiction, determined a debtor’s net worth for
purposes of calculating its liability under ERISA for the termination of a pension
plan, denied the motion of a potential future claimant of the debtor for transfer of
venue, and denied the motion of a future claimant against a debtor to disqualify coun-
sel for the legal representative of future claimants. See id. at 148-54.

151. 9B Am. Jur. 2d Bankruptcy § 3254, at 750. See, e.g., Nike, Inc. v. National
Shoes, Inc. (In re National Shoes, Inc.), 20 B.R. 672, 673-74 (B.A.P. 1st Cir. 1982)
denying a motion to appeal an order transferring the appellant’s claim against
the debtor to another venue, on the ground that the appellant’s motion failed to in-
voke exceptional circumstances as the proceeding was in its early stages and transfer
to the debtor’s home court is proper); Victor v. Edison Bros. Stores, Inc. (In re Edison
Bros. Stores, Inc.), No. CIV.A. 96-177-SLR, 1996 WL 363806, at *3 (D. Del. June 27,
1996) (noting that exceptional circumstances must warrant departure from the gen-
eral policy against interlocutory review); In re Johns-Manville Corp., 47 B.R. at 961
(holding that the appellant had neither passed the § 1292(b) test nor shown excep-
tional circumstances justifying immediate appeal). The exceptional circumstances re-
quirement is derived from the Supreme Court’s statement in Coopers & Lybrand v.
Livesay to the effect that appellants from district courts to courts of appeals must
demonstrate exceptional circumstances to warrant interlocutory review. See Americare
Lybrand v. Livesay, 437 U.S. 463, 475 (1978)).

152. See, e.g., 6 Norton Bankr. L. & Prac. 2d, supra note 145, § 148:15 (“District
courts have not permitted appeals from all nonfinal orders and decrees entered by
bankruptcy judges. Instead, they have uniformly limited their appellate jurisdiction
over such orders to the circumstances provided for in an analogous statute, 28 U.S.C.
§ 1292.”); Henry Gabriel & Scott Beal, Fifth Circuit Appeals from Bankruptcy De-
cisions, 15 Miss. C. L. Rev. 309, 312 (1995) (“Although § 158(a) does not define the
parameters of this discretion [to hear interlocutory appeals], the district courts have
appeals contrasts with the general policy in favor of bankruptcy appeals reflected in the flexible finality doctrine.\textsuperscript{153}

The rationale behind the widespread adoption of § 1292(b) in the bankruptcy context rests on several grounds. Because § 1292(b) is the sole statute available evidencing congressional intent as to appropriateness of interlocutory review, it is in many ways only natural that district courts should turn to it for guidance in the absence of a similar statute in the bankruptcy context.\textsuperscript{154} Congress enacted § 1292(b) as a standard relating to the propriety of hearing interlocutory appeals between district courts and courts of appeals.\textsuperscript{155} Section 1292(b) reflects the legislative judgment disfavoring interim appeals except under specific, particularized circumstances.\textsuperscript{156} The stringent requirements contained in the statute reflect a bias against piecemeal appeals that can disrupt the litigation process.\textsuperscript{157} District courts applying § 1292(b) to bankruptcy appeals have noted with approval the policy behind the statute, and have extended its rationale to their application of § 158(a)(3).\textsuperscript{158} In addition, § 1292(b) gives structure to a district court's deliberations,\textsuperscript{159} offering peace of mind and ease of use.\textsuperscript{160}


154. See, e.g., Trustee of Jartran, Inc. v. Winston & Strawn, 208 B.R. 898, 900 (N.D. Ill. 1997) (stating that § 1292(b) is “instructive” on the question of the standard to be applied to bankruptcy interlocutory appeals).

155. See supra notes 44-48 and accompanying text.

156. See supra notes 46-48 and accompanying text.

157. See supra notes 49-51 and accompanying text.

158. See, e.g., In re Delaware & Hudson Ry. Co., 96 B.R. 469, 473 (D. Del. 1989) (holding that an appellate must establish “exceptional circumstances [that] justify a departure from the basic policy of postponing review until after the entry of final judgment”); aff'd, 884 F.2d 1383 (3d Cir. 1989); Harlem-Irving Realty, Inc. v. Weiboldt Stores, Inc. (In re Weiboldt Stores, Inc.), 68 B.R. 578, 580 (N.D. Ill. 1986) (“[T]he advent of bankruptcy appeals should be the exception rather than the rule; we do not want to encourage piecemeal appeals.”); In re Hunt Int'l Resources Corp., 57 B.R. 371, 372 (N.D. Tex. 1985) (“Because interlocutory appeals interfere with the overriding goal of the bankruptcy system, expeditious resolution of pressing economic difficulties, . . . they are not favored.”) (citations omitted)).

159. See Maquoketa State Bank v. Hayes (In re Hayes Bankruptcy), 220 B.R. 57, 62 (N.D. Iowa 1998) (positing that courts have adopted § 1292(b) due to a felt necessity to “impose a . . . structure” on § 158(a)(3) appeals).

160. See, e.g., Pileckas v. Marcucio, 156 B.R. 721, 724 (N.D.N.Y. 1993) (noting that while leave to appeal is within the “sound discretion” of the district court, it may use § 1292(b) by analogy). Perhaps as a reflection of the inherent convenience of using § 1292(b), many courts fail to articulate a basis for the analogy, and simply apply its criteria with little reflection. See, e.g., Bertain v. Mitchell (In re Bertain), 215 B.R. 438, 441 (B.A.P. 9th Cir. 1997) (noting without analysis the appropriateness of the adop-
In substituting the criteria in § 1292(b) for the statutory language "with leave of the court" in § 158(a)(3), courts require that (1) the order sought to be reviewed involve a controlling question of law, (2) as to which a substantial ground for difference of opinion exists, and (3) that immediate appeal may materially advance the ultimate termination of the litigation.161 Courts have defined a controlling question of law as one that will materially affect the outcome of the litigation, whose "incorrect disposition amounts to reversible error on appeal," or more liberally as one in which interlocutory reversal will save the litigants time and expense.162 The third requirement, that hearing the appeal materially advance the litigation, involves an analysis similar to that under the "controlling question of law" criterion.163 One court has noted that this element requires either that the appeal save parties significant time and expense or that it prevent irreparable harm.164 Courts have interpreted the second element, a "substantial ground for difference of opinion," as involving an issue of heightened complexity and first impression.165 Together, these criteria require a would-be

161. See 28 U.S.C. § 1292(b) (1994). The movant bears the burden of meeting these criteria, and this burden has been termed a "heavy one." Northeast Sav., F.A. v. Geremia (In re Kalian), 191 B.R. 275, 278 (D.R.I. 1996) (citation omitted).

162. In re PHM Credit Corp., 99 B.R. at 768; see also McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984) ("[I]nterlocutory certification under 28 U.S.C. § 1292(b) [in the court of appeals context] should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.").

163. See Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 654 n.21 (B.A.P. 1st Cir. 1998) (stating that "both are directed toward assuring that the interlocutory review will advance the resolution of the underlying action").

164. See Victor v. Edison Bros. Stores, Inc. (In re Edison Bros. Stores, Inc.), No. CIV.A. 96-177-SLR, 1996 WL 363806, at *3 (D. Del. June 27, 1996) (denying leave to appeal order rejecting appellants' request to establish an official equity committee to appeal appellant public shareholders' rights in the bankruptcy, and noting that even if appellants' rights were "materially advanced," this did not equate to materially advancing the litigation); American Nat'l Bank v. Huff (In re Huff), 61 B.R. 678, 683 (N.D. Ill. 1986) (stating that an issue that is the "focal point" of the proceeding is not enough).

165. See In re Bank of New England, 218 B.R. at 653 (finding that the contract interpretation issue before it did not rise to the "level of difficulty and significance required under § 1292(b)"); American Freight Sys., Inc. v. Transport Ins. Co. (In re American Freight Sys., Inc.), 194 B.R. 659, 662 (D. Kan. 1996) ("The court will not resort to speculating that a substantial basis exists simply because the applicants have not demonstrated one."). At least one court has rejected this criterion in the context of bankruptcy appeals:

To conclude that a district court may grant leave to appeal where a substantial ground for difference of opinion exists but not where the court believes that the bankruptcy court's decision is contrary to well-established law would create the absurd result that interlocutory bankruptcy decisions in-
appellant to meet a high threshold in order to obtain a discretionary interim appeal.\textsuperscript{166}

B. Departure from a Strict § 1292(b) Analysis

Although the vast majority of courts have elected to utilize § 1292(b) as a substitute standard when confronting bankruptcy interlocutory appeals, a small number of courts have taken a more contemplative approach to its use.\textsuperscript{167} The First Circuit has recently produced...
a line of cases stemming from a district court's opinion in Williams v. United States (In re Williams)\textsuperscript{168} that illustrates the appropriateness of a more flexible use of § 1292(b) in bankruptcy. Williams concerned monetary and alleged verbal sanctions imposed on two government lawyers by the bankruptcy court for discovery violations.\textsuperscript{169} On appeal, the attorneys claimed that the bankruptcy court exceeded its authority by imposing a criminal fine, and that the attorneys' due process rights were violated.\textsuperscript{170} The government joined the appeal, arguing that the bankruptcy court's ruling that the attorneys could not seek reimbursement from their employer violated the separation of powers doctrine.\textsuperscript{171} The First Circuit considers monetary discovery sanctions imposed on attorneys to be nonfinal orders, which are ordinarily unappealable.\textsuperscript{172} Because the bankruptcy judge had also issued two opinions vehemently criticizing the attorneys,\textsuperscript{173} however, the district court found that the danger of injury to reputation counseled in favor of allowing interlocutory appeal.\textsuperscript{174}

In reaching this conclusion, the Williams court noted the imperfection of the analogy of using § 1292(b) as a surrogate standard in bankruptcy, and stated that the decision to do so is "jurisprudential and not jurisdictional."\textsuperscript{175} The court found that because district courts exercise plenary authority over bankruptcy cases, retaining the power to refer cases to, and to withdraw them from, the bankruptcy courts, it is unlikely that Congress intended to limit district courts' power to hear capriciously in its ruling, the appeal will not lie. See In re Executive Office Ctrs., Inc., 75 B.R. 60, 61 (E.D. La. 1987) ("[D]istrict courts are . . . to determine whether the bankruptcy court has stated some rational or reasonable basis for its decision or whether the applicant has known [sic] that the bankruptcy court acted arbitrarily or capriciously or abused its discretion.")\textsuperscript{168}. 215 B.R. 289 (D.R.I. 1997), appeal dismissed, 156 F.3d 86 (1998), cert. denied, 119 S. Ct. 905 (1999).

\textsuperscript{169} See id. at 296.
\textsuperscript{170} See id. at 297.
\textsuperscript{171} See id.
\textsuperscript{172} See id. at 298.
\textsuperscript{173} See id. at 296-97. The bankruptcy court had referred to the attorneys' conduct as "'egregious' . . . 'autocratic' . . . 'intentional, unprofessional and unjustified."' Id. at 296 (quoting Williams v. United States (In re Williams), 181 B.R. 1, 2-5 (Bankr. D.R.I. 1995)).
\textsuperscript{174} See id. at 297-98 ("Although there is no constitutionally protected interest in one's reputation . . . some courts have found that a published reprimand of an attorney confers standing in that attorney to appeal injurious findings of fact." (citations omitted)). The district court ultimately dismissed the monetary sanctions. See id. at 303. The attorneys then appealed that decision, seeking solely to vacate the bankruptcy court's findings of misconduct. See Williams v. United States (In re Williams), 156 F.3d 86, 89 (1st Cir. 1998), cert. denied, 119 S. Ct. 905 (1999). On appeal, the First Circuit faced the question of whether the bankruptcy court's published findings of attorney misconduct supported appeal absent monetary sanctions. See id. at 87. The court answered this question in the negative and dismissed the appeal, holding that the bankruptcy court's opinion constituted findings of fact, and did not operate as a sanction. See id. at 89-93.

\textsuperscript{175} In re Williams, 215 B.R. at 298 n.6.
interlocutory appeals. The court acknowledged the strong policy against piecemeal review, and the usefulness of § 1292(b) in many circumstances, but found that it was not jurisdictionally bound to apply that standard. It observed that bankruptcy proceedings often extend for a number of years, and that the threat of continuing injury during this time may warrant immediate appeal. The court concluded that in a situation such as this, where "serious, perhaps irreparable consequence[s]" are threatened which can be "effectually challenged only by immediate appeal," granting leave to appeal is appropriate.

Although one court has criticized Williams, others have noted its approach with approval. For example, in Foreign Car Center, Inc. v. Salem Suede, Inc. (In re Salem Suede, Inc.), the district court granted leave to one of several appellants to appeal from an order denying summary judgment. Although such orders are usually considered nonfinal, the court utilized a flexible finality and "exceptional conditions" analysis to further "the articulated goals of discretionary appellate jurisdiction over interlocutory appeals" in the bankruptcy context. The court stated that discretion under § 158 is greater than that under § 1292(b), and noted that the bankruptcy court's order finding an insurance contract provision ambiguous was unclear. According to the court, leaving a murky record would impair the trial

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176. See id.
177. See id.
178. See id. at 299 (finding that hearing the appeal would not delay advancement of the proceedings below); cf. Northeast Sav., F.A. v. Geremia (In re Kalian), 191 B.R. 275, 278 (D.R.I. 1996) (noting that § 1292(b) as applied by courts of appeals is "usually reserved for complex and prolonged litigation such as an antitrust or a conspiracy matter").
180. A First Circuit Bankruptcy Appellate Panel rejected the Williams approach in Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 652 (B.A.P. 1st Cir. 1998). In denying appellant leave to appeal from an order granting summary judgment against it and requiring that it indemnify the debtor for liability toward a third party, see id. at 645, the BAP reasoned that the order was not final because it involved only a single count in an ongoing six-count adversary proceeding. See id. at 647-48. After finding that the order also did not fall within the collateral order doctrine for appeals of nonfinal orders, see id. at 649-51, the court denied leave to appeal under § 158(a)(3). See id. at 654. While the court acknowledged Williams, it held that § 1292(b) provided "appropriate guidance for (and limitation of) our exercises of discretionary jurisdiction under § 158(a)(3)." Id. at 652. The court stated as an aside that even were it to apply an alternative "responsible approach," the appeal simply did not merit interlocutory review as it did not dispose of the remaining counts in the proceeding and involved a mundane matter of contract interpretation. Id. at 653-54 & n.22.
182. See id. at 594.
183. Id. at 599.
184. See id. at 596.
185. See id. at 601.
judge, to whom the case would be transferred, from properly identifying triable issues of fact—"a consideration that is unique to a bankruptcy context."\(^{186}\)

In *BancBoston Real Estate Capital Corp. v. JBI Associates Ltd. (In re Jackson Brook Institute, Inc.)*,\(^{187}\) a district court relied on § 158(a)(3) to grant a mortgagor leave to appeal a bankruptcy court order refusing to abstain or remand the mortgagor's foreclosure action against the debtor.\(^{188}\) The primary issue on appeal was whether the foreclosure action was a core or noncore proceeding, and thus whether the bankruptcy judge could enter a judgment in the matter.\(^{189}\)

The court adopted a pragmatic approach to using § 1292(b) as a substitute standard, noting courts' liberal attitude toward bankruptcy appeals in general.\(^{190}\) In applying the § 1292(b) criteria, the court found that when the issue on appeal is whether a bankruptcy court's ruling relates to a core or noncore proceeding, interim appeal is appropriate due to the sustained injury litigants will suffer over time if forced to abide by orders entered by a judge who lacks jurisdiction in the proceeding.\(^{191}\)

A Southern District of New York court has also cited *Williams* approvingly.\(^{192}\) In *Mishkin v. Ageloff*, the court granted corporate insiders accused of causing the debtor's collapse leave to appeal from a bankruptcy court's order granting the Trustee relief from an automatic stay of discovery to avoid undue prejudice.\(^{193}\) The court reversed the bankruptcy judge's order because the Trustee had not sustained its statutory burden of showing "particularized discovery" necessary to avoid undue prejudice.\(^{194}\) In finding that it had jurisdiction to hear the appeal, the court expressly praised the *Williams* decision and its rejection of the automatic adoption of the § 1292(b) standard.\(^{195}\) To support its approach, the court referenced the doctrine of flexible finality and extended the policy behind that doctrine to interlocutory

\(^{186}\) *Id.*


\(^{188}\) See *id.* at 572-73. The bankruptcy judge determined that the foreclosure action was a "core" proceeding against objection by the appellant. See *id.* at 573.

\(^{189}\) See *id.* at 583-86.

\(^{190}\) See *id.* at 581-82 ("This Court will thus analyze the appealability of the Bankruptcy Order in this case using the factors set out in section 1292(b) to guide its analysis while adopting the pragmatic and liberal approach required in determining the appealability of an interlocutory order in a bankruptcy proceeding.").


\(^{193}\) *Id.* at 787-89.

\(^{194}\) *Id.* at 789-90 (reaching this conclusion required interpretation of the Private Securities Litigation Reform Act of 1995's automatic stay provision, which is a matter of non-bankruptcy law). The district court also granted motions to withdraw the reference from the bankruptcy court. See *id.* at 801.

\(^{195}\) *See id.* at 790-91 (noting that no court of appeals has precisely addressed the propriety of using § 1292(b) in the context of the current version of § 158(a)(3)).
appeals. Mishkin also noted that the Second Circuit has "indicated that its appellate jurisdiction is more limited than the district courts vis-à-vis bankruptcy appeals." While not rejecting the use of § 1292(b) in other factual contexts, the court looked elsewhere for authority to hear the appeal, implying that the order did not qualify under § 1292(b). The court held that appeal was warranted because the order involved an important question of interpretation of a non-bankruptcy statute and raised issues that were of apparent first impression. In addition, because the court was withdrawing the reference simultaneously with granting appellant’s requested relief, appeal was appropriate under the circumstances before it.

Other courts have also exercised a more flexible approach to a § 158(a)(3) appeal. In Moix-McNutt v. Coop (In re Moix-McNutt), a BAP granted a debtor leave to appeal due to the unique procedural posture of the case. The appeal concerned the denial of a recusal motion pursuant to appellant’s accusation of gender bias against the bankruptcy judge. Denials of recusal motions are generally considered nonfinal. The court declined to apply the § 1292(b) standard in determining whether or not to hear the appeal: "Given our broad discretion over interlocutory orders, we are not constrained to follow the standards established for the courts of appeals." The court found that if it were to require appellant to await entry of a final order, it might later be forced to vacate all subsequent orders should the charge of bias be proved.

Similarly, in Maquoketa State Bank v. Hayes (In re Hayes Bankruptcy), a district court stated that the application of § 1292(b) in lieu of the absence of a statutory standard under § 158(a)(3) "arise[s] from a felt necessity to impose an analytical structure on the . . . in-

196. See id. at 791.
197. Id. The court stated that this acknowledgment by the Second Circuit: "supports adoption of a standard . . . for determining whether to hear discretionary appeals which takes into account this broader jurisdiction and which is not automatically tied to a standard that is designed to limit, in a different context, the number of appeals to the Court of Appeals." Id.
198. See id. at 791 n.5.
199. See id. Interestingly, the Second Circuit has held that the "mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion [under § 1292(b)]." Flor v. BOT Fin. Corp. (In re Flor), 79 F.3d 281, 284 (2d Cir. 1996).
200. 215 B.R. 405 (B.A.P. 8th Cir. 1997).
201. See id. at 408.
202. See id. at 407. The bankruptcy judge allegedly referred to appellant as "just a housewife" and "just a babysitter" during the proceedings, but the appellate court found these allegations to be false. See id. at 409.
203. See id. at 407-08.
204. Id. at 408 n.6.
205. See id. at 408 n.7 ("We would rather undo a few stitches at the outset than unravel the entire garment.").
quiry and to discourage pell-mell appeals." Although the court declined to hear creditor-appellants' appeal from an order refusing to convert a Chapter 13 case to a Chapter 7 case, it noted that nothing in the "statutory or constitutional relationship between district and bankruptcy courts" indicates a limit on the district court's discretion in this area. The court instead pointed to the structural relationship between the two courts as evidence of district courts' power. Because bankruptcy courts are units of the district courts, the court reasoned, and because district courts have the power to confer jurisdiction upon, and to withdraw it from, bankruptcy courts, it follows that district courts should be able to review bankruptcy decisions as freely as they review their own.

These cases demonstrate the many compelling arguments for a more flexible, pragmatic approach to hearing interlocutory appeals from bankruptcy court orders in some procedural and factual contexts. These arguments draw on the plenary authority that district courts exercise over bankruptcy courts, the doctrine of flexible finality as a reflection of a more lenient attitude toward appeals in the bankruptcy context, injury to litigants resultant from abiding by orders relating to matters in which the bankruptcy judge lacks jurisdiction, matters of first impression, especially as to non-bankruptcy issues, the chance of an unclear record if the case is transferred to the district court for trial, the potential that a later reversal of the order sought to be appealed will negate all prior orders, and the

207. Id. at 59.
208. See id. at 62-63 (finding that denial of a motion to convert a Chapter 13 case into a Chapter 7 case is nonfinal because creditors' recovery will be secured by the debtor's future income, rather than from the debtor's property, and thus no prejudice arises). The court went on to deny leave to appeal under § 158(a)(3) because in effect the creditors had shown no injury, and could appeal once the Chapter 13 Plan was confirmed. Id. at 62-63.
209. Id. at 59.
210. See id.
211. See id. But see American Nat'l Bank v. Huff (In re Huff), 61 B.R. 678, 682-83 (N.D. Ill. 1986) (observing that even though bankruptcy courts are units of the district courts, and that theoretically discretion to hear interlocutory appeals is greater than that available to the courts of appeals, district courts should not avail themselves of this more liberal discretion).
212. See Williams v. United States (In re Williams), 215 B.R. 289, 298 n.6 (D.R.I. 1997), appeal dismissed, 156 F.3d 86 (1999), cert. denied, 119 S. Ct. 905 (1999); In re Hayes Bankruptcy, 220 B.R. at 59.
216. See In re Salem Suede, Inc. 221 B.R. at 600-01.
217. See Moix-McNutt v. Coop (In re Moix-McNutt), 215 B.R. 405, 408 n.7 (B.A.P. 8th Cir. 1997).
extended period of time often involved in bankruptcy proceedings.\textsuperscript{218} These arguments stand opposed by courts’ need for facility and certainty in deciding which interlocutory appeals merit appellate review.\textsuperscript{219} Against this background of disagreement over the correct approach that district courts and BAPs should take when encountering bankruptcy interlocutory appeals, part IV argues that while an appropriate analysis properly begins with § 1292(b), the statute should be applied in a more flexible, pragmatic manner in the bankruptcy context.

IV. Toward a More Flexible Standard

The concerns of bankruptcy litigants can be unique: the ability to resolve and regulate their respective financial positions as expeditiously as possible is paramount.\textsuperscript{220} Delay in final adjudication of rights, or loss of the ability to contest a ruling, can be economically disastrous to debtors and creditors. Courts developed the flexible approach to finality in bankruptcy in part to respond to these issues.\textsuperscript{221} The doctrine functions to render many decisions automatically appealable that would otherwise qualify as interlocutory, and thus be subject to discretionary review.\textsuperscript{222} Although bankruptcy litigants benefit from the flexible finality doctrine, it alone is not enough to protect litigants seeking to appeal purely interlocutory matters that do not qualify for appeal under that doctrine.

In addition, exceptions to the finality doctrine, and other approaches that have been suggested to fill § 158(a)(3)’s void, cannot adequately protect litigants’ rights. The collateral order doctrine applies to a small class of prejudgment orders that finally determine claims of right collateral to the primary cause of action.\textsuperscript{223} The requirement voiced by many courts that appellants demonstrate “exceptional circumstances” to warrant interim appeal is only another way of requiring a heightened showing in keeping with § 1292(b).\textsuperscript{224} The abuse-of-discretion standard voiced in \textit{In re Executive Office Centers},

\begin{itemize}
\item \textsuperscript{219} See \textit{supra} notes 154-60 and accompanying text.
\item \textsuperscript{221} See \textit{supra} notes 106-13 and accompanying text.
\item \textsuperscript{222} See \textit{supra} notes 112-13 and accompanying text.
\item \textsuperscript{223} See \textit{supra} notes 26-30 and accompanying text.
\item \textsuperscript{224} See, e.g., United States Lines, Inc. v. American S.S. Owners Mut. Protection & Indem. Assoc. (\textit{In re United States Lines, Inc.}), 199 B.R. 465, 471 (S.D.N.Y. 1996) (stating that the conditions satisfying § 1292(b) will exist only in “exceptional circumstances”).
\end{itemize}
Inc., is yet another onerous requirement that aims to weed out all but a few interlocutory appeals.

In resolving the concerns of bankruptcy litigants, this Note does not advocate a wholesale discretionary approach to hearing interlocutory appeals from bankruptcy courts; indeed, such an approach would be unwise. The general judicial reluctance to entertain interlocutory appeals, reflected in Congress's enactment of § 1292(b), is sound: avoiding piecemeal review ordinarily saves litigants and the courts time and money. In addition, if litigation proceeds uninterrupted, disputed rulings may lose their significance, or cases may settle. Despite the policies weighing against interim appeals, bankruptcy interlocutory appeals should not be limited by rote application of § 1292(b) in all situations.

Section 1292(b) provides a useful starting point for assessing appeals in the absence of a specific statutory standard in the bankruptcy context, as it reflects the legislative posture disfavoring piecemeal review. A more flexible, pragmatic approach to hearing interlocutory appeals in bankruptcy, however, can ensure that litigants' economic needs will be emphasized. Such a reasoned, reflective approach would be grounded in, but not limited by, § 1292(b), and would highlight the unique characteristics of bankruptcy cases and proceedings. Thus, a district court confronting a bankruptcy interlocutory

225. *In re Executive Office Ctrs.*, Inc., 75 B.R. 60, 61 (E.D. La. 1987); *see supra* note 167 and accompanying text.
226. *See supra* notes 14-19 and accompanying text.
227. *See Joseph Mitzel, Note, When Is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts, 74 Minn. L. Rev. 1337, 1341 n.20 (1990).*
228. *See supra* notes 14-19 and accompanying text.
229. *See supra* notes 45-53 and accompanying text; *see also* Williams v. United States (*In re Williams*), 215 B.R. 289, 298 n.6 (D.R.I. 1997), *appeal dismissed*, 156 F.3d 86 (1998), *cert. denied*, 119 S. Ct. 905 (1999) (observing that "while strict adherence to the § 1292(b) procedures comports with sound policy, the language of § 158(a)(3) obviously vests broader discretion in the district courts to permit interlocutory appeals"); *American Nat'l Bank v. Huff* (*In re Huff*), 61 B.R. 678, 682 (N.D. Ill. 1986) (noting that while district courts may properly hear interlocutory appeals when circuit courts may not, and that policy reasons may compel the district court to do so, restraint should be exercised in order to limit piecemeal review).
230. For example, commentators have urged that courts of appeals, in considering whether to hear interlocutory appeals from district court rulings on bankruptcy appeals, should consider "[t]he special needs and opportunities created by bankruptcy procedure." 16 Wright & Miller, *supra* note 48, § 3926.1, at 256.
231. *See, e.g., Cuevas, supra* note 133, at 23 (stating, in the context of corporate reorganization, that appeals from interlocutory rulings are "consequential", and therefore, the district court should be more liberal in granting leave to appeal than in the context of traditional civil litigation"). Cuevas lists the following factors that district courts should consider: whether the appeal involves an issue central to the corporate reorganization; whether the bankruptcy court has abused its discretion; whether the order conflicts with controlling precedent; hardship to the litigants and other parties; and whether appellate review will advance or impede the termination of the reorganization. *See id.*
appeal should appropriately consider the general judicial reluctance to entertain disruptive, time-consuming appeals in the midst of litigation, as reflected by § 1292(b)'s stringent criteria, but should ultimately base its decision on whether to hear the appeal on the particular set of circumstances before it. When encountering bankruptcy orders that do not meet § 1292(b)'s three-pronged test, the appellate court should consider whether the heavy economic burdens of bankruptcy litigants or the procedural peculiarities of bankruptcy litigation merit permission to appeal nonetheless.

As set forth in part I, commentators have criticized a rigid application of § 1292(b)'s criteria even in the context of appeals from district courts to courts of appeals. These authorities focus on the pitfalls of a strict reading of § 1292(b), which can foreclose litigants' ability to protect their rights. Among the arguments advanced for a more flexible reading of § 1292(b) include the need to clarify issues that frequently fail to reach the appellate level, the opportunity to save costs and time, the ability of courts of appeals to more closely supervise district courts, and the fact that complex litigation can move forward while discrete issues are dealt with on appeal. Several of these factors are especially compelling in the bankruptcy context. The precedential value of district court rulings, though limited, can create greater consistency in the patchwork of bankruptcy law. Because bankruptcy courts are non-Article III courts that function as units of the district courts, the freedom of district courts to closely supervise bankruptcy litigation and to grant leave to appeal, particularly in noncore proceedings, is crucial to the rights of litigants. In addition, because heightened economic interests are frequently at stake, the ability to afford a party relief by hearing an appeal that may expedite the litigation or to adjust the financial relationships between the parties is paramount. It makes little sense, therefore, for courts that are not statutorily constrained by § 1292(b) to insist on a literal, automatic application of its standard in determining whether to grant leave to appeal.

232. See supra notes 56-63 and accompanying text.
233. See supra notes 56-57 and accompanying text; see also Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir. 1974) ("The determination of what orders are properly reviewable under § 1292(b) must be made by a practical application of those policies [favoring interlocutory appeals], not by a mechanical application of labels . . . .").
234. See supra note 58.
235. See supra note 146.
236. See supra notes 75-77 and accompanying text.
238. One criticism of the current statutory structure concerns both the ability and the availability of the district courts to properly adjudicate bankruptcy appeals. The argument is that district judges, who have more pressing matters on their dockets and limited expertise in bankruptcy law, provide bankruptcy litigants with limited oppor-
The application of § 1292(b) in the bankruptcy context should involve a balancing of the "probable gains and losses of immediate appeal." A flexible approach to using § 1292(b) would engage in such a weighing process based on the factual and procedural circumstances of each litigation, departing from that standard when necessary to prevent undue injury to litigants' economic interests. Examples of situations in which denial of leave to appeal is likely to be proper include: fact-intensive inquiries, such as denial of a debtor's reorganization plan or adequacy of representation of parties' interests; orders remaining subject to change below (e.g., grants of summary judgment in multi-party, multi-claim proceedings that have not been certified as entries of final judgment under Federal Rule of Civil Procedure 54(b)); proceedings in which appeal will likely lead to protracted delay due to chance of further appeal, especially when likelihood of trial is high anyway; when further factual determinations below may affect the question of law sought to be reviewed; and routine discovery orders.

On the other hand, examples of situations in which immediate appeal may be warranted include: threat of prolonged injury over the
course of the bankruptcy proceedings; the existence of questions as to the bankruptcy court's power to issue a ruling; the potential for reversal of all subsequent orders if the order sought to be appealed from is later reversed; when the case is likely to be transferred for trial and the record is at risk of being confusing or unclear; when the issue is whether an order relates to a core or noncore matter, with preference given to granting appeal of noncore rulings; matters of first impression; when the reference is being withdrawn; and when length of the bankruptcy proceedings is likely to render chance of success on appeal highly unlikely, as in venue orders.

These examples illustrate the unique circumstances that mark bankruptcy litigation, and provide but a few instances in which a flexible approach to granting leave to appeal may be warranted. The ability of district courts and BAPs to approach bankruptcy interlocutory appeals flexibly is provided by §158(a)(3); the decision to do so should be governed by pragmatism, necessity, and justice.

**Conclusion**

Bankruptcy laws regulate the operation of businesses. Clarity of legal rules and expeditious resolution of litigated issues are crucial not only to the parties in any given case or proceeding, but to those en-

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248. See, e.g., Back v. LTV Corp. (In re Chateaugay Corp.), 213 B.R. 633, 636-37 (S.D.N.Y. 1997) (granting leave to appeal, under the criteria of §1292(b), a bankruptcy court's entering of a preliminary injunction against a state-court action against the debtor, but denying leave to appeal the denial of motions to dismiss).

249. See, e.g., Moix-McNutt v. Coop (In re Moix-McNutt), 215 B.R. 405, 408 & n.7 (B.A.P. 8th Cir. 1997) (granting leave to appeal the denial of a recusal motion where the debtor charged the bankruptcy judge with gender bias).

250. See, e.g., Foreign Car Ctr., Inc. v. Salem Suede, Inc. (In re Salem Suede, Inc.), 221 B.R. 586, 600-01 (D. Mass. 1998) (granting leave to appeal the denial of summary judgment due to the bankruptcy judge's failure to clarify the material issues of fact that remained).

251. See, e.g., BancBoston Real Estate Capital Corp. v. JBI Assocs. Ltd. (In re Jackson Brook Inst., Inc.), 227 B.R. 569, 582 (D. Me. 1998) (noting that if a bankruptcy judge's erroneous ruling is left intact, the parties are "threatened with the continuing injury of orders being entered over a long period of time by a court that lacks jurisdiction").

252. See, e.g., Mishkin v. Ageloff, 220 B.R. 784, 791 n.5 (S.D.N.Y. 1998) (allowing leave to appeal an order granting the Trustee relief from an automatic stay of discovery, when interpretation of non-bankruptcy law was required).

253. See id. at 795 (noting that withdrawal of the reference is mandatory when matters raised in "proceedings or claims require 'significant interpretation, as opposed to simple application' of non-bankruptcy federal law" (quoting City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991))).

254. See, e.g., ICMR, Inc. v. Tri-City Foods, Inc., 100 B.R. 51, 53-54 (D. Kan. 1989) (stating that courts should have discretion to permit interlocutory appeals of orders changing venue where there is a small chance of success if appeal is taken after the bankruptcy case has closed).
gaged in commercial planning and development. The nature of bankruptcy litigation, which affects multiple parties’ interests, involves large amounts of money, and often lasts for years, has led to the development of the flexible finality doctrine. Under this doctrine, orders become appealable as of right in more instances than they would in non-bankruptcy litigation. But a flexible approach to final rulings does not necessitate an overly strict approach to interlocutory rulings as a form of judicial over-correction. Flexibility is appropriate even in the interlocutory context to serve the unique interests of bankruptcy litigants.

In confronting a request for leave to appeal from a bankruptcy court’s interim ruling, district courts and BAPs should weigh the “probable gains and losses of immediate appeal,”255 carefully considering the potential prejudice to appellants if forced to await a final ruling. In adopting § 1292(b) as a surrogate standard, courts should take a pragmatic, flexible approach to its use, and view § 1292(b) as a springboard, not a straightjacket. The decision to adopt § 1292(b) as a stand-in for § 158(a)(3)’s absence of criteria is, after all, “jurisprudential and not jurisdictional.”256