Alternative Structures for Bankruptcy Appeals

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Preface

With the dramatic rise in bankruptcy filings beginning in the mid-1980s, the debate over the appropriate structure and operation of the bankruptcy system began to command increasing attention from Congress and other observers and users of the system. The debate has focused largely on substantive bankruptcy law, particularly as it affects consumer debtors and their creditors, but some efforts to examine the system have taken a broader approach (e.g., the work of the congressionally created National Bankruptcy Review Commission). These efforts have refocused attention on how first-level bankruptcy decisions should be reviewed on appeal. Some in Congress moved to implement the Bankruptcy Review Commission's 1997 recommendations, including one recommendation to route bankruptcy appeals directly to the courts of appeals rather than, as now, to the district courts or bankruptcy appellate panels. The Judicial Conference of the United States asked Congress to defer action on these proposals until the judiciary had an opportunity to "study further the existing process and possible alternative structures and to submit a subsequent report to Congress." To facilitate the Judicial Conference's deliberations, its Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) asked the Federal Judicial Center to study the existing bankruptcy appellate structure and possible alternatives.

The Center's study report served as the basis for discussion at the Bankruptcy Committee's June 1999 meeting. At that meeting, the committee recommended that appeals from dispositive orders should in most instances continue to be taken to the district court or to the bankruptcy appellate panel, if one has been established, with further appeal as of right to the court of appeals. But the committee recommended that the dispositive orders of bankruptcy judges should be reviewable directly in the court of appeals if, upon certification from the district court or the bankruptcy appellate panel or on motion by all parties to the appeal, the court of appeals determines that (1) a substantial question of law or matter of public importance is presented and (2) an immediate appeal from the order to the court of appeals is in the interests of justice. The Committee on Court Administration and Case Management, which also considered the Center's report at its June 1999 meeting, concurred in this recommendation. Shortly thereafter, in view of pending legislation that would provide for direct appeal of bankruptcy court orders to the court of appeals, the Judicial Conference's

Executive Committee took expedited action to approve the recommendation on behalf of the Conference. In September 1999, the Executive Committee assented to a proposal by Senator Patrick J. Leahy to modify the Judicial Conference recommendation by deleting the provision that would allow the parties to bring a direct appeal without certification by the district or bankruptcy court.

At the time of this writing, it is unclear whether Congress will pass a major bankruptcy statute and how that legislation (if passed) will affect the bankruptcy appeals process, if at all. The Senate version of the legislation contains no appeal-related provisions, but the House version would permit direct appeal to the courts of appeals. It would eliminate district court appellate jurisdiction but would also permit circuits to create or retain bankruptcy appellate panels, to which appeals could be taken with the consent of the parties. During informal negotiations to resolve differences between the House and Senate bills, yet another approach to changing the bankruptcy appellate system was proposed: Any bankruptcy appeal not decided by the district court within thirty days (or an extension thereof) could be taken to the court of appeals as though the district court had affirmed the bankruptcy judge's decision.

Interest in the bankruptcy appellate system will likely persist, regardless of the outcome of the current legislative activity. At a minimum, information about the operation of the present system will be critical to any evaluation of structural changes that may be made. In light of continuing interest in this recurring policy question about judicial administration, this report sets out the major results of the Center's study.

Executive Summary

Under the current bankruptcy appellate system, appeals from dispositive orders of bankruptcy judges are taken to the district court or to the bankruptcy appellate panel, if one has been established and the district has chosen to participate, with further appeal as of right to the court of appeals. In response to legislative proposals to change this system, the Judicial Conference of the United States asked Congress to defer action until the judiciary had an opportunity to "study further the existing process and possible alternative structures and to submit a subsequent report to Congress."[1] To facilitate the Conference's deliberations, its Committee on the Administration of the Bankruptcy System asked the Federal Judicial Center to study the existing bankruptcy appellate structure and possible alternatives.[2] This report sets out the results of that study. It describes the bankruptcy appellate system now operating in the United States and how it evolved, sets out the recent efforts to change this system, and analyzes the evidence regarding the need for change and the desirability of proposed changes. Here we summarize the study's major points regarding precedent, disposition speed, cost, process, and outcome under the current appellate system, and how the proposed alternative systems might differ on these dimensions.

Findings

Regarding precedent

1. The bankruptcy appellate system is not well structured to produce binding precedent. The number of first-level reviewers greatly exceeds

1. Report of the Proceedings of the Judicial Conference of the United States, Sept. 1998, at 47.

2. We are grateful to the Bankruptcy Committee, particularly Judge David R. Thompson, who chaired it during this study, and Judge Sarah Vance, who chaired its Subcommittee on Bankruptcy Appeals. The subcommittee and its liaison members from the Committee on Court Administration and Case Management provided guidance and oversight of the project. This publication is substantially similar to the report delivered to the committees. We are also grateful to our FJC colleagues who provided research assistance—George Cort, John Shapard, Naomi Medvin, Patricia Lombard, Dean Miletich, and Ross Jurewitz. Also, Russell Wheeler was a thoughtful sounding board on many occasions and a careful reviewer of earlier drafts. Portions of this report are derived from two papers prepared by the authors at the direction of the Commission on Structural Alternatives for the Federal Courts of Appeals. See Elizabeth C. Wiggins & Judith A. McKenna, *Evaluating Alternative Bankruptcy Appellate Processes* and *Direct Bankruptcy Appeals to the Courts of Appeals and Alternatives Using Bankruptcy Appellate Panels*, both in the commission's *Working Papers* (1999). The empirical research described here updates and expands the work we did for the Commission.

the number of bankruptcy judges producing the judgments reviewed, and appellate caseloads are spread thinly among district judges, giving few judges much opportunity to develop bankruptcy expertise. Moreover, the inability of most appellate reviewers to create binding precedent diminishes the value of appellate review and is asserted to hinder lawyers' and others' ability to structure transactions and predict litigation outcomes. We did not independently assess the level of uncertainty among lawyers, but we did survey bankruptcy and district judges about their experiences with precedent problems.

2. Neither bankruptcy judges nor district judges report high levels of uncertainty about bankruptcy law, but with their more specialized caseloads, bankruptcy judges experience uncertainty more often and identify more discrete instances in which they had to decide an issue on which the law is unclear. Both bankruptcy and district judges attribute much of this uncertainty to the dearth of binding precedent from the courts of appeals or the Supreme Court. There are also clear examples of unresolved issues on which bankruptcy and district court opinions conflict (within and between the groups).

3. Bankruptcy judges report more experiences with unclear or conflicting precedents in their typical caseloads than district judges report having in theirs. Moreover, district judges report more problems when asked only about bankruptcy cases than they do when asked about their overall caseloads.

4. Bankruptcy appellate panel (BAP) judges provide specialized bankruptcy expertise that their bankruptcy colleagues (and, to a slightly lesser extent, district judges) value highly as a source of authority. Specifically: Bankruptcy and district judges facing issues on which there is no binding circuit precedent find the decisions of BAPs important sources of information in deciding the issues, particularly when those decisions were rendered in cases coming from their own districts. A large majority of bankruptcy judges find BAP decisions "very important" even when they are in cases arising from other districts. This finding is not discussed in this report because a full report on the survey awaits completion of a companion survey of attorneys.

Regarding disposition speed

Caveat: Substantial problems with measuring relevant disposition times make comparisons among the appellate routes on this dimension problematic. For the BAPs and the courts of appeals, we can distinguish with some confidence between cases determined on the merits and cases terminated in other ways. However, in the district court statistics, we cannot distinguish with much confidence between bankruptcy appeals determined on the merits and those that are terminated in other ways. Disposition time analyses should be used with caution, but using the best available data, we find:

1. District courts are, on the whole, faster at deciding bankruptcy appeals than are the courts of appeals (median disposition times of approximately 152–165 days v. 230–240 days), but data-quality problems preclude us from making a confident estimate of how those times break down between merit and non-merit dispositions in the district courts.

2. It is too early to tell whether bankruptcy appellate panels will be on average slower or faster than district courts. The BAPs differ among themselves on this dimension, but also differ in the nature of the cases they handle (e.g., some took cases transferred in after long delays in the district court, others took only new filings) in ways that may affect their disposition times. The Ninth Circuit BAP appears to have a longer median disposition time than the district courts in the circuit, but we have insufficient data to conclude that with any certainty.

3. For cases that continue on through the court of appeals, the time spent at the district court or BAP adds substantially to the total time on appeal—for cases terminated on the merits by the courts of appeals in fiscal 1998, the average time spent in the total appellate process was more than 27 months (826 days), and the median time was more than 22 months (663 days).

Regarding cost

1. For litigants who desire only a second, independent look at their cases and would not pursue the matter further, district courts are likely to be a less expensive appeal route than courts of appeals. (We did not independently assess costs, but base this conclusion on gross comparisons of the procedural differences between the systems and their implications for litigant expense.) For litigants who would pursue the appeal in any event

(e.g., to obtain a binding precedent), the dual appeal structure adds to expense.

2. For the taxpayer, direct appeal to the courts of appeals (eliminating district court *and* BAP) would likely impose fairly substantial costs in circuit judge time and related resource needs. Those costs are likely to exceed whatever resources are saved in district judge time—total time saved might amount to that of nine district judges, but few or no judgeships could be eliminated because the savings would be distributed so widely across the nation. However, the additional burdens on the courts of appeals are likely to be concentrated in a few circuits that will experience the highest increases in their caseloads.

3. Bankruptcy appellate panels have been structured differently in different circuits. Their costs vary depending on the extent to which the functions of the BAP clerk are integrated with those of the clerk of the court of appeals. A full assessment of likely recurring costs (e.g., per case) was beyond our scope and premature as to all but the Ninth Circuit. Preliminarily, it appears likely that more integrated operations are better able to absorb the cost of experimenting with a BAP, particularly in circuits that are small or have relatively few cases eligible for BAP review.

Regarding process and outcome

1. Earlier reports claiming that only 18% to 25% of bankruptcy appeals in the district courts require significant judge time can no longer be relied on. Review of approximately 5,000 district court docket sheets reveals that the nationally collected statistics reported by the courts to the Administrative Office about how bankruptcy appeals are decided in the district courts are grossly inaccurate and cannot support the claims that some academics and others have made based on them. A rough estimate is that 60% to 75% of bankruptcy appeals decided by the district courts are decided on the merits of the appeal or otherwise with non-trivial expenditure of judge time.

2. Only 20% of bankruptcy appeals *filed* in the district courts are taken further on appeal to the courts of appeals; similar patterns seem to be developing in the BAPs. However, the rate of appeal from cases *decided on the merits* at the first level of appeal is higher—up to a third, depend-

ing on how we estimate the number of district court decisions on the merits.

3. The courts of appeals fully affirm the judgments of district courts in bankruptcy appeals in about 73% of the cases appealed to them, and reverse at least in part, or remand, in about 20%. Few courts of appeals other than the Ninth Circuit's have had much opportunity to review BAP decisions. From the data we have available, we estimate affirmance rates from the bankruptcy appellate panels are about the same as from the district courts, but Ninth Circuit sources report that the circuit's BAP historically has had a higher rate of affirmance than its district courts.

Implications of alternatives

1. Eliminating district courts and BAPs from the appellate structure entirely
    - might invite constitutional challenge, but probably would not render the bankruptcy system unconstitutional;
    - would likely affect detrimentally some courts of appeals that already have high judicial vacancy rates or high per-judge caseloads, and would have little net effect on others. Specifically:
        - The courts of appeals overall could experience a net increase in total appellate filings ranging from 4.5% (assuming that only about 65% of appeals now taken to the district court or BAP would be taken to the court of appeals) to slightly less than 7% (assuming *every* case now appealed would be taken to the courts of appeals). These numbers would be affected by overall trends in bankruptcy litigation, but we did not attempt to predict those trends.
        - The largest percentage increases in filings would probably be experienced in the First Circuit (with a potential 10% to 16% increase) and the Ninth (8% to 13% increase). The Second, Third, and Tenth Circuits would probably also experience noteworthy percentage increases, but there would probably be little effect on total filings in the courts in the D.C, Fourth, Fifth, and Seventh Circuits.
    - would alleviate the lack-of-precedent problem somewhat, but probably much less (and more slowly) than proponents suggest, in part because

merit termination and publication rates in the courts of appeals have fallen in recent decades;

- would sacrifice the benefits of specialized review in core bankruptcy matters, benefits that are valued highly by judges at all levels of the system; and
- would likely result in many appeals that now receive a second look by a judge going unreviewed or being reviewed primarily by court staff rather than an Article III judge or specialized bankruptcy panel.

2. If the district court is to be removed from the appellate structure, retaining bankruptcy appellate panels at party option could ameliorate the resulting effect on the courts of appeals. However, it is impossible to predict at this point whether parties who have opted for BAP review in the past (possibly at a higher cost than district court review) would continue to go to the BAP for the benefits of specialized decision making, or would simply go directly to the court of appeals. Since the BAP structure is already in place in several circuits, there is little to be lost by continuing the BAP experiment.
3. Direct appeal to the courts of appeals on party stipulation would probably do little to alleviate whatever problems exist under the current system. When appeals to the courts of appeals on party stipulation were permitted under the 1978 Bankruptcy Reform Act, relatively few bankruptcy appeals (about 2%) were taken directly to the courts of appeals. It seems likely that the number would again be fairly low if a similar approach were adopted. This would bring to the courts of appeals the cases that all parties believe need a definitive resolution, but this would obviously be smaller than the total number of cases in which such resolution would be beneficial (because it depends on party cooperation, and delay is in the interests of some). Some combination of certification requirements (e.g., party motion and bankruptcy or district court concurrence) might better serve the end of precedent development. Allowing direct appeal only at the discretion of the courts of appeals would help those courts maintain control over their dockets, but perhaps at the expense of precedent development.
4. If direct appeal is instituted, allowing the courts to continue the BAP as an adjunct to the court of appeals might alleviate negative impacts on overburdened courts. Substantial workload relief would derive from al-

lowing the courts to refer bankruptcy appeals to the BAP as district courts refer bankruptcy matters to the bankruptcy courts, perhaps with analogous provisions for withdrawal of such a reference.

5. Allowing courts of appeals to refer cases to BAPs to issue presumptive opinions akin to reports and recommendations would preserve many of the benefits of the BAP for the parties who now choose that route anyway. If imposed on others who would not choose it, there may be objections to the additional layer of review and the time it would entail; however, the costs and delay should be lower than in the current system because there would be no need for dual briefing (other than filing objections to the report if necessary), additional filing fees, or duplicate oral argument in the ordinary case. But there is a significant risk that bankruptcy judges would no longer choose to serve on the BAP (which they now take on in addition to their trial duties) if the judges came to be viewed as specialized staff attorneys.
6. Specialized expertise could also be obtained by routing bankruptcy appeals to a new Article III Federal Court of Bankruptcy Appeals or to the Court of Appeals for the Federal Circuit. The dangers associated with specialized courts will raise grave objections to a new court, and this alternative would probably go too far in sacrificing the countervailing benefits of generalists, benefits now provided by review of BAP decisions in the courts of appeals. The Federal Circuit option does not seem practical at the court's current size and configuration.

Options and considerations

The data we examined do not point clearly to a preferred alternative. Much depends on one's beliefs about the values of appellate review and how best to serve those values, and on one's view of the tradeoffs inherent in the bankruptcy appellate structure. In settling on a preferred option, it may be best to focus on aspects of the system that appear to present problems: precedent quality, process quality, and speed and economy.

Focusing on precedent quality

1. If one concludes that lack of binding precedent is a serious problem in bankruptcy and that the courts of appeals will rectify it, some version of direct appeal to the courts of appeals might be preferred. Direct appeal

for all cases is probably not the only way to increase precedent and the stability of the law, and may not even be the best. Statutory changes to clarify and strengthen the precedential effect of BAP decisions might be most desirable to help stabilize bankruptcy law, but may not be politically feasible.

2. Stabilizing bankruptcy law by concentrating the law-declaring function in a very few people (e.g., in a specialized court or the Federal Circuit) may be both politically infeasible and go too far in the direction of specialization.

3. We found that some districts may concentrate their bankruptcy appeals in a few judges. Although this would no doubt be anathema to some courts, this would further the goal of increasing predictability and could create a closer link between the district court and the bankruptcy court, which the current widely dispersed appellate function may not do.

Focusing on process quality

1. If one concludes that the values of appeal can only be served by multipartite review, a preferred option might be to eliminate the district court as an appellate forum in favor of the BAP, the court of appeals, or both.

2. If the primary value of an appeal is to provide an independent look at a case, single-judge review may be sufficient. But it seems anomalous to restrict such appeals to one or two classes of cases solely because a non-Article III judge entered the judgment being reviewed.

Focusing on speed and economy

1. If the fastest possible disposition for the majority of cases is the most important value, a preferred option may be to retain the district court as a first-level appellate forum where there is no BAP. But it is too early to tell whether BAPs will be slower or faster than district courts, so there is no speed-based reason to eliminate the BAP option.

2. The disadvantages of the time it takes for some appellants' cases to traverse the two appellate levels may outweigh the benefits of speedier dispositions for those who stop at the first level. This is especially likely to be true if many appellants who now stop after one appeal forgo further review solely because of the expense of pursuing it. Creating a two-track

system in which parties may choose the BAP's expertise (and in some circuits, speed) over Article III review and the possibility of binding precedent from the court of appeals may be a preferable alternative even where district courts are faster, because the total time for parties forced into the district court forum can be quite long. So long as BAPs maintain disposition times approximating the district courts' and the BAP forum remains optional for the parties, delay can be reduced for those seeking a binding precedent, without undue expense to those who would not in any event go to the court of appeals.

3. Uncertainty remains about the effects of the system's structure on the majority of users, who are not represented by the business bankruptcy community advocating change. A survey of the bar could obtain the views of a broader cross-section of affected parties, and it could be especially useful in gathering baseline data with which to evaluate the experience of bankruptcy appellate panels as the Center did for the Ninth Circuit BAP in the 1970s.

A possible first step

If precedent is the most serious problem (as it appears to be from our examination), loosening access to the courts of appeals without opening the floodgates may be a good first approach. But users of the complex bankruptcy system probably want precedent not just settled, but settled right (Justice Brandeis notwithstanding). If early (and, in the Ninth Circuit, not so early) impressions about the quality of work by the bankruptcy appellate panels hold up, the dual needs for binding authority and substantive correctness, like the dual needs for generalist and specialist review of some matters, argue for some sort of a dual or hybrid system involving the bankruptcy appellate panels in some form. The result may be worth the inelegance, but if it turns out not to be worth the price, the BAP (unlike, say, a new Article III court) is easily disbanded without having imposed substantial lasting costs on the judicial budget.

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I. Overview of Issues

Under the current system, in a core proceeding[3] a bankruptcy judge may both hear and determine the matter and enter a final order or judgment, subject to appellate review in the district court or a bankruptcy appellate panel, and subject to further review as of right in the court of appeals. In related non-core proceedings, unless all the parties consent to entry of a judgment by the bankruptcy judge, that judge may only hear the matter and submit proposed findings of fact and conclusions of law to the district judge, subject to *de novo* review on timely objection. The district judge then enters the final order, which is subject to appellate review as of right by the court of appeals. Bankruptcy litigation, therefore, often follows a longer and more complicated path to final resolution than most other kinds of federal cases. This difference in appellate structure has engendered criticism from some and praise from others and underlies the suggestions for change that we analyze in this report.

Arguments of proponents of change

The asserted problems of the bankruptcy system are qualitative (e.g., structural factors causing difficulty in knowing the applicable law) and quantitative (e.g., the time and cost associated with obtaining bankruptcy appellate review). Many of the assertions have been based on a simple examination of the system's structure. In brief, critics argue that the current system is inadequate or undesirable for the following reasons:

1. The bankruptcy appellate system is not uniform. There is no nationally uniform system of bankruptcy appeal (and, for some circuits, not a uniform system within the circuit). A variation on this argument complains of non-uniformity of the appellate structure more generally, with bankruptcy cases treated differently from other kinds of cases in the system.
2. The bankruptcy system is not structured to serve the law-declaration functions of an appellate system. In particular, it lacks the traditional pyramid structure that concentrates appellate review in substantially fewer judges than the number at the trial level. Moreover, most appellate

3. The U.S. Code provides a non-exhaustive list of core matters (28 U.S.C. § 157(b)(2)(A)–(O) (1984)) and defines them generally as proceedings "arising under title 11 or arising in a case under title 11" (28 U.S.C. § 157(b)(1) (1984)).

decisions made in the bankruptcy system do not bind most actors in most cases, and cannot be relied on when making later business or legal judgments. The lack of binding precedent results in issues being repeatedly litigated and appealed.

3. Its multiple layers add time and expense to the appellate process.
4. It does not always ensure review by a panel of judges at the first level, and the result is a review process that is less likely to serve the values of appellate review than is the traditional process at the court of appeals.
5. Many district judges do not act promptly on bankruptcy appeals, which involve especially time-sensitive matters. This causes undue hardship for litigants.

Different critics argue for different alternatives to the current structure, but many of them urge the removal of the district court from the appellate structure in bankruptcy, arguing that ready access to the courts of appeals would remedy these problems and would not create any new practical or constitutional problems for the bankruptcy system.

Arguments of opponents of change

Those who reject the conclusions of the critics argue that the present system is sufficient, or superior to alternatives (particularly direct appeal to the courts of appeals) for the following reasons:

1. Nationally uniform bankruptcy laws are necessary, but nationally uniform structures and procedures to apply them are not.
2. Conflicting decisions and unresolved legal issues are found in all areas of the law, and there is no evidence that the problem is worse in bankruptcy than in other areas or that problems would be lessened under alternative arrangements.
3. The current system strikes the appropriate balance between the values of speed and economy for most litigants and the need for binding precedent. Most cases end after the first level of appellate review (either the district court or a bankruptcy appellate panel). Many bankruptcy litigants cannot afford an appeal to the court of appeals (even if it were the initial forum). Without a convenient, inexpensive forum, they would be unable to obtain any appellate review of their cases. On the other hand,

most repeat players whose interests would be served by obtaining a precedential decision have the money and opportunity to do so.

4. Multijudge appellate review is most critical in law declaring; most bankruptcy appeals are fact-intensive and would not result in new or clearer law regardless of who decided them. Further, most bankruptcy appellants simply want another set of eyes to look at their cases and make an independent judgment, for which a panel of judges is not necessary. In any event, multijudge review is available (if parties consent) from the bankruptcy appellate panels in many districts, and ultimately from the courts of appeals.
5. Since the Civil Justice Reform Act was implemented, district judges have been managing their caseloads better and deciding bankruptcy appeals more quickly, so any valid complaints about cases languishing in the district courts should diminish.
6. The appellate function of the district courts is an integral part of the overall bankruptcy system. Removing it would impair the constitutionality of the entire system and endanger the fragile balance created by the Bankruptcy Amendments and Federal Judgeship Act of 1984.
7. Removing the intermediate appeal options would severely affect the workloads of several courts of appeals (or create a substantial workload for a new court such as a Federal Court of Bankruptcy Appeals), at the very time that many in the judiciary and in Congress are arguing that the size and jurisdiction of the courts of appeals should be constrained, not expanded. The costs of the additional circuit judge power required would exceed the likely benefits.

Evaluating the arguments

In this study, we sought evidence to help the Bankruptcy Committee assess these various claims. Along with a literature review, our sources of information are case information reported to the Administrative Office by bankruptcy courts, district courts, bankruptcy appellate panels, and courts of appeals; a study of docket sheets from more than 5,000 bankruptcy appeals terminated in the district courts in fiscal 1997 and 1998; a questionnaire administered to all bankruptcy judges and a sample of district judges to learn their experiences ascertaining and applying bankruptcy precedent in their courts; and informal interviews with chief judges and clerks of bank-

ruptcy appellate panels and with other bankruptcy judges. We also commissioned a report (Appendix C, *infra*) from Professor Susan Block-Lieb analyzing the constitutional implications of certain proposed alternatives.

One of the important issues in evaluating the appellate structure of the bankruptcy system is how the bankruptcy appellate panels are functioning. Because most of them are so new, it is too early to tell how well they will fulfill their functions and whether litigants will choose them more or less often once they become well known and well established in their circuits. Much of what one would like to know about their performance cannot be determined yet.

There are other constraints on our ability to describe the performance of the system, and these constraints will be detailed as appropriate throughout this report. In particular, some of the data on which we ordinarily would rely are too inaccurate to be useful even as a general guide to how the district courts handle bankruptcy appeals. Additionally, caseload information for recent years (typically fiscal 1998 and, for some matters, 1997), even when valid, cannot be fully interpreted because too many of the cases that began their lives together have not yet terminated. Because early-terminating cases can be substantially different from cases that take longer to terminate, it is dangerous to draw inferences about outcomes and disposition times until nearly all cases in a filing cohort have closed.

Certain elements of the inquiry into bankruptcy appellate structure would be better informed by systematic input from bankruptcy practitioners. Although the views of the organized business bankruptcy community are well known, a survey of counsel across a broader spectrum could give us valuable information about the practical significance of the precedent situation, the likely effects of direct appeal on the decision to appeal, the reasons for electing to have an appeal heard by the district court or BAP, and the costs of a two-tiered appellate system. We are conducting such a survey as part of our continued analysis of appellate structure and process.

II. History and Overview of Reform Movements and Legislation

Bankruptcy Act of 1898 and the Commission on the Bankruptcy Laws of the United States

Under the Bankruptcy Act of 1898, the district court could refer summary proceedings to referees (formally called bankruptcy judges beginning in 1973 when the new bankruptcy rules became effective). Matters that arose in the course of a bankruptcy case and did not fall within summary jurisdiction had to be resolved by plenary suit in either the federal district court or a state court. This bifurcated jurisdiction was not clearly defined, and litigation over threshold jurisdictional questions proliferated. Calling for recommendations that would "reflect and adequately meet the demands of present technical, financial, and commercial activities," Congress established in 1970 a Commission on the Bankruptcy Laws of the United States to "study, analyze, evaluate, and recommend changes" in the Bankruptcy Act.[4] The ensuing report and hearings ultimately led to the passage of the Bankruptcy Reform Act of 1978.

Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978 granted pervasive jurisdiction to bankruptcy courts. "The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts."[5] The Act also gave the district court original and exclusive jurisdiction of all cases under title 11 and original, but not exclusive, jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The 1970 Bankruptcy Commission had recommended that the district court retain its appellate function in bankruptcy. That commission, devoting little more than four paragraphs in its report to the issue of appellate review, recognized that single-judge review was anomalous but rejected direct appeal to the courts of appeals. The report cited as reasons the remote-

4. Commission on the Bankruptcy Laws of the United States, Report on the Bankruptcy Laws of the United States, H.R. Doc. No. 137 93d Cong., 1st Sess., part I at 1–2 (1973).

5. 28 U.S.C. § 1471 (1978) (repealed 1984).

ness of the courts of appeals from many litigants, the likely effects on the dockets of the courts of appeals, and the continued availability of the courts of appeals in high-stakes cases by virtue of the right to appellate review of the district court's judgment.[6]

The appeal provisions in the 1978 Reform Act reflect a compromise between divergent views about the proper status of the bankruptcy courts in the federal judicial system and consequently what type of appellate review was most appropriate.[7] Most parties to the reform process thought the jurisdiction of the bankruptcy courts as it existed under the Bankruptcy Act of 1898 should be expanded, but disagreed about whether there was a constitutional need for Article III bankruptcy judges to exercise that expanded jurisdiction. Those favoring a bankruptcy court independent of the district court and staffed by Article III judges urged appellate review outside the district courts—either in the courts of appeals or a new separate bankruptcy court of appeals. The major arguments for a separate bankruptcy court of appeals were that it would avoid overloading the dockets of the courts of appeals and would provide review by bankruptcy specialists before review by a court of general jurisdiction, and thus would promote greater uniformity, efficiency, and economy. Others favoring independent bankruptcy courts thought appeals from bankruptcy court decisions should follow the same route as appeals from district court decisions, that is, to the courts of appeals. Those who disfavored independent bankruptcy courts and Article III bankruptcy judges favored the appellate review of bankruptcy decisions by the district courts. Some courts of appeals judges who were concerned about the increased burden on their courts also favored district court review.

The House and Senate reached different conclusions in response to these arguments. The House bill gave bankruptcy judges Article III status and proposed that bankruptcy appeals go directly to the courts of appeals,[8] in part because the anomalous one-judge review in the district court was thought likely to detract from the stature of the new bankruptcy courts and would leave appeals in the hands of "unconcerned" district courts.[9] The Senate bill did not provide Article III status for bankruptcy judges and pro-

6. Commission on the Bankruptcy Laws of the United States, *supra* note 4 at 97.

7. *See generally* Lloyd D. George, *The Bankruptcy Appellate Panels: An Unfinished Experiment*, 1982 BYU L. Rev. 205, 206–16 (providing a detailed account of the legislative history of the appeals provisions in the Bankruptcy Reform Act of 1978).

8. H.R. Rep. No. 95-595, at 39–43 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6000–04.

9. Richard B. Levin, *Bankruptcy Appeals*, 58 N.C. L. Rev. 967, 969 (1980).

posed that bankruptcy appeals go first to the district court.[10] Under the compromise reached by the House and Senate, the bankruptcy courts were organized as adjuncts of the district court (and staffed by non-Article III bankruptcy judges) but were given expanded jurisdiction to hear all cases under title 11 of the United States Code, all proceedings arising in or related to cases under title 11, and all actions concerning the property of the estate. The bankruptcy courts were free from direct control by district courts, but the district courts would still hear bankruptcy appeals, unless the circuit created a bankruptcy appellate panel or the parties agreed to take their appeal directly to the court of appeals.

Thus, under the 1978 Act that emerged, appeals from most bankruptcy judges' final decisions were to be heard by the district court, or by the BAP if the circuit had established one. District court and BAP decisions were appealable as of right to the court of appeals. Interlocutory orders, judgments, and decrees of a bankruptcy court were appealable in the district court and BAP only if the district court or BAP granted leave to appeal. Only two circuits (the First and Ninth) established a BAP pursuant to the 1978 legislation, although several others considered doing so.

During the existence of this structure, roughly 1981–1987, relatively few appeals were taken directly to the courts of appeals on party stipulation. Overall, cases taken directly to the courts of appeals from the bankruptcy courts never amounted to even 2% of the bankruptcy appeals filed annually, as Table 1 shows.

Table 1. Appeals directly from bankruptcy court to courts of appeals, as a percentage of all first-level bankruptcy appeals filed, fiscal 1981–1987

Year filed	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	National
1981	0.6	1.7	0.0	1.3	3.4	1.7	2.1	1.0	2.0	2.9	0.3	0.0	1.7
1982	0.8	2.2	0.5	1.1	2.1	2.8	1.0	1.6	3.9	1.6	0.4	3.4	1.7
1983	3.3	1.3	2.0	1.1	1.0	1.5	1.8	1.2	0.7	2.7	0.7	4.0	1.4
1984	3.5	0.2	2.2	0.7	1.6	1.3	0.4	0.4	1.1	0.3	1.5	10.8	1.2
1985	0.0	0.5	1.8	0.7	0.6	0.4	0.2	0.6	0.7	0.0	1.1	0.0	0.5
1986	0.0	0.0	0.2	1.1	0.2	0.3	0.0	0.0	1.2	0.0	0.1	0.0	0.3
1987	1.1	0.0	2.3	2.4	0.0	0.0	0.0	0.4	2.6	0.0	0.0	0.0	0.8

Note: No comparable data are available for pre-1981 filings.

10. S. Rep. No. 95-989, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5804.

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

The 1978 Act's expansive grant of jurisdiction to the bankruptcy court was invalidated in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[11] Justice Rehnquist's concurring opinion, as summarized by Chief Justice Burger's dissenting opinion, has been viewed by many commentators as the true holding of the Court regarding the constitutionality of the Bankruptcy Reform Act of 1978: "[A] 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Art. III court' if it is to be heard by a court or agency of the United States."[12] The Act "removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct."[13]

Emergency Model Rule

To afford Congress time to reconstitute the bankruptcy courts, the Supreme Court stayed its June 28, 1982, judgment in *Marathon* for more than three months, then extended that stay to December 24, 1982. When Congress failed to act during this period, the Administrative Office of the U.S. Courts, at the direction of the Judicial Conference of the United States, formulated the Emergency Model Rule to keep the bankruptcy courts in operation. The provisions of this rule were similar to those of the Bankruptcy Amendments and Federal Judgeship Act of 1984 except that bankruptcy judges' final orders, in addition to findings of fact and conclusions of law, were subject to *de novo* review in the district court. The rule did not mention BAPs. All districts adopted the Emergency Model Rule, or a modification of it.

In the First Circuit, the court of appeals ruled that the circuit council's adoption of the emergency rule implicitly withdrew from the BAP its authority to hear appeals.[14] Accordingly, the First Circuit's BAP ceased to operate. In contrast, the Ninth Circuit decided that its emergency rule did not directly or impliedly delegitimate the BAP, and that the continuing su-

11. 458 U.S. 50 (1982).
12. *Id.* at 92.
13. *Id.* at 87.
14. Massachusetts v. Dartmouth House Nursing Home, Inc., 726 F.2d 26 (1st Cir. 1984).

pervision of the BAP by the court of appeals met the *Marathon* criterion for Article III review.[15]

Bankruptcy Amendments and Federal Judgeship Act of 1984 (current Bankruptcy Code)

The Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) was enacted on June 29, 1984, and became effective July 10, 1984, retroactive to June 27, 1984.[16] BAFJA amended some provisions of the Bankruptcy Reform Act of 1978 and effectively repealed others that had been found unconstitutional in *Marathon*. BAFJA authorized district courts to refer any or all bankruptcy cases and proceedings falling within bankruptcy jurisdiction to the bankruptcy judges for the district.[17] A bankruptcy judge's authority to decide a referred proceeding depends upon whether the proceeding is "core" or "non-core." In a core proceeding, the bankruptcy judge may both hear and determine the matter and enter a final order or judgment, subject to traditional appellate review in the district court or BAP, and from there to the court of appeals. In related non-core matters, unless all the parties consent to entry of a judgment, the bankruptcy court may only hear the matter and submit proposed findings of fact and conclusions of law to the district judge, subject to *de novo* review on timely objection. The district judge then enters the final order, which is subject to appellate review by the court of appeals.

BAFJA granted the district courts jurisdiction to hear appeals from final determinations of bankruptcy judges, but also allowed the judicial council of a circuit to establish a bankruptcy appellate panel service for the circuit. In circuits that have established a BAP, the judicial council appoints bankruptcy judges to it for specified terms of service, which vary from circuit to circuit. By the terms of the statute, the BAPs operate in panels of three, with judges ineligible to act on appeals arising from their district of appointment or designation. An appeal from a final judgment, order, or decree of a bankruptcy judge may be directed to the BAP only if (1) the appeal arises from a district whose district judges have, by majority vote,

15. Briney v. Burley, 738 F.2d 981, 986 (9th Cir. 1984) ("Because the court of appeals and the BAP apply the same standard of review to the underlying judgment, the court of appeals effectively reviews the decision de novo. . . . This close review contrasts sharply with the deference for bankruptcy judges' findings of fact that *Marathon* found fatal.").

16. Pub. L. No. 98-353, 98 Stat. 333 (1984).

17. 28 U.S.C. § 157(a) (1984).

authorized referral of appeals to the BAP, and (2) all parties to the appeal consent to have the appeal heard by the BAP. If the district court has not authorized appeals to the bankruptcy appellate panel or if any party fails to consent to the panel's jurisdiction, the appeal must be taken to the district court.

To conform to the new requirements of BAFJA, the Ninth Circuit Judicial Council entered a new order establishing a BAP. Whereas referral to the BAP had once been automatic, the new order required both parties to consent to BAP review before the district court was divested of its jurisdiction over appeals in core matters. Because the BAP received few cases under this arrangement, the circuit council amended the consent requirement in 1985 so that failure to object was deemed consent. Thus, instead of "opting into" the BAP, parties had to "opt out" to obtain district court review instead.

Federal Courts Study Committee recommendation

In its 1990 final report, the Federal Courts Study Committee recommended that Congress amend 28 U.S.C. § 158 to (1) require each circuit to establish bankruptcy appellate panels to decide all bankruptcy appeals unless a party affirmatively opted out of the BAP; and (2) authorize small circuits to create multicircuit panels.

In response, Congress declined to mandate BAPs, but as a first step to encourage experimentation, amended 28 U.S.C. § 158(b) to permit the judicial councils of two or more circuits to adopt a multicircuit BAP if authorized to do so by the Judicial Conference of the United States. The Judicial Conference's Executive Committee approved the Study Committee's multicircuit BAP recommendation, but the Conference opposed the call for mandatory BAPs, deciding instead merely to encourage BAP creation.

Long Range Plan for the Federal Courts

In 1994, the Judicial Conference's Committee on Long Range Planning issued a Proposed Long Range Plan for the Federal Courts, seeking comments. In that version of the plan, the committee proposed a partial return to the system enacted in the 1978 Act, giving parties a role in determining whether an appeal would be taken directly to the court of appeals, but with a significant difference—both direct appeals and appeals from district court appellate decisions would be in the discretion of the courts of appeals. In particular, the 1994 proposed plan recommended the following:

- Leave most bankruptcy appellate review in the district courts, with further review by the court of appeals discretionary, for significant questions of law or public importance; but
- Where parties stipulate or other circumstances make it expedient, allow direct court of appeals review, if the district court certifies the issue(s) to be reviewed and the court of appeals grants leave to appeal.

After receiving comments on the proposed plan, the Long Range Planning Committee redrafted its recommendations and called for a study of the existing system. The committee also recommended that until such a study was conducted, Congress should permit direct appeal to the court of appeals if the parties stipulated, or if the district court or bankruptcy judge certified that immediate review was needed to establish legal principles on which subsequent proceedings in the case might depend. As the recommendations evolved, the Long Range Planning Committee received comments from many members of the bankruptcy community, including some within the Judicial Conference structure, who were concerned both about the *stare decisis* needs of the bankruptcy system and about the potentially disruptive effects of allowing parties to invoke the jurisdiction of the courts of appeals by stipulation.[18] In the end, the party stipulation provision was deleted from the recommendation by the Judicial Conference, leaving only judicial certification as the key to obtaining immediate appeal to the court of appeals. The 1995 plan, as adopted by the Judicial Conference, recommends the following:

- Study existing mechanism to determine what appellate structure will ensure prompt, inexpensive resolution of bankruptcy cases and foster coherent, consistent development of bankruptcy precedent. (Recommendation 21)
- Pending completion of the study, Congress should allow direct review in the court of appeals in those cases where the district court or BAP certifies that such review is needed immediately to establish legal principles on

18. The Long Range Planning Committee received comments from two Judicial Conference committees (Committee on the Administration of the Bankruptcy System and Committee on Court Administration and Case Management), the ABA Standing Committee on Federal Judicial Improvements, an ABA Joint Task Force established by the Business Law and Litigation Sections, and numerous individuals.

which subsequent proceedings in the case may depend. (Recommendation 22)

Bankruptcy Reform Act of 1994

In the Bankruptcy Reform Act of 1994, Congress renewed its effort to implement the Federal Courts Study Committee recommendations by directing the judicial council of each circuit to establish a BAP unless the council determined that the circuit had insufficient judicial resources or that the establishment of a BAP would result in undue delay or increased cost to the parties. At the time of the 1994 legislation, a BAP was operating only in the Ninth Circuit. Pursuant to the 1994 Act, the judicial councils of five circuits established BAPs—the First, Second, and Tenth Circuit BAPs began operating on July 1, 1996, and the Sixth and Eighth Circuit BAPs began operating on January 1, 1997. The judicial councils of five other circuits (D.C., Third, Fourth, Fifth, and Eleventh) indicated that they did not intend to create BAPs at that time; one circuit (the Seventh) deferred its decision and has not created a BAP. On December 8, 1999, at its regular biannual meeting, the Second Circuit Judicial Council decided to terminate its bankruptcy appellate panel service.

National Bankruptcy Review Commission

The Bankruptcy Reform Act of 1994 also created the National Bankruptcy Review Commission (NBRC) to investigate and study issues related to the Bankruptcy Code. The NBRC recommended that the current system be changed to eliminate the first layer of appeal to a district court or BAP (Recommendation 3.1.3).[19] Recognizing that many orders in bankruptcy cases determine substantive rights but are not technically "final," the NBRC also recommended an interlocutory appeal provision (Recommendation 3.1.4).[20]

19. NBRC Recommendation 3.1.3 states: "The current system which provides two appeals, the first either to a district court or a bankruptcy appellate panel and the second to the U.S. Court of Appeals, as of right from final orders in bankruptcy cases should be changed to eliminate the first layer of review."

20. NBRC Recommendation 3.1.4 states: "28 U.S.C. § 1293 should be added to provide, in addition to the appeal of final bankruptcy orders, for the appeal to the courts of appeals of interlocutory bankruptcy court orders under the following circumstances: (1) an order to increase or reduce the time to file a plan under section 1121(d); (2) an order granting, modifying, or refusing to grant an injunction or an order modifying or refusing to modify the automatic stay; (3) an order appointing or refusing to appoint a trustee, or authorizing the sale or other disposition of property of the estate; (4) where an order is certified by the bankruptcy judge that (x) it involves a controlling issue of law [as] to which there

After its September 1998 meeting, the Judicial Conference issued a position statement on NBRC Recommendations 3.1.3 and 3.1.4. The Conference supported the simplification of appellate review of dispositive orders of bankruptcy judges; urged that no change in the current appellate process be considered until the judiciary had an opportunity to study further the existing process and possible alternative structures and to submit a subsequent report to Congress; and pending completion of the study, opposed the appeal as of right from dispositive orders of bankruptcy judges directly to the courts of appeals.

Efforts in the 105th Congress to change bankruptcy appellate structures

Legislation introduced in the 105th Congress would have effectively eliminated BAP and district court appellate jurisdiction over bankruptcy appeals (H.R. 3150) or substantially curtailed district court appellate jurisdiction (S. 1914).[21] The Department of Justice opposed H.R. 3150 and urged Congress "not to lessen district court review and remove this potentially significant basis for the constitutionality of the bankruptcy court's exercise of judicial power."[22] On behalf of the Judicial Conference of the United States, the director of the Administrative Office of the U.S. Courts twice urged Congress to defer consideration of the proposed changes until they had been reviewed by both the Judicial Conference and the Commission on Structural Alternatives for the Federal Courts of Appeals.[23] The bill that came out of conference during the 105th Congress did not contain any provision that would have changed the route that bankruptcy appeals take, nor did the conference report mention the abandonment of the appeal provisions.

is a substantial difference of opinion, and (y) immediate appeal of the order may materially advance resolution of the litigation, and leave to appeal is granted by the court of appeals; and (5) with leave from the court of appeals."

21. S. 1914 would have left the district court as the first-level appellate forum but if the court did not file a decision on the appeal within thirty days, any party could take it to the court of appeals, at which point the chief judge of that court was to order the district clerk to enter the bankruptcy judge's order as a final order of the district court, clearing the way for review in the court of appeals.

22. Letter of Ann M. Harkins, Acting Assistant Attorney General, to the Hon. Henry J. Hyde, Chair of the House Committee on the Judiciary, May 7, 1998 (on file with the Federal Judicial Center).

23. Letters of Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts, to the Hon. Henry J. Hyde, Chair of the House Committee on the Judiciary, and to the Hon. Orrin G. Hatch, Chair of the Senate Committee on the Judiciary, June 30, 1998, and July 2, 1998 (on file with the Federal Judicial Center).

Commission on Structural Alternatives for the Federal Courts of Appeals

In October 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals issued its Tentative Draft Report. The Commission's bankruptcy-related recommendations urged Congress not to enact the direct appeal provisions recommended by the NBRC, but to consider alternatives, particularly three alternatives that would preserve bankruptcy appellate panels in some form. After the Tentative Draft Report had been completed, the Judicial Conference announced the policy statement adopted as a result of its September 1998 meeting. In light of the Conference's position and the Bankruptcy Committee's request to the Federal Judicial Center to conduct this study, the Commission on Structural Alternatives revised its recommendations. In its final report, the Commission retained its expressions of concern about the effects of direct appeal on the courts of appeals and urged Congress to forgo making any changes pending the completion of this study and the Conference's report to Congress. Given its agreement with the call for further study, the Commission deleted from its final report the specific alternatives it had commended for Congress's consideration in the draft report.

Efforts in the 106th Congress to change bankruptcy appellate structures

In the 106th Congress, H.R. 833 originally contained no appeal-related provisions. During the markup of the bill, Representative George W. Gekas introduced an amendment that would permit direct appeal to the courts of appeals. The amendment would eliminate district court appellate jurisdiction but would also permit circuits to create or retain bankruptcy appellate panels, to which appeals could be taken with the consent of the parties. Neither party stipulation nor certification would be required for a litigant to take the appeal directly to the court of appeals—the appellant could elect to do so at the time of filing, and any other party could do so not later than ten days after service of the notice of the appeal. Appeal from the bankruptcy appellate panels would be by right to the courts of appeals. That amendment is embodied in section 612 of H.R. 833 as passed by the House. (See Appendix A, *infra*.)

The Senate's bankruptcy reform bill, S. 625, contains no appeal-related provisions. Senator Patrick J. Leahy planned to introduce the judiciary's recommendation—minus the provision that would allow direct appeal on

motion of the parties—as an amendment to S. 625. The Executive Committee, on behalf of the Judicial Conference, supported the amendment in September 1999, after conferring with the incoming chair of the Bankruptcy Committee and the chair of the Committee on Court Administration and Case Management. However, the amendment was never considered by the full Senate.

During informal negotiations to resolve differences between the House and Senate bills, yet another approach to changing the bankruptcy system was proposed: Any bankruptcy appeal not decided by the district court within thirty days (or an extension thereof) could be taken to the court of appeals as though the district court had affirmed the bankruptcy judge's decision.

Commonalities in reform efforts

The proposed efforts to change the bankruptcy appellate system reflect beliefs about how the current structures operate and about the relationship between structure and outcome, and they are based on predictions that an alternative structure would better meet the goals of an appellate system. In section IV we review major alternatives that have been advanced, with special attention to the direct appeal proposal embodied in H.R. 833. First we describe the systems in place and review the evidence bearing on the primary arguments in favor of change, including qualitative and quantitative claims about the performance of the system.

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III. Current Bankruptcy Appellate Systems and the Arguments for Changing Them

Depending on the level of analysis one uses in considering bankruptcy appellate structure, there are either two or three bankruptcy appellate systems in the United States. At the circuit level of analysis (generally the most relevant one when analyzing the knowability and predictability of the law), there are essentially three systems currently in place. All of them ensure a right of review by a court of appeals, but these systems differ in how they handle first-level appeals—some circuits use only district courts to review bankruptcy appeals; some circuits have created a BAP in which all of their districts participate; and some circuits have created a BAP in which not all of their districts participate. Thus, at the level of individual litigants, there is either one appeal route or two. In fiscal 1998, for litigants in 39 districts in six circuits, there was a choice between the district court and the bankruptcy appellate panel. For litigants in the remaining 55 districts, appeal had to be to the district court.[24] Table 2 shows how the appellate caseload was distributed that year.

Table 2. Distribution of first-level bankruptcy appeals filed in fiscal 1998

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.
USDC	53%	91%	100%	100%	100%	75%	100%	42%	41%	68%	100%	100%
BAP (all districts)	47%	—	—	—	—	—	—	—	59%	—	—	—
BAP (some districts)	—	9%	—	—	—	25%	—	58%	—	32%	—	—
Total filings	227	517	427	299	408	332	166	141	1,236	255	388	32

Note: Elections to withdraw from the BAP are treated here as filings in the district court only.

District courts continue to handle the large majority of appeals from orders and judgments of bankruptcy judges overall and in most circuits. In fiscal 1998, in only two circuits (the Eighth and Ninth) did bankruptcy appellate panels receive more than half the appeals filed.

24. Under H.R. 833, this non-uniformity would remain, but the first-level choice would be between the court of appeals and the BAP if a BAP is available for appeals from the district in which the bankruptcy court sits.

Is structural uniformity important?

For some observers, the mere existence of multiple systems is sufficient to condemn the arrangement, because a national judicial system should, in their view, be uniform. As some point out, the Constitution calls for uniform laws on the subject of bankruptcies throughout the United States. But there is no obvious reason why uniform laws must be applied and interpreted with uniform structures using uniform procedures. The federal judicial system accommodates—and sometimes encourages—great diversity of practice among the circuits and individual courts. For example, regardless of efforts to discourage or eliminate local rules and standing orders, deference to local cultures and preferences, and respect for the autonomy of courts, remain dominant principles in judicial administration (so long as differences do not affect substantive rights).

Structural nonuniformity may or may not detrimentally affect the functioning of the system and the practice of bankruptcy law. Although nonuniform interpretation of the bankruptcy laws is undesirable (at least beyond a certain healthy percolation), it is likely that intercircuit nonuniformity of structure affects few users of the system. Intracircuit nonuniformity, on the other hand, may raise costs somewhat for those litigants whose counsel must evaluate the likelihood of success under alternate routes by researching different lines of (nonbinding) authority. This is a subject ripe for exploration in a comprehensive survey of the bar, whose members in BAP districts might give insight into whether the costs of such research are preferable to losing the forum choice they now have. At this point, it seems likely that the greater cost derives from the fact that much of the legal research they might do is unlikely to be fruitful in the attempt to determine either what the law is or what the reviewing entity is likely to say it is. That problem derives from the role of precedent in the bankruptcy appellate structure.

Precedent and its relationship to structure

More troubling than structural disparities are the aspects of the bankruptcy appellate system that seem bound to foster uncertainty and unpredictability. Commentators argue that litigants and counsel are unable to know what the law is or predict how a case will be decided because there is very little binding precedent in bankruptcy law. This lack, they claim, is a direct result of structure: the large number of appellate reviewers makes for unpredictable results; first-level appellate reviewers are unable to create binding precedent

in most instances; and the two-tiered structure makes it too expensive to pursue the matter to the court of appeals in search of a definitive ruling.[25]

Multiplicity of decision makers

The traditional appellate structure is a pyramid in which many trial-level judges feed into a much smaller number of appellate reviewers, but the bankruptcy appellate structure in most parts of the country cannot fairly be characterized as pyramidal. For example, in fiscal 1997, during which 3,172 bankruptcy appeals were terminated by the district courts, approximately 705 different district judges were listed as the terminating judge, for an average of five cases per judge that year (the median number of cases was four). With the lower number of appeals in fiscal 1998 (2,638), slightly fewer district judges handled bankruptcy appeals—approximately 630 judges, for an average of four and a median of three. Note that "terminated" does not mean "decided," so a given judge's actual opportunities to apply and interpret bankruptcy law in the appellate context are likely to have been somewhat less than indicated by the number of cases. Indeed, when we asked a sample of district judges to report the number of bankruptcy appeals they had handled in the past year, the mean was again five and the median four, but the most frequent response was zero.[26]

In most districts, it appears bankruptcy appeals are distributed among judges according to the normal civil case assignment system (i.e., essentially by lot). In a few districts, it appears bankruptcy appeals may be assigned to one or perhaps two judges, suggesting a concentration of effort that may have implications for both precedent in the district and the supervisory function of the district court over the bankruptcy court. We did not set out to find this information, so we did not survey districts about their case-assignment practices. However, along with looking at the distribution of judges for cases decided in fiscal 1997 and 1998 by district, we also noticed in our review of docket sheets that in at least one district, statistical closings were accompanied by a docket entry noting that the case was transferred to

25. *See generally* Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L.J. 287 (1993); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 Am. Bankr. L.J. 525 (1995); Nathan B. Feinstein, *The Bankruptcy System: Proposal to Restructure the Bankruptcy Court and Bankruptcy Appellate Processes*, 1995–1996 Ann. Surv. Bankr. L. 517; Daniel J. Bussel, *Bankruptcy Appellate Reform: Issues and Options*, 1995–1996 Ann. Surv. Bankr. L. 257.

26. Our survey is described in more detail below, and the survey instruments are reproduced in Appendix D, *infra*.

one of two of the district's judges and the reason given for the transfer was "bankruptcy-related." Additionally, we received in response to our survey a comment from one district judge who said he supervises all bankruptcy appeals in his district.

In addition to the more than 700 district judges handling bankruptcy appeals, some district courts also involve magistrate judges in the process, usually to manage the development of the appeal (e.g., by ruling on motions), and sometimes to write a report and recommendation as to the ultimate disposition of the appeal. At its June 1992 meeting, the Bankruptcy Committee was briefed on the status of efforts by various districts to develop litigation management plans required by the Civil Justice Reform Act, and was advised that some districts were considering the use of magistrate judges to resolve bankruptcy appeals. The committee resolved unanimously to express opposition to this practice to the Committee on Court Administration and Case Management because the practice would raise jurisdictional problems, was not contemplated by Congress, and would not be sound policy.[27] The Judicial Conference's Long Range Plan for the Federal Courts discouraged the practice, calling it "questionable both in terms of its efficient resource allocation and in its impact on expeditious resolution of appeals."[28] Although a few districts apparently continue to refer bankruptcy appeals to magistrate judges under their CJRA plans or other formal arrangements, we found little evidence—from national data, our survey, and our review of docket sheets—of widespread use of magistrate judges to prepare reports and recommendations in bankruptcy appeals.[29]

27. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item E-4, 32–33 (September 1992).

28. Long Range Plan for the Federal Courts (December 1995), at 48, n.22. We could not find enough cases to determine whether cases involving a magistrate judge were decided more quickly or more slowly than other cases, and we cannot evaluate here whether referral to magistrate judges may be the best use of resources in particular districts.

29. Only three district judges who responded to our survey reported that they had used the services of a magistrate judge for a bankruptcy appeal in the past year. National data suggest that magistrate judges were used for these cases in at least 27 districts in fiscal 1998, but the total number of cases was only 205, and most of these were concentrated in a few districts. At least one court of appeals has ruled that referral to a magistrate judge to decide a bankruptcy appeal is unauthorized even with the parties' consent, Minerex Erdoel, Inc. v. Sina, Inc., 838 F.2d 781, 786 (5th Cir. 1988), although referral for a report and recommendation is not barred by 28 U.S.C. § 158, Allstate Ins. Co. v. Foreman, 906 F.2d 123 (5th Cir. 1990).

Production of precedential opinions and other guidance

All of the reviewers in the bankruptcy appellate structure may produce written opinions that are often made available in the West reporter system, online, or in specialized publications. The availability of published opinions is generally thought to be an important aspect of the appellate process because written opinions provide guidance to judges and litigants by explaining the reasons for the appellate decision. Table 3 gives a sense of the number of opinions in bankruptcy-related matters from various sources in just two fiscal years.

Table 3. Opinion publication in bankruptcy between October 1, 1996, and September 30, 1998

Source	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	National
U.S.C.A.*	21	35	71	70	109	51	48	44	65	22	54	5	595
Merit publ'n rate	53%	41%	25%	18%	32%	36%	75%	54%	28%	44%	20%	42%	35%
BAP*	24	12	—	—	—	31	—	55	70	40	—	—	232
Merit publ'n rate	45%	67%	—	—	—	69%	—	93%	22%	65%	—	—	42%
U.S.D.C. (est.)*	71	253	135	94	113	42	126	25	56	68	54	18	1,055
U.S.B.C. (est.)*	158	370	361	224	172	338	378	350	224	109	514	10	3,208

**Note:* Figures represent number of published opinions. U.S. District Court and U.S. Bankruptcy Court opinions were estimated from Lexis and Westlaw searches for the two-year period. U.S. Court of Appeals and BAP figures were obtained from case termination information regularly submitted by the courts and panels to the Administrative Office.

Clearly, along with the binding precedent issued by the courts of appeals, judges and lawyers have access to other sources of authority that may be helpful even without being binding. But along the way, critics assert, a helpful plethora of published opinions became a glut. With so much written yet so little that is binding, lawyers can cite relevant authority for any proposition, with no ethical obligation to cite opposing authority because it is not controlling. As a practical matter, busy district judges may be unable (and perhaps may be disinclined) to look for alternative reasoning when the bankruptcy judge's conclusion seems reasonable and there is no circuit precedent to the contrary. If the adversary system does not function well in bankruptcy to prevent such occurrences, the proliferation of opinions is a negative aspect of the system.

Sources of precedent in bankruptcy

The legislative history of the 1994 amendments reveals that one driving force behind the move to bankruptcy appellate panels was the idea that

BAPs would help to remedy the lack of precedent. In commenting on the 1994 legislation that mandated BAPs for all circuits (absent extenuating circumstances), Senator Howell Heflin noted: "It should be recognized that the creation of a bankruptcy appellate panel service can help to establish a dependable body of case law."[30] (Senator Heflin had been a member of the Federal Courts Study Committee, which recommended BAP creation. The Study Committee's report did not itself employ this rationale, mentioning instead the role of the BAP in reducing workloads at the district courts and courts of appeals, and venturing the opinion that BAPs foster expertise and increase the morale of bankruptcy judges.) By the time of the 1994 amendments, the Ninth Circuit's court of appeals had already decided that bankruptcy appellate panel decisions do not bind the district courts,[31] and the precedential effect of BAP decisions on other parts of the system had been well vetted, though not settled.[32] It is possible, then, either that Congress intended to move in the direction of making BAP decisions binding on a broader scale, or that it recognized that even absent the ability to bind other courts, the concentration of a circuit's bankruptcy appeals among a smaller group of more specialized judges would bring some order to the perceived chaos.

To some extent, the hope of increased stability may be realized with bankruptcy appellate panels, at least if they adopt the same posture as the Ninth Circuit BAP with regard to following prior BAP decisions, just as the courts of appeals agree by custom or local rule to be bound by the decisions of panels of their courts. Thus litigants can have some ability to predict how an appeal will be decided by the BAP. But because any party can opt out of the BAP, litigants have no assurance that the BAP will ultimately decide their cases. It is beyond our scope here to explore the issue of whether and when a panel of judges without Article III protections can bind an Article III district court, or even a bankruptcy court. Suffice it to say that the issue remains unsettled.[33] One author cites cases to show that support can be found for inconsistent positions:

30. 140 Cong. Rec. S14463 (daily ed. Oct. 6, 1994).

31. Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1989).

32. *See, e.g.*, Henry J. Boroff, *The Precedential Effect of Bankruptcy Appellate Panel Decisions*, 103 Com. L.J. 212 (1998), and cases cited therein; Kathleen P. March & Rigoberto V. Obregon, *Are BAP Decisions Binding on Any Court?*, 18 Cal. Bankr. J. 189 (1990); Jeffrey J. Brookner, Note, *Bankruptcy Courts and Stare Decisis: The Need for Restructuring*, 27 U. Mich. J.L. Ref. 313 (1993).

33. *See, e.g.*, Boroff, *supra* note 32; March & Obregon, *supra* note 32; Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 San Diego L. Rev. 1643 (1997).

- BAP decisions are not binding on district courts;
- BAP decisions are binding on district courts;
- BAP decisions are not binding on bankruptcy courts outside a district from which a BAP appeal originated; and
- BAP decisions are not binding on any bankruptcy courts.[34]

Regardless of the formal effect of BAP or district court decisions as a matter of hierarchy, judges can choose to act independently in every case, or they can follow the decisions of coordinate judges or a specialist panel as a matter of comity, exercising self help to begin to stabilize the law. Although this gives litigants no guarantees, public statements of inclination to follow the BAP or another source of precedent could go some measure towards increasing the predictability of bankruptcy decisions. Indeed, we have some evidence of that sort of approach, which we are still analyzing and will report at a later time, from the survey we describe next.

Experiences with unclear precedent: survey research

If the appellate system causes the kind of chaos alleged, it should affect the ability of judges to perform their roles effectively. Bankruptcy judges should experience difficulty in knowing the law, or deciding legal issues quickly and efficiently. Similarly, district judges performing their appellate functions should have more difficulty deciding legal issues than they would if the courts of appeals issued more decisions in the area. To get a sense of judges' perceptions about the state of bankruptcy law, and how the asserted lack of precedent affects their work, we surveyed all bankruptcy judges and a random sample of active and senior district judges.

We designed our survey after consulting with chief or presiding judges of the bankruptcy appellate panels and several other interested bankruptcy judges, including Chief Judge A. Thomas Small of the Federal Judicial Center's Board. To account for differences in the kinds of authority available to judges in different districts, we developed three versions of each questionnaire—one for BAP-participating districts, one for nonparticipating districts in circuits with a BAP, and one for districts in non-BAP circuits. We mailed questionnaires to all bankruptcy judges and to 356 district judges. Within each group of district judges, we selected a random

34. Boroff, *supra* note 32 (citations omitted).

sample of judges, stratified by district. Table 4 shows the group sizes and response rates.[35]

Table 4. Survey group sizes and response rates

	Bankruptcy judges				District judges			
	BAP participating	BAP non-participating	Non-BAP	Total	BAP participating	BAP non-participating	Non-BAP	Total
Surveys mailed	145	53	142	340	131	55	170	356
Valid mailings	145	53	140	338	122	49	164	335
Usable responses	110	33	87	230	61	29	81	171
Usable response rate	75.9%	62.3%	62.1%	68.0%	50%	59.2%	49.4%	51%

Response rates were significantly higher among bankruptcy judges from districts that participate in BAPs than from districts that do not, probably suggesting a heightened awareness of the structural issues being debated. However, there were no significant differences in responses from BAP-participating, BAP non-participating, and non-BAP districts on the questions we report here.

We asked both sets of judges questions to elicit reports of difficulty with unclear or insufficient precedent. We designed two questions to closely parallel a similar inquiry made of district judges (but not limited to bankruptcy law) in a 1998 Center survey for the Commission on Structural Alternatives for the Federal Courts of Appeals. The questions and results follow:

> QUESTION: "When deciding a question of [bankruptcy] law, do you find the body of precedent coherent, consistent, and developed enough to allow you to decide the question efficiently and confidently?"

35. These response rates are generally consistent with first mailings of Center surveys, but the response rate for district judges was a bit low. Because of time constraints, we did not send reminder postcards or follow-up surveys. Twenty-one district judges wrote or called to tell us they had not had enough bankruptcy appeals in recent memory to make their responses useful, and it is likely that other non-respondents had similar reasons. These judges were not replaced in the sample. Several of these were senior judges, some were recent appointees, and one said a single judge handled all bankruptcy appeals in the district. We included senior judges in our sample even though they might be expected to have even fewer bankruptcy appeals than average, because we had indications that in some districts, bankruptcy appeals might be routed to one or two senior judges to the exclusion of most other judges in the district. Those indications were confirmed, but probably at some cost to the response rates for district judges.

Table 5. Frequency with which judges find the law sufficiently coherent, consistent, and developed

	Bankruptcy judges	District judges (bankruptcy law)	District judges (circuit law generally)*
Almost always	18.8%	18.8%	32%
Frequently	51.8%	46.1%	50%
About 1/2 the time	21.4%	29.2%	15%
Infrequently	7.6%	5.8%	3%
Almost never	0.4%	0.0%	0%
	N = 224	*N* = 154	*N* = 726

*Data from survey for Commission on Structural Alternatives (see footnote 36).

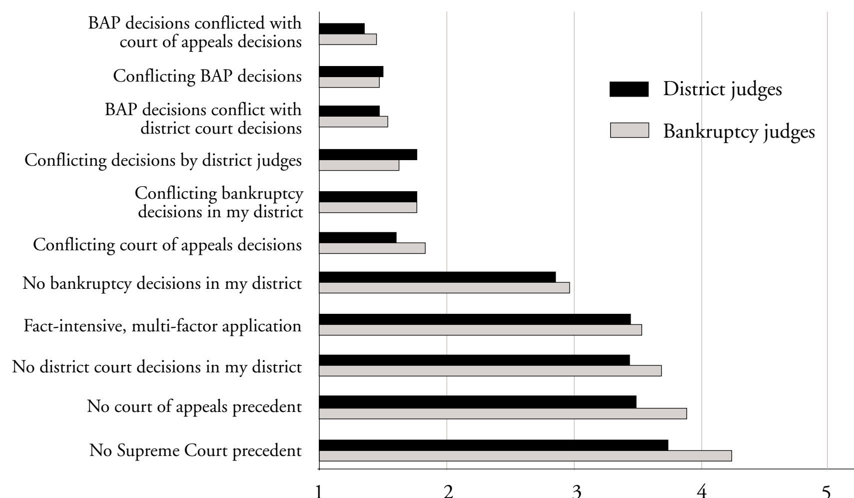
Although the overall results do not seem to reflect grave problems with precedent in the overall experience of judges, the responses of the district judges to the two surveys suggest that they are less likely to find sufficient precedent in bankruptcy than in other areas of the law. When thinking of circuit law in general, 82% of district judge respondents said they frequently or almost always found precedent sufficient, but when focusing on bankruptcy law, only about 65% said so. This may reflect their lesser familiarity with bankruptcy law than with other areas (attributable to the relatively few bankruptcy matters that appear on their dockets) or the difficulty of the subject matter relative to the typical case on their dockets. But it may also suggest that the state of the law is in fact considerably less settled in bankruptcy. Although structure is not the only possible cause for this lack of stability—changes in bankruptcy and state laws may also play a role—it seems a likely one.

We find support for the proposition that bankruptcy law is less settled than in other areas of law—and that it affects judges' work—in reports of the number of actual occurrences of difficulty discerning the law. We asked the surveyed judges: "About how often have you had to decide an issue of [bankruptcy] law on which you found precedent was not clear enough to give you confidence in your decision?" They were to estimate the number of such occurrences in the past twelve months. For bankruptcy judges, the mean number of times was 10.1; for district judges, only 1.1. Given the few bankruptcy matters the typical district judge handles in a twelve-month period, and the wider range of matters bankruptcy judges handle in their more specialized caseloads, this difference is not surprising. But once again, the more telling comparison is between the bankruptcy judges who answered this survey and the district judges who responded to a similar in-

quiry, not constrained to bankruptcy law.[36] On that survey, district judges reported encountering such a situation an average of 6.1 times in the prior twelve months (with the most frequently reported response being only 2). Within their own typical caseloads, then, district judges are less likely to experience problems from lack of precedent than are bankruptcy judges. Indeed, if we consider the fact that the median number of bankruptcy appeals the responding district judges reported handling in the past year was only 4, with many handling fewer, even the seemingly low mean problem rate of 1.1 might be viewed as somewhat alarming—i.e., they may experience precedent-related difficulties in about a quarter of the bankruptcy appeals they handle.

We also asked the judges who had experienced such difficulties to estimate which factors were most often responsible for the problem. Figure 1 shows how the bankruptcy and district judge respondents ranked the frequency with which potential sources of difficulty were associated with the lack of clear precedent, on a scale from "almost never" to "almost always."

Figure 1. Reported sources of difficulty in deciding a bankruptcy law issue*



**Note:* 1 = Almost never; 2 = Infrequently; 3 = About half the time; 4 = Frequently; and 5 = Almost always.

36. *See* Federal Judicial Center Survey of United States District Judges, Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers (1999), at 47.

Despite the complaints of some commentators about conflicting decisions from district courts and bankruptcy judges, the clearer problem is the lack of authoritative decisions from a body able to issue binding precedents.

Unresolved issues of bankruptcy law. Consistent with the survey results shown in Figure 1, judges, academic commentators, and practitioners have collected examples of issues of bankruptcy law that they assert are repeatedly litigated because there is no binding precedent that resolves them.[37] Along with fostering litigation, they assert, the lack of precedent interferes with business planning and other client counseling.[38] These issues, they argue, would lessen or disappear if appeal to the courts of appeals were more readily available.

Baisier and Epstein argued in 1995 that in the seventeen years since the Bankruptcy Reform Act of 1978, many basic questions of substantive bankruptcy law had been answered differently by different lower courts.[39] They blamed the absence of settled law "at least in part" on the structure of bankruptcy appeals in the U.S.—the structure, at the time they wrote, was district court review everywhere except the Ninth Circuit, where a BAP was also operating. Some of the commentary by academics and practitioners probably overstates the ease and speed with which bankruptcy law would become clear if only the courts of appeals were the courts of first resort.[40] While we do not know the extent of practical uncertainty (and we recommend further study), it is beyond dispute that the surest way to move towards stability and predictability in bankruptcy law is to obtain more authoritative decisions from the courts of appeals.

37. *See, e.g.*, Rhodes, *supra* note 25; Baisier & Epstein, *supra* note 25; Feinstein, *supra* note 25.

38. *See, e.g.*, Lissa Lamkin Broome, *Bankruptcy Appeals: The Wheel Has Come Full Circle*, 69 Am. Bankr. L. J. 541, 542 (1995) (lack of precedent "means that attorneys acting in their planning capacity may have little guidance in advising a client on the best way to avoid adverse consequences should bankruptcy ensue").

39. Baisier & Epstein, *supra* note 25. As an example, they pointed to the intercircuit split over the issue of whether a Chapter 11 debtor may propose a plan of reorganization that classifies an undersecured secured creditor's unsecured deficiency claim separately from other general unsecured claims, which they described as "a basic [issue] that arises in virtually every Chapter 11 case in which real estate is a significant asset." Other examples they reported were: if § 553 mutuality exists for claims by and against different government agencies; whether Chapter 12 debtors can avoid trustees' fees by making direct payments to creditors; when lease rejection is effective (on court approval vs. on filing of motion to reject); and six issues on which there were splits of authority until Congress resolved them in the 1994 amendments. *Id.* at 527, note 9.

40. One bankruptcy professor, for example, asserts: "Normally, outside bankruptcy, a first-tier appellate decision settles law circuit-wide." Bussel, *supra* note 25. Many are not so sanguine about the state of precedent in other areas of the law.

To get current examples of unresolved issues that might pose problems for judges, we asked both sets of judges we surveyed whether there are issues or areas of bankruptcy law that are particularly difficult to know. District judges and bankruptcy judges differed on whether there are any such issues. Only 7.4% of district judges said "Yes," whereas a third of the bankruptcy judge respondents did so. Eighty-two bankruptcy judges identified at least one such issue. (The questionnaire provided space for two examples—42 judges mentioned only one issue; 40 identified two.) Some of the comments raise broadly defined issues (e.g., post-confirmation Chapter 13 issues, relationship between bankruptcy law and tax law, jurisdiction), but others raise narrower ones (e.g., reasonableness of attorneys' fees, whether a Chapter 13 debtor can void the lien of a totally unsecured second mortgage, nondischargeability of marital dissolution debts). Many fall somewhere in between. Thus, it is impossible to count the discrete number of issues the judges' comments raised. The entire set of issues is listed in Appendix B.[41]

Some comments related to the interpretation of changes made to the Bankruptcy Code by the 1994 Bankruptcy Reform Act (e.g., nondischargeability of marital dissolution debts, payment of a mature mortgage over the life of a Chapter 13 plan). Other comments referred to the difficulty of applying standards set out in the Bankruptcy Code (e.g., good faith standard in many statutes, "undue hardship" standard in the context of discharging student loan debt, reasonableness of attorney fees, nondischargeability of debts for "willful and malicious" injury by the debtor, discretionary withdrawal of the reference for "cause shown") or of supplying standards absent from the Code (e.g., the Code requires approval of the assumption or rejection of executory contracts, but does not set out criteria).

Some judges raised issues of broad significance (e.g., collateral estoppel in dischargeability actions, whether the government should be treated as a single debtor/creditor (mutuality rule), whether 11 U.S.C. § 106 regarding sovereign immunity is constitutional), while others raised less far-reaching questions (e.g., whether an agency that makes educational loans is entitled to unpaid administrative costs of collection).

Several judges identified the "new value exception" to the absolute priority rule as a problem area. The Supreme Court recently decided a case that observers thought would settle whether the rule has such an exception,

41. Special thanks to Chief Bankruptcy Judge David S. Kennedy who helped interpret the issues identified by survey respondents.

but the Court decided it on narrower grounds, and did not issue a per se prohibition against old equity participating in a reorganization on the basis of new capital infusion.[42]

Another issue that many judges identified concerns undersecured and unsecured liens. In *Dewsnup v. Timm,*[43] the Supreme Court held that a Chapter 7 debtor could not strip down or bifurcate an undersecured lien. And in *Nobelman v. American Savings Bank*,[44] the Court disallowed bifurcation of an undersecured lien on a Chapter 13 debtor's principal residence. The hot issue now is whether a completely unsecured junior mortgage on a principal residence can be "stripped off" (treated as unsecured debt).

Sources of ambiguity in bankruptcy law. We asked judges who identified a problematic issue to identify the source or sources of the difficulty. Results closely tracked those for the more general question, with the absence of precedent from the courts of appeals and Supreme Court being the most frequently identified. Because we were seeking information on precedent specifically, we did not ask about ambiguities in the Bankruptcy Code, which obviously overlap with issues of unclear precedent. For some, perhaps many, of the problems identified, the appropriate remedy may be statutory. Although this has been interpreted as a failing of the system's structure, responsibility may lie equally with Congress.

Disposition times, appeal rates, and their relationship to structure

Critics of the current system express concern about the time it takes for bankruptcy appeals to be decided. Some argue that bankruptcy appeals "languish" on the dockets of district judges, for asserted reasons ranging from district judge disinterest to the pressures of criminal and other cases with statutory priority. Others assert that even when the district court or BAP acts in a timely way, the time required to take the matter further to get a definitive ruling from the court of appeals is prohibitive.

42. Bank of America Nat'l Trust & Savings Ass'n v. 203 N. La Salle St. Partnership, 526 U.S. 434, 119 S. Ct. 1411 (1999).
43. 502 U.S. 410 (1992).
44. 508 U.S. 324 (1993).

Caveats about evaluating disposition time information

Measuring disposition time for bankruptcy appeals is not a straightforward matter. We report disposition times for all district courts combined, but the actual disposition times experienced by litigants differ fairly dramatically by district (and to some extent vary within districts over time). They may also differ by BAP, but it is too early to determine what the disposition speed is likely to be in the individual BAPs. Only the Ninth Circuit has had a functioning BAP long enough to produce a substantial body of cases, and only recently has it collected caseload information comparable to that now collected for the other BAPs at the national level. Therefore, we cannot be confident of trends in the Ninth Circuit panel's disposition times.

A second problem arises from differences in how courts conduct their business. In some districts and BAPs, a bankruptcy appeal is not opened until the record is complete and transmitted by the bankruptcy court. In others, the bankruptcy court transmits the notice of appeal immediately, so the case is opened, but there may be no action on the appeal until the record is completed and transmitted (e.g., 60 days later). (This reality is incorporated in the Judicial Conference's determination not to define a bankruptcy appeal as "pending" for CJRA reporting requirements until 60 days after the notice of appeal is docketed.)

Finally, we cannot yet know the effects, if any, of changes occurring as a result of CJRA or other case-management efforts, and whether any such effects will be lasting. Between September 30, 1997, and September 30, 1998, the number of bankruptcy appeals pending three years or more dropped slightly—from 107 to 91.[45] After the most recent reporting period closed, we attempted to obtain from the Administrative Office a report on the bankruptcy appeal matters that must now be reported more frequently, but at the time of our request some districts had not yet reported and we were not able to obtain the information. In any event, bankruptcy appeals were so recently added to the list of matters for which such reports must be filed that it would not be possible to draw strong inferences from the information. It may be that disposition times will drop as a result of the new requirement. That seems likely, because the reporting requirement may spur docket-clearing activities that will dispose of matters forgotten but not gone. We saw evidence of this sort of docket clearing in our review of docket

45. Administrative Office of the U.S. Courts, 1998 Annual Report of the Director, at Table S-11.

sheets, although we cannot link it causally with any particular case-management change, nor do we have a comparison set of dockets from a pre-CJRA period to examine to discover whether such activities are regular occurrences. Activity we saw included disposal of long-pending cases by transfer to the BAP in several circuits, transfers of many cases to a single judge who promptly either disposed of them or got them moving, and large-scale statistical and administrative closings that appeared to be the result of a deliberate push from the court rather than from a party.

It is possible, therefore, that disposition times—particularly average times—will fall as these statistical outliers are eliminated. That result will not necessarily indicate that litigants who actually care about having their appeals decided are experiencing any more expeditious service from the courts, any more than long average times directly indicate undue delay. If our observations generalize to the larger population of cases, times will drop because the appeals that parties have essentially abandoned will no longer linger on the docket, yet the appeals that require a judge to dismiss or decide them may not take any less time. With those caveats, we next present information on disposition times for first-level bankruptcy appeals.

District court disposition times

As Table 6 shows, district courts generally dispose of bankruptcy appeals considerably more quickly than they dispose of all civil cases. Once nearly all cases have made their way through the system, median disposition times for bankruptcy appeals appear to hover around 5 to 5.4 months, compared to 7 to 7.3 months for all civil cases as a group. (Of course, the nature of most civil cases on the courts' dockets is quite different from an appeal, as is the process they require, so we would expect the disposition times to differ.)

Table 6. Disposition times from filing to judgment for bankruptcy appeals and all civil cases filed in the district courts in fiscal 1994–1996

	Bankruptcy appeals in district courts			All civil cases in district courts		
Year filed	Percent pending	Mean (days)	Median (days)	Percent pending	Mean (days)	Median (days)
1994	0.4%	250	161	2.0%	330	222
1995	1.2%	241	165	3.0%	299	212
1996	3.1%	216	152	8.1%	276	204

Bankruptcy appellate panel disposition times

As a multijudge appellate court whose judges must coordinate to decide many appeals, a bankruptcy appellate panel might be expected to take longer than a single judge to decide an appeal. This is especially likely given that the judges on the panel also serve as trial judges, and most have little or no additional law clerk assistance. So far, that expectation does not appear to be the reality for most BAPs. Table 7 shows the disposition times in the BAPs for cases filed in fiscal 1997. In most circuits, the overall mean and median disposition times for BAPs are lower than the national figure for bankruptcy appeals to the district courts, but in most circuits they are based on a rather small number of cases, which limits the conclusions to be drawn from the figures. (There are too few cases to make a merits/procedural distinction meaningful at this point, and no good comparable breakdown for district courts.) Only in the Ninth Circuit have BAP disposition times been substantially longer than in the district courts; in most of the other circuits with a BAP, the panels have had noticeably faster disposition times than the district courts.

Table 7. Disposition times from filing to judgment for bankruptcy appeals filed in the bankruptcy appellate panels in fiscal 1997*

Circuit	Number filed	Number terminated	Percent pending	Mean (days)	Median (days)
1st	109	102	6.4%	145	120
2d	55	50	9.1%	140	129
6th	90	83	7.8%	156	128
8th	69	69	0.0%	128	118
9th	742	713	3.9%	241	239
10th	63	63	0.0%	162	163
All BAPs	1,128	1,080	4.3%	209	195

*Too many cases filed in FY 1998 and 1999 are still pending to permit a meaningful assessment of mean and median times for those years; full information for FY 1996 is not available. The "All BAPs" figures are heavily influenced by the much larger proportion of Ninth Circuit cases in the total BAP caseload.

If BAP judges, particularly those of the newer bankruptcy appellate panels, are heavily invested in the success of the panels, they may be especially attentive to the needs of the litigants and the likelihood that their disposition times and other performance measures will be examined. It is impossible to know whether that would continue as the BAPs mature; future performance may depend on how large the judges' trial and appellate caseloads grow. In short, it is too early to tell whether the BAPs or the district courts give prompter service to bankruptcy litigants on appeal. When the number

of cases is sufficient to make such a judgment, it is likely to be a mixed one—some district courts will be faster, some slower. However, as long as litigants have a choice between the two routes, attorneys will be able to make their own judgments about the speed of each and, if time is of the essence in the individual case, choose the forum more likely to render the quicker decision.

More important than the comparison between BAP times and district court times (which cannot be made with confidence yet) is the consideration of the total time on appeal and how that relates to the system's structure. While there cannot yet be a conclusion about which first-level forum is faster, it cannot be disputed that a single level would be faster overall for most cases that would have progressed through the court of appeals level, as a comparison of Tables 6, 7, and 8 suggests. Whether that were to be achieved by leaving most review at the first level and making court of appeals review discretionary, or by eliminating the current first level for some or all appeals, the total appeal time for most cases would fall.

Table 8. Disposition times for bankruptcy appeals, from filing in the district court to termination in the court of appeals[46]

Fiscal year terminated in court of appeals	Bankruptcy appeals terminated procedurally in court of appeals		Bankruptcy appeals terminated on the merits in court of appeals	
	Mean (days)	Median (days)	Mean (days)	Median (days)
1995	896	487	675	595
1996	1,821	766	801	687
1997	602	480	798	694
1998	709	505	826	663

Note: Includes cases that had been filed in the district court by October 1, 1993.

Some have argued for keeping the appellate function in the district courts because although appeals that progress to the next level will take longer, a greater proportion of the total bankruptcy appellate population will be decided faster because the district courts are faster than the courts of appeals. Moreover, they argue, the district court provides a valuable filtering function and relatively few cases move on to the courts of appeals. Those that do are sometimes presumed to be the more serious cases in which a precedential opinion is needed or where reversible error has obviously been

46. We do not report similar measures for cases appealed from the BAPs because the courts of appeals have been inconsistently reporting the date from which the time is counted, with some using the date of docketing in the BAP and others apparently using the filing date in the bankruptcy courts.

committed. In the next section we examine the evidence for those claims, with particular reference to their importance in the debate over direct appeal.

Appeal outcomes and further proceedings

The evidence for the filtering function of the first level of appellate review has been used by both proponents and opponents of direct appeal to the courts of appeals. On the one hand, the fact that fewer than one-fifth of bankruptcy appeals in the district courts move on to the courts of appeals has been offered as proof of the insubstantiality of the typical bankruptcy appeal and, by some, as evidence of the general satisfaction of litigants with the process and outcomes afforded at the first level of appeal. The courts of appeals, it is argued, should not be subjected to several thousand more cases if those cases are rarely meritorious and can be disposed of more quickly and economically below. On the other hand, the same data are used to show that this potential flood of cases would be of little practical significance to the most precious resource of the courts of appeals—circuit judge time—because so many of them will be dismissed without a judicial decision on the merits.

Whatever the force of these arguments might be if supportable, in fact the data on which the original claims were based are so unreliable as to make the claims impossible to evaluate empirically. Although we have reasonably good information about how BAPs are disposing of their caseloads (at least in the past two years of their operation), we do not have comparably useful information about district court appeals. The data reporting system for BAPs is modeled on the reporting system for the courts of appeals, but the district courts use codes developed for the typical civil caseload. This difference has important implications for efforts to compare the two appellate routes, especially on appellate process dimensions (e.g., oral argument vs. decision without oral argument).

From the more accurate coding system used in the BAPs, we know that approximately 35% to 45% of appeals are terminated on the merits in that forum, although circuits differ and the figures have probably not yet stabilized. District courts, on the other hand, have been reported to dispose of no more than about a quarter of their bankruptcy appeals on the merits. Some have used these reports to support the claim that the predicted increased workload for the courts of appeals should be substantially discounted. The claim is premised on the distribution of reported district court

outcomes in bankruptcy appeals, and on suppositions about the relationship between those outcomes and the amount of judge time required to produce them. In previous work, we have reported this distribution of district court dispositions, relying on codes used by the district clerks to report how, and at what stage, a case was terminated. Table 9 shows the distribution of reported dispositions in the cases filed in the district courts since October 1993. There are actually at least 20 distinct codes that district clerks use, but these figures group them in logical categories.

Table 9. Reported outcomes of bankruptcy appeals filed in the district courts in fiscal 1994–1998 (*caveat:* figures contain substantial errors)

	Fiscal year filed				
Reported method of disposition	1994	1995	1996	1997	1998
Appeals: Decision affirmed	15.2%	14.3%	16.3%	15.1%	9.1%
Appeals: Decision reversed at least in part	3.3%	2.7%	2.5%	2.3%	1.5%
Other judgment	14.5%	15.0%	14.4%	13.7%	11.2%
Dismissal	56.1%	56.8%	52.9%	50.6%	39.5%
Transfer (to other district or MDL) or remand to state court	1.2%	1.4%	1.6%	1.0%	1.1%
Remand to U.S. agency	7.4%	6.5%	7.2%	7.2%	5.7%
Statistical closing	1.8%	2.2%	2.0%	2.0%	1.4%
Still pending as of 12/31/98	0.4%	1.2%	3.1%	8.1%	30.5%
Total filings	4,512	4,290	3,845	3,450	3,314

Some have inferred from reported information about bankruptcy appeals in the district courts, particularly the percentage reported dismissed, that the great majority of cases terminate without receiving substantial judicial attention. These inferences are typically based on distributions such as that shown in Table 9 or similar ones relying on the courts' reports of the stage at which a case terminated. Law review articles, letters in the bar's campaign to obtain a right to direct appeal, the commentary to the Long Range Plan, and a letter from the director of the AO to Congress opposing certain appeal provisions in legislation proposed in the 105th Congress have relied on these numbers to argue that most bankruptcy appeals take only minimal judge time in the district courts. Some have inferred that these appeals will therefore take little or no judge time in the courts of appeals.[47] We have re-

47. *See, e.g.*, Letter from Nathan B. Feinstein to Commission on Structural Alternatives for the Federal Courts of Appeals, Nov. 5, 1998 (on file with the Federal Judicial Center); Letter from Daniel J. Bussel to the Hon. Byron R. White, Chairman of the Comm'n on Structural Alternatives, Oct. 28,

lied on these numbers ourselves.[48]

Unfortunately, the conclusions are unwarranted because the data are nearly worthless for the purpose of determining whether a case was decided on the merits or otherwise required nontrivial amounts of judge time. In our review of more than 5,000 docket sheets, we discovered several anomalies in the coding that convinced us that the nationally reported statistics (i.e., the case information the district courts report to the Administrative Office) should not be relied on for making this assessment. Nor can the reported data be used for estimating district court affirmance and reversal patterns in bankruptcy appeals. Among other things, our review found that:

- Twenty federal district courts do not use the code for "affirmed" or "reversed" at all.[49] That is, in the information reported by the courts to the AO for cases filed in the district courts beginning in FY 1994 and terminated by December 31, 1998, twenty districts did not report a single affirmance or reversal. Review of their dockets showed, not surprisingly, that bankruptcy judge orders were in fact being affirmed and reversed in these districts during the two-year period examined.

- In many districts, cases coded as "dismissed" appear to be decisions on the merits. In some districts they are straightforward affirmances and reversals (often of the form "the judgment of the bankruptcy court is affirmed, and

1998 (on file with the Federal Judicial Center) (referring to "disproportionate procedural terminations"). In making these arguments, the commentators have relied on a memorandum by A. Fletcher Mangum, then of the Federal Judicial Center, to the Long Range Planning Committee. That memorandum, which relied on information the courts reported to the AO about "procedural progress at termination," reported results allowing the inference that 73% of bankruptcy appeals to the district courts were disposed of with little or no judicial involvement. Obviously, the conclusions in that memorandum were only as valid as the data on which they were based, which we now believe to be grossly inaccurate.

48. *See* Judith McKenna, Elizabeth C. Wiggins, & Patricia Lombard, *Statistical Information Regarding Bankruptcy Appeals*, prepared for the 71st Annual Meeting of the National Conference of Bankruptcy Judges (Oct. 16–19, 1997), p. 6–23.

49. Although we did not do a district-by-district analysis of the docket sheets, it appears that some districts regularly use fairly accurate codes in their reports, but these were in the minority. We have reported elsewhere that the materials used at the Administrative Office's San Antonio training center gave incorrect instructions for how the codes are to be used. McKenna, Wiggins, and Lombard, *id.* We do not know whether the materials have been revised, but we did determine that the mistakes clerks are making do not track the instructions. With a few exceptions, if the "affirmed" and "reversed" codes were used at all, they were used correctly. The problem lies in the courts' failure to use them. Inaccurate coding of relatively rare events (in the scheme of a district clerk's duties) such as bankruptcy appeals is not especially unusual, and in the case of bankruptcy appeals the problem is compounded by the novelty of the appellate outcome codes "affirmed" and "reversed" relative to the other disposition codes. [In the summer of 1999 the training materials were corrected and the AO distributed new instructions to the district clerks. Thus, for cases terminating after July 1999, the accuracy of the disposition coding should improve markedly.]

this appeal is dismissed”). In many they are judgments on a motion to dismiss, in which the judge reaches the merits of the appeal. “Dismissed—other” appears to be the category most seriously out of kilter, containing large numbers of cases that should have been classified in a merit-related category, but also many dismissals that did not appear to require much judicial involvement.

- Cases coded “Judgment: Other” generally reflect a decision on the merits by the district judge. (This is an impression developed during the coding process, not a systematic assessment.)

We concluded this after recoding by hand the disposition information in 4,264 cases terminated in the last two fiscal years.[50] Using the recoded values, we estimate that bankruptcy appeals have been disposed of as shown in Table 10.

Table 10. Estimated distribution of district court decisions in bankruptcy appeals terminated in fiscal 1997 and 1998

Recoded method of disposition	Number of cases	Percentage of dispositions
Merit terminations (includes appellate judgments that affirm, reverse in whole or part, or vacate a bankruptcy court judgment or order; remands following an apparent determination on the merits; and other judgments and dismissals on the merits)	2,593	61%
Non-merit terminations (includes voluntary dismissals and settlements; dismissals for want of prosecution or for noncompliance with rules; statistical/administrative closings; consolidations; intra- and interdistrict transfers; transfers to BAP; remands to state court)	1,113	26%
Unclear or Dismissed—other (includes cases so categorized by the court when no more specific category appeared correct; jurisdictional dismissals where they appeared straightforward)	558	13%
Total terminations examined	4,264	

50. We obtained and did preliminary coding on just over 5,000 docket sheets, representing approximately 70% of the cases terminated in the two-year period. Technical details are available from the Center. For the disposition method study, we coded 4,264 docket sheets; we coded the entire set for some other variables. Most recoding was done by experienced attorneys on the Center’s research staff. A small amount was done by a law student; attorneys sampled his work to ensure reasonable accuracy. However, these numbers must be viewed as estimates because the recoding often required judgment calls about the terminating event. Where the category was unclear but the docket sheet reflected significant judicial action (including magistrate judge action), cases were generally categorized as “dismissed—other” or a merit termination.

We have no way to approximate a district court equivalent of "procedural termination by judges/by staff" as those terms are used in the courts of appeals or BAPs. Many dismissals on procedural grounds are encompassed in the non-merit and unclear categories in Table 10, and they entail a range of judicial time investments. Accordingly, we believe that 61% is likely to be an underestimate of the cases that consume nontrivial amounts of judge time; in view of the ambiguity of the measure, for purposes of this report, we estimate the percentage to fall between 60% and 75%.

The finding that perhaps 60% to 75% of bankruptcy appeals to the district courts result in some kind of "merit" termination cuts both ways in the debate over whether the system needs to be changed and, if so, whether direct appeal is the best way to change it. If the same merit/non-merit pattern were to hold true at the court of appeals, the effect on their workloads would actually be higher than we have projected in the past, because the merit termination rate in most courts of appeals is lower than 60% to 75%—approximately 45% to 50% depending on the case types examined. It is not clear whether the courts of appeals would tend to treat direct bankruptcy appeals more like the district courts do, or like the courts of appeals now treat second-level bankruptcy appeals. In bankruptcy appeals now handled in the courts of appeals, the merit termination rates are virtually identical to those for other civil, non-prisoner appeals overall.

Yet while the figures underscore the potential workload impacts for the courts of appeals, they also undercut the assertion that no change is needed because so few cases go on to the second level. As Table 11 shows, only about 20% of bankruptcy appeals *filed* in the district courts go on to the next level, a figure that has been fairly stable over the last several years of complete data. Appeals from the BAPs occur at about the same, or slightly lower, rate.

Table 11. Number of bankruptcy appeals filed in the district courts that generated at least one appeal to the courts of appeals

Fiscal year of bankruptcy appeal filing	Total appeals filed in district court	Appeals that generated at least one appeal to the court of appeals	Percentage of total appeals filed in district court	Total appeals filed in BAPs	Appeals that generated at least one appeal to the court of appeals	Percentage of total appeals filed in BAP
1994	4,512	869	19.3%	*	*	*
1995	4,290	862	20.1%	*	*	*
1996	3,845	772	20.1%	907	167 (est)	18.4%
1997	3,450	591	17.1%	1,128	169	15.0%

* Insufficient data.

But a true rate of appeal—and a better measure of litigant satisfaction with the first-level process—is the number of appeals as a percentage of appealable judgments, not filings.[51] With a potentially large margin of error, we can estimate that number by using the 60% to 75% merit termination rate we observed for appeals terminated by the district courts in fiscal 1997–1998. Table 12 shows the rate of appeal from district court bankruptcy judgments (using merit terminations as an admittedly rough proxy for appealable judgments).

Table 12. Estimated rate of appeal from the district courts to the courts of appeals

Fiscal year of bankruptcy appeal filing	Total appeals filed in district court	Estimated number of terminations on the merits	Number of terminations that generated at least one appeal to the court of appeals	Est. percentage of merit terminations that get appealed to court of appeals
1994	4,512	2,707–3,384	869	26%–32%
1995	4,290	2,574–3,218	862	27%–33%
1996	3,845	2,307–2,884	772	27%–33%
1997	3,450	2,070–2,588	591	23%–29%

We do not have sufficient data for the BAPs to make a similar assessment, although our best estimate is that of the 1,128 cases filed in the BAPs in fiscal 1997, 384 were terminated on the merits and 140 of those gave rise to a further appeal, for a rate of 36%. However, we have serious reservations about the comparability of these estimates to the ones for the district courts.

51. *See* Carol Krafka, Civil Caseload Trends in the U.S. Courts of Appeals, Commission on Structural Alternatives, Working Papers, 1999; Carol Krafka et al., Stalking the Increase in the Rate of Federal Civil Appeals (Federal Judicial Center 1995).

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IV. Alternative Bankruptcy Appeal Structures

Here we describe and compare several options for the bankruptcy appellate system.[52] We first review the NBRC proposal for direct appeal. This alternative addresses the problems of delay (at least in circuits whose courts of appeals will be able to handle the increased caseload in a timely way) and the lack of precedent, and goes some way to decreasing litigant cost. It is also the alternative that imposes the greatest immediate burden on the courts of appeals.

Option 2 is a variation on direct appeal to the courts of appeals, also addressing the need for coherent precedent. In larger courts of appeals, it would concentrate bankruptcy appellate review in relatively few of the court's judges, who would over time develop subject-matter expertise analogous to that supplied by the BAP.

Options 3, 4, and 5 would direct appeals to the courts of appeals but allow those courts to use BAPs in a variety of ways to help manage the increase in caseload and bring subject-matter expertise to bear on the decision-making process.

Options 6 and 7 put a premium on developing precedent; they would use Article III reviewers with specific subject-matter expertise.

Option 8, originally proposed by the Long Range Planning Committee of the Judicial Conference, would limit appeals as of right to the district court or the BAP, thereby addressing cost and delay, but it is inadequate with respect to the need to develop a body of precedent.

Option 9 would use BAPs to develop within-district (and, to some extent, within-circuit) consistency, with possible recourse to the regional court of appeals, in its discretion, to develop circuit law. The discretionary appeal

52. In describing and comparing the various options, we relied on statements to the Judicial Conference Long Range Planning Committee, Recommendation and Report to the American Bar Association House of Delegates by the Litigation and Business Law Sections (adopted August 9, 1995); Recommendation and Report to the American Bar Association House of Delegates by the Standing Committee on Federal Judicial Improvements (adopted August 9, 1995); Report of the National Bankruptcy Review Commission, Vol. I (October 20, 1997); Memorandum to the Ninth Circuit Judicial Council from its Committee on Bankruptcy Appeals (February 27, 1998); Baisier & Epstein, *supra* note 25; Broome, *supra* note 38; Bussel, *supra* note 25; Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. Rev. 545; Feinstein, *supra* note 25. We also used materials on bankruptcy appeals prepared by Hon. Elizabeth L. Perris, Hon. Paul A. Magnuson, and Hon. David R. Thompson for the 71st Annual Meeting of the National Conference of Bankruptcy Judges (Oct. 16–17, 1997). We thank Hon. Thomas E. Carlson for his input regarding the use of BAPs, and are especially grateful to Judge Perris for her ongoing dialogue with us over the years about bankruptcy appellate structure.

not only presents constitutional problems but also could develop precedent much more slowly than would appeal as of right. On the other hand, having two appeals as of right slows the process for individual litigants.

Options 10 and 11 would make procedural changes, rather than structural ones, to improve the stare decisis situation.

We analyzed each proposal using the following criteria, and comment on the criteria where relevant:

- What relationship does it set between the bankruptcy courts and the rest of the judiciary? To what extent does it avoid problems associated with specialization and preserve values of generalist review? To what extent does it preserve the value of an expert review?
- What are its effects on precedent? Within districts, circuits, and the nation, what are the likely effects on "percolation" of issues, and predictability and uniformity of decisions?
- What are its effects on the speed and economy for the parties, and the quality and fairness of individual decisions? Are core and non-core matters appealed to the same forum?
- What are its effects on the workload of judicial system, including the courts of appeals, the district courts, and the bankruptcy courts?
- Is it constitutional? What are its implications for the constitutionality of the bankruptcy system?

With regard to interlocutory appeals, we can do little more at this time than note that a workable bankruptcy appellate system must provide for review of interlocutory orders of bankruptcy judges. The issues of finality (flexible or otherwise) and mootness relate to structure, but are sufficiently distinct that the Judicial Conference Bankruptcy Committee may wish to study them separately. As the NBRC (and others before and since) noted, it would be unworkable for the only appealable order to be the technically "final" one (viz., the order confirming the plan in a Chapter 9, 11, or 12 case, or the order discharging the debtor in a Chapter 7 or 13 case). Many orders in bankruptcy cases determine substantive rights even though they do not end the case.

Option 1: Direct appeal to the courts of appeals (National Bankruptcy Review Commission recommendation)

The NBRC recommendation would eliminate BAPs entirely. It would leave for the district court only *de novo* review of the findings of fact and conclusions of law submitted by bankruptcy judges in non-core matters where the parties did not consent to the entry of a final order by a bankruptcy judge. Appeal from the district court's decision could then be taken to the court of appeals. All other bankruptcy matters (viz., all appealable bankruptcy orders in core matters and non-core-with-consent matters) would go directly to the regional courts of appeals, bypassing the district court. Review from the courts of appeals would be by *certiorari* to the U.S. Supreme Court.

Effects on precedent, cost, and disposition time

Routing bankruptcy appeals to the courts of appeals would go a long way toward ameliorating current precedent problems because the first appellate reviewer would be able to set binding circuit-wide precedent, but proponents of direct appeal probably overestimate the rapidity with which a body of precedent would develop. Regardless of the estimated merit termination rate one uses, most bankruptcy appeals will not end in a merits decision and published opinion, if current court practices in other areas of the law prevail. But direct appeal should cut appellate litigation costs and disposition times in some cases—those that would have been appealed to the court of appeals in any event. It would also extend to a larger number of cases the benefits of collegial review by three generalist judges who can evaluate the appellate issues within a broader framework, and can decide both core and non-core bankruptcy matters using the same standard of review.

Constitutionality

While the issue is not free from doubt, and we may assume that constitutional challenges would be mounted, moving initial appellate review to the courts of appeals would probably not endanger the constitutionality of the bankruptcy system.[53] A system of direct appeals to the courts of appeals should be constitutionally sound to the extent the current bankruptcy system organized around core and non-core matters is constitutionally sound.[54]

53. *See* Susan Block-Lieb, *Assessing the Constitutionality of Proposed Reforms to the Bankruptcy Appellate Process* (1999), reproduced as Appendix C.

54. The NBRC reached the same conclusion. National Bankruptcy Review Commission, Final

That is, if there is an "Article III problem," it is that the initial decision is made by non-Article III judges, not that appellate review of that decision is performed by the courts of appeals rather than by the district courts. The availability of appellate review of bankruptcy court decisions by an Article III court, although necessary, does not by itself ensure that all the "essential attributes" of the judicial power of the United States will be exercised by Article III judges. The current Bankruptcy Code provides several Article III controls over the trial court functions of bankruptcy courts: (1) courts of appeals appoint bankruptcy judges, who may be removed for cause by the judicial council of the circuit; (2) district courts have discretion to refer a case or proceeding to the bankruptcy court (although currently all districts automatically refer cases and proceedings to the bankruptcy court under orders of general reference) and may withdraw the reference for cause; and (3) in non-core matters, bankruptcy judges submit proposed findings of fact and conclusions of law to the district court, subject to *de novo* review of those matters to which any party has timely objected. It seems that the constitutionality of the bankruptcy system would depend on whether these trial level controls are adequate, not whether bankruptcy judge decisions are reviewable by just the courts of appeals rather than by both the district courts and courts of appeals.[55]

Some argue that regardless of whether the system would be constitutional, eliminating the appellate function of the district courts in bankruptcy may have negative consequences for the relationship between district courts and their bankruptcy court units. We are not aware of empirical evidence that would bear on the validity of this argument. Given the way bankruptcy appeals typically are spread across a district's judges, it is not clear how much oversight an individual judge actually exercises in most districts by way of the appellate function. The district court's responsibility to supervise closely the work of the bankruptcy court does not require an appellate component. The power to withdraw the reference, or decline to refer in the first instance, is sufficient for this purpose.

Direct review has other drawbacks, though, the most significant of which is the increased workload it would bring to the courts of appeals. Although bankruptcy appeals have always been a small part of the dockets of

Report at 758–59 (concluding that the bankruptcy system's constitutional infirmity, if any, rests in the original adjudication, not the appeal process).

55. *See* Block-Lieb, *supra* note 53; Carlson, *supra* note 52 at 565–67.

the courts of appeals, their addition at a time when many courts are overburdened may prove troublesome. It may be argued that this should not figure into the policy decision to be made—if appellate review to the courts of appeals is the right decision on the merits, Congress should simply create the conditions necessary to make this happen, whether that be new judgeships, other resources, or reduced jurisdiction in some other area. But it is still important to know what the likely effects are in the event only the burden, not the relief, is forthcoming.

Effects on judicial workloads

For the last decade, bankruptcy appeals have represented less than 3% of all appeals terminated by the courts of appeals, a proportion that has not varied substantially from year to year.[56] The NBRC estimated that the share of the dockets of the courts of appeals accounted for by bankruptcy cases would increase under the proposed system to approximately 11%, ranging from 1% in the D.C. Circuit to 21% in the First Circuit.[57] However, because the dockets of the courts of appeals vary greatly in size, the net increase in the number of appeals filed is a better indicator of increased workload. The NBRC estimated that direct appeal would increase the caseloads of the courts of appeals overall about 9% (or 3,937 cases).[58] The NBRC estimate assumes that *every* appeal currently filed in the district courts and BAPs would be filed in the courts of appeals, that a growing body of binding precedent would not diminish the number of appeals taken, and that the possibility of obtaining such precedent in a single step would not cause appeals to be filed that are not now taken.

We cannot assess the plausibility of these assumptions. It seems likely that some matters currently appealed to the district court or BAP would not be appealed to the court of appeals because of the expense and inconvenience involved,[59] but as more appeals are handled without oral argument and using other efficiency measures, the differences between the appeal avenues may diminish on those dimensions.

In Table 13, we estimate how direct appeal would affect the caseloads of

56. McKenna et al., *supra* note 48.

57. Report of the National Bankruptcy Review Commission, *supra* note 54, at 762–64.

58. The projected figure actually represents an almost 10% increase.

59. *See* Broome, *supra* note 38, at 543 (describing the substantial costs associated with an appeal to the court of appeals and arguing that in many bankruptcy cases where assets are limited and likely to dwindle, costs may preclude any appeal at all).

the courts of appeals. We present three possible projections, each based on a five-year average of filings and an assumption about how the change might affect litigants' decisions to appeal. The first is the most extreme of the plausible cases, and uses the assumption the NBRC used—100% passthrough of all appeals (i.e., all appeals now filed in the district courts and BAPs would be filed in the courts of appeals). The second and third assume an 80% and 65% passthrough rate, respectively. Assuming a 100% passthrough rate, we estimate the courts of appeals would experience a filing increase of about 6.9%, or 3,531 appeals annually.[60] Of course, the effects will vary over time as the total number of bankruptcy cases fluctuates. For example, in the year ending September 30, 1998, there could have been at least 4,464 bankruptcy appeals in the court of appeals under a direct appeal system (3,261 more bankruptcy cases than were filed in the courts of appeals that year).

The effects also vary greatly by circuit. For example, if every current appeal were taken to the court of appeals, the percentage caseload increase could range from 1.9% in the District of Columbia Circuit to 15.8% and 12.7% in the First and Ninth Circuits, respectively. The Fourth Circuit estimates in our tables may differ from actual effects because of an anomalous year with very high (but related) filings that were not terminated on the merits.

It may be that bankruptcy appeals now taken to the district courts and BAPs differ in kind from those now taken to the courts of appeals and that the figures should be adjusted to account for the plausible assumption that many who now appeal to the district court (or perhaps the BAP) will find the court of appeals too remote or expensive a forum and will simply not appeal at all. Accordingly, the second and third projections in Table 13 assume that fewer appeals will be taken to the court of appeals than are now taken to the district courts and BAPs. The 65% rate reflects our best estimate of merit disposition rates in the district courts, used here as a rough measure of serious appeals (ones likely to be pursued by the parties through to decision and resolved by judges).

60. The estimated net filing increase in the courts of appeals is the number of bankruptcy appeals filed in the district courts and BAPs minus the number of bankruptcy appeals filed in the courts of appeals under the current system.

Table 13. Projected increase in total filings using alternative passthrough rates

Rate	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC	National
	Average annual filings (all case types, five-year average)												
	1,402	4,425	3,557	4,748	7,178	4,604	3,219	3,287	8,552	2,625	6,095	1,580	51,271
Rate	Average annual filings (all case types, five-year average) with direct appeal of bankruptcy matters												
100%	1,624	4,774	3,883	4,877	7,457	4,882	3,376	3,412	9,641	2,828	6,439	1,609	54,802
80%	1,579	4,704	3,818	4,851	7,401	4,826	3,345	3,387	9,423	2,788	6,370	1,603	54,096
65%	1,546	4,652	3,769	4,832	7,359	4,784	3,321	3,368	9,260	2,757	6,319	1,599	53,566
	Increase in filings with direct appeal												
100%	222	349	326	128	278	278	158	125	1,089	204	344	29	3,531
80%	177	279	261	103	223	222	126	100	871	163	275	24	2,825
65%	144	227	212	83	181	181	103	82	708	132	224	19	2,295
	Percentage increase in filings with direct appeal												
100%	15.8	7.9	9.2	2.7	3.9	6.0	4.9	3.8	12.7	7.8	5.6	1.9	6.9
80%	12.7	6.3	7.3	2.2	3.1	4.8	3.9	3.1	10.2	6.2	4.5	1.5	5.5
65%	10.3	5.1	6.0	1.8	2.5	3.9	3.2	2.5	8.3	5.0	3.7	1.2	4.5

Note: The national figures may not equal the sums of the circuit figures as a result of rounding.

An appeal filed in the district court generally affects the caseload of a single judge. Because courts of appeals operate in panels, a single appeal can affect the caseloads of three judges. Thus appellate caseloads are often reported as appeals per panel. Table 14 shows recent per-panel caseloads in the courts of appeals and the estimated per-panel increase in filings at each of the three passthrough rates.

Table 14. Projected increase in per-panel filings using alternative passthrough rates

Rate	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC	National
	Per-panel filings without direct appeal (FY 1998)												
	719	1,115	769	979	1,420	888	891	901	976	646	1,589	407	967
Rate	Additional filings per panel with direct appeal												
100%	97	100	74	35	37	50	32	27	99	55	64	6	59
80%	78	80	60	28	30	40	26	22	79	44	51	5	47
65%	63	65	48	23	24	33	21	18	64	35	41	4	38

Relationship of disposition methods in courts of appeals to projected workloads. Some have argued that using the total number of new filings that would come to the courts of appeals may overstate the problem of increased workload. One commentator has suggested that we should discount the

filings because many cases are disposed of without substantial judicial attention.[61] This is true for all case types, but only relevant to the comparative analysis if bankruptcy cases are more likely or less likely to be terminated on the merits than the rest of the caseload. Bankruptcy cases currently taken to the courts of appeals are terminated on the merits at rates virtually identical to those of other kinds of civil appeals. Merit termination rates differ somewhat by circuit, but within circuits, the rates for bankruptcy and other cases are quite similar. Accordingly, in estimating the effects of direct appeal on judgeship needs, we do not have to adjust the figures so long as the judiciary assesses those needs on the basis of filings (which it has been doing for several years) and not on the basis of merit terminations.[62]

Nevertheless, because raw filing numbers can be misleading regardless of appeal type, in Table 15 we remove the cases likely to be terminated without any judicial action, and refer to the remainder as the adjusted judicial workload.

Table 15. Projected increase in adjusted judicial workload using alternative passthrough rates

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC	National
	Adjusted judicial workload based on 5-year average of filings												
	963	2,422	2,685	3,691	5,036	3,124	2,081	2,772	6,199	1,991	4,512	1,001	36,483
Rate	Adjusted judicial workload with an increase due to direct appeal												
100%	1,108	2,551	2,888	3,747	5,232	3,278	2,181	2,867	6,840	2,123	4,779	1,023	38,588
80%	1,079	2,525	2,847	3,736	5,193	3,247	2,161	2,848	6,712	2,097	4,726	1,018	38,167
65%	1,057	2,506	2,817	3,727	5,163	3,224	2,146	2,834	6,616	2,077	4,686	1,015	37,851

Note: Adjusted judicial workload = (filings x merit termination rate) + (filings x rate of procedural termination with judicial action). Adjustment rates were individually calculated for each circuit using the last five years of terminations in the courts of appeals. The national figures may not equal the sums of the circuit figures as a result of rounding.

A note on interlocutory appeals. The committee expressed a particular interest in learning the number of interlocutory appeals in bankruptcy matters. Tables 13–15 include some of the interlocutory appeals that the courts would likely receive, but not all of them. Some districts place interlocutory appeals on the general docket immediately, coded as bankruptcy appeals, and those

61. Feinstein, *supra* note 47.

62. The Federal Judicial Center paper analyzing the effect of direct appeal for the Commission on Structural Alternatives did project merit terminations per panel, not just filings, but did so using the merit termination rates for the courts of appeals, at that time the only valid measure available. *See* Wiggins & McKenna, *supra* note 2 at 198.

would be included in our overall filing numbers.[63] Other districts place them on a miscellaneous docket unless the court grants review, so petitions that are denied do not show up in the national statistics. A better count could only be obtained from bankruptcy court records, a task beyond the scope of this study. We can assess some aspects of the interlocutory appeal situation by counting the number of petitions for interlocutory review that do appear on available district court dockets. In the approximately 5,000 docket sheets we examined from bankruptcy appeals terminated in the district courts in fiscal 1997 and 1998, we found 73 instances in which interlocutory review was clearly or fairly clearly granted, 138 in which it was denied, and 13 in which a motion for leave had been filed but was mooted or the outcome was unclear.[64] Extrapolating to the 4,464 bankruptcy appeals that might have been filed in fiscal 1998, we would expect to see at least 204 instances in which an appellant seeks interlocutory review. We emphasize, though, that in light of the varying docketing practices in the district courts, and the ambiguous distinctions between interlocutory and non-interlocutory matters, this figure should definitely be regarded as a floor, not a ceiling.

Type of work required by the increased caseload. The courts of appeals report whether an appeal was terminated on the merits after oral argument, terminated on the merits after being submitted on briefs, terminated procedurally with judicial action, or terminated procedurally by staff. Nationally, about one-half of bankruptcy cases are decided on the merits, but the individual circuit rates range from 31% to 73%. Of bankruptcy appeals filed nationwide since fiscal 1994 and terminated by December 31, 1998, 49% were terminated on the merits, and of these a little more than half received oral argument. Most of the appeals that were procedurally terminated were terminated by staff.

63. Bankruptcy appellate panels also differ in how they record these matters. Clerks from two BAPs independently estimated that about 20% of the matters their panels receive are or could be considered interlocutory, but they do not separately track interlocutory matters so we could not confirm the estimates or see if others experience like filings.

64. For this part of our docket study we relied on a computerized search of the dockets to identify a pool of cases in which it appeared interlocutory review may have been implicated. We first identified cases in which docket sheets contained pertinent words or phrases (e.g., "interloc," "leave to appeal," "motion to appeal," "motion to certify for appeal," "permission to appeal," and variants thereof). Then a coder examined the docket sheet to ascertain whether it was a valid instance and, if so, the outcome of the motion.

Table 16. Disposition of bankruptcy appeals filed in the courts of appeals since fiscal 1994 and terminated by December 31, 1998

Termination method	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC	National
% on the merits	56.4	37.2	56.2	31.4	59.1	45.8	56.3	72.8	50.6	52.6	48.6	62.8	49.3
–orally argued	39.3	29.8	24.9	18.4	30.6	28.4	43.7	44.9	26.2	20.6	21.6	27.9	27.4
–on briefs	17.2	7.4	31.3	13.0	28.4	17.3	12.7	27.9	24.5	32.0	27.0	34.9	21.9
% procedural	43.6	62.8	43.8	68.6	40.9	54.2	43.7	27.2	49.4	47.4	51.4	37.2	50.7
–proc/judge	9.8	4.0	7.7	14.7	13.0	11.1	10.8	5.1	9.9	14.2	30.0	16.3	12.4
–proc/staff	33.7	58.8	36.1	53.8	28.0	43.1	32.9	22.1	39.5	33.2	21.4	20.9	38.2

Note: Discrepancies in sums may result from rounding.

Almost a third of the appeals filed in the BAPs during fiscal 1997 were terminated on the merits and of these about three-fourths received oral argument. About two-thirds of the appeals that were procedurally terminated received some judicial attention. This is a considerably higher number than in the courts of appeals, possibly because the BAPs do not have the same extensive network of staff support that the courts of appeals have. Some BAPs have staff who function like the staff attorneys in the courts of appeals, but in some BAPs the staff does not perform legal work.

The nationwide publication rate for bankruptcy merits terminations in the courts of appeals is similar to that for all merits terminations (i.e., in fiscal 1997, the publication rate for bankruptcy merits terminations was 25% and that for all terminations was 23%). In some circuits, however, the rate for bankruptcy merits terminations appears to be slightly higher and in other circuits, slightly lower than the circuit publication rate for all merits terminations.

Proponents of direct appeal argue that the increasing body of binding precedent might diminish the number of appeals over time. This is a plausible supposition, but appeal rates have proven to be considerably more complex than the hunches about what factors affect the rates and how those rates can be reduced.[65] Especially in an area prone to substantive legislative changes, the expectation that direct appeal will markedly reduce the appeal rate by stabilizing the law (as distinct from pricing many appellants out of the market) should be recast as a hope.

Savings to the district courts from direct appeal. Proponents of direct appeal argue correctly that direct appeal would, notwithstanding the increased

65. See Krafka et al., *supra* note 51.

caseload pressures on the courts of appeals, also create savings at other levels of the system. First, to the extent that the total appeals filed would decrease somewhat (by virtue of eliminating a layer of review), the system could realize savings in the form of deputy clerk positions and other court staff. The asserted saving of judge time is more speculative. If we view the entire district court caseload as an undifferentiated whole unconstrained by circuit or district lines, being processed by fungible judges who may be sent anywhere, then some savings could conceivably be realized. A reasonable estimate is that overall, eliminating the district court's appellate function in bankruptcy could free up the time equivalent to nine district judges (some of which is already freed up by the gratuitous services of BAP judges). We arrived at the nine-judge estimate by using the weight that the Judicial Conference assigns to bankruptcy appeals at the district court, .86, multiplying it by the possible appellate filings for fiscal 1998 (4,464), and dividing by 430[66] (430 weighted filings is the approximate threshold for when a district might be eligible, depending on many factors, to obtain a new district judgeship).

But there are practical limits to this analysis because judges are not fungible and are not equally available to do work anywhere in the country. Courts with a currently heavy bankruptcy load may find some relief as they are freed from bankruptcy appeals in large numbers, but this would occur in a minority of districts. The district with the heaviest volume of bankruptcy cases in the nation (the Central District of California) is also in a circuit that has experienced chronic judicial vacancies on its court of appeals—in recent years, vacancies of up to one-third of its authorized strength.

Other disadvantages to direct appeal

Although a prompt decision is often essential in bankruptcy appeals, in some already overburdened courts of appeals bankruptcy appeals probably will not be decided soon enough to realize the proponents' efficiency hopes. And cost savings for litigants are not assured. Many appeals will be heard outside the district in which they arose because most courts of appeals hold

66. The case weight was derived from a Federal Judicial Center time study in which district and magistrate judges were asked to record all the time they spent working on cases in a sample of more than 8,000 civil cases. The resulting time reports were used to construct a scale of relative case weights. Based on the time reported in the study, bankruptcy cases in the district courts were assigned a weight of .86. This case weight was developed based on time recorded in both bankruptcy appeals and bankruptcy cases in which the district court had withdrawn the reference. Bankruptcy appeals accounted for 88% of the cases that contributed to the weight, and 88% of the hours reported.

court in only one or two places. Thus, in those cases in which oral argument is held, parties who would have stopped at one appeal in any event will incur more expense and inconvenience than they would in the current system.

Finally, direct review would sacrifice the benefits of bankruptcy judge expertise that have been realized in circuits that have created BAPs. Circuit judges, on average, have less specialized knowledge than bankruptcy judges, particularly those selected to serve on BAPs. There is anecdotal evidence that circuit judges find the BAP decisions they review better reasoned and the cases better prepared for review than decisions from the district courts, and that this impression is independent of the likelihood of affirmance or reversal.

Option 2: Direct appeal to the courts of appeals, with subject-matter panels to hear bankruptcy appeals

This option is identical to Option 1, except a court of appeals could by rule provide for a relatively stable subset of its judges to hear bankruptcy appeals. This would allow the development of a "known bench" within a subject area asserted to be lacking in predictability and consistency.[67] It would ensure review by Article III judges without entirely sacrificing the advantage that BAPs have in developing subject-matter expertise.

Many of the dangers associated with increased specialization of courts are discussed more fully in connection with Options 6 and 7 (direct appeal to a new national court of bankruptcy appeals, or to the Court of Appeals for the Federal Circuit). The advantage of this option over Options 6 and 7 is that appeals would be heard by generalist judges who would develop bankruptcy expertise but would continue to bring a broader perspective to the development of bankruptcy precedent. This would avoid most of the dangers of capture, and fear of lessened prestige for those handling bankruptcy appeals. And it would prevent the feared boredom of the judges because they would continue to hear appeals of all types. If adopted, a specialist panel approach could ensure that judges would still hear the full range of appeals, but bankruptcy appeals would be concentrated among a few judges, not the entire court.

67. One author pointed to the perceived success of the Ninth Circuit BAP as an indicator of the potential for the specialized panel approach in other areas of the law. Michael A. Berch, *The BAP and Its Implications for Adoption of Specialist Panels in the Courts of Appeals, in* Restructuring Justice 165 (Arthur D. Hellman ed., 1990).

Option 3: Direct appeal to the court of appeals, with presumptive decisions by a BAP

Borrowing a page from district court practice, this approach would use adjunct decision makers with expertise to aid the court of appeals. In this system, there would be only one appeal as of right to the court of appeals. In its discretion, the court of appeals could use panels of bankruptcy judges to prepare recommended dispositions in appeals from the judgments of other bankruptcy judges, subject to de novo review by the court of appeals. Unless a party objected or the court disagreed with the BAP's decision, the BAP's decision (akin to a report and recommendation) would be adopted as the court of appeals' decision. The BAPs would sit in panels of three and hear oral argument when appropriate.

This option would help the courts of appeals handle their workloads if the NBRC's recommendation regarding direct appeals were adopted. During 1996, the losing party appealed in only 15% of cases decided by the Ninth Circuit BAP. In the best case, we may assume a similar percentage would object to the BAP's recommendation, keeping the workload of the courts of appeals substantially lower than it would be without the BAP assistance. It is likely, however, that parties would object to a BAP's presumptive decision more frequently than they file formal appeals from BAP decisions under current law, because less time and expense would be involved.

The relief does not come without cost. At least in the short run, a court of appeals may be reluctant to use the BAP's report to create precedent without full-fledged review by circuit judges. If so, the court might issue the BAP-generated decision as an unpublished opinion, or might undertake a full review of its own. The former would defeat the precedent-building purpose; the latter would defeat the efficiency advantages of the option. Still, the option might serve to improve the quality of precedent in the long run. It seems generally accepted that BAP decisions are of high quality and that even when the court of appeals rejects the BAP's conclusions, it finds the analysis useful in reaching its own conclusion. And the BAP could serve an important function by identifying for the court of appeals cases in which a precedential opinion is needed to settle or clarify a question of law, regardless of whether an objection is filed.

This approach should satisfy all constitutional requirements, for the same reason that a district judge is not constitutionally barred from referring a bankruptcy appeal to a magistrate judge for a report and recommen-

dation. The Article III court retains ultimate power—that is, the court of appeals would exercise "the essential attributes of the judicial power" of an Article III court as required by *Marathon*, as long as the parties have the opportunity to object to the BAP report, and obtain *de novo* Article III review. Of course, the procedure's compliance with the spirit of Article III review also rests on the assumption that the court of appeals would give more than cursory review to the BAP's decision.

A serious disadvantage to this approach is its potential for turning BAP judges into glorified staff attorneys for the courts of appeals. If judges or litigants come to view them this way, there may be little incentive for bankruptcy judges to take on the often substantial additional work that comes with being a member of a BAP. If this approach is adopted, courts should take steps to avoid this development, perhaps by refraining from needlessly tinkering with the BAP's decision and by retaining the BAP's signed opinion where the court adopts it as its own. Accountability demands that the circuit judges be identified as well, of course, but methods could probably be devised to give BAP judges adequate credit for their work.

Option 4: Direct appeal to the court of appeals or to the BAP by consent, with discretionary appeals from BAP decisions

One way to preserve the advantage of the BAP while reducing the problems associated with a guaranteed second level of review would be to allow parties to choose their forum. Under this approach, there would be only one appeal as of right, but the parties could appeal to either the court of appeals or a BAP, which would decide all bankruptcy appeals in which the parties expressly consented to its jurisdiction. Further review of a BAP decision would be to the court of appeals, but only by leave of that court. The approach need not be the same for every circuit; the circuit could retain the discretion to decide whether its resources and caseload warranted a BAP.

The Ninth Circuit Council argues that using BAPs in this way would avoid a large increase in the workload of the courts of appeals, and simultaneously would provide for faster resolution of issues by judges especially knowledgeable about bankruptcy.[68] Under this option, the courts of appeals

68. Letter from the Hon. Procter Hug, Jr., Chief Judge of the Ninth Circuit, to the Hon. Wm. Terrell Hodges, Chair of the Executive Committee of the Judicial Conference of the United States (March 27, 1998) (on file with the Federal Judicial Center); *see also* the Memorandum to the Ninth

would be least burdened if parties were required to "opt out" of the BAP system rather than "opt in." That is, consent to BAP jurisdiction would be implied by a party's failure to timely request direct review by the courts of appeals.[69] This option would save parties time and money, the Council argues, because the BAP would decide appeals more quickly than the courts of appeals. The Council also noted that the Federal Judicial Center 1989 study of the Ninth Circuit BAP[70] found that a large majority of attorneys had high regard for the BAP and supported its continuation. The persistence of these views is supported by Ninth Circuit data that show (1) parties consent to BAP review in 50% to 60% of bankruptcy appeals, and (2) the rate of further appeal from BAP decisions in bankruptcy appeals is about half the rate of appeal from district court decisions. Experience therefore suggests that the parties would be fairly unlikely to seek further review; in any event the court of appeals would be free to deny such requests.

This approach would meet the National Bankruptcy Review Commission's major objectives of (1) eliminating the cost and delay inherent in two levels of appeal of right, and (2) ensuring bankruptcy appeals are heard by tribunals having typical attributes of an appellate court (sit in multijudge panels and render decisions that bind lower courts in the circuit). But it would probably be less successful in achieving the goal of precedent development. It would likely do less to clarify and stabilize bankruptcy case law than a straight system of direct appeal for reasons discussed above with regard to the report and recommendation or presumptive decision approach—the possible reluctance of the court of appeals to be bound by decisions made in the first instance by others. Moreover, if BAP decisions carry precedential weight, this option would continue the current problems associated with having two entities declaring law on the same subject. On the other hand, it is likely that more appeals would receive full review by the courts of appeals under this approach compared to the report and recommendation approach, especially if express rather than implied consent is

Circuit Council by its Committee on Bankruptcy Appeals (February 27, 1998) (on file with the Federal Judicial Center).

69. The Bankruptcy Amendments and Federal Judgeship Act of 1984 required consent of all parties before an appeal could be decided by a BAP. Initially, the Ninth Circuit required affirmative, express consent from the parties and the BAP received few appeals. When the circuit amended the procedure to require parties to opt out of BAP review, the BAP caseload soared (i.e., increased by tenfold). Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 Ariz. St. L. J. 181, 198 (1989).

70. *Id.*

required, since experience suggests that parties oftentimes would not object to BAP decisions.

It may be argued that the approach would be unconstitutional because it would allow parties to waive their sole right to review by an Article III court. But a fair reading of the Supreme Court's decision in *Thomas v. Arn*[71] suggests that the approach is constitutional. Thomas had been convicted of homicide in state court. She filed a federal habeas corpus petition asserting that exculpatory evidence had been improperly excluded at trial, and the petition was referred to a magistrate judge who recommended that the petition be dismissed. Thomas was expressly warned that, pursuant to a Sixth Circuit local rule, if she failed to file an objection to the magistrate's report within ten days, she would waive her right to review in the court of appeals. She failed to file a timely objection. The district court reviewed the recommendation *de novo*, notwithstanding the lack of objection, and dismissed the petition. The court of appeals affirmed without reaching the merits, reasoning that Thomas had waived her right of appeal by not timely objecting to the magistrate judge's report. The Supreme Court upheld the court of appeals' decision, holding that the waiver rule did not violate the requirements of Article III. The Court stated:

> Even assuming, however, that the effect of the Sixth Circuit's rule is to permit both the district judge and the court of appeals to refuse to review a magistrate's report absent timely objection, we do not believe that the rule elevates the magistrate from an adjunct to the functional equivalent of an Article III judge. . . . Any party that desires plenary consideration by the Article III judge need only ask.[72]

The Court also noted that the waiver rule did not create a jurisdictional bar, and the court of appeals therefore retained jurisdiction to excuse a waiver and reach the merits of an appeal.[73] Likewise under this option, the court of appeals would retain the ability to review BAP decisions if a party requested further review.

71. 474 U.S. 140 (1985). This analysis was taken from the Memorandum to the Ninth Circuit Council from its Committee on Bankruptcy Appeals (February 27, 1998).

72. 474 U.S. at 154.

73. *Id.* at 155 & n.15.

Option 5: Direct appeal to the regional courts of appeals, using BAPs as an alternative dispute resolution forum

One can view the BAP as analogous to the court-annexed alternative dispute resolution forums used in district courts and by courts of appeals in their appellate conferencing programs. Other options then open up. Parties could consent to, for example, (1) a nonbinding report and recommendation by the BAP; (2) a final judgment by the BAP, with discretionary review to the court of appeals; or (3) a non-appealable judgment. This proposed use of the BAPs is like ADR in that it is an alternative forum selected by the parties, and is arguably consistent with the federal judiciary's use of ADR and non-Article III judges to conserve the time of Article III judges. But it does raise constitutional and policy questions, such as whether parties can waive their right to Article III review and whether the system as a whole benefits from such waivers.

Option 6: Direct appeal to a Federal Court of Bankruptcy Appeals staffed by Article III judges

Proponents of centralized review to establish a national body of bankruptcy precedent favor a specialized court, sometimes called a Federal Court of Bankruptcy Appeals. Such a court would be staffed by Article III judges who would sit in panels of three in each of the places that courts of appeals currently sit. It would hear all appeals from bankruptcy judges and from district judges exercising their original jurisdiction in bankruptcy. Review from the Federal Court of Bankruptcy Appeals would be by *certiorari* to the U.S. Supreme Court.

The advantages of this option are the same as those for Option 1 (direct appeals to the regional courts of appeals), plus the salutary effects of decision makers who, on average, have more familiarity with bankruptcy law. It gains those advantages without the detrimental effects on the dockets of the courts of appeals.

The arguments in opposition are the familiar objections to national subject-matter courts.[74]

- Judicial selection could become politicized, interfering with the reality or appearance of the court's impartiality. The lobbying efforts with respect to

74. *See* Judith A. McKenna, Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States 84–85 (Federal Judicial Center 1993).

bankruptcy legislation considered in the 105th and 106th Congresses suggest that this is a legitimate concern.

- As a specialty bench developed, the specialty bar could gain unfair advantages from their familiarity with the same judges, often drawn from their ranks.
- The judges' vision will narrow with continued service concentrated on a particular area, contributing to the creation of an insular area of law. This is particularly problematic in bankruptcy because of its relationship to state law and commercial law beyond bankruptcy.
- Specialized courts, it is argued, ultimately result in lessened prestige for their members—members of the new court would likely have less prestige than generalist circuit judges, but certainly would have more prestige than bankruptcy judges serving on BAPs because under this proposal, the appellate judges would have Article III status.

In addition:

- The concentration of law-declaration power in relatively few hands will result in less "percolation" of the issues; accordingly, the Supreme Court will receive issues before there has been sufficient development of competing positions in the courts below.
- The new court might need to decide commercial and other state law issues for which independent lines of circuit precedent may be developing—will the court follow the precedent of the circuit from which the appeal originates or opt for national uniformity? Will the court's rulings be binding on the regional courts of appeals? This is especially problematic if the court hears appeals from decisions in both core and non-core matters.
- The current volume of bankruptcy appeals implies that the new court would be relatively large. Depending on the estimates one uses for how many appeals would be taken to such a court, and the number of those that would be by pro se litigants, up to twenty new judges could be needed to handle the volume of appeals in a timely fashion.[75] Although diverting bankruptcy appeals to this court would save some district judge time, the district-level savings would not completely offset the costs associated with creating a court that sits in panels. The few districts with a

75. This estimate is based on the current formula used to assess circuit judgeship needs.

high volume of bankruptcy appeals might realize a savings in judgeships, but most districts' judgeship needs would be unaffected.

- Appeals might be heard outside the district, adding to the expense and inconvenience for the parties.

This option raises the same constitutional issue as Option 1 (direct appeals to the courts of appeals).

Option 7: Direct appeal to the Court of Appeals for the Federal Circuit

Some proponents of centralized review who assess as remote the chances that Congress would establish an entirely new court of appeals for bankruptcy suggest that review be centralized in the Court of Appeals for the Federal Circuit. Further review would be by *certiorari* to the U.S. Supreme Court.

This option provides the advantages of direct and centralized review, but by a court with a somewhat broader focus than a Federal Court of Bankruptcy Appeals. The Court of Appeals for the Federal Circuit currently functions in several relatively discrete areas and is authorized to sit in panels throughout the country. Moreover, the court has extensive experience in economic and commercial matters, and some argue that it has brought order and speedy resolution of disputes in commercially important fields.

The current volume of bankruptcy appeals, however, would impose a significant burden on the court, and could require additional judgeships to handle bankruptcy appeals in a timely fashion. Moreover, the arguments made against subject-matter courts in general and offered as criticisms of the Court of Appeals for the Federal Circuit in particular apply equally in the bankruptcy context.

This option raises essentially the same constitutional issue as Option 1 (direct appeals to the courts of appeals), and is therefore likely to be constitutional, although the remoteness of available review might call into question its constitutionality.

Option 8: Appeal as of right to the district court or BAP with subsequent discretionary appeal to the court of appeals (November 1994 Proposed Long Range Plan)

Under the initial proposals of the Long Range Planning Committee, dispositive orders of bankruptcy judges would continue to be reviewable by Arti-

cle III judges in the district court or BAP, with further review available only at the discretion of the court of appeals for significant questions of law or public importance.

The advantages of this proposal are:

- Appeals as of right are limited to one, thus reducing the cost and delay of obtaining a final decision.
- Bankruptcy appeals will be determined more quickly than they would be under the current appellate system or by direct appeal to the court of appeals.
- Preserving the opportunity for review at the district court level is consistent with the bankruptcy court's configuration as a unit of the district court.
- The workload of the courts of appeals would be reduced by eliminating most bankruptcy appellate matters from their dockets.

The disadvantages are:

- Circuit and district-wide precedent would be slow to develop—even slower than it is now. District judges deciding bankruptcy appeals might not defer to the non-binding decisions of their colleagues. There is a split of authority as to whether bankruptcy courts are bound by district court decisions, but the trend appears to be against *stare decisis. Stare decisis* problems arguably would be compounded in circuits that established BAPs because district judges deciding bankruptcy appeals and bankruptcy judges might view BAP decisions as merely persuasive, not binding precedent.[76]

  The November 1994 Proposed Long Range Plan coupled this proposal with another that allowed for certification of issues directly to the courts of appeals if such review was needed immediately to establish legal principles on which subsequent proceedings in the case may depend. Such a provision would improve the *stare decisis* effects of this proposal.
- Many bankruptcy appeals will be decided by a single judge, rather than a three-judge panel with the advantage of a collegial appellate process.

76. Bussel, *supra* note 25, at 259.

- Bankruptcy decisions of bankruptcy judges would be heard in the district court or BAP, whereas bankruptcy decisions of district judges would be heard in the courts of appeals. Appeals from core and non-core matters within a case could thus be fragmented.

This proposal most likely raises no constitutional issues, except in districts with BAPs—there the constitutional issue would be whether parties may waive their right to Article III review.

Option 9: Appeal as of right to the BAP with review by the regional court of appeals

This option would substitute BAP review for district court appellate review of bankruptcy judge decisions in core bankruptcy proceedings and in non-core proceedings where the parties had consented to final judgment by a bankruptcy judge. (District courts would continue to provide *de novo* review of bankruptcy court findings of fact and conclusions of law in non-core matters where parties had not consented to final judgment by the bankruptcy judge.) The decisions of the BAPs would bind bankruptcy judges but not district judges. The regional courts of appeals would have jurisdiction in appeals from BAP decisions and from decisions by district courts exercising their original bankruptcy jurisdiction.

At first glance, this proposal appears to have significant advantages. Circuit precedent would be established more quickly than under the current system, because bankruptcy judges would be bound by their circuit's BAP and the current dual appeal routes for bankruptcy court orders (that is, via district court or BAP to the court of appeals) would be eliminated. Determination of appeals at all levels would involve the deliberation of a three-judge panel, a hallmark of the federal appellate system. The first appeal would be heard by judges with expert knowledge of bankruptcy law, and any subsequent appeal would be heard by generalist judges, each type bringing strengths. And the workload of the district courts would be reduced by removing bankruptcy appeals from their dockets.

A major disadvantage of this approach is that litigants would have another non-Article III hurdle to clear before obtaining review by an Article III court. The remoteness of Article III review might weaken or destroy the constitutional validity of bankruptcy courts, which require Article III supervision to pass constitutional muster. Also, although BAPs are likely to be more convenient than courts of appeals, they are less convenient than district courts, and thus could increase cost and inconvenience for parties.

Making BAPs truly mandatory would cause problems in some circuits (and would probably not be cost effective in a circuit as small as the D.C. Circuit). Difficulties arise in circuits in which bankruptcy caseloads are concentrated in a single district. The judges in that district produce most of the decisions to be reviewed, but cannot fully share the load (or rewards) of BAP participation because they are not eligible to sit on most of the circuit's bankruptcy appeals. Yet eliminating the "same district" rule could undermine the litigants' confidence in the integrity of the appellate system and might interfere with the working relationships among bankruptcy judges within a district. For this proposal to work, therefore, arguably either a number of separate BAP judges would need to be appointed, imposing a cost on the system, or two or more circuits would have to create a single BAP, imposing added expense and inconvenience to litigants. The experiences of the First and Second Circuits could be studied to determine whether a single-circuit BAP is a feasible option even in a small circuit. Of particular interest would be the reasons that the Second Circuit Judicial Conference decided to terminate its Bankruptcy Appellate Panel service on December 8, 1999, only three and a half years after the service was established.

Option 10: Appeal as of right to the district court and court of appeals with direct appeal to the court of appeals in some instances

A hybrid proposal situating some review in the district court or BAP and some in the courts of appeals has been made in at least three forms:

10-1. Dispositive orders of bankruptcy judges would continue to be reviewable by Article III judges as of right in the district court and then in the courts of appeals, but also would be reviewable directly in the court of appeals in those cases where the parties stipulate, or the district court or BAP certifies, that such review is needed immediately to establish legal principles on which subsequent proceedings in the case may depend. (One such interim measure was described in the March 1995 Proposed Long Range Plan.)

10-2. A second version would be structured like Option 10-1, except orders would not be appealable directly to the courts of appeals on stipulation of the parties.

10-3. A third version would also be structured like Option 10-1, but the certification could be made by the bankruptcy court, the district court, the bankruptcy appellate panel, or the court of appeals.

These options track the basic idea of the 1978 Act's arrangement—selective access to the court of appeals. Requiring party agreement would keep the number of direct appeals quite low, if history is any guide. When appeals to the courts of appeals on party stipulation were permitted under the 1978 Bankruptcy Reform Act, relatively few bankruptcy appeals (about 2%) were taken directly to the courts of appeals. Commentators have identified several circumstances in which litigants in bankruptcy are more likely than litigants in other kinds of cases to agree to take the case directly to the court of appeals. Still, it seems likely that so few cases would come directly to the court of appeals under such a system that it would do relatively little to solve the precedent problems. Some combination of certification requirements (e.g., party motion and bankruptcy court or district court concurrence) might better serve the end of precedent development.

Many of the disadvantages of the current system would remain, but these options would expedite resolution of conflicts among district judges or between the district court and BAP. On the other hand, the courts of appeals would likely object to having no control over whether to grant review, and the procedure would deprive the courts of appeals of the benefit of a district court appellate opinion. Moreover, giving priority to certain bankruptcy appeals (even if few in number) necessarily implies subordinating, if only to a small degree, the rest of the workload of the courts of appeals. This could open the door to similar proposals that might have a greater impact on the operations of the courts of appeals.

The position adopted by the Judicial Conference after the June 1999 committee meetings is essentially that set out in Option 10-1, except that the Conference would allow a court of appeals to accept or reject the appeal. The Conference's September 1999 position parallels Option 10-2, but again would give the courts of appeals discretion to deny leave to appeal directly.

Option 11: Change to the rules of precedent

In recommending direct appeals to the courts of appeals, the NBRC report cited the *stare decisis* problem and how it resulted in non-uniform bankruptcy laws. It noted that certain bankruptcy courts have held that a decision by one district court judge does not create binding precedent for all of

the bankruptcy judges within the circuit, and similarly, that BAP decisions often do not have precedential effect in either bankruptcy courts or district courts. The system thus leads to multiple non-binding—and conflicting—decisions of the same issue.

Law within a district could be clarified by requiring, through legislation or judicial action. that the bankruptcy courts follow the decisions of their district court and BAP, unless there are conflicting district court decisions or conflicting decisions between the district court and BAP. However, this change would not resolve conflicts between the district court and BAP, within district courts, or between districts, and thus would not ensure uniform national bankruptcy laws.

Requiring district courts to follow BAP decisions would enhance uniformity and give a greater role in settling bankruptcy law to specialist judges. It would lead to relatively quick establishment of circuit-wide precedent, and would reduce forum shopping between the BAPs and district courts. But this proposal raises serious constitutional issues because it would make decisions by non-Article III courts binding on Article III courts.

V. Conclusion

The discussion of alternatives here has of necessity been based to some extent on assertions made by those promoting and opposing the alternatives. Some of the asserted problems can be assessed, although fewer of them can be tested empirically. As we anticipated, some issues about the performance of the new BAPs are not answerable yet. Too few cases have made their way through the system to allow us to evaluate the BAPs with any confidence, particularly to examine their effects on the predictability or stability of bankruptcy law. However, our planned survey of the members of the bar who use the system is essential to understanding how the structure of the system affects bankruptcy practice and the costs of litigation outside the judicial branch.

Much depends on one's beliefs about the values of appellate review and how best to serve those values, and on one's view of the tradeoffs inherent in the bankruptcy appellate structure. In settling on a preferred option, it may be best to focus on aspects of the system that appear to present problems: precedent quality, process quality, and speed and economy. If precedent is the most serious problem (as it appears to be from our examination), loosening access to the courts of appeals without opening the floodgates may be a good first approach. But users of the complex bankruptcy system probably want that precedent not just to be settled, but to be settled right (Justice Brandeis notwithstanding). If early (and, in the Ninth Circuit, not so early) impressions about the quality of work by the bankruptcy appellate panels holds up as the experiment progresses, the dual needs for binding authority and substantive correctness, like the dual needs for generalist and specialist review of some matters, may strengthen arguments for some sort of a dual or hybrid system involving the bankruptcy appellate panels. The result may be worth the inelegance. But if it turns out not to be worth the price, the BAP (unlike, say, a new Article III court) is easily disbanded without having imposed substantial lasting costs to the judicial budget.

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Appendix A

Section 612 of H.R. 833

SEC. 612. BANKRUPTCY APPEALS.

Title 28 of the United States Code is amended by inserting after section 1292 the following:

"§ 1293. Bankruptcy appeals

"(a) The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from the following:

"(1) Final orders and judgments entered by bankruptcy courts and district courts in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, including final orders in proceedings regarding the automatic stay of section 362 of title 11.

"(2) Interlocutory orders entered by bankruptcy courts and district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions in cases under title 11, in proceedings arising under title 11, and in proceedings arising in or related to a case under title 11, other than interlocutory orders in proceedings regarding the automatic stay of section 362 of title 11.

"(3) Interlocutory orders of bankruptcy courts and district courts entered under section 1104(a) or 1121(d) of title 11, or the refusal to enter an order under such section.

"(4) An interlocutory order of a bankruptcy court or district court entered in a case under title 11, in a proceeding arising under title 11, or in a proceeding arising in or related to a case under title 11, if the court of appeals that would have jurisdiction of an appeal of a final order entered in such case or such proceeding permits, in its discretion, appeal to be taken from such interlocutory order.

"(b) Final decisions, judgments, orders, and decrees entered by a bankruptcy appellate panel under subsection (b) of this section.

"(c)(1) The judicial council of a circuit may establish a bankruptcy appellate panel composed of bankruptcy judges in the circuit who are appointed by the judicial council, which panel shall exercise the jurisdiction to review orders and judgments of bankruptcy courts described in paragraphs (1)–(4) of subsection (a) of this section unless—

“(A) the appellant elects at the time of filing the appeal; or

“(B) any other party elects, not later than 10 days after service of the notice of the appeal;

to have such jurisdiction exercised by the court of appeals.

“(2) An appeal to be heard by a bankruptcy appellate panel under this subsection (b) shall be heard by 3 members of the bankruptcy appellate panel, provided that a member of such panel may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

“(3) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel.”.

Appendix B

Sources of Precedent in Bankruptcy: 1999 Federal Judicial Center Survey of U.S. Bankruptcy and District Judges—Issues Identified as Particularly Inconsistent or Difficult to Know in Judge's Circuit*

* The second column of this table consists of the comments (with some editing) of bankruptcy and district judges who responded to the survey. We retained duplicate comments to show how frequently certain issues were raised. Unless otherwise noted, references in the third column are to the Bankruptcy Code.

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
1	Attorney's fees in Ch. 7 cases	327, 328, 329, 330, 331	Attorney's fees—Chapter 7
2	Determining reasonable fees in bankruptcy	330	Attorney fees—reasonableness of fees
3	Propriety of paying professionals more frequently than every 120 days	331	Attorney fees—frequency of payment
4	Retroactive orders approving employment of professional persons	327, 1103, 901	Employment of professions—*nunc pro tunc* approval
5	The applicability of section 362(a) to state court enforcement of criminal court orders re payment of fines and restitution	362(a), 362(b)(1)	Does section 362(a) automatic stay prohibit state enforcement of criminal court orders re fines/restitution?
6	Section 362(a)(3)	362(a)(3)	Automatic stay of "any act to obtain possession of property of the estate or of property from the estate, or to exercise control over property of the estate"
7	Violations of the automatic stay and damages therefor	362(h)	Violations of the automatic stay and damages therefor (may recover actual damages and in appropriate cases punitive damages)
8	Executory contracts	365, Rule 6006	Assumption or rejection of executory contracts and unexpired leases—there are many issues here: e.g., (1) code requires court approval but does not set out criteria—most but not all circuit apply business judgement rule; some use the "balancing of the equities" test; (2) "lease-restriction" cases, where debtor wants to assume and assign lease; (3) intellectual property rights under 365(h); also see issues below regarding (4) 365(d)(3), and (5) time for assuming/rejecting nonresidential real property lease.
9	Executory contracts—assumption and assignment	365, Rule 6006	Assumption or rejection of executory contracts and unexpired leases—there are many issues here: e.g., (1) code requires court approval but does not set out criteria—most but not all circuit apply business judgement rule; some use the "balancing of the equities" test; (2) "lease-restriction" cases, where debtor wants to assume and assign lease; (3) intellectual property rights under 365(h); also see issues below regarding (4) 365(d)(3), and (5) time for assuming/rejecting nonresidential real property lease.
10	Section 365(d)(3) interpretation of "timely perform all obligations"	365(d)(3)	Assumption or rejection of executory contracts and unexpired leases—interpretation of "timely perform all obligations" in 365(d)(3)
11	Time for assumption/rejection of non-residential real property lease	365	Assumption or rejection of executory contracts and unexpired leases—time for assumption/rejection of non-residential real property lease

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
12	Whether an agency that makes educational loans is entitled to "unpaid administrative costs of collection"—there appears to be no case law on point	503, Rule 4003	Administrative expenses (this is likely not too controversial an issue)
13	Whether certain types of expenses, such as severance pay and post-petition rent constitute administrative expenses	503, 365	Administrative expenses, including post-petition rent
14	Exemptions	522	Exemptions
15	Exemption questions	522	Exemptions
16	Definition of "intent to hinder, delay, or defraud" in context of fraudulent-transfer litigation, objections to discharge, and objections to exemptions	522, 544(b), 548, 727(a)(2)	Fraudulent-transfer litigation, objections to discharge, and objections to exemptions: definition of "intent to hinder, delay, or defraud."
17	11 U.S.C. § 523(a)(15)	523(a)(15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
18	Section 523(a)(15) issues	523(a)(15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
19	Code § 523 (a)(15) application	523(a)(15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
20	Section 523(a)(15) issues	523(a)(15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
21	Section 523(a)(5)	523(a)(5)	Nondischargeability of alimony, maintenance, support

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
22	Extent to which marital claims may be discharged in bankruptcy	523(a)(5), (15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
23	Marital litigation	523(a)(5), (15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
24	Nondischargeability of alimony obligations	523(a)(5), (15)	Nondischargeability of marital dissolution debts. Before the 1994 amendments, alimony, maintenance, and support were nondischargeable under § 523(a)(5), but debts related to the division of property were dischargeable. Now the latter type of debts are also nondischargeable under § 523(a)(15).
25	Credit card dischargeability standards	523(a)(2)(A), (B), (C)	Nondischargeability of credit card debts (obtained by false pretenses, obtained by materially false writing, or for luxury goods/services or cash advances within 60 before filing bankruptcy)
26	Dischargeability in credit card cases	523(a)(2)(A), (B), (C)	Nondischargeability of credit card debts (obtained by false pretenses, obtained by materially false writing, or for luxury goods/services or cash advances within 60 before filing bankruptcy)
27	What are standards for dischargeability of credit card debts under section 523(a)(2)(A) and (a)(2)(C)?	523(a)(2)(A), (B), (C)	Nondischargeability of credit card debts (obtained by false pretenses or for luxury goods/services or cash advances within 60 before filing bankruptcy)
28	Section 523(a)(2)(B)	523(a)(2)(B)	Nondischargeability of debts for money, property, services, or an extension, renewal, refinancing of credit, obtained by use of a written statement that is materially false.
29	Section 523(a)(4) fiduciary standard	523(a)(4)	Nondischargeability of debts for fraud or defalcation while acting in a fiduciary capacity—what is fiduciary standard?
30	Section 523(a)(6)	523(a)(6)	Nondischargeability of debts for "willful and malicious injury by the debtor to another entity or to the property of another entity." Injury to property cases are commonly referred to as "collateral conversion" cases. See the recent Supreme Court case regarding the "willful and malicious" standard in the context of a medical malpractice injury (*In re Geiger*, 118 S. Ct. 974 (1998)).

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
31	Section 523(a)(6) issues in light of *Geiger*	523(a)(6)	Nondischargeability of debts for “willful and malicious injury by the debtor to another entity or to the property of another entity.” Injury to property cases are commonly referred to as “collateral conversion” cases. See the recent Supreme Court case regarding the “willful and malicious” standard in the context of a medical malpractice injury (*In re Geiger*, 118 S. Ct. 974 (1998)).
32	Section 523(a)(8)(B)—many courts differ on hardship	523(a)(8)(B)	What constitutes “undue hardship” for the dischargeability of student loans?
33	Burden of proof—dischargeability cases	523	Dischargeability—burden of proof
34	Ability to enter money judgments by default in dischargeability actions—no ruling on appeal by district court	523,Rule 7005	Dischargeability—ability to enter money judgements by default. Is a motion for discharge judgement required, and is a hearing required?
35	Whether the debtor’s (or trustee’s) interest in an officer’s and director’s insurance policy is property of the bankruptcy estate subject to the automatic stay? Conflict between In re Minoco, 799 F.2d 517 (9th Cir. 1986) and In re Pinkler Corp., 124 F.3d 1310 (9th Cir. 1997)	541	Property of estate subject to automatic stay: interest in insurance policy
36	Avoidance actions	544, 546, 547, 548, 549, 550, and others	Avoidance actions, generally
37	Uniform Commercial Code issues as to chattel paper, proceeds and applicability of Code section 546(b)	546(b)	Limitations on avoiding powers
38	Reclamation obligations	546(c)	Seller’s right to reclaim goods received by insolvent debtor

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
39	Good faith standards	109, 363, 364, 542, 548, 549, 550, 727, 746, 921, 1113, 1114, 1125, 1126, 1129, 1144, 1225, 1325. Also, 707(a), 930, 1112(b), 1208(c), 1307(c)	Eighteen statutes in the Code contain good faith standards. Also, there is much case law stating that bankruptcy cases must be filed in good faith, and that filing in bad faith is cause for dismissal (*see* 7007(a), 930, 1112(b), 1208(c), and 1307(c)) and relief from the stay (*see* 365(d)(1)). Additional notes/comments: 109: to file under chapter 9, municipal debtor must have negotiated in good faith with creditors; 363: effect of reversal or modification on appeal of authorization for sale or lease of property on entity that purchases or leased the property in good faith; 365: effect of reversal or modification on appeal of authorization for obtaining credit on entity that extended credit in good faith; 542: transfer of property or payment of debt owing to the debtor in good faith by entity that has neither actual notice or actual knowledge of bankruptcy case; 548: interests of transferee or obligee that took for value and in good faith a fraudulent transfer/obligation; 549: rights of a good faith post-petition purchaser of real property; 550: rights of transferee that took for value and in good faith voidable transfer; 727: denial of discharge to debtor who received discharge under 1228 or 1328 within previous six years unless . . . plan in such case was proposed in good faith—good faith conference required when seeking rejection of collective bargaining agreement; 746: rights of post-petition good faith customer. 921: Chapter 9 case must be filed in good faith; 1113: good faith conference required when seeking rejection of collective bargaining agreement; 1114: good faith conference required when seeking modification of retiree benefits; 1125: liability of person that solicits acceptance/rejection of a plan in good faith, or that participates in good faith in the offer, issuance, sale, or purchase of a security offered or sold under the plan; 1126: court may designate entity whose acceptance/rejection of Chapter 11 plan was not in good faith, or was not solicited or procured in good faith; 1129: Chapter 11 plan must be proposed in good faith; 1144: protection of entity who relied on order of confirmation in good faith, upon the orders revocation; 1225: Chapter 12 plan must be proposed in good faith; 1325: Chapter 13 plan must be proposed in good faith.
40	Disposition of Chapter 7 proceeds when parties "settle" to distribute in a way that does not comport with Chapter 7 priorities	726, Rule 9019(a)	Because multiple parties are involved in a bankruptcy case, court approval is required for settlement
41	Chapter 7 administrative status being given to pre-petition claims	726, 105(a), 503(a)	Rarely would pre-petition debts be given administrative expense status; need compelling reason to do it ("necessity of payment" doctrine)
42	Chapter 13 generally	Chapter 13 of the Bankruptcy Code	Chapter 13, generally

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
43	"Good faith" in Chapter 13 confirmation (11 U.S.C. § 1325(a)(3))	1325(a)(3); compare 1129(a), 901, 1225(a)(3)	Whether the Chapter 13 plan was proposed in good faith
44	Bad faith filing of Chapter 13	1307(c)	Whether the Chapter 13 case was filed in good faith
45	Successive purchaser's ability to raise claim objection	502, Rule 3007	Claim objection by successive purchaser
46	Lien avoidance issues—circuit court persisted in a line of cases overruled by Supreme Court (finally recently resolved)	506(d), 522(f)	Lien avoidance and stripping: In Dewsnup v. Timm (502 U.S. 410 (1992)), the Supreme Court held that a Chapter 7 debtor could not strip down or bifurcate an undersecured lien, and in Nobelman v. American Savings Bank (508 U.S. 324 (1993)) the court disallowed bifurcation of an undersecured lien on a Chapter 13 debtor's principal residence. The hot issue now is whether a completely unsecured junior mortgage on a principal residence can be "stripped off" (treated as unsecured debt).
47	Lien avoidance	506(d), 522(f)	Lien avoidance and stripping
48	Application of lien stripping (Nobelman v. American Savings Bank) in Chapter 13	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping
49	Lien stripping in Chapter 13	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping
50	Lien stripping in Chapter 13's of unsecured second trust deed	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping
51	Strip off of junior liens vs. principal residences in Chapter 13 cases when there is no value to those liens	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping
52	In a Chapter 13, debtor's right to void the lien of a totally unsecured second mortgage	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping
53	Home mortgage modifications in Chapter 13	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
54	Section 1322(b)(2)—What kind of security must be taken to put contract out of scope of section? E.g., is security in rents, fixtures, insurance, and escrowed funds enough? Is a totally undersecured loan exempt from section 1322(b)(2)?	506(d), 522(f), 1322(b)(2)	Lien avoidance and stripping—also at issue is how to treat "mixed collateral" liens
55	Extent to which adversary proceedings must be filed to accomplish routine lien avoidance or reduction in secured amount of claim	506(d),1322(b)(2), Rule 7001(2); also see 522(d), Rule 4003(d)	Lien avoidance and stripping: procedural issues
56	Section 1322(c)(2)	1322(c)(2), which is an exception to 1322(b)(2)	Prior to the 1994 Reform Act, courts disagreed about whether payment could be spread over the life of the plan for a loan that was secured by the debtor's principal residence and that fully matured before the filing of a Chapter 13 case or would mature during the pendency of the plan. Section 1322(c)(2) was amended so that the payment could be spread over the life of the plan on the condition that the loan was paid in full before plan completion.
57	Whether Section 1322(c?) applies to Colorado judgment liens	1322(c)(2)	Should judicial lien fall under section 1322(c)(2) exception?
58	Chapter 11 generally	Chapter 11 of the Bankruptcy Code	Chapter 11 generally
59	Classification of claims	1122, 901, 1322(a)(3), 1322(b)(1)	Claim classification
60	Permissibility of separately classifying non-recourse deficiency claim in Chapter 11	506(a), 1111(b)(2), 1122	Claim classification (Chapter 11)
61	Separate classification of various unsecured creditors (deficiency of secured claims) in Chapter 11	506(a), 1111(b)(2), 1122	Claim classification (Chapter 11)
62	Chapter 11 classification issues	506(a), 1111(b)(2), 1122	Claim classification (Chapter 11)

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
63	Continued viability of the exception to the absolute priority rule under the code	1129(b)	New value exception to absolute priority rule—on 5/3/99, the Supreme Court restricted the new value exception. The once common use of the exception to lock in old equity's ownership of a reorganized debtor is no longer permitted, but the Court did not issue a per se prohibition against old equity participating in a reorganization on the basis of new capital infusion. The ABI Web site has a nice summary of the case and its practical significance (*Bank of American National Trust & Savings Association v. North LaSalle Street Partnership*).
64	Is there a new value exception to the absolute priority rule?	1129(b)	New value exception to absolute priority rule
65	New value exception	1129(b)	New value exception to absolute priority rule
66	New value exception	1129(b)	New value exception to absolute priority rule
67	New value exception	1129(b)	New value exception to absolute priority rule
68	Status of new value exception under section 1129(b)	1129(b)	New value exception to absolute priority rule
69	New value exception—no Supreme Court decisions; *In re Rash*—unclear Supreme Court decision	1129(b)	New value exception to absolute priority rule
70	Application of Rash replacement value standards		Rash replacement value standards
71	Interest rate—present value in Chapter 13 cases	1325(a)(5), 1325(a)(4), 1322(e)	Interest rate that is used varies across jurisdictions (e.g., some use the prevailing market rate and others use a modification of the prime rate). Another issue is whether the return to the creditor, given the rate, satisfies the best interest test.
72	Interest rates and valuation in "cramdown" Chapter 13 cases	1325(a)(5), 1325(a)(4), 1322(e)	Interest rate that is used varies across jurisdictions (e.g., some use the prevailing market rate and others use a modification of the prime rate). Another issue is whether the return to the creditor, given the rate, satisfies the best interest test.
73	Valuation of collateral for "cramdown" purposes in Chapter 13 cases	1325(a)(5), 1325(a)(4), 1322(e)	Interest rate that is used varies across jurisdictions (e.g., some use the prevailing market rate and others use a modification of the prime rate). Another issue is whether the return to the creditor, given the rate, satisfies the best interest test.

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
74	Interest rates	1325(a)(5), 1325(a)(4), 1322(e), and other statutes	Interest rate that is used varies across jurisdictions (e.g., some use the prevailing market rate and others use a modification of the prime rate). Another issue is whether the return to the creditor, given the rate, satisfies the best interest test.
75	Interest rates	1325(a)(5), 1325(a)(4), 1322(e), and other statutes	Interest rate that is used varies across jurisdictions (e.g., some use the prevailing market rate and others use a modification of the prime rate). Another issue is whether the return to the creditor, given the rate, satisfies the best interest test.
76	Jurisdiction	28 U.S.C. 151, 157, 1334, 1452	Jurisdiction generally
77	Appropriate exercise of jurisdiction by bankruptcy judge	28 U.S.C. 151, 157, 1334, 1452	Jurisdiction generally
78	Abstention	28 U.S.C. 1334; 11 U.S.C. 305, and 543(d)	Jurisdiction—abstention (proceeding and case)
79	Remand, etc.	28 U.S.C. 1452	Jurisdiction—removal and remand
79	What should and what can the bankruptcy court do when venue is not proper? 28 U.S.C. 1412; Rule 1014	28 U.S.C. 1412, Rule 1014	Jurisdiction—venue: Does Rule 1014 conflict with 18 U.S.C. 1412 ("may" versus "must" transfer)?
80	Application of *Rooker Feldman* to concurrent jurisdiction situations		The *Rooker-Feldman* doctrine, established by two U.S. Supreme Court decisions handed down sixty years apart, provides that a federal district court lacks the jurisdiction to hear a collateral attack on a state court judgment or to review final determinations of state court decisions. Instead, the proper court in which to obtain such review is the U.S. Supreme Court. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).
81	Binding effect (if any) of BAP decisions in districts that do participate in the BAP and in districts that do not participate in the BAP	28 U.S.C. 158	Binding effect of BAP decisions
82	Binding effect (if any) of district court decisions on Bankruptcy Court	28 U.S.C. 158	Binding effect of district court decisions

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
83	Chapter 13 post—confirmation issues	Among others, 1329, 1307, 362(d), 1305	This encompasses many issues. For starters, 1329 (post-confirmation modification of the plan), 1307 (discharge), 362(d) (relief from the stay), 1305 (debtor wants to incur post-petition debt). See the specific comments regarding 541, 1306, and 362(d).
84	Jurisdictional and property of the estate questions in Chapter 12 and 13 cases with a confirmed plan	541, 1306, 1207	Post-confirmation Chapter 12 and 13—property of the estate and other jurisdiction issues
85	What constitutes property of the estate in a Chapter 13 case after confirmation of a plan in the case	541, 1306, 1327(b)	Post-confirmation Chapter 13—property of estate
86	Whether relief from stay can enter for creditor after confirmation of Chapter 13 plan for nonpayment outside plan	362(d)	Post-confirmation Chapter 13—can relief from stay be entered for creditor to whom debtor is making direct payments?
87	Jurisdictional questions in Chapter 11 cases after confirmation of a plan	1141–1146 (Chapter 11, subchapter III), Rule 3020(d)	Jurisdiction in post-confirmation Chapter 11 cases. There is no provision that expressly deals with the extent to which the court retains jurisdiction of a Chapter 11 case once the plan is confirmed. The provisions in Chapter 11, subchapter III imply that some jurisdiction is retained, but the framers of the Code did not contemplate that the court would oversee the case for the life of the plan. Note that the Code requires a Chapter 11 case be closed once the plan is confirmed and the plan is substantially consummated (can't modify plan after this time).
88	Sovereign immunity issues in state tax issues and student loan cases	106, 505, 525	Sovereign immunity: dispute over the constitutionality of 11 U.S.C. 106
89	Jurisdiction after *Seminole*	106	Sovereign immunity: dispute over the constitutionality of 11 U.S.C. 106
90	Sovereign immunity of states	106	Sovereign immunity: dispute over the constitutionality of 11 U.S.C. 106
91	Interrelationship of federal tax laws with bankruptcy laws	505	Federal tax laws and bankruptcy, generally
92	Is 26 U.S.C.. § 7502 the exclusive method to prove timely filing and mailing of IRS documents?	505	Federal tax laws and bankruptcy—method of proving timely filing and mailing

Comment #	Problem areas identified by bankruptcy judges	Related statute or rule provision	Description of issue/notes
93	In an individual Chapter 7, the right of the Trustee to step into Debtor's shoes re federal tax advantage in sale of home for a debtor over age 65 years old, who owned the property for last 3 years	505	Federal tax laws and bankruptcy—tax advantage for sale of home by trustee in Chapter 7 case
94	Collateral estoppel		Collateral estoppel—the Bankruptcy Review Commission had an extensive discussion about this issue and recommended that Congress resolve it. Briefly, in 1973 the Supreme Court held that the doctrine of *res judicata* did not apply to dischargeability proceedings but left open the question of whether collateral estoppel applied. In 1991 the Supreme Court said it did apply (*Grogan v. Garner*, 111 S. Ct. 654 (1991)). This has led to some arguably unfair situations where state court default judgments affect substantive rights in bankruptcy.
95	Preemption		
96	"Milk base"—the appropriate place to file a financing statement - no clear precedent from court of appeals		
97	Environmental injury potentially incurred prepetition, notice by publication, etiology uncertain		

Comment #	Problem areas identified by district judges	Related statute or rule provision	Description of issue/notes
98	"Claim" vs. setoff vis-a-vis automatic stay	362(a)(7), 553	If a set off is already in place before the petition is filed, it is valid. If it is not, the automatic stay prevents the set off, and so, a motion for relief from the stay must be filed and granted for a valid set off. This issue is difficult to understand but it is not in conflict.
99	Applicability of automatic stay to post petition set off	362(a)(7), 553	If a set off is already in place before the petition is filed, it is valid. If it is not, the automatic stay prevents the set off, and so, a motion for relief from the stay must be filed and granted for a valid set off. This issue is difficult to understand but it is not in conflict.
100	Executory contracts and discharge of pre-petition debt with a number of intervening bankruptcies	365, 727, 1328, 1141(d), 1228	Multiple filings: executory contracts and discharge of prepetition debt
101	What to do about multiple, successive filings	7007(a), 930, 1112(b), 1208(c), 1307(c), 349	Multiple filings: This relates to the good faith filing issue and to the effect of a dismissal. Pending legislation seeks to address this issue.
102	Whether reference should be withdrawn under 11 U.S.C. § 157(d) when resolution of the issues involves substantial and material consideration of non-bankruptcy code statutes	157(d)	Interpretation of 157(d). Court MAY withdraw cases and proceedings for cause on its own motion or own motion of a party, and MUST withdraw a proceeding on timely motion of party if its resolution requires consideration of both title 11 and laws affecting interstate commerce.
103	Discretionary vs. mandatory withdrawal to U.S.D.C.	157(d)	Interpretation of 157(d). Court MAY withdraw cases and proceedings for cause on its own motion or own motion of a party, and MUST withdraw a proceeding on timely motion of party if its resolution requires consideration of both title 11 and laws affecting interstate commerce.
104	Potential conflict between 11 U.S.C. §§ 522(f)(1) & 522(l)	522	Exemptions: avoidance of liens that impair an exemption to which the debtor would have been entitled
105	Government as single debtor/creditor (mutuality rule)		Split as to whether the United States is one entity or each agency is a separate entity (e.g., can a government agency set off a tax refund). This is an important issue.
106	Interpretation and application of certain bankruptcy rules		

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Appendix C

Assessing the Constitutionality of Proposed Reforms to the Bankruptcy Appellate Process

by Susan Block-Lieb
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Under current law, bankruptcy litigants have a right of appeal to the district court from "final judgments, orders, and decrees" entered by a bankruptcy judge in a core proceeding,[1] and from interlocutory orders and decrees increasing or reducing the time periods set forth in 11 U.S.C. § 1121(d).[2] They also can request that the district court grant leave to appeal "other interlocutory orders and decrees" of the bankruptcy court.[3] Alternatively, if the judicial council has established a Bankruptcy Appellate Panel ("BAP") for the circuit[4] and the parties to the appeal have consented to BAP appellate jurisdiction,[5] then they have the same rights of appeal and ability to request leave to appeal to a BAP as are available to a district court.[6] Following this intermediate appellate review, the parties have a right of appeal to

1. 28 U.S.C. § 158(a)(1) (1984).

2. *Id.* at § 158(a)(2). 11 U.S.C. § 1121(d) permits a bankruptcy court "for cause" to reduce or increase the 120-day and 180-day exclusive periods relating to the filing of a Chapter 11 plan of reorganization and solicitation of its acceptance.

3. *Id.* at § 158(a)(3).

4. 28 U.S.C. § 158(b)(1) would seem to make the creation of a BAP the rule, rather than the exception:

> The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council . . . to hear and determine, with the consent of all parties, appeals under [28 U.S.C. § 158(a) applicable to district courts] unless the judicial council finds that –
>
> (A) there are insufficient judicial resources available in the circuit; or
>
> (B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.
>
> Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

To date, the First, Second, Sixth, Eighth, Ninth, and Tenth Circuits have constituted a bankruptcy appellate panel service, but the Second Circuit has discontinued its service.

5. "Consent" is presumed under the statute unless the parties opt-out. 28 U.S.C. § 158(c)(1) provides that

> [s]ubject to subsection (b), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless –
>
> (A) the appellant elects at the time of filing the appeal; or
>
> (B) any other party elects, not later than 30 days after service of notice of the appeal;
>
> to have such appeal heard by the district court.

6. *Id.* at § 158(b)(1).

the courts of appeals "from all final decisions, judgments, order, and decrees entered under subsection (a) [pertaining to district courts] and (b) [pertaining to BAPs] of this section."[7] Although section 158(d) does not, on its face, admit of exceptions to the final order rule applicable to the bankruptcy appellate jurisdiction of courts of appeals, the Supreme Court has held that 28 U.S.C. § 1292 also governs bankruptcy appeals.[8]

In its report to Congress, the National Bankruptcy Review Commission (NBRC) recommended that appeals from bankruptcy court orders entered in core proceedings proceed directly to courts of appeals.[9] Congress reacted favorably to this recommendation, incorporating it into H.R. 3150. Section 411 of H.R. 3150,[10] which passed the House of Representatives last Congress but did not successfully emerge from conference, would have eliminated all intermediate levels of appellate review in the bankruptcy context and provided for direct appeals to courts of appeals. Similarly, in this Congress, the House recently passed H.R. 833.[11] Section 612 of H.R. 833 also provides for direct appeals to courts of appeals, but, unlike H.R. 3150, would permit circuits to establish bankruptcy appellate panels as an optional intermediate level of appellate review.[12]

During the last Congress's session, in a letter to the House Judiciary Committee, the Department of Justice voiced its objection to section 411 of H.R. 3150 and urged Congress "not to lessen district court review and remove this potentially significant basis for the constitutionality of the bankruptcy court's exercise of judicial power."[13] In a recent law review article,

7. *Id.* at § 158(d).

8. Connecticut National Bank v. Germain, 503 U.S. 249 (1992). 28 U.S.C. § 1292 provides, in relevant part as follows:

> (a) . . the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, . . .
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.
>
> (b) 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 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 may thereupon, in its discretion, permit an appeal to be taken from such order. . . .

9. National Bankruptcy Review Commission, Final Report, Bankruptcy: The Next Twenty Years, Recommendation 3.1.3 at 752–53 (1997).

10. H.R. 3150, 105th Cong. (1998). Available online at www.abiworld.org/legis/bills/hr3150rev.pdf.

11. H.R. 833, 106th Cong. (1999). Available online at www.abiworld.org/legis/bills/hr833rev.pdf.

12. Section 612 of H.R. 833 appears as Appendix A, *supra*.

13. Letter from Ann N. Harkins, Acting Assistant Attorney General, to Rep. Henry J. Hyde (May 7, 1998). Section 411 did not survive the conference on H.R. 3150.

Prof. John P. Hennigan, Jr., also opines that direct appeals from bankruptcy orders to the courts of appeals would create constitutional concerns.[14] Hennigan argues that direct appeals from orders entered in core proceedings that do not involve public rights—particularly, orders arising in a preference or fraudulent transfer action—may be unconstitutional in that the lack of intermediate appellate review by a federal district court undercuts the contention that the bankruptcy court acted as an "adjunct" of the district court when it entered the order.[15]

This report considers whether certain appellate reform proposals that would eliminate district court appellate review would raise constitutional concerns. Direct appeals to courts of appeals are considered in the first section, direct appeals with bankruptcy appellate panel involvement in the second.

I. Direct Appeals to Courts of Appeals

Based on the recommendation of the National Bankruptcy Review Commission, section 411 of H.R. 3150 proposed that appeals from bankruptcy court orders entered in core proceedings go directly to the court of appeals. Would removal of an extra layer of appeal to the district court or bankruptcy appellate panel create constitutional uncertainties for the bankruptcy court system?[16]

Any discussion of the constitutionality of the bankruptcy system should consider the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,*[17] as well as its subsequent constructions of the requirements of Article III of the U.S. Constitution—*Commodity Futures Trading Commission v. Schor*[18] and *Thomas v. Union Carbide Agricultural Products Co.*[19]

In *Northern Pipeline* the Court held 28 U.S.C. § 1471, the former bankruptcy jurisdictional provision, unconstitutional, invalidating the wholesale reference of the broad grant of bankruptcy jurisdiction to untenured bank-

14. John P. Hennigan, Jr., *The Appellate Structure Regularized: The NBRC's Proposal*, 102 Dick. L. Rev. 839 (1998).

15. *Id.* at 853 ("There is a plausible argument that the constitutionality of the present system depends upon classifying bankruptcy judges as adjuncts to the district courts and bypassing those courts on appeal obviates that classification.").

16. Implicit in this question is an assumption that the existing bankruptcy court system is constitutional, although there is some uncertainty as to this underlying premise. *See* Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 Amer. Bankr. L. J. 529 (1998).

17. 458 U.S. 50 (1982).

18. 478 U.S. 833 (1986).

19. 473 U.S. 568 (1985).

ruptcy judges.[20] Northern Pipeline, a Chapter 11 debtor-in-possession, had filed suit against Marathon in the bankruptcy court, seeking damages for alleged breach of contract, warranty, misrepresentation, coercion, and duress. Marathon had not filed a proof of claim against the Northern Pipeline estate. Although the bankruptcy court denied Marathon's motion to dismiss, the district court reversed, holding that the delegation of authority to bankruptcy judges was unconstitutional. On direct appeal the Supreme Court held constitutionally invalid Congress's grant to the bankruptcy court of jurisdiction to make final determinations in matters involving purely private disputes—i.e., matters merely related to the bankruptcy case. Under the jurisdictional provisions enacted in 1978, Congress had "vest[ed] all 'essential attributes' of the judicial power of the United States in the . . . bankruptcy court."[21] The Court held that such judicial power could not constitutionally be exercised by a court whose judges lacked the attributes of life tenure and salary protection mandated by Article III. The rationale of this holding is obscured by the Court's splintered decisions in *Northern Pipeline,* however.[22]

The plurality concluded that the bankruptcy court jurisdiction at issue violated Article III because it did not fit within its description of the Supreme Court's previous judicially created exceptions to the general rule that federal judicial power is to be exercised only by Article III judges. It described the two most relevant exceptions as those involving the adjudication of "public rights," and those in which the non-Article III decision maker acted as an "adjunct" to an Article III court.

The public rights doctrine finds its origins in a group of cases in which the Supreme Court has upheld the constitutionality of legislative and administrative courts. The plurality in *Northern Pipeline* described the public rights doctrine as limited to matters arising "between the [United States] Government and persons subject to its authority in connection with the performance of the constitutional functions of the legislative or executive departments" and which "historically could have been determined exclusively by those departments."[23] The *Northern Pipeline* plurality declined to uphold the exercise of jurisdiction at issue under the public rights doctrine because the suit there was between two private parties concerning liability under state law. However, the plurality noted that some bankruptcy proceedings may fall within the public rights exception:

20. 458 U.S. at 87.

21. *Id.* at 84–85.

22. Only four justices joined in the plurality decision, and the two justices who concurred in the judgement did so based only on a terse explanation of the holding.

23. 458 U.S. at 67–68.

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.[24]

The *Northern Pipeline* plurality went on to derive the adjunct court exception to Article III from two cases, *Crowell v. Benson*[25] and *United States v. Raddatz*.[26] *Crowell* validated the statutory grant of authority to a federal administrative agency to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. In *Raddatz*, the Supreme Court upheld the practice, authorized by the 1978 Federal Magistrates Act, of referring certain pretrial criminal motions to a magistrate judge for initial determination. From these cases, the plurality derived two principles relevant to determining the extent to which Congress constitutionally may vest judicial power in an adjunct to an Article III court. First, it determined that Congress, when it creates a substantive federal right, possesses substantial discretion to prescribe the process under which that right may be adjudicated—including the right to delegate judicial functions to a non-Article III adjunct. The second principle that the plurality inferred from these cases is that the adjunct must be limited in such a way that the "essential attributes" of judicial power are retained in the Article III court.

In applying this "adjunct courts" analysis, the *Northern Pipeline* plurality found that the first principle—Congress's discretion to prescribe the process under which federally created rights are adjudicated—was of no assistance to Northern Pipeline, because the suit there involved state, not federal, law. The plurality also found that the delegation of jurisdiction to bankruptcy judges under the 1978 Bankruptcy Code was far greater than that approved in either *Crowell* or *Raddatz,* and, thus, not supportable under the adjunct courts doctrine. In reaching the latter conclusion, the plurality noted that under former section 1471(c) of the 1978 Act, bankruptcy courts exercised all of the ordinary powers of federal district courts. These powers included the power to preside over jury trials, and to issue declaratory judgments, writs of habeas corpus, and any other order necessary or appropriate to enforcement of the provisions of the Code, as well as the power to make conclusive findings of fact and conclusions of law subject to conventional ap-

24. 458 U.S. at 71.
25. 285 U.S. 22 (1932).
26. 447 U.S. 667 (1980).

pellate review by Article III courts, under which findings of fact are upheld unless clearly erroneous.

The concurring opinion in *Northern Pipeline* did not join in the plurality's description of the "public rights" and "adjunct court" exceptions to Article III. The plurality and concurring decisions agreed, however, that because the grant of jurisdiction to bankruptcy courts over matters related to bankruptcy cases was made in the same statutory provision as the remaining grant of jurisdiction to bankruptcy courts, the Court could not simply remove jurisdiction of the bankruptcy court over state common law actions.[27] Thus, the Supreme Court invalidated the jurisdiction granted to non-Article III bankruptcy courts in its entirety.

Despite the broad language of the plurality decision in *Northern Pipeline*, the Supreme Court later limited its holding:

> The Court's holding in *Northern Pipeline* establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.[28]

More than simply narrowing the holding in *Northern Pipeline*, these subsequent Supreme Court decisions also represented a shift in Article III jurisprudence from formalized, bright-line tests to a flexible, balancing approach. [29]

In *Commodity Futures Trading Commission v. Schor*,[30] the Court indicated that determinations of the constitutionality of a congressional delegation of judicial authority to a non-Article III tribunal "must be assessed by reference to the purposes underlying the requirements of Article III" and that "[t]his inquiry, in turn, is guided by the principle that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[31] Applying this pragmatic approach, the Court upheld the constitutionality of regulations enabling the Commodity Futures Trading Commission to hear not only reparation claims but also all counterclaims "aris[ing] out of the transaction or occur-

27. *Id.* at 71.

28. Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 584 (1985); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

29. *See, e.g.,* Erwin Chemerinsky, Federal Jurisdiction § 4.5.4 (1994).

30. 478 U.S. 833 (1986) (upholding constitutionality of regulations permitting Commodity Futures Trading Commission to provide reparations to individuals injured by fraudulent or illegally manipulative conduct by brokers, and hear all counterclaims arising out of same allegedly impermissible transactions).

31. *Id.* at 847–48.

rence or series of transactions or occurrences set forth in the [reparation] complaint."[32] In addressing the constitutionality of the exercise of jurisdiction by the CFTC over counterclaims arising under state law, the Court weighed the benefits of administrative efficiencies and expertise against the costs of intrusions on the underlying purposes of Article III. It identified two such purposes: first, to provide an independent and fair-minded judiciary to individual litigants; and second, to promote institutional interests in a judiciary separate and independent from the other branches of government. The Court in *Schor* found both of these purposes fulfilled in the case before it, despite the delegation of authority over the counterclaims to the non-Article III tribunal.

It viewed individuals' interests in fairness protected in that the plaintiff had consented to the CFTC's exercise of jurisdiction, both by commencing that proceeding with the CFTC rather than in a federal district court, and by expressly demanding that the defendant dismiss its parallel federal court action and litigate its counterclaim in the administrative setting. It also viewed separation of powers interests satisfied, applying a factor approach that considered

> the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[33]

In *Schor*, although no single factor was viewed as determinative, the Court concluded that the exercise of agency jurisdiction over state-law counterclaims did not, standing alone, intrude on separation of powers interests inherent in Article III, because the counterclaims were factually related to reparation proceedings that otherwise closely resembled traditional agency exercises of jurisdiction. It also found Congress's intent to expedite the resolution of reparations claims important in concluding that the delegation fulfilled the mandates of Article III.

The *Schor* Court's pragmatic view of Article III had also been followed in its earlier decision in *Thomas v. Union Carbide Agricultural Products Co.*[34] In *Thomas*, the Court upheld the constitutionality of provisions requiring participants in a pesticide registration program to submit their compensa-

32. *Id.* at 837.
33. *Id.* at 851.
34. 473 U.S. 568 (1985) (upholding constitutionality of arbitration system designed to resolve valuation disputes among private parties participating in federal pesticide registration program).

tory valuation claims to binding arbitration. Like in *Schor*, the Court in *Thomas* narrowly stated the holding in *Northern Pipeline* and rejected the notion, implicit in the plurality of *Northern Pipeline*, that there exist four categories of circumstances in which legislative courts are constitutionally permissible. And like in *Schor*, the Court in *Thomas* instead adopted a functional approach to Article III that weighed the policy purposes of the delegation of jurisdiction to the non-Article III decision maker and the extent to which the non-Article III tribunal encroached upon functions traditionally viewed as properly within the province of the judiciary. In balancing these interests, the Court in *Thomas* found that, consistent with the mandates of Article III, Congress could create "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[35]

The Supreme Court has not ruled on the constitutionality of the bankruptcy jurisdictional provisions enacted with the 1984 Amendments. However, in *Granfinanciera, S.A. v. Nordberg*,[36] the Court held that a fraudulent transfer action commenced under federal bankruptcy law by a trustee in bankruptcy against a transferee that has not filed a proof of claim involves "private" not "public rights," and that, as a result, the defendant in this action was entitled to assert its Seventh Amendment jury trial right in this proceeding. Although the plurality in *Northern Pipeline* had indicated that the restructuring of debtor-creditor relations "may well be a 'public right,'"[37] the Court in *Granfinanciera* distanced itself from this dicta, stating that "[w]e do not suggest that the restructuring of debtor-creditor relations is in fact a public right."[38] Moreover, although the Court in *Granfinanciera* narrowly held only that the defendant in that fraudulent transfer action retained a jury trial right under the Seventh Amendment, the Court went out of its way to declare in dicta that "the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal."[39]

Thus, any argument for the constitutionality of the exercise of bankruptcy court jurisdiction in core proceedings depends on a confluence of factors:

35. *Id.* at 593–94.
36. *In re* Chase & Sanborn, Inc., 492 U.S. 33 (1989).
37. 458 U.S. at 71.
38. 492 U.S. at 56 n.11.
39. *Id.* at 53.

1. whether private rights are implicated in the core proceeding;
2. whether district courts exercise the "essential attributes of judicial authority" as to these core proceedings because they retain the power to withdraw the reference of any title 11 case or any proceeding arising under title 11 or arising in or related to such case, "for cause";
3. whether district courts exercise this essential judicial authority because the power of a bankruptcy court is limited in important respects—bankruptcy judges cannot conduct jury trials absent the parties' consent—they may not be able to exercise supplemental jurisdiction; they may have limited authority to sanction for contempt, they may have limited authority as "courts of the United States" to impose certain statutory fines; and
4. whether, by virtue of their involvement in the bankruptcy case and the litigated proceeding at issue, the parties may be viewed to have consented to the exercise of bankruptcy court jurisdiction, especially where a proof of claim has been filed.

The question is whether the fact that district courts and courts of appeals both retain appellate jurisdiction over final and certain interlocutory orders entered by bankruptcy courts in core proceedings has any constitutional significance.

Hennigan argues that there is "serious doubt about the validity of a system combining Article I bankruptcy judges with direct appeals."[40] He bases this contention, first, on the recognition that the constitutionality of an exercise of bankruptcy court jurisdiction over core proceedings may depend upon the characterization of bankruptcy judges as adjuncts of the district court.[41] This is particularly true for core proceedings that do not involve public rights, such as the preference or fraudulent transfer actions at issue in *Granfinanciera.* He next asserts that direct appeal would undercut the adjunct status of bankruptcy courts, raising significant questions as to the constitutionality of an exercise of its jurisdiction over core proceedings.

> If appeals are routed around the district courts, . . . their only remaining vestiges of control would be their broadly ignored option not to make the reference in the first instance and their occasionally exercised power to withdraw a reference already made.[42]

40. Hennigan, *supra* note 14, at 856.

41. *Id.* at 854–55 (arguing that bankruptcy courts can be construed as adjuncts of district courts even when considering their broader authority to enter orders in core proceedings: "they are acting on reference from the Article III district court, which has the power either to withdraw the reference or to review any appealable decision").

42. *Id.* at 855–56.

In making this argument, however, Hennigan confuses appellate review with the retention of the "essential attributes of judicial authority" that constitutes the hallmark of an adjunct court relationship. In its decision in *Raddatz*, the Supreme Court was careful to identify *de novo* review, rather than ordinary appellate review, as characteristic of adjunct court status.[43] Similarly, in *Thomas v. Arn,*[44] the Court rejected the argument that a rule viewing a failure timely to object to a magistrate judge's decision as a waiver of appellate review would violate Article III on these terms, emphasizing that

> [t]he waiver of appellate review does not implicate Article III, because it is the district court, not the court of appeals, that must exercise supervision over the magistrate.[45]

If adjunct status depends on the supervision of the district court—specifically, the supervision that follows from the power to review *de novo*—then there should be no constitutional significance to the shift to a system permitting direct circuit court appellate review of core proceedings. Under either the current two-tiered system, or the proposed direct appeal system, bankruptcy court orders in core proceedings will not be reviewed *de novo* unless the district court withdraws its reference of the proceeding.

Although Hennigan does not put his argument in quite these terms, he might be read to contend that direct appeals raise constitutional concerns because they alter the ability of an appellate court to withdraw the reference of a core proceeding. Under the current bankruptcy appellate and jurisdictional provisions, in the course of conducting ordinary appellate review of an order entered in a core proceeding, the district court may determine to withdraw the reference of the order on appeal "for cause."[46] Hennigan may be read to argue that a system of direct appeals would preclude this response since courts of appeals are not authorized by statute to withdraw the reference of a proceeding.

The direct appeal proposal should not be viewed as unconstitutional for this reason either, however. First, if the argument has any merit, then it also

43. U.S. v. Raddatz, 447 U.S. 667 (1980) (in holding delegation to untenured magistrates as consistent with Article III, Court emphasized the "Congress has provided that the magistrate's proposed findings and recommendations shall be subjected to *de novo* determination 'by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order'" (quoting from S. Rep. No. 94-625 at 3 (1976))).

44. 474 U.S. 140 (1985).

45. *Id.* at 153–54.

46. 28 U.S.C. § 157(d) (permitting district courts to withdraw "in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown").

finds constitutional infirmity in the jurisdiction of bankruptcy appellate panels since BAPs also possess no statutory authority to withdraw the reference of a proceeding on appeal. Second, courts of appeals are divided as to the propriety of a withdrawal of the reference of a proceeding after an appeal of a bankruptcy court order has been entered in such a proceeding.[47] Moreover, although courts of appeals are not explicitly permitted by statute to withdraw a reference as a practical matter, they could cause the reference to be withdrawn by communicating such a desire to the district court in the course of reversing and remanding the decision on appeal. Finally, assuming the presence of constitutional significance, Congress might simply fix the problem by authorizing courts of appeals to direct that the district court withdraw the reference "for cause."

In sum, nothing in the Constitution or Supreme Court precedent construing Article III of the Constitution suggests the need for two layers of appellate review or mandates the level at which appellate review is available.[48] So long as there is some form of appellate review by an Article III court, the constitutional balance of the bankruptcy court system should be maintained.[49] The constitutionality of a system of direct bankruptcy appeals to courts of appeals is also strengthened by reference to the process for appeals from non-Article III magistrate judges' decisions by analogy. Under 28 U.S.C. § 636(c)(1), magistrate judges are authorized, upon the consent

47. *Compare In re* Burger Boys, Inc., 94 F.3d 755, 762–63 (2d Cir. 1996) (upholding withdrawal of reference in interest of judicial economy) *with In re* Hall Bayoutree Assocs., Ltd., 939 F.2d 802, 805 (9th Cir. 1991) ("[District court's] decision to reach the issue of bad faith was not a withdrawal by implication, but rather an incorrect attempt by an appellate court to assume the role of fact finder."); *In re* Pruitt, 910 F.2d 1160, 1168 (3d Cir. 1990) ("[T]he 'district court has, in effect, derailed the appellate process provided by statute. . . . Moreover, allowing the Pruitts a second opportunity to adduce the facts will encourage forum shopping, dissipate the parties' resources, and prolong the bankruptcy process."); *In re* Powelson, 878 F.2d 976, 983–84 (7th Cir. 1989) ("We think that, if consent were not in the picture here, it would be clearly wrong for the district court to suspend the mandated appeal process as it has done in this case. Although the statute does not expressly forbid the course taken here, it appears to violate the intent of Congress as reflected in the statutory scheme.").

48. Briney v. Burley, 738 F.2d 981, 986 (9th Cir. 1984) ("Because there is no constitutional right to an appeal, . . . a fortiori there is no constitutional right to two levels of appeal . . . by an Article III judge.").

49. *See* Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 455 n.13 (1976) (in upholding constitutionality of delegation of jurisdiction to non-Article III administrative tribunal, Court emphasized that the administrative decision would be subject to review by courts of appeals under substantial-evidence test, and noted that its decision did not "present the question whether Congress may commit the adjudication of public rights . . . without any sort of intervention by a court at any stage of the proceedings"). This is not to say that the presence of appellate review by an Article III court on its own satisfies the requirements of Article III of the Constitution. Northern Pipeline, *supra* note 17, 458 U.S. at 74 n.28 ("The dissent's view that appellate review is sufficient to satisfy either the command or the purpose of Article III is incorrect."); *id.* at 91 (concurring in judgment and agreeing that "the extent of review by Article III courts provided on appeal from a decision of the bankruptcy court in a case such as Northern's does not save the grant of authority").

of the parties, to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." Judgments in such cases are subject to ordinary appellate review by courts of appeals, without intermediate appellate review by the district court.[50] Courts of appeals have uniformly upheld the constitutionality of § 636(c).[51]

Moreover, the appellate jurisdiction of district courts to review core bankruptcy proceedings duplicates the appellate jurisdiction of the courts of appeals.[52] Because the scope of the appellate jurisdiction of district courts and courts of appeals is identical, the shift from a two-tiered to a one-tiered system of bankruptcy appeals alters the number of Article III courts that review the bankruptcy court decision but neither the standard for review nor the scope of appellate jurisdiction. As a result, there should be no constitutional significance to a two-tiered system of bankruptcy appeals.

II. Direct Appeals, with Bankruptcy Appellate Panel Involvement

Section 612 of H.R. 833 would create a system for direct bankruptcy appeals to the courts of appeals, but would continue to authorize each circuit

50. 28 U.S.C. § 636(c)(3). Pursuant to § 636(c)(4), the parties are permitted, "at the time of reference to a magistrate," to consent to appeal to a judge of the district court, with these district court decisions reviewable by the court of appeals only upon petition for leave to appeal. 28 U.S.C. §§ 636(c)(4) & (5).

51. *See, e.g.,* K.M.C., Inc. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985); Gairola v. Commissioner of Va. Dept. of Gen. Servs., 753 F.2d 1281, 1284–85 (4th Cir. 1985); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029, 1031–32 (Fed. Cir.), *cert. denied*, 474 U.S. 825 (1985); Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890, 893–95 (D.C. Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Co., 739 F.2d 1313, 1316 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985); Puryear v. Ede's Ltd., 731 F.2d 1153, 1154 (5th Cir. 1984); Collins v. Foreman, 729 F.2d 108, 120 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984); Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537, 547 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984); Wharton-Thomas v. United States, 721 F.2d 922, 929–30 (3d Cir. 1983).

52. Assessment of the plain language of the two appellate jurisdictional statutes might initially lead one to conclude that the district courts' appellate jurisdiction is far broader. Section 158(a) explicitly confers on district courts jurisdiction to grant leave to review interlocutory bankruptcy court orders, whereas courts of appeals appear to enjoy no parallel discretionary authority under § 158(d). But district courts uniformly construe the standard by which they determine whether to grant leave to appeal interlocutory bankruptcy court orders as identical to that applied under 28 U.S.C. § 1292(b). *See* William L. Norton, Jr., Bankruptcy Law and Practice 2d § 148:15 (1999). Moreover, notwithstanding the apparently unqualified language of § 158(d), the Supreme Court has held that courts of appeals have jurisdiction under 28 U.S.C. § 1292(b) to grant leave to appeal interlocutory bankruptcy orders entered by district courts in the exercise of their appellate jurisdiction under § 158(a). Connecticut National Bank v. Germain, 503 U.S. 249 (1992). That is, it has construed § 158(d) to parallel § 1291, and § 1292 to supplement the appellate jurisdiction of courts of appeals in both the bankruptcy and non-bankruptcy contexts. As a result, there is no practical difference between the appellate jurisdiction of district courts and courts of appeals over bankruptcy orders entered in core proceedings.

to create a bankruptcy appellate panel for intermediate appellate review of orders entered in core bankruptcy proceedings as to which the parties have consented to BAP review.[53] Inserting a non-Article III appellate panel into the bankruptcy appellate process raises distinct constitutional questions.[54]

First, would a non-Article III BAP's exercise of appellate jurisdiction over orders entered in a core proceeding constitute an unconstitutional exercise of the "essential attributes of [appellate] judicial authority," where there exists no alternate route for intermediate appellate review in the district courts? If the constitutionality of the current BAP system is assumed, there would seem to be little constitutional difference between proposals for direct bankruptcy appeals and proposals to provide for intermediate appellate review by BAPs on consent. Put another way, there would seem to be little constitutional significance to the intermediate appellate review by the district court in the absence of the parties' consent to the exercise of BAP jurisdiction if it is assumed that direct bankruptcy appeals to courts of appeals would be constitutional.

Existing Supreme Court precedent does not assist in resolving this question. Neither *Raddatz* nor *Arn* directly speak to the issue, since magistrate judges hold no appellate jurisdiction. Nonetheless, the Ninth Circuit's decision in *Briney v. Burley* is instructive.[55] In *Burley*, the court of appeals analogized BAPs to the magistrate judge courts upheld in *Raddatz* and concluded that the BAP was a constitutional "adjunct" of the courts of appeals.

> We believe that the court of appeals retains all of the essential attributes of the judicial power that were retained by the district court in *Raddatz*. The court of appeals retains the power to make the final determination of all questions because it reviews decisions of the BAP de novo. The circuit council also makes the choice whether or not to establish a BAP. Thus, we conclude that the continued functioning of the BAP is consistent with Article III and the *Marathon* decision.[56]

Thus, one could look to *Raddatz* by analogy and argue that, under proposed section 612 of H.R. 833, the appellate jurisdiction of the BAP would not exceed Article III because (1) the jurisdiction would be limited to appeals from orders entered in core proceedings; (2) the parties to the appeal would have consented to the exercise of the BAP review; (3) life-tenured courts of

53. *See* Appendix A, *supra*.

54. In asking these questions, I assume that bankruptcy appellate panels and the bankruptcy court system are constitutional under current law.

55. *Burley*, 738 F.2d 981 (9th Cir. 1984) (upholding constitutionality of bankruptcy appellate panel as applied to appeals filed before effective date of Supreme Court's decision in *Northern Pipeline* but after promulgation of emergency rule).

56. *Id.* at 987.

appeals judges would review BAP appellate decisions *de novo*;[57] and (4) the circuit could "withdraw the reference" of appeals to the BAP by discontinuing the BAP altogether. The analogy is imperfect, however, in that courts of appeals could not withdraw the reference of individual appeals from a BAP.[58] Moreover, one could argue that parties' consent to BAP jurisdiction would not be wholly voluntary under a proposal where there exists no alternative route of intermediate appeal and exigencies preclude consideration of a direct appeal to the court of appeals as a practical alternative.

Second, would the exercise of appellate jurisdiction by a non-Article III BAP impinge upon the constitutionality of the bankruptcy court system itself? Under H.R. 833, if litigants consent to BAP jurisdiction, courts of appeals would review only the final decisions of a bankruptcy appellate panel.[59] The literal language of the proposed statute could be construed to differentiate between the scope of the jurisdiction on direct appeal to courts of appeals and that on appeal from an intermediate BAP determination. As a result, courts of appeals might have broader appellate jurisdiction of the judgments, orders, and decrees of the bankruptcy court than of the BAP, although both are non-Article III tribunals.

In practical effect, however, the jurisdiction of courts of appeals will depend on whether the Supreme Court's decision in *Connecticut National Bank v. Germain* would remain good law following enactment of H.R. 833. *Germain* construes current 28 U.S.C. § 158(d).[60] It found that the plain language of section 158(d) does not preclude courts of appeals from granting leave to appeal from interlocutory district court and BAP determinations pursuant to the guidelines set forth in 28 U.S.C. § 1292(b).[61] Courts have also construed *Germain* to incorporate 28 U.S.C. § 1292(a) into bank-

57. Although courts of appeals only review *de novo* the legal determinations of a BAP, the BAP will not itself have made any factual determinations.

58. The dissent in *Burley* noted this inflexibility, as follows:

> The circuit council is presented with a flat choice between having BAPs and not having BAPs. If a sensitive case arises after the BAPs have been created, the council has no recourse other than the total abolition of the system—a radical measure unlikely to be employed. Thus, the circuit council's power to create or abolish the BAPs offers little in the way of Article III protection.

Briney v. Burley, 738 F.2d 981, 992 (Norris, J., dissenting). Of course, Congress could authorize courts of appeals to withdraw the reference of an appeal to a BAP. They could also make the analogy a better fit by literally providing by statute for the reference of appellate jurisdiction to the BAP. *Cf.* 28 U.S.C. § 157(a).

59. *See* Appendix A.

60. 28 U.S.C. § 158(d) provides, as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decision, judgments, orders, and decrees entered under subsections (a) [applicable to the intermediate appellate jurisdiction of district courts] and (b) [applicable to BAPs] of this section.

61. *See* note 8, *supra* (quoting § 1292 in its entirety).

ruptcy appeals.[62] If *Germain* were construed as governing new section 1293 following enactment of H.R. 833, then circuit court review of BAP determinations would not differ substantially from circuit court review of bankruptcy court orders, notwithstanding apparent differences between the language of subsections (a) and (b) of the proposal.

However, differences in the statutory language of current section 158(d) and the proposal may convince courts that Congress intends to override the result in *Germain*. If courts were to construe section 612 of H.R. 833 as overriding *Germain,* then there may be some BAP determinations that would not enjoy immediate review by a court of appeals. *Atlas Roofing* indicates *in dicta* that a complete absence of Article III appellate review of a non-Article III court's determinations may be unconstitutional,[63] but section 612 would not altogether obviate circuit court review of BAP appellate decisions. Moreover, the possibility of immediate review by an Article III circuit court would have been waived by the parties' consent to BAP review, in circumstances not so dissimilar from those upheld in *Thomas v. Arn.*[64] Finally, the court of appeals rejected just this argument in its decision in *Burley*.[65]

62. *Id.*

63. *See* note 49, *supra*.

64. 474 U.S. 140 (1985).

65. Briney v. Burley, 738 F.2d 981, 987 (1984) (concluding that "there is no constitutional right to . . . immediate review of interlocutory decisions by an Article III judge"). However, the dissent in *Burley* criticized this argument as "obscure." *Id.* at 992. It went on to elaborate its disagreement at some length:

> If the majority intends to claim that despite the absence of article III review of interlocutory appeals, the court of appeals retains sufficient control over the BAP's resolution of interlocutory appeals, the control which the majority finds sufficient is nothing more than the clearly inadequate administrative controls I have already discussed. If the majority intends to argue that despite the absence of article III review of interlocutory appeals, the court of appeals retains sufficient control over the BAP resolutions of cases generally, the majority is advancing the novel proposition that article III is satisfied even when 'the essential attributes of the judicial power' are not retained by article III judges in all cases. . . . [Finally, the majority's argument that because BAP review of interlocutory orders is not constitutionally compelled it is not necessary to satisfy article III standards if such review is provided] is in essence, an application of the right-privilege distinction to the field of appellate review. Since there is no right to appellate review, the government may provide any form of appellate review it deems appropriate. The right-privilege distinction has long been discredited. . . . In fact, the Supreme Court has implicitly rejected the right-privilege distinction in precisely this context [in its decision in *Northern Pipeline*].

Id. at 993 (Norris, J., dissenting).

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Appendix D

Sources of Precedent in Bankruptcy
Federal Judicial Center Survey of U.S. Bankruptcy Judges
(Version 1: BAP-participating districts)

What is your circuit? ___________________

What is your district? ___________________

1. When deciding a question of bankruptcy law, do you find the body of precedent coherent, consistent, and developed enough to allow you to decide the question efficiently and confidently?

   ❐ Almost always
   ❐ Frequently
   ❐ About half the time
   ❐ Infrequently
   ❐ Almost never

2. About how often have you had to decide an issue of [bankruptcy] law on which you found precedent was not clear enough to give you confidence in your decision?

   _____ times in the past twelve months

3. For these instances, how often was the lack of clarity attributable to the following sources?

	Almost always	Frequently	About half the time	Infrequently	Almost never
No Supreme Court precedent					
No precedent from my court of appeals					
Conflicting decisions by my court of appeals					
No decisions on point by district judges in my district					

Conflicting decisions by district judges in my district					
No decisions on point by bankruptcy judges in my district					
Conflicting decisions by bankruptcy judges in my district					
BAP decision(s) in conflict with district court decision(s)					
BAP decision(s) in conflict with court of appeals decision(s)					
Conflicting BAP decisions					
Application of law was fact-intensive, or based on multi-factor test rather than bright-line test					
Other (please specify):					

4. Are there issues or areas of bankruptcy law that appear to be particularly inconsistent or difficult to know in your circuit?

❒ No	Skip to question 6.
❒ Yes	Please answer question 5.

5. Please briefly describe these issues or areas and identify the sources of the difficulty.

Issue #1 (briefly describe)

Source of difficulty (mark all that apply)
❒ No Supreme Court decisions
❒ No precedent from my court of appeals
❒ Conflicting decisions by my court of appeals
❒ No decisions on point by district judges in my district
❒ Conflicting decisions by district judges in my district
❒ No decisions on point by bankruptcy judges in my district
❒ Conflicting decisions by bankruptcy judges in my district

❐ BAP decision(s) in conflict with district court decision(s)
❐ BAP decision(s) in conflict with court of appeals decision(s)
❐ Conflicting BAP decision(s)
❐ Application of law was fact-intensive, or based on multi-factor rather than bright-line test
❐ Other (please specify): ______________________________

Issue #2 (briefly describe)

Source of difficulty (check all that apply)
❐ No Supreme Court decisions
❐ No precedent from my court of appeals
❐ Conflicting decisions by my court of appeals
❐ No decisions on point by district judges in my district
❐ Conflicting decisions by district judges in my district
❐ No decisions on point by bankruptcy judges in my district
❐ Conflicting decisions by bankruptcy judges in my district
❐ BAP decision(s) in conflict with district court decision(s)
❐ BAP decision(s) in conflict with court of appeals decision(s)
❐ Conflicting BAP decision(s)
❐ Application of law was fact-intensive, or based on multi-factor rather than bright-line test
❐ Other (please specify): ______________________________

6. When deciding a question of bankruptcy law for which your circuit's court of appeals has not issued a binding precedent, how important are the following sources of information?

	Very important	Somewhat important	Of little importance
Bankruptcy court decisions in your district			
Bankruptcy court decisions in other districts			
District court appellate decisions in your district			
District court appellate decisions in other districts			
Court of appeals decisions in your circuit, related but not controlling			

Court of appeals decisions in other circuits			
Decisions by the bankruptcy appellate panel in your circuit in cases originating in your district.			
Decisions by the bankruptcy appellate panel in your circuit in cases originating in other districts.			
Decisions by bankruptcy appellate panels in other circuits			

7. This question concerns how, when you face an issue of bankruptcy law [that is new to you and] on which your circuit's court of appeals has not issued binding precedent, you treat district court and BAP decisions on the issue. For each subquestion, read the set of assumptions and then mark the statement that best describes your typical treatment of decisions by your district court and your circuit's BAP.

   a. Assume:
   i. Your district court's decisions on point are consistent with one another.
   ii. There are no BAP decisions on point.

   ❒ I would always or almost always follow the district court decisions.
   ❒ I would treat the district court decisions as persuasive authority.
   ❒ I would give no special weight to the district court decisions.

   b. Assume:
   i. The decisions on point by your circuit's BAP are consistent with one another.
   ii. There are no district court decisions on point.

   ❒ I would always or almost always follow the BAP decisions.
   ❒ I would treat the BAP decisions as persuasive authority.
   ❒ I would give no special weight to the BAP decisions.

   c. Assume:
   i. Your district court's decisions on point are consistent with one another.
   ii. The BAP decisions on point are consistent with one another.
   iii. BAP decisions in cases from your district conflict with your district court's position.

   ❒ I would always or almost always follow the district court decisions.
   ❒ I would always or almost always follow the BAP decisions.
   ❒ I would treat the district court decisions as persuasive authority.
   ❒ I would treat the BAP decisions as persuasive authority.

❐ I would treat both the district court and BAP decisions as persuasive authority.
❐ I would give no special weight to the district court or BAP decisions.

d. Assume:
i. Your district court's decisions on point are consistent with one another.
ii. The BAP decisions on point are consistent with one another.
iii. The BAP decisions conflict with your district court's position, but arise only from cases outside your district.

❐ I would always or almost always follow the district court decisions.
❐ I would always or almost always follow the BAP decisions.
❐ I would treat the district court decisions as persuasive authority.
❐ I would treat the BAP decisions as persuasive authority.
❐ I would treat both the district court and BAP decisions as persuasive authority.
❐ I would give no special weight to the district court or BAP decisions.

District judges were also asked:

8. a. About how many bankruptcy appeals have you handled in the past 12 months?
   b. Of these, in about how many have you used the services of a magistrate judge?

Sources of Precedent in Bankruptcy
Federal Judicial Center Survey of U.S. Bankruptcy Judges, April 1999
(Version 2: Non-participating districts in a BAP circuit)

What is your circuit? __________________

What is your district? __________________

1. When deciding a question of bankruptcy law, do you find the body of precedent coherent, consistent, and developed enough to allow you to decide the question efficiently and confidently?

   ❐ Almost always
   ❐ Frequently
   ❐ About half the time
   ❐ Infrequently
   ❐ Almost never

2. About how often have you had to decide an issue of [bankruptcy] law on which you found precedent was not clear enough to give you confidence in your decision?

   _____ times in the past twelve months

3. For these instances, how often was the lack of clarity attributable to the following sources?

	Almost always	Frequently	About half the time	Infrequently	Almost never
No Supreme Court precedent					
No precedent from my court of appeals					
Conflicting decisions by my court of appeals					
No decisions on point by district judges in my district					
Conflicting decisions by district judges in my district					
No decisions on point by bankruptcy judges in my district					

Conflicting decisions by bankruptcy judges in my district					
BAP decision(s) in conflict with district court decision(s)					
BAP decision(s) in conflict with court of appeals decision(s)					
Conflicting BAP decisions					
Application of law was fact-intensive, or based on multi-factor test rather than bright-line test					
Other (please specify):					

4. Are there issues or areas of bankruptcy law that appear to be particularly inconsistent or difficult to know in your circuit?

   ❒ No Skip to question 6.
   ❒ Yes Please answer question 5.

5. Please briefly describe these issues or areas and identify the sources of the difficulty.

   Issue #1 (briefly describe)

   Source of difficulty (check all that apply)
   ❒ No Supreme Court decisions
   ❒ No precedent from my court of appeals
   ❒ Conflicting decisions by my court of appeals
   ❒ No decisions on point by district judges in my district
   ❒ Conflicting decisions by district judges in my district
   ❒ No decisions on point by bankruptcy judges in my district
   ❒ Conflicting decisions by bankruptcy judges in my district
   ❒ BAP decision(s) in conflict with district court decision(s)
   ❒ BAP decision(s) in conflict with court of appeals decision(s)
   ❒ Conflicting BAP decision(s)
   ❒ Application of law was fact-intensive, or based on multi-factor rather than bright-line test
   ❒ Other (please specify): ______________________________

Issue #2 (briefly describe)

Source of difficulty (check all that apply)

❐ No Supreme Court decisions
❐ No precedent from my court of appeals
❐ Conflicting decisions by my court of appeals
❐ No decisions on point by district judges in my district
❐ Conflicting decisions by district judges in my district
❐ No decisions on point by bankruptcy judges in my district
❐ Conflicting decisions by bankruptcy judges in my district
❐ BAP decision(s) in conflict with district court decision(s)
❐ BAP decision(s) in conflict with court of appeals decision(s)
❐ Conflicting BAP decision(s)
❐ Application of law was fact-intensive, or based on multi-factor rather than bright-line test
❐ Other (please specify): ______________________________

6. When deciding a question of bankruptcy law for which your circuit's court of appeals has not issued a binding precedent, how important are the following sources of information?

	Very important	Somewhat important	Of little importance
Bankruptcy court decisions in your district			
Bankruptcy court decisions in other districts			
District court appellate decisions in your district			
District court appellate decisions in other districts			
Court of appeals decisions in your circuit, related but not controlling			
Court of appeals decisions in other circuits			
Decisions by the bankruptcy appellate panel in your circuit in cases originating in other districts.			
Decisions by bankruptcy appellate panels in other circuits			

7. This question concerns how, when you face an issue of bankruptcy law [that is new to you and] on which your circuit's court of appeals has not issued binding precedent, you treat district court and BAP decisions on the issue. For each subquestion, read the set of assumptions and then mark the statement that best describes your typical treatment of decisions by your district court and your circuit's BAP.

   a. Assume:
   i. Your district court's decisions on point are consistent with one another.
   ii. There are no BAP decisions on point.

   ❐ I would always or almost always follow the district court decisions.
   ❐ I would treat the district court decisions as persuasive authority.
   ❐ I would give no special weight to the district court decisions.

   b. Assume:
   i. The decisions on point by your circuit's BAP are consistent with one another.
   ii. There are no district court decisions on point.

   ❐ I would always or almost always follow the BAP decisions.
   ❐ I would treat the BAP decisions as persuasive authority.
   ❐ I would give no special weight to the BAP decisions.

   c. Assume:
   i. Your district court's decisions on point are consistent with one another.
   ii. The BAP decisions on point are consistent with one another.
   iii. The BAP decisions conflict with your district court's position, but arise only from cases outside your district.

   ❐ I would always or almost always follow the district court decisions.
   ❐ I would always or almost always follow the BAP decisions.
   ❐ I would treat the district court decisions as persuasive authority.
   ❐ I would treat the BAP decisions as persuasive authority.
   ❐ I would treat both the district court and BAP decisions as persuasive authority.
   ❐ I would give no special weight to the district court or BAP decisions.

   d. The assumptions here are the same as for subquestion c, but also assume that your district participates in your circuit's BAP.
   i. Your district participates in your circuit's BAP.
   ii. Your district court's decisions on point are consistent with one another.

iii. The BAP decisions on point are consistent with one another.
iv. The BAP decisions conflict with your district court's position, but arise only from cases outside your district.

❒ I would always or almost always follow the district court decisions.
❒ I would always or almost always follow the BAP decisions.
❒ I would treat the district court decisions as persuasive authority.
❒ I would treat the BAP decisions as persuasive authority.
❒ I would treat both the district court and BAP decisions as persuasive authority.
❒ I would give no special weight to the district court or BAP decisions.

e. Assume:
i. Your district participates in your circuit's BAP.
ii. Your district court's decisions on point are consistent with one another.
iii. The BAP decisions on point are consistent with one another.
iv. BAP decisions in cases from your district conflict with your district court's position.

❒ I would always or almost always follow the district court decisions.
❒ I would always or almost always follow the BAP decisions.
❒ I would treat the district court decisions as persuasive authority.
❒ I would treat the BAP decisions as persuasive authority.
❒ I would treat both the district court and BAP decisions as persuasive authority.
❒ I would give no special weight to the district court or BAP decisions.

District judges were also asked:

8. a. About how many bankruptcy appeals have you handled in the past 12 months?
   b. Of these, in about how many have you used the services of a magistrate judge?

Sources of Precedent in Bankruptcy
Federal Judicial Center Survey of U.S. Bankruptcy Judges, April 1999
(Version 3: Districts in a non-BAP circuit)

What is your circuit? ___________________

What is your district? ___________________

1. When deciding a question of bankruptcy law, do you find the body of precedent coherent, consistent, and developed enough to allow you to decide the question efficiently and confidently?

   ❒ Almost always
   ❒ Frequently
   ❒ About half the time
   ❒ Infrequently
   ❒ Almost never

2. About how often have you had to decide an issue of [bankruptcy] law on which you found precedent was not clear enough to give you confidence in your decision?

   _____ times in the past twelve months

3. For these instances, how often was the lack of clarity attributable to the following sources?

	Almost always	Frequently	About half the time	Infrequently	Almost never
No Supreme Court precedent					
No precedent from my court of appeals					
Conflicting decisions by my court of appeals					
No decisions on point by district judges in my district					
Conflicting decisions by district judges in my district					
No decisions on point by bankruptcy judges in my district					

Conflicting decisions by bankruptcy judges in my district					
BAP decision(s) in conflict with district court decision(s)					
BAP decision(s) in conflict with court of appeals decision(s)					
Conflicting BAP decisions					
Application of law was fact-intensive, or based on multi-factor test rather than bright-line test					
Other (please specify):					

4. Are there issues or areas of bankruptcy law that appear to be particularly inconsistent or difficult to know in your circuit?

   ❒ No Skip to question 6.
   ❒ Yes Please answer question 5.

5. Please briefly describe these issues or areas and identify the source of the difficulty.

   Issue #1 (briefly describe)

   Source of difficulty (check all that apply)
   ❒ No Supreme Court decisions
   ❒ No precedent from my court of appeals
   ❒ Conflicting decisions by my court of appeals
   ❒ No decisions on point by district judges in my district
   ❒ Conflicting decisions by district judges in my district
   ❒ No decisions on point by bankruptcy judges in my district
   ❒ Conflicting decisions by bankruptcy judges in my district
   ❒ BAP decision(s) in conflict with district court decision(s)
   ❒ BAP decision(s) in conflict with court of appeals decision(s)
   ❒ Conflicting BAP decision(s)
   ❒ Application of law was fact-intensive, or based on multi-factor rather than bright-line test
   ❒ Other (please specify): ______________________________

Issue #2 (briefly describe)

Source of difficulty (check all that apply)
❐ No Supreme Court decisions
❐ No precedent from my court of appeals
❐ Conflicting decisions by my court of appeals
❐ No decisions on point by district judges in my district
❐ Conflicting decisions by district judges in my district
❐ No decisions on point by bankruptcy judges in my district
❐ Conflicting decisions by bankruptcy judges in my district
❐ BAP decision(s) in conflict with district court decision(s)
❐ BAP decision(s) in conflict with court of appeals decision(s)
❐ Conflicting BAP decision(s)
❐ Application of law was fact-intensive, or based on multi-factor rather than bright-line test
❐ Other (please specify): ______________________________

6. When deciding a question of bankruptcy law for which your circuit's court of appeals has not issued a binding precedent, how important are the following sources of information?

	Very important	Somewhat important	Of little importance
Bankruptcy court decisions in your district			
Bankruptcy court decisions in other districts			
District court appellate decisions in your district			
District court appellate decisions in other districts			
Court of appeals decisions in your circuit, related but not controlling			
Court of appeals decisions in other circuits			
Decisions by bankruptcy appellate panels in other circuits			

7. This question concerns how, when you face an issue of bankruptcy law [that is new to you and] on which your circuit's court of appeals has not issued bind-

ing precedent, you treat district court decisions on the issue. Some of the subquestions ask you to assume that your circuit has a BAP and that your district participates in it, and then to predict how you would treat the BAP's decisions. For each subquestion, read the set of assumptions and then mark the statement that best describes your typical treatment of district court and BAP decisions.

a. Assume:
i. Your district court's decisions on point are consistent with one another.

❒ I would always or almost always follow the district court decisions.
❒ I would treat the district court decisions as persuasive authority.
❒ I would give no special weight to the district court decisions.

b. Assume:
i. Your circuit has a BAP and your district participates in it.
ii. The decisions on point by your circuit's BAP are consistent with one another.
iii. There are no district court decisions on point.

❒ I would always or almost always follow the BAP decisions.
❒ I would treat the BAP decisions as persuasive authority.
❒ I would give no special weight to the BAP decisions.

c. Assume:
i. Your circuit has a BAP and your district participates in it
ii. Your district court's decisions on point are consistent with one another.
iii. The BAP decisions on point are consistent with one another.
iv. BAP decisions in cases from your district conflict with your district court's position.

❒ I would always or almost always follow the district court decisions.
❒ I would always or almost always follow the BAP decisions.
❒ I would treat the district court decisions as persuasive authority.
❒ I would treat the BAP decisions as persuasive authority.
❒ I would treat both the district court and BAP decisions as persuasive authority.
❒ I would give no special weight to the district court or BAP decisions.

d. Assume:
i. Your circuit has a BAP and your district participates in it.
ii. Your district court's decisions on point are consistent with one another.

iii. The BAP decisions on point are consistent with one another.
iv. The BAP decisions conflict with your district court's position, but arise only from cases outside your district.

❒ I would always or almost always follow the district court decisions.
❒ I would always or almost always follow the BAP decisions.
❒ I would treat the district court decisions as persuasive authority.
❒ I would treat the BAP decisions as persuasive authority.
❒ I would treat both the district court and BAP decisions as persuasive authority.
❒ I would give no special weight to the district court or BAP decisions.

District judges were also asked:

8. a. About how many bankruptcy appeals have you handled in the past 12 months?
   b. Of these, in about how many have you used the services of a magistrate judge?