
COMMENT

BAPCPA AND BANKRUPTCY DIRECT APPEALS: THE IMPACT OF PROCEDURAL UNCERTAINTY ON PREDICTABLE PRECEDENT

LINDSEY FREEMAN[†]

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[†] Comments Editor, *University of Pennsylvania Law Review*, Volume 159. J.D. Candidate, 2011, University of Pennsylvania Law School; B.A., 2005, Harvard University. I would like to thank Michelle Banker, Alisa Waxman, Mark Brown, the Comments Office, and the members of the *University of Pennsylvania Law Review* for their faithful support, encouragement, and hard work. I would also like to thank Judge Anthony Scirica and Professor Geoffrey Hazard for their insights on earlier drafts, and express my deepest gratitude to Professor Catherine Struve, who has been an incredible mentor to me during my time in law school. Finally, I would like to thank my friends and family for their constant love and support. Any errors are entirely my own.

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On June 5, 2009, over 200 attorneys, reporters, and spectators filed into the courthouse of the Court of Appeals for the Second Circuit, eager to hear the court's decision on Chrysler's impending bankruptcy.¹ After months of losses, billions of dollars in bailout funding, and a failed attempt at a merger, Chrysler filed for Chapter 11 bankruptcy and agreed to sell all of its operating assets to "New Chrysler," led by Italy's Fiat.² Among those anxiously awaiting the Second Circuit's opinion were representatives of Indiana's Police Pension Trust, the Teachers Retirement Fund, and the Major Moves Construction Fund (collectively, "Pensioners"), who had appealed the bankruptcy court's approval of the plan. If the sale moved forward, the Pensioners stood to receive only twenty-nine cents on the dollar for investments purchased less than a year earlier for forty-three cents on the dollar.³ After only "an hour and [a] half of oral argument and a 10-minute recess," the court ruled directly from the bench and affirmed the sale.⁴ Five days later, the sale was closed.⁵ Almost instantly, the

¹ See Noleen G. Walder, *Ruling in Chrysler Bankruptcy Upholds Sale of Assets to Fiat*, N.Y. L.J., June 8, 2009, at 1.

² *In re Chrysler LLC*, 576 F.3d 108, 111-12 (2d Cir. 2009), *vacated as moot*, *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015, 1015 (2009); see also Walder, *supra* note 1 (summarizing the procedural history of the bankruptcy proceedings).

³ Walder, *supra* note 1.

⁴ *Id.*; see also *In re Chrysler*, 576 F.3d at 111 (detailing the bankruptcy proceedings of June 5, 2009). Simultaneously, the Second Circuit approved a short stay pending Supreme Court review. *Id.* at 112. However, the Supreme Court ultimately declined to extend the stay. *Id.*

⁵ *In re Chrysler*, 576 F.3d at 112. On December 14, 2009, the Supreme Court granted certiorari for an appeal from the Indiana Petitioners. In its four-sentence decision, the Court vacated the judgment and remanded the case to the Second Circuit, instructing the court to "dismiss the appeal as moot." *Ind. State Police Pension Trust*, 130 S. Ct. at 1015. These actions seem "mysterious," but it is likely the Court disagreed with the lower court's opinion, and thus granted certiorari, but then was forced to dismiss the appeal because the sale had closed and the matter was therefore "moot." See Steve Jakubowski, *US Supreme Court Drops Bombshell "Summary Disposition" Vacating 2d Circuit's Chrysler Decision*, BANKR. LITIG. BLOG (Dec. 14, 2009), <http://www.bankruptcylitigationblog.com/archives/241190-print.html> (follow "December 14, 2009"). By citing *United States v. Munsingwear*, 340 U.S. 36 (1950), the Court prevented the Second Circuit's decision from becoming binding precedent. See Jakubowski, *supra* ("Our supervisory power over the judgments of the lower federal courts is a broad one. . . . [I]t is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." (emphasis omitted) (quoting *Munsingwear*, 340 U.S. at 40-41)).

loss of the American icon quickly became a hallmark of “the worst recession since the Great Depression.”⁶

One of the most startling aspects of the decision was the speed at which it occurred. As in most bankruptcy cases, the sense of urgency surrounding the proceedings had to be weighed against the opportunity for meaningful review.⁷ In an attempt to protect both interests, the circuit court certified the Pensioners’ motion for a stay and direct appeal, foregoing discussion in the district court entirely. Over the course of only five days, the matter was concluded in the bankruptcy court and affirmed by the court of appeals, and five days later, the sale was closed.⁸

During this time of financial uncertainty, it is critical that decision-makers develop procedures to guarantee efficient resolutions while also crafting predictable precedent to guide and govern bankruptcy law. *In re Chrysler* illustrates, however, that the realities of bankruptcy make it particularly difficult to strike the appropriate balance between speed and the opportunity for meaningful review. In an effort to streamline an often cumbersome bankruptcy appellate process, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),⁹ which provided for, among other things, direct appeals from bankruptcy courts to the courts of appeals.¹⁰ According to a comprehensive survey of the case law, the courts of appeals have largely used 28 U.S.C. § 158(d)(2) as Congress envisioned, granting direct appeals to resolve outstanding or particularly thorny issues of bankruptcy law.¹¹ This Comment argues that while § 158(d)(2) creates an important mechanism for expediting bankruptcy appeals, the provision unintentionally establishes a loophole

⁶ Andrew Sum et al., Ctr. for Labor Mkt. Studies, Ne. Univ., *The Economic Recession of 2007–2009: A Comparative Perspective on Its Duration and the Severity of Its Labor Market Impacts 1* (Apr. 2009) (unpublished manuscript) (quoting President Obama), available at http://www.clms.neu.edu/publication/documents/Economic_Recession_of_20072009.pdf.

⁷ It was estimated that Chrysler was “hemorrhaging” close to \$100 million a day. Walder, *supra* note 1.

⁸ On June 1, 2009, the Bankruptcy Court for the Southern District of New York authorized the sale of Chrysler. The *very next day*, the Second Circuit Court of Appeals certified the Pensioners’ motion for a stay and a direct appeal. On June 5, 2009, the Second Circuit affirmed the bankruptcy court. *In re Chrysler*, 576 F.3d at 111. By June 10, 2009, the sale was closed. *Id.* at 112.

⁹ Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 and 28 U.S.C.).

¹⁰ BAPCPA § 1233, 28 U.S.C. § 158(d)(2) (2006).

¹¹ See Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145, 146 (2010) (“[T]he new direct appeal process is being used for the purposes intended by those who advocated for its adoption . . .”).

thwarting an individual's right to Article III review and Congress's long-term intent to create predictable precedent. As § 158(d)(2) is currently written, the lower court (the bankruptcy court or district court) may certify a matter for direct appeal while denying the party's related motion for a stay pending that appeal. As a result, the case could move forward and the appellant could be denied review—even though the lower court has acknowledged that at least one issue deserves review by a court that can create binding precedent—because it would be “inequitable” to grant relief according to the doctrine of equitable mootness.¹² To correct these vulnerabilities, decisionmakers should consider the authority of the lower courts to grant or deny stays pending direct appeals in light of the potential threat of equitable mootness. Although granting a stay pending appeal may delay bankruptcy proceedings for the individual in the short term, long-term interests weigh heavily in favor of ensuring review by an Article III court capable of crafting binding precedent.

Though this Comment will focus on a specific bankruptcy procedure, the problems direct appeals create highlight a tension inherent in bankruptcy law: the need to balance practical considerations such as speed, efficiency, and specialized review, with constitutional values, including fairness, due process, and the right to an appeal. Thus, examining the use of § 158(d)(2) and the difficulties that have arisen over the past five years provides not only an overview of bankruptcy direct appeals, but also valuable insights for bankruptcy procedure in general. As the Appellate Rules Committee¹³ and the Advisory Com-

¹² The doctrine of equitable mootness allows an appellate court to deny an otherwise legitimate review of an appeal if an order (often a reorganization plan) has progressed to the point where granting relief would be inequitable or impractical. See *Manges v. Seattle-First Nat'l Bank* (*In re Manges*), 29 F.3d 1034, 1038-39 (5th Cir. 1994) (“In [bankruptcy proceedings], ‘mootness’ is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions.”); Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRAC. 33, 33 (2010) (“The equitable mootness doctrine constitutes a judicial anomaly in that it permits a federal court to voluntarily [sic] refrain from exercising jurisdiction over an appeal that is indisputably ripe for adjudication simply on the ground that granting relief would be ‘inequitable.’”).

¹³ The authority of the Appellate Rules Committee is set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006). See generally James C. Duff, Admin. Office of the U.S. Courts, *A Summary for the Bench and Bar*, U.S. COURTS (Oct. 2010), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx> (providing a brief summary of the workings of the Rules Advisory Committees).

mittee on Bankruptcy Rules¹⁴ prepare to amend direct appeals in the near future, these insights should guide any changes to ensure that the urgency of an individual bankruptcy proceeding is appropriately considered against the long-term need for precedent in an unpredictable area of the law.

Part I of this Comment will discuss bankruptcy appellate procedure, as well as the inherent tension between efficiency and the right to review in bankruptcy law. Part II describes the motivations behind direct appeals, including Congress's desire to streamline bankruptcy appellate procedures and to create a predictable body of precedent. Part III reviews the provisions of § 158(d)(2), focusing in particular upon the discretion of a court of appeals to accept or deny a direct appeal as well as the freedom of the lower court (bankruptcy or district court) to grant or deny a stay pending that appeal. Part IV compares § 158(d)(2) with 28 U.S.C. § 1292(b), a provision governing immediate appeals of interlocutory decisions that many circuit courts have relied upon to guide the application of direct appeals in bankruptcy. Part V examines circuit courts' use of § 158(d)(2) over the past five years, including a discussion of when courts have chosen to authorize direct appeals. Part VI analyzes the role of the lower courts, including how the choice to grant or deny a stay pending appeal has affected the long-term impact of direct appeals in light of the doctrine of equitable mootness. Part VII provides a case study of an instance in which a lower court granted the certification for direct appeal but denied the stay, illustrating the tension between direct appeals and the equitable mootness doctrine, as well as a weakness in the current drafting of § 158(d)(2) that may undermine Congress's objectives. Finally, Part VIII provides recommendations regarding how rule-makers and bankruptcy practitioners should reconsider the relationship between direct appeals and stays to protect the long-term aims of § 158(d)(2). In particular, this Comment argues that if a lower court deems a matter worthy of direct appeal, the relevant court of appeals should consider whether or not a stay should be granted *in concert with* the direct appeal to guarantee review by an Article III court.

¹⁴ The Advisory Committee on Bankruptcy Rules is currently conducting a "comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules)" and discussing potential changes. Memorandum from Honorable Laura Taylor Swain, Chair of the Advisory Comm. on Bankr. Rules, to Honorable Lee H. Rosenthal, Chair of the Standing Comm. on Rules of Practice & Procedure (Dec. 7, 2009) (on file with author).

I. BANKRUPTCY APPELLATE LAW: PAST CONSIDERATIONS AND CURRENT CHALLENGES

Bankruptcy is a unique area of the law. Its highly technical and specialized nature, as well as the real-world urgency of bankruptcy proceedings, has forced decisionmakers to alter the rules of appellate procedure to meet the needs of the field.¹⁵ For example, the flexible finality standard—a unique component of bankruptcy law—allows parties to appeal a discrete issue immediately to the higher court (either to the district court or, in the case of a direct appeal, to the circuit court).¹⁶ Yet, the realities that have driven reform have also made finding the correct balance between speed and meaningful review particularly difficult. In such a complex area of the law, context is ne-

¹⁵ See Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 144 (1997) (“Bankruptcy matters proceed at a pace entirely different from most of the litigation that comes before district courts. Many of the questions that arise must be dealt with immediately if the ongoing businesses are to be kept operating.”); R. Wilson Freyermuth, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069, 1075 (2006) (“Speed of resolution is especially important in the bankruptcy context, where the automatic stay gives particular significance to the familiar adage . . . that time is money.”).

¹⁶ See DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 14.2, at 342 (5th ed. 2007) (“The flexible finality rule is best understood in terms of whether the order from which appeal is sought constitutes a final determination of a discrete dispute within the bankruptcy. If it does, the order is appealable.”); Edith H. Jones, *Bankruptcy Appeals*, 16 T. MARSHALL L. REV. 245, 253 (1991) (noting that in the “classic standard of finality, a judgment that ‘ends the litigation . . . and leaves nothing for the court to do but execute the judgment,’ is ill-suited to bankruptcy. No one advocates relegating all appeals until after the confirmation of a plan or disposition of a . . . case.” (alteration in original) (footnote omitted) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945))); see also *Ades-Berg Investors v. Breeden (In re The Bennett Funding Grp., Inc.)*, 439 F.3d 155, 164 (2d Cir. 2006) (“Any inefficiencies resulting from separate appeals . . . are outweighed by the need for finality.”).

Yet this flexible standard creates its own problems and uncertainty. First, scholars and judges continue to debate the scope of the flexible finality standard. As Chief Judge Edith Jones noted in her article on bankruptcy appeals, it is beyond agreement that in flexibility necessarily “lies a bewildering array of decisions on finality.” Jones, *supra*, at 253. In recognition of the uncertainty the flexible finality standard creates, circuit courts have debated whether they should apply the certification standard of Rule 54(b) of the Federal Rules of Civil Procedure. KNIBB, *supra*, § 14.2, at 346. Second, because bankruptcy law is composed of many discrete parts, each potentially altering the outcome of the proceedings, earlier decisions may affect ones that come later in the process. See, e.g., *In re Manges*, 29 F.3d at 1043-44 (holding that the substantial consummation of the bankruptcy plan rendered appeal of an earlier confirmation order moot). In fact, the doctrine of equitable mootness might prevent a party from bringing an appeal altogether. Therefore, the flexible finality doctrine, while necessary to meet the practical considerations of bankruptcy proceedings, makes it difficult to create binding precedent because important questions of law may be rendered moot before the appellate court is able to address them.

cessary to appreciate the impetus for BAPCPA, as well as some of the current challenges facing bankruptcy appellate procedure.

Bankruptcy law in the United States has been shaped by competing concerns: practical considerations (such as speed, efficiency, and specialized review) and constitutional values (including fairness, due process, and the right to an appeal). At the heart of this debate is the origin of bankruptcy law itself. Unlike Article III courts, which were created as a separate branch of government to protect litigants' rights, Congress established bankruptcy courts under Article I of the Constitution.¹⁷ Due to bankruptcy courts' constitutional foundations, scholars have argued that the legitimacy of bankruptcy appeals depends upon proper review by an Article III court.¹⁸ The possibility of such review, however, may be frustrated by the bankruptcy courts' authority to determine whether to grant a stay pending appeal. By refusing to grant a stay, a bankruptcy court affects the "application of the equitable mootness doctrine" and "allow[s] an Article I court to impact the power of review reserved strictly for an Article III court."¹⁹ Part VI discuss the interplay between the failure to grant stays and the doctrine of equitable mootness.

The debate regarding the constitutionality of bankruptcy courts came to a head in 1982, when a plurality of the Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipe Line* that Congress did not have the power to vest "the essential attributes of judicial power" reserved for Article III courts in an Article I court.²⁰ In its analysis, the Court was concerned with protecting the independence of the judiciary and maintaining the system of checks and balances.²¹ The Court recognized that powerful Article I courts created by Congress could threaten the right of litigants to "have claims decided by judges who are free from potential domination by other branches of government."²² To prevent uncertainty from undermining bankruptcy

¹⁷ Article I of the Constitution provides Congress with the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

¹⁸ See Katelyn Knight, Comment, *Equitable Mootness in Bankruptcy Appeals*, 49 SANTA CLARA L. REV. 253, 255 (2009) (noting that denying review by an Article III court "undermines the protections afforded by separation of powers in government").

¹⁹ Murphy, *supra* note 12, at 45.

²⁰ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982). The result in the case was reached because two additional Justices concurred in the judgment.

²¹ See *id.* at 58 (considering in its analysis that Article III is "an inseparable element of the constitutional system of checks and balances").

²² *Id.* at 58 (quoting *United States v. Will*, 449 U.S. 200, 217-18 (1980)).

proceedings in the wake of its opinion, the Supreme Court voluntarily stayed its own decision for five months to allow Congress to draft new bankruptcy legislation.²³ More than two years later, Congress passed the 1984 Bankruptcy Amendments and Federal Judgeship Act, which largely established the system as it functions today.²⁴

Currently, bankruptcy courts act as specialized “units” of the district courts. While the district courts theoretically retain original jurisdiction, most districts have a standing order that automatically refers bankruptcy proceedings to the bankruptcy courts.²⁵ Bankruptcy judges have the authority to make the initial determination on “core” matters, such as stays, creditors’ claims, and other issues “historically” relegated to the bankruptcy court.²⁶ District courts may hear appeals from final judgments, orders, and decrees by bankruptcy judges.²⁷ District courts may also adjudicate interlocutory orders and decrees “with leave of the court.”²⁸ In certain jurisdictions, a bankruptcy appellate panel (BAP),²⁹ instead of the district court, may exercise juris-

²³ *Id.* at 88.

²⁴ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 and 28 U.S.C.). Note, however, that appellate review of bankruptcy decisions continued to present constitutional challenges. Even after 1984, bankruptcy courts had the authority to dismiss cases without an appeal to an Article III court. Knight, *supra* note 18, at 258 (citing 11 U.S.C. § 305 (1988) (amended 1990)). In 1991, the Eleventh Circuit held that this practice was unconstitutional. See *Parklane Hosiery Co. v. Parklane/Atlanta Venture (In re Parklane/Atlanta Joint Venture)*, 927 F.2d 532, 536 (11th Cir. 1991). The court came to this conclusion by determining that the power to dismiss a case vested an Article III authority in an Article I court. *Id.* at 538.

²⁵ See Knight, *supra* note 18, at 258 (“Every district court in the United States except the District of Delaware has a standing order to refer bankruptcy cases to its bankruptcy division.”).

²⁶ KNIBB, *supra* note 16, § 14.1, at 338. Until 1978, bankruptcy judges could adjudicate only certain “core” matters. Knight, *supra* note 18, at 256 n.31. In 1978, Congress passed the Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at scattered sections of 11 and 28 U.S.C.), which allowed bankruptcy courts to hear almost all matters that arose during a bankruptcy proceeding. *Id.* at 256-57. It was this expansion of powers that the Supreme Court found unconstitutional in *Northwestern Pipeline*. Today, for noncore proceedings, bankruptcy judges are permitted to make only recommendations to the district court, which exercises original jurisdiction in these matters. KNIBB, *supra* note 16, at § 14.1.

²⁷ 28 U.S.C. § 158(a)(1) (2006).

²⁸ *Id.* § 158(a)(3).

²⁹ Bankruptcy Appellate Panels were established by the 1978 Bankruptcy Code. § 160, 92 Stat. at 2659 (amended 1984). BAPs, like bankruptcy courts, are Article I courts that exercise jurisdiction over bankruptcy appeals. Though district courts have concurrent jurisdiction over the appeals, most appeals are automatically routed to the “nontenured appellate panels” and “[c]onsent . . . is inferred from a party’s failure to

diction over appeals.³⁰ From the district court or the BAP, an appeal may then be taken to the appropriate court of appeals. While this two-tiered structure remains for many bankruptcy litigants today, Congress attempted to remedy the uncertainty and sluggishness of the process in 2005 with the BAPCPA provision for direct appeals.³¹

II. RECENT DEVELOPMENTS: BAPCPA AND DIRECT APPEALS

Congress sought to address some of the concerns raised by the two-tiered bankruptcy appellate structure with the passage of BAPCPA.³² BAPCPA includes a provision allowing direct appeals from the bankruptcy courts to the courts of appeals. This option, which was codified in 28 U.S.C. § 158(d)(2), allows a party to appeal directly to the relevant court of appeals if the party receives certification from the bankruptcy court or district court and the court of appeals (the appropriate Article III court) grants review.³³

With BAPCPA, Congress attempted to facilitate the efficient resolution of bankruptcy appeals and minimize uncertainty.³⁴ In the two-tiered system (with the district court or BAP providing the first layer of appellate review and the circuit court the second), the time and cost required of creditors and debtors provided significant disincentives to pursuing bankruptcy appeals.³⁵ In addition to time and cost, Congress

insist timely on Article III court review.” Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 683 (2009).

³⁰ The First, Sixth, Eighth, Ninth, and Tenth Circuits have established BAPs. 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 117.02[2], at 117 n.24 (Asa S. Herzog & Lawrence P. King eds., 2010).

³¹ 28 U.S.C. § 158(d).

³² Pub. L. No. 109-8, 119 Stat. 23.

³³ 28 U.S.C. § 158(d)(2).

³⁴ See Don Beskrone & Ricardo Palacio, *Interlocutory Direct Appeals Under BAPCPA: Questionable Role of the Bankruptcy Court*, AM. BANKR. INST. J., July–Aug. 2007, at 10, 10 (“The legislative intent behind the new statute, embodied in 28 U.S.C. § 158(d)(2), was to facilitate the efficient resolution of bankruptcy appeals and reduce attendant cost and delay.”).

³⁵ See NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 754 (1997) (“Under the current system, every bankruptcy appeal is an expensive excursion for both debtor and creditor who must work through two layers of appeals for a final resolution of their disputes.”); see also Jones, *supra* note 16, at 246 (“The average bankruptcy practitioner will not often find himself participating in an appeal of a bankruptcy court’s decision. The disincentives to appeal—the cost, the inevitable delay, the possibility of jurisdictional dismissals that would accomplish nothing—are considerable.”); cf. News Release, Admin. Office of the U.S. Courts, Judicial Conference Asks Congress to Address Areas of Concern in Bankruptcy Reform Bill (Feb. 8, 2001) (“Judge Becker pointed out that appeals to the U.S. Courts of Appeals are far more

was concerned by the lack of certainty in the bankruptcy field.³⁶ Decisions by the district courts, while functioning as the first layer of appellate review, did not create binding precedent.³⁷ As a result, litigants would often forum-shop for courts more favorable to their position.³⁸ Consequently, many issues in bankruptcy law had no definitive resolution.³⁹ This uncertainty created more litigation and a greater strain on the federal court system.⁴⁰

expensive than appeals to the district courts where the procedures are less formal. [As] 80% of the bankruptcy appeals never go beyond the district court . . . requiring appeals to the courts of appeals will make the process more, not less expensive.”).

³⁶ See H.R. REP. NO. 109-31, pt. 1, at 148 (2005) (“In addition to the time and cost factors attendant to the present appellate system, decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value.”); see also *Weber v. U.S. Tr.*, 484 F.3d 154, 158 (2d Cir. 2007) (“Among the reasons for the direct appeal amendment was widespread unhappiness at the paucity of settled bankruptcy-law precedent.”). Legislators had been concerned by the lack of precedent in the field for many years. In 1994, Senator Howell Heflin discussed the value in “establish[ing] a dependable body of case law” in bankruptcy. *Weber*, 484 F.3d at 158 n.1 (alteration in original) (citing 140 CONG. REC. S14,463 (daily ed. Oct. 6, 1994) (statement of Sen. Heflin)). Eight years later, Judith McKenna and Elizabeth Wiggins, in their seminal article on the issue, noted that

[t]he bankruptcy appellate system is not well structured to produce binding precedent. . . . [A]ppellate 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.

Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627 (2002).

³⁷ See *Fairchild Aircraft Corp. v. Campbell (In re Fairchild Aircraft Corp.)*, 220 B.R. 909, 917 (Bankr. W.D. Tex. 1998) (“A district court’s ruling on a bankruptcy appeal enjoys little more precedential weight than does the original bankruptcy decision itself.”); see also *Weber*, 484 F.3d at 158 n.1 (“[O]ne bankruptcy court apparently felt unconstrained even by the decisions of the district courts within its district.”). Judith McKenna and Elizabeth Wiggins attributed uncertainty in the field to a lack of binding precedent. See McKenna & Wiggins, *supra* note 36, at 628 (“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.”).

³⁸ See Crabb, *supra* note 15, at 140 (noting that the system “[did] not foster predictability” because “[as] long as litigants [could] choose their forum for appeal, they [could] shop for the one they think will be most favorable to their position”).

³⁹ See *id.* (explaining that bankruptcy appellate panels and district courts sitting as appellate courts do not “build a coherent body of law because their decisions issue from too many sources to provide coherency”); see also Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or An Ambulance*, 69 AM. BANKR. L.J. 525, 526-27, 527 n.9 (1995) (discussing issues in bankruptcy law that lawyers “litigate again and again”); Anna Snider, *Panel: Take District Courts Out of Bankruptcy Appeals*, 149 N.J. L.J. 972, 972 (1997) (stating that “even basic issues are relitigated fre-

BAPCPA was not the first time Congress considered bankruptcy direct appeals. Eight years earlier, the 1997 National Bankruptcy Review Commission⁴¹ suggested that the bankruptcy appellate structure needed reform.⁴² The Commission, concerned with “the cost, delay, and redundancy that is inherent” in the two-tiered bankruptcy appellate system,⁴³ recommended the elimination of the first layer of review.⁴⁴ Section 1235 of the Bankruptcy Reform Act of 2001 incorporated the Commission’s suggestion.⁴⁵ Unlike BAPCPA, however, the Commission’s recommendation did not grant the courts of appeals the discretion to accept or deny appeals. The Judicial Conference came out in vehement opposition to section 1235.⁴⁶ The Confe-

quently” so that “you can find a decision in almost any area of bankruptcy to support or counter your position”).

⁴⁰ See Freyermuth, *supra* note 15, at 1070 (“A lack of doctrinal clarity [in bankruptcy] produces a greater volume of disputes for the system to resolve, as parties already stuck in a largely zero-sum collection game posture to maximize their respective positions.”). In one Seventh Circuit case, the court felt that direct review could “[l]ower litigation costs for thousands of debtors and creditors . . . by expediting appellate consideration of [the] case.” *In re Wright*, 492 F.3d 829, 831-32 (7th Cir. 2007).

⁴¹ The Bankruptcy Reform Act of 1994 established the National Bankruptcy Review Commission as an independent commission to examine “issues relating to the Bankruptcy Code.” NAT’L BANKR. REVIEW COMM’N, *supra* note 35, at 47.

⁴² Interestingly,

[t]he previous National Bankruptcy Review Commission, which convened in 1970, rejected a proposal to eliminate the district court level of appeal. The commission cited the remoteness of the courts of appeal and the risk of overloading the circuit courts’ dockets with litigants who may have been satisfied with district court determinations.

Snider, *supra* note 39, at 984.

⁴³ NAT’L BANKR. REVIEW COMM’N, *supra* note 35, at 717.

⁴⁴ See *id.* at 752-67 (noting that because “an appellate system should provide stability and consistency in case law decision-making,” bankruptcy appellate procedure “should be changed to eliminate the first layer of review”). The Commission assumed that direct appeal would not affect the distinction between core and noncore proceedings. *Id.* at 758. The direct appeal provision would only apply to core proceedings and to those noncore proceedings in which the parties agreed to the entry of a final order by the bankruptcy judge. *Id.* In noncore proceedings, where a bankruptcy judge can only make a recommendation, a district court order would still constitute the first final order from which an appeal could be taken. These would still be governed by §§ 1291 and 1292, which control regular civil actions. *Id.* at 758. The Commission also recommended that bankruptcy courts be established under Article III. *Id.* at 742-52. Such a change could eliminate the constitutional concerns that haunt bankruptcy appellate review to this day. See Knight, *supra* note 18, at 256-60 (discussing the constitutional concerns of providing an Article I court with jurisdiction that is typically reserved for Article III courts, which are free from political pressures).

⁴⁵ S. 220, 107th Cong. § 1235 (2001).

⁴⁶ See News Release, *supra* note 35, at 1 (evaluating section 1235 of the Bankruptcy Reform Bill and expressing concern about the section’s effects).

rence—represented by former Chief Judge Edward Becker of the Court of Appeals for the Third Circuit—was concerned that the workload in the appellate courts would increase by “upwards of three thousand new cases per year.”⁴⁷ In addition, while agreeing that greater certainty was needed in bankruptcy law, Chief Judge Becker felt that the fact-specific nature of courts of appeals’ bankruptcy opinions would not create meaningful precedent.⁴⁸ To remedy these concerns, Judge Becker recommended that direct appeals require certification by the district court or BAP, a provision similar to what Congress included in BAPCPA four years later.⁴⁹

III. THE PROVISIONS OF § 158(D)(2)

A textual analysis of § 158(d)(2) suggests that the provision functions in two ways: (1) it affects *when* matters can go up on appeal,⁵⁰ and (2) it affects *which* court will handle the appeal at each stage.⁵¹ Practically speaking, it allows parties to appeal matters earlier in the proceedings (via interlocutory appeals)⁵² and permits cases to “leap frog” the district courts and receive direct review by the courts of appeals. However, the imprecise text of § 158(d)(2) makes it difficult to understand based solely on the language of the provision.⁵³ Part V will

⁴⁷ *Id.*

⁴⁸ *See id.* (“Judge Becker observed . . . that most opinions in bankruptcy cases tend to be fact-bound, thereby creating little precedent . . .”). Note, however, that according to the Second Circuit this may not be an issue: “Congress believed direct appeal would be most appropriate where we are called upon to resolve a question of law not heavily dependent on the particular facts of a case, because such questions can often be decided based on an incomplete or ambiguous record.” *Weber v. U.S. Tr.*, 484 F.3d 154, 158 (2d Cir. 2007). Chief Judge Becker also cited a concern of the Department of Justice that without meaningful review by the district court, direct appeal to the court of appeals would create constitutional problems under *Northern Pipeline*. News Release, *supra* note 35. In contrast, the 1997 National Bankruptcy Review Commission determined that direct appeals would be constitutional (to the extent that the current two-tiered system was constitutional). NAT’L BANKR. REVIEW COMM’N, *supra* note 35, at 758-59 (“The appellate structure has no effect on the constitutionality of the bankruptcy court system.”).

⁴⁹ *See* 28 U.S.C. § 158(d)(2)(A) (2006) (facilitating appellate jurisdiction if the judgment is certified).

⁵⁰ *See id.* § 158(d)(2)(B) (specifying when bankruptcy courts, district courts, or BAPs should certify appeals).

⁵¹ *See id.* § 158(d)(2)(A) (listing instances when courts of appeals have jurisdiction).

⁵² Initially, the interlocutory-appeal issue was a matter of some debate. *See infra* notes 69-74 and accompanying text (noting that most circuit courts have held that § 158(d)(2) allows direct appeal of interlocutory appeals).

⁵³ *See* 1 COLLIER ON BANKRUPTCY ¶ 5.05A[1], at 5-16 (Alan N. Resnick et al. eds., 15th ed. rev. 2009) (“Section 158(d)(2) of title 28 . . . is hardly an example of precise

discuss how courts have interpreted the text of § 158(d)(2) and how parties have used it thus far.

Section 158(d)(2)(A) grants the courts of appeals jurisdiction to hear bankruptcy direct appeals.⁵⁴ It specifies that the lower court (either the bankruptcy court, the BAP, or the district court)⁵⁵ “acting on its own motion” or at the “request” of any party to a judgment may certify the appeal if

(i) the judgment, order or decree involves a question of law as to which there is *no controlling decision* of the court of appeals for the circuit or of the Supreme Court . . . or involves a *matter of public importance*;

(ii) the judgment, order or decree involves a *question of law* requiring the *resolution of conflicting decisions*; or

(iii) an immediate appeal from the judgment, order, or decree may *materially advance the progress of the case* or proceeding in which the appeal is taken.⁵⁶

Once the appeal is certified, the appropriate court of appeals must authorize it.⁵⁷

In addition, § 158(d)(2) grants different amounts of discretion to the courts of appeals and the lower courts. While the courts of appeals have complete discretion over whether to grant the direct appeal,⁵⁸ lower courts *must* certify the application if a majority of the appellants and appellees make the request or if the request meets one of

and careful drafting . . .”). Stephanie Freeman, a staff attorney at the Tenth Circuit BAP, also mentioned the “hasty and imprecise” drafting of § 158(d)(2) in an interview with the author. Interview with Stephanie Freeman, Staff Attorney, Tenth Circuit BAP (Dec. 9, 2009) (on file with author).

⁵⁴ 28 U.S.C. § 158(d)(2)(A). According to the Bankruptcy Rules, “[a] certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be effective until a timely appeal has been taken.” FED. R. BANKR. P. 8001(f)(1).

⁵⁵ According to the Bankruptcy Rules, the request for certification “shall be filed in the court in which a matter is pending for purposes of 28 U.S.C. § 158(d)(2).” FED. R. BANKR. P. 8001(f)(2). A matter is considered “pending” “until the docketing, in accordance with Rule 8007(b).” *Id.*

⁵⁶ 28 U.S.C. § 158(d)(2)(A) (emphasis added).

⁵⁷ *Id.*

⁵⁸ *See* Weber v. U.S. Tr., 484 F.3d 154, 161 (2d Cir. 2007) (“Congress has explicitly granted us plenary authority to grant or deny leave to file a direct appeal, notwithstanding the presence of one, two, or all three of the threshold conditions . . .” (citation omitted)). Notably, “[a]lthough [§ 158(d)(2)] sets forth in detail the standards for certification of the appeal by the lower courts or the parties, the . . . statute provides no direction to the court of appeals as to the circumstances under which such a petition should be granted.” Bartell, *supra* note 11, at 159.

three statutory requirements under § 158(d)(2)(A).⁵⁹ Specifically, § 158(d)(2)(B) states that if “on its own motion or on the request of a party” the court determines that a circumstance specified in § 158(d)(2)(A) exists, the court “shall” certify the appeal.⁶⁰ In addition, if the court receives a request from the majority of the appellants and the appellees, the court “shall” certify the direct appeal.⁶¹ Section 158(d)(2)(C) allows parties to “supplement the certification with a short statement of the basis for the certification.”⁶²

Section 158(d)(2)(D) states that an appeal does not stay any proceedings before the lower court unless the “respective” court “or the court of appeals in which the appeal in [sic] pending” issues a stay pending appeal.⁶³ This provision grants an important authority to the lower courts that Part VI will discuss in more detail.

Finally, § 158(d)(2)(E) requires that the request for certification by the parties “be made not later than sixty days after the entry of judgment, order or decree.”⁶⁴ The lower court, however, is not held to the sixty-day standard when “acting on its own motion.”⁶⁵ After obtaining the certification, the parties have thirty days to petition the court of appeals for permission to appeal.⁶⁶ Notably, this deadline was increased from ten days.⁶⁷ The interim rules noted that, unless speci-

⁵⁹ 28 U.S.C. § 158(d)(2)(B). Of course, the lower court has the discretion to determine when and if a requirement has been met.

⁶⁰ *Id.*

⁶¹ *Id.* § 158(d)(2)(B)(ii). The ability of the parties to agree, without court involvement, to certify the matter for direct appeal “has no parallel in current federal practice.” COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 5.05A[1], at 5-17.

⁶² 28 U.S.C. § 158(d)(2)(C).

⁶³ *Id.* § 158(d)(2)(D) (emphasis added) (footnote omitted). The language of the provision highlights that courts of appeals may (and this Comment argues should) consider granting a stay *in concert with* the permission for direct appeal to guarantee that an Article III court can create binding precedent.

⁶⁴ *Id.* § 158(d)(2)(E).

⁶⁵ *Id.* §§ 158(d)(2)(A), (E). Ms. Freeman noted that, practically speaking, the lower court would likely certify the matter within sixty days if direct appeal were warranted. Interview with Stephanie Freeman, *supra* note 53.

⁶⁶ FED. R. BANKR. P. 8001(f)(5).

⁶⁷ When BAPCPA was passed, Congress put interim rules into place “until a rule of practice or procedure . . . [could be] promulgated or amended.” BAPCPA, Pub. L. No. 109-8, § 1233(b)(1), 119 Stat. 23, 203 (codified at 28 U.S.C. § 158 note). Compare *id.* § 1233(b)(4) (providing parties ten days to petition the court of appeals for permission to appeal), with FED. R. BANKR. P. 8001(f)(5) (providing thirty days). Section 1292(b), however, remains at ten days. 28 U.S.C. § 1292(b). Though the minutes from the Bankruptcy Conference mention the alteration, no explanation is given for why it was made. Bankr. Minutes of the Judicial Conference, 2006 WL 2940712 (J.C.U.S.), at *11 (March 8–10, 2006). The Bankruptcy Committee’s May 2006 Report

fied otherwise, appeals should be taken as prescribed by Rule 5 of the Federal Rules of Appellate Procedure.⁶⁸

In addition to circumventing the district court, § 158(d)(2) applies to interlocutory orders, allowing matters often central to the bankruptcy proceeding to be reviewed earlier than they normally would.⁶⁹ Although the drafting of § 158(d)(2) is vague on this point,⁷⁰ courts have largely held that interlocutory appeals may be the subject of a direct appeal. The Fifth Circuit addressed this issue in 2008 in *In re OCA, Inc.*⁷¹ Focusing on the reference to the “first sentence” of subsection (a), the Fifth Circuit determined that this provision authorizes jurisdiction over interlocutory orders and decrees if granted leave by the district court.⁷² The Fifth Circuit also found that the sixty days permitted to request certification for a direct appeal applied equally to judgments, orders, and decrees that were either final or in-

to the Standing Committee also does not provide any insight; in the notes about Bankruptcy Rule 8001(f)(5), the only applicable comment suggests that “Subdivision (f)(5) was added to advise parties that certification of an order or decree is insufficient to have the court of appeals hear the matter.” Memorandum from Hon. Thomas S. Zilly, Chair, Advisory Comm. on Bankr. Rules, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 196 (May 24, 2006), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/Rules/Reports/BK05-2006.pdf>. In the American Bankruptcy Institute’s survey, only one relevant respondent commented: “The time for taking an appeal from a bankruptcy court decision should be increased from 10 days to 28 days.” ABI TASK FORCE ON BANKR. RULES, REPORT OF SURVEY ON PROPOSED AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE app. B (2007), *available at* http://www.abiworld.org/Rules_CommentsFinal.pdf.

⁶⁸ § 1233(b)(3), 119 Stat. at 203 (“[A]n appeal authorized by the court of appeals . . . shall be taken in the manner prescribed in . . . rule 5 of the Federal Rules of Appellate Procedure.”).

⁶⁹ For instance, § 158(d)(2) might be applicable in instances when the matter does not meet the criteria of Rule 54(b) of the Federal Rules of Civil Procedure or for a permissive appeal under § 1292. Note that § 158(d)(2) is broader than § 1292. *See infra* notes 75-84 and accompanying text (investigating courts’ comparison of § 158(d)(2) to the permissive appeal standard under § 1292(b), although appeals under § 1292(b) are more limited than those under § 158(d)).

⁷⁰ Section 158(d)(2)(A) states that the “appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a).” 28 U.S.C. § 158(d)(2)(A). “Subsection (a)” refers to § 158(a), which governs appeals by the district court. *Id.* § 158(a). Subsection (3) of § 158(a) includes the phrase, “with leave of the court, from other interlocutory orders and decrees.” *Id.* However, besides the reference to the “first sentence” of § 158(a), § 158(d)(2)(A) only mentions “the judgment, order, or decree”; “interlocutory orders” is notably absent from the list, though it could be argued that “interlocutory order and decrees” is included in “judgment, order, or decree.” Due to the lack of specificity, various circuit courts have felt compelled to address this issue directly. *See infra* note 74 (surveying these opinions).

⁷¹ 552 F.3d 413 (5th Cir. 2008).

⁷² *Id.* at 418.

terlocutory.⁷³ Other courts have held similarly.⁷⁴ Therefore, while the statute's wording is less than precise, the unanimity of opinion suggests that interlocutory judgments, orders, and decrees may be appealed directly to the courts of appeals.

IV. A COMPARISON OF § 158(D)(2) AND § 1292(B)

In their application of § 158(d)(2), circuit courts have often sought guidance from previous interpretations of permissive interlocutory appeals under § 1292(b).⁷⁵ Like § 158(d)(2), Congress enacted § 1292(b) to guarantee that the courts of appeals had jurisdiction to “rule on . . . ephemeral question[s] of the law that m[ight] disappear in the light of a complete and final record,”⁷⁶ which is particularly relevant in the context of mootness. In addition, § 1292(b) “sought to

⁷³ See *id.* at 418 n.6 (stating that a party may request certification for direct appeal under § 158(d)(2)(E) up to sixty days after either final or interlocutory judgments, orders, or decrees).

⁷⁴ In February 2009, the Fourth Circuit granted a direct interlocutory appeal from a bankruptcy court's orders without even addressing whether it had jurisdiction over interlocutory appeals. See *Hutson v. E.I. du Pont de Nemours & Co. (In re Nat'l Gas Distribs., LLC)*, 556 F.3d 247, 250, 252 (4th Cir. 2009). In October 2008, the Third Circuit noted that the new provisions under § 158(d)(2), established by BAPCPA, granted the courts of appeals jurisdiction over interlocutory orders. See *In re Am. Capital Equip., LLC*, 296 F. App'x 270, 275 n.5 (3d Cir. 2008) (Jordan, J., concurring). However, the court also recognized that it did not have this authority under the prior interpretation of § 158(d): “[W]hile the district courts have jurisdiction to hear interlocutory appeals under subsection (a), subsection (d) gives us jurisdiction only over appeals from final orders.” *Id.* at 276. Also in October 2008, the Tenth Circuit mentioned briefly that “§ 158(d)(2) establishes procedures for us to review interlocutory appeals.” *Harwell v. Dalton (In re Harwell)*, 298 F. App'x 733, 735 (10th Cir. 2008). The court noted, however, that the case did not invoke § 158(d)(2), so the matter was not resolved as a direct appeal. *Id.* Finally, the Seventh Circuit also discussed the matter in 2008: “With the exception of a relatively new procedure for certain interlocutory appeals that has not been invoked here, the courts of appeals have jurisdiction only over appeals from final decisions entered by district courts under § 158(a) and bankruptcy appellate panels under § 158(b).” *In re Comdisco, Inc.*, 538 F.3d 647, 650 (7th Cir. 2008) (citation omitted).

⁷⁵ See, e.g., *Weber v. U.S. Tr.*, 484 F.3d 154, 158-59 (2d Cir. 2007) (“[W]e are also assisted by our prior analysis of other grants of ‘discretionary jurisdiction,’ both in [§ 1292(b)] and the Federal Rules of Civil Procedure . . . 23(f).”).

⁷⁶ *Id.* at 159 (quoting *Koehler v. Bank of Berm. Ltd.*, 101 F.3d 863, 864 (2d Cir. 1996)); see also *Koehler* at 865-66 (noting that Congress enacted § 1292(b) to “avoid protracted litigation”). This quotation has troubling implications for bankruptcy direct appeals; because bankruptcy proceedings move more quickly than regular civil litigation, the concern that the doctrine of equitable mootness may absolve the need for the court of appeals to examine an issue could be of real concern. See *infra* notes 134-40 and accompanying text (addressing the problems that arise under the doctrine of equitable mootness, such as actions that render the appeal moot).

assure the prompt resolution of knotty legal problems,”⁷⁷ a concern that Congress also had when it passed § 158(d)(2).⁷⁸

BAPCPA’s direct appeal provision is also broader than § 1292(b), emphasizing that bankruptcy requires balancing an effective review with a speedy resolution. Section 1292(b) provides that a district judge may allow parties to petition the court of appeals for permission for a direct appeal if the matter involves a “controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the *ultimate termination* of the litigation.”⁷⁹ In comparison, § 158(d)(2) does not limit direct appeals to “controlling legal issue[s].”⁸⁰ A BAPCPA direct appeal is also allowed when it “materially advance[s] a case’s *progress*,” while permissive interlocutory appeals are permitted only when “the appeal may materially advance the case’s *ultimate termination*.”⁸¹ Furthermore, § 1292(b) employs the conjunctive “and,” suggesting permissive interlocutory appeals must include both (1) a substantial difference of opinion regarding controlling legal issues and (2) the need to resolve an issue that materially advances the case’s ultimate termination.⁸² In contrast, § 158(d)(2) uses the broader “or.”⁸³ In addition, “a matter of public importance,” another criteria that the lower court can use to certify the direct appeal under § 158(d)(2), has no equivalent in § 1292(b).⁸⁴ Finally, unlike § 1292(b), § 158(d)(2) “expressly provides” that a direct appeal may be warranted “solely because there is no governing legal precedent.”⁸⁵

Procedurally, both provisions allow the court of appeals either to grant or deny the request. However, § 1292(b) allows parties to petition the court of appeals for permission to appeal within ten days of the district court’s order. In contrast, Bankruptcy Rule 8001(f)(5) gives parties thirty days from the lower court’s certification of the direct appeal to petition the court of appeals.⁸⁶ As no reason has been

⁷⁷ *Weber*, 484 F.3d at 159.

⁷⁸ *See id.* (discussing Congress’s intent in passing § 158(d)(2)).

⁷⁹ 28 U.S.C. § 1292(b) (2006) (emphasis added).

⁸⁰ David George, *An Idea Whose Time Has (Sort of) Come: BAPCPA Provides Direct Appeals from Bankruptcy Courts to Circuit Courts in Limited Situations* 6 (bepress Legal Series, Working Paper No. 1134, 2006) (internal quotation marks omitted).

⁸¹ *Id.* (emphasis added) (internal quotation marks omitted).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 5.05A[2], at 5-18 to 5-19.

⁸⁵ *Weber v. U.S. Tr.*, 484 F.3d 154, 159 n.4 (2d Cir. 2007).

⁸⁶ FED. R. BANKR. P. 8001(f)(5).

given for this difference, and in light of the urgency surrounding bankruptcy proceedings, this Comment recommends that rulemakers shorten the timing provision of Bankruptcy Rule 8001(f)(5) to ten days.⁸⁷

V. FOUR YEARS LATER: § 158(D)(2) AND THE CIRCUIT COURTS OF APPEALS

Five years after the enactment of BAPCPA, it is possible to assess whether Judge Becker's fears about overburdening the federal judiciary with bankruptcy appeals were mitigated by the discretion granted to the circuit courts of appeals. In a recent survey of the case law, Professor Laura Bartell identified sixty-two cases in which the courts of appeals granted a direct appeal.⁸⁸ Drawing on Professor Bartell's findings, Section V.A examines in what instances the courts of appeals have decided to grant review, including a survey of the number of cases in which the appellate court reversed and affirmed. Section V.B focuses on how the courts of appeals have ruled on particular procedural elements of direct appeals under § 158(d)(2). Finally, Section V.C discusses Professor Bartell's finding that § 158(d)(2) has had the effect Congress desired; namely, that it has both shortened the bankruptcy appeals process and created binding precedent.

A. *Discretion: How the Circuit Courts Have Applied § 158(d)(2)*

The first court of appeals case to address when a court should exercise its discretion to permit direct appeals was the Second Circuit's *Weber v. United States Trustee* decision in 2007.⁸⁹ The case involved whether the bankruptcy court could retroactively apply New York's homestead exemption to the debtor-appellees' property.⁹⁰ Though the court ultimately denied the motion, the Second Circuit established important guidance for the application of § 158(d)(2). First, the court noted that courts of appeals are particularly suited for answering questions of law as they arise in the bankruptcy context: "When a discrete, controlling question of law is at stake, we may be able to

⁸⁷ See *infra* Part VIII (suggesting that shortening the time period for parties to petition the circuit court for permission to appeal would allow bankruptcy proceedings to continue with minimal delay).

⁸⁸ Bartell, *supra* note 11, at 161.

⁸⁹ 484 F.3d 154 (2d Cir. 2007).

⁹⁰ *Id.* at 157.

settle the matter relatively promptly.”⁹¹ Although the court recognized that other circuit courts would not be bound by its standards, the Second Circuit decided that it would grant a direct appeal only where there is “uncertainty in the bankruptcy courts . . . or where we find it patently obvious that the bankruptcy court’s decision is either manifestly correct or incorrect.”⁹²

The Second Circuit was hesitant to exercise review too readily. Recognizing the inherent tension in bankruptcy law between efficiency and the right to review, the court asserted that “although Congress emphasized the importance of our expeditious resolution of bankruptcy cases, it did not wish us to privilege speed over other goals.”⁹³ The court also cautioned that hearing direct appeals might actually hinder the development of binding precedent in bankruptcy because matters would be denied the opportunity to “percolate” in the district courts.⁹⁴ It appears that the other circuits have heeded the Second Circuit’s warning; in most instances in which the courts of appeals have granted review⁹⁵ it has been for matters of “first impression.”⁹⁶

⁹¹ *Id.* at 158. Due to the flexible finality rule in bankruptcy, there are many “discrete” issues that the courts of appeals may consider. See KNIBB, *supra* note 16, § 14.2, at 341-42 (“Various steps in the bankruptcy process are often so distinct and conclusive either to the rights of the parties or the ultimate outcome of the proceeding that final decisions as to them are appealable as a matter of right.”).

⁹² *Weber*, 484 F.3d at 161. While drawing heavily on § 1292(b) for guidance on the application of § 158(d)(2), the court recognized that § 1292(b) was not meant to “serve an error-correction function,” which the court appears to bestow upon § 158(d)(2). See *id.* at 159 & n.3 (“Congress hoped that § 1233 would permit us to resolve controlling legal questions expeditiously and might foster the development of coherent bankruptcy-law precedent.”).

⁹³ *Id.* at 160.

⁹⁴ See *id.* (noting that appeals courts often benefit from reviewing a variety of district court resolutions to unsettled bankruptcy questions).

⁹⁵ While it is critical to examine how direct appeals have been utilized by the circuit courts of appeals, it is also important to respond to Judge Becker’s concern of overloading the circuit courts. Though eighty-one cases of certified direct appeals (sixty-two granted by the courts of appeals, nineteen denied) in four years across all of the circuits may appear to be manageable, Bartell, *supra* note 11, at 160-63, it is important to recognize that this number reflects that § 158(d)(2) of BAPCPA was found not to apply retroactively. See *In re McKinney*, 457 F.3d 623, 624 (7th Cir. 2006) (“[T]he presumption that a procedural change is to be applied retroactively falls away when the statute making the change specifies that the statute shall not apply to pending cases as the new bankruptcy law does.” (citation omitted)). Since 2005, there has been an upward trend in the number of § 158(d)(2) certifications reviewed by the courts of appeals. According to Professor Bartell’s study, the number of cases has increased from three in the first year to sixteen in the second year, twenty-one in the third year, and back to sixteen in the fourth year (a twelve-month period ending on September 30, 2009). Bartell, *supra* note 11, at 163.

Of the sixty-two cases in which the court of appeals granted a direct appeal, an opinion was issued thirty-seven times.⁹⁷ Of those thirty-seven opinions, in eight instances the court of appeals either stated that the appeal presented “a question of law as to which there is no controlling decision . . . or involve[d] a matter of public importance”⁹⁸ or noted that the direct appeal met both these requirements for certification under § 158(d)(2)(A)(i).⁹⁹ One case noted only that there was “no controlling decision” in the jurisdiction,¹⁰⁰ and in *In re Pacific Lumber Co.*, the court mentioned the “prominence of this case to the citizens of California.”¹⁰¹ In nine instances, the court determined that the dispute was a matter of first impression.¹⁰² Another case noted

While it is possible that the number of cases will continue to rise, it is also possible that the number will continue to level off as more issues are resolved and greater certainty is brought to the bankruptcy field. Notably, all of the courts of appeals, except for the Federal Circuit, have reviewed § 158(d)(2) certifications. *Id.* Most have been repeat players, with the Fifth Circuit using the provision most often. *Id.*

⁹⁶ See Bartell, *supra* note 11, at 174-75 (reporting seventy-six out of ninety-two cases in which the court mentioned that there was no controlling decision).

⁹⁷ *Id.* at 161 n.129. As of the time of Professor Bartell’s study,

[i]n nine additional cases, the circuit court granted a petition for direct appeal, but the appeal was subsequently dismissed or the case remanded on motion. . . . Three cases that were certified were dismissed without the court of appeals acting on a petition for leave to appeal. . . . In sixteen more cases the petition for leave to appeal directly was granted, but there is not yet any opinion from the court. . . . Four cases that have been certified await a decision from the circuit court on the petition for leave to appeal, or the parties have not filed one.

Id. at 161-62 n.129.

⁹⁸ 28 U.S.C. § 158(d)(2)(A)(i) (2006).

⁹⁹ See *Pension Benefit Guar. Corp. v. Oneida Ltd.*, 562 F.3d 154, 155 (2d Cir. 2009); *Blausey v. U.S. Tr.*, 552 F.3d 1124, 1128 (9th Cir. 2009); *Crosby v. Orthalliance New Image (In re OCA, Inc.)*, 552 F.3d 413, 418 (5th Cir. 2008); *DaimlerChrysler Fin. Servs. Ams. LLC v. Barrett (In re Barrett)*, 543 F.3d 1239, 1241 (11th Cir. 2008); *Nuvell Fin. Servs. Corp. v. Dean (In re Dean)*, 537 F.3d 1315, 1317-18 (11th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312, 315 (4th Cir. 2008); *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 345 (5th Cir. 2008); *In re Wright*, 492 F.3d 829, 831 (7th Cir. 2007). The circuit courts in *In re Dean* and *Drive Financial Services* certified direct appeals because they met all three criteria of 28 U.S.C. § 158(d)(2).

¹⁰⁰ *Ford v. Ford Motor Credit Corp. (In re Ford)*, 574 F.3d 1279, 1281-82 (10th Cir. 2009).

¹⁰¹ *Bank of N.Y. Trust Co. v. Official Unsecured Creditor’s Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 242 (5th Cir. 2009).

¹⁰² See *In re Howard*, 597 F.3d 852, 853 (7th Cir. 2010); *SeaQuest Diving, LP v. S&J Diving, Inc. (In re SeaQuest Diving, LP)*, 579 F.3d 411, 417 (5th Cir. 2009); *Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045, 1047 (9th Cir. 2009); *Reinhardt v. Vanderbilt Mortg. & Fin., Inc. (In re Reinhardt)*, 563 F.3d 558, 561 (6th Cir. 2009); *Hutson v. E.I. du Pont de Nemours & Co. (In re Nat’l Gas Distribs., LLC)*, 556 F.3d 247, 255 (4th

that the matter was “indeed important” for the court to consider.¹⁰³ In eight cases, the appropriate court of appeals identified that the appeal would resolve “conflicting decisions”¹⁰⁴ present within its jurisdiction or others.¹⁰⁵ Interestingly, in some cases the court did not feel the need to address the nature of the appeal at all; instead, the court simply stated (in some fashion), “we have jurisdiction under § 158(d)(2).”¹⁰⁶ Even where the court did not specify, the matters reviewed appear to be questions of law not addressed in prior cases.¹⁰⁷ Ironically, many of the cases in which review was granted involved uncertainty surrounding new provisions included in BAPCPA.¹⁰⁸ In many

Cir. 2009); *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 700 (7th Cir. 2009); *In re Barrett*, 543 F.3d at 1241; *Affordable Bail Bonds, Inc. v. Sandoval (In re Sandoval)*, 541 F.3d 997, 998 (10th Cir. 2008); *Tidewater*, 531 F.3d at 314.

¹⁰³ See *In re Turner*, 574 F.3d 349, 351 (7th Cir. 2009) (“The issue is indeed important. In the wake of the bursting of the housing bubble . . . many mortgagors . . . cannot meet their mortgage obligations . . .”).

¹⁰⁴ 28 U.S.C. § 158(d)(2)(A)(ii) (2006).

¹⁰⁵ See *In re Ford*, 574 F.3d at 1282; *Thompson*, 566 F.3d at 700; *Ennis v. Green Tree Servicing, LLC (In re Ennis)*, 558 F.3d 343, 344 (4th Cir. 2009); *In re Barrett*, 543 F.3d at 1242; *Nuvell Fin. Servs. Corp. v. Dean (In re Dean)*, 537 F.3d 1315, 1317 (11th Cir. 2008); *Tidewater*, 531 F.3d at 315; *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 345 (5th Cir. 2008); *In re Wright*, 492 F.3d 829, 831 (7th Cir. 2007).

¹⁰⁶ See, e.g., *Ford Motor Credit Co. v. Mierkowski (In re Mierkowski)*, 580 F.3d 740, 741 (8th Cir. 2009); *In re Chrysler LLC*, 576 F.3d 108, 111 (2d Cir. 2009), *vacated as moot*, Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015, 1015 (2009); *Gen. Elec. Capital Corp. v. Future Media*, 536 F.3d 969, 971 (9th Cir. 2008); *Wachovia Dealer Servs. v. Jones (In re Jones)*, 530 F.3d 1284, 1287 (10th Cir. 2008); *Garcia v. Dockery (In re Garcia)*, 282 F. App'x 549, 551 (9th Cir. 2008); *AmeriCredit Fin. Servs., Inc. v. Moore*, 517 F.3d 987, 989 (8th Cir. 2008); *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 276 (4th Cir. 2008); *Ad Hoc Grp. of Timber Noteholders v. Pac. Lumber Co. (In re Scotia Pac. Co.)*, 508 F.3d 214, 216 (5th Cir. 2007); *Perlin v. Hitachi Capital Am. Corp. (In re Perlin)*, 497 F.3d 364, 369 (3d Cir. 2007).

¹⁰⁷ See, e.g., *In re Mierkowski*, 580 F.3d at 743 (discussing the “hanging paragraph” in § 1325 of BAPCPA and noting that “[t]he Tenth, Fourth, and Eleventh Circuits” were the “only three to resolve this issue” at that time).

¹⁰⁸ See *Bartell*, *supra* note 11, at 146 (“[I]n the vast majority of those cases in which it is invoked the direct appeal is necessary because of the ambiguities created by the very statute in which the amendment was made, BAPCPA.”). Courts were particularly perplexed by the “hanging paragraph” in § 1325 of BAPCPA. The section earned its name because it was “arbitrarily placed without a number reference” and “does not in any way relate to the code sections amid which it resides.” Julianne R. Frank, *Key Strategies and Considerations in Chapter 13*, in *BEST PRACTICES FOR FILING CHAPTER 13*, at 51, 61 (2010). At its most basic, the “hanging paragraph” “constrains debtors from ‘stripping’ or ‘cramming down’ purchase money loans on their vehicles if they have not owned the vehicle for more than 910 days.” *Id.* Several cases have used direct appeals to address the “hanging paragraph.” See, e.g., *In re Mierkowski*, 580 F.3d at 741; *In re Ford*, 574 F.3d at 1281; *In re Turner*, 574 F.3d at 350; *In re Miller*, 570 F.3d 633, 636 (5th Cir. 2009); *Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045, 1047 (9th Cir. 2009); *Hutson v. E.I. du Pont de Nemours & Co. (In re Nat'l Gas Distribs., LLC)*, 556 F.3d 247,

of the categories mentioned, some cases overlap (for instance, a court may have justified direct review on the basis of a “question of law where there was no controlling decision,” as well as “previous conflicting decisions”).

In describing the need for direct appeals, one scholar mentioned that the decisions of bankruptcy judges are rarely reversed, suggesting that two levels of review may be unnecessary.¹⁰⁹ In comparison, there is a relatively high rate of reversals in direct appeals. Of the thirty-seven cases in which the courts of appeals granted jurisdiction and issued an opinion, ten resulted in reversals (often with a remand),¹¹⁰ twenty were affirmed,¹¹¹ and six were vacated and remanded.¹¹² One case, *In re Pacific Lumber Co.*, was reversed on one matter, declared moot on others, and affirmed on the remaining issues.¹¹³ Frequent re-

253 (4th Cir. 2009); *In re Barrett*, 543 F.3d at 1241; *In re Dean*, 537 F.3d at 1319; *In re Jones*, 530 F.3d at 1289; *Tidewater*, 531 F.3d at 314-16; *Drive Fin. Servs.*, 521 F.3d at 346; *AmeriCredit Fin. Servs.*, 517 F.3d at 989; *In re Perlin*, 497 F.3d at 371; *In re Wright*, 492 F.3d at 831. For a list of twenty-four cases in which a court has certified a direct appeal to address the “hanging paragraph” issue, see Bartell, *supra* note 11, at 176-77 nn.176-78.

¹⁰⁹ See Freyermuth, *supra* note 15, at 1075 (“[R]eversal rates in bankruptcy appeals are relatively low, which at least raises some question of whether an additional level of judicial review improves actual decision making quality to an extent that justifies its cost.” (footnote omitted)).

¹¹⁰ See *In re Mierkowski*, 580 F.3d at 741-43; *In re Turner*, 574 F.3d at 356; *In re Miller*, 570 F.3d at 641; *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 708 (7th Cir. 2009); *Pension Benefit Guar. Corp. v. Oneida Ltd.*, 562 F.3d 154, 158 (2d Cir. 2009); *Ennis v. Green Tree Servicing, LLC (In re Ennis)*, 558 F.3d 343, 344 (4th Cir. 2009); *In re Nat'l Gas Distribs.*, 556 F.3d at 250; *Gen. Elec.*, 536 F.3d at 975; *In re Garcia*, 282 F. App'x at 551; *AmeriCredit*, 517 F.3d at 989.

¹¹¹ See, e.g., *In re Howard*, 597 F.3d 852, 858 (7th Cir. 2010); *eCast Settlement Corp. v. Washburn (In re Washburn)*, 579 F.3d 934, 943 (8th Cir. 2009); *Schaefer v. Superior Offshore Int'l, Inc. (In re Superior Offshore Int'l, Inc.)*, 591 F.3d 350, 355 (5th Cir. 2009); *SeaQuest Diving, LP v. S&J Diving, Inc. (In re SeaQuest Diving, LP)*, 579 F.3d 411, 426 (5th Cir. 2009); *In re Chrysler*, 576 F.3d at 112-13; *In re Egebjerg*, 574 F.3d at 1047; *In re Ford*, 574 F.3d at 1281; *Sheehan v. Peveich*, 574 F.3d 248, 251 (4th Cir. 2009); *Jafari v. Wynn Las Vegas, LLC (In re Jafari)*, 569 F.3d 644, 646 (7th Cir. 2009); *Reinhardt v. Vanderbilt Mortg. & Fin., Inc. (In re Reinhardt)*, 563 F.3d 558, 565 (6th Cir. 2009); *Blausey v. U.S. Tr.*, 552 F.3d 1124, 1126-27 (9th Cir. 2009); *OCA, Inc. v. Orthalliance New Image (In re OCA)*, 552 F.3d 413, 416 (5th Cir. 2008); *In re Sandoval*, 541 F.3d 997, 998 (10th Cir. 2008); *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 871 (9th Cir. 2008); *Drive Fin. Servs.*, 521 F.3d at 350; *In re Kingsley*, 518 F.3d 874, 876 (11th Cir. 2008); *In re Bateman*, 515 F.3d at 280; *In re Scotia Pac.*, 508 F.3d at 216; *In re Perlin*, 497 F.3d at 367; *In re Wright*, 492 F.3d at 831.

¹¹² See *In re Barrett*, 543 F.3d at 1247; *In re Meadows*, 292 F. App'x 256, 257 (4th Cir. 2008); *DaimlerChrysler Fin. Servs. Ams., LLC v. Samek*, 291 F. App'x 502, 503 (4th Cir. 2008); *In re Dean*, 537 F.3d at 1320; *In re Jones*, 530 F.3d at 1291-92; *Tidewater*, 531 F.3d at 314-15.

¹¹³ The result of this case will be discussed in more detail in Part VII, *infra*.

versals in direct appeals indicate that courts are using § 158(d)(2) as Congress intended—namely, when there is uncertainty in the law. Rather than simply affirming the bankruptcy courts' decisions, the circuit courts are discovering that they must correct the lower courts' misapplications of difficult areas of bankruptcy law to establish the proper binding precedent.

The courts of appeals declined to hear matters certified for direct appeal by a lower court nineteen times, in comparison to granting the direct appeal on sixty-two occasions.¹¹⁴ In only a few instances did the court reject an appeal because the matter was within the purview of the lower courts or because the matter failed to meet the statutory requirements.¹¹⁵ This practice suggests that, despite their discretion to deny the appeal for any reason, the circuit courts are finding that the majority of matters that the lower courts choose to certify are worthy of review.¹¹⁶ In two of those instances, the circuit court denied the direct appeal because the parties failed to file a timely notice of appeal as required by Bankruptcy Rule 8001(f)(1).¹¹⁷ In a third case, the court of appeals found that it could not exercise jurisdiction because

¹¹⁴ Bartell, *supra* note 11, at 161. "In only nineteen of those cases did the court of appeals reject the petition on the merits, and in one of those nineteen the reason for the rejection was that the issue that was the subject of the certified case had just been decided by the circuit court in another direct appeal." *Id.* at 164-65.

¹¹⁵ See, e.g., *W. Aircraft, Inc. v. Lisowski (In re Silver State Helicopters, LLC)*, 566 F.3d 1177, 1177 (9th Cir. 2009) (denying the appeal because the "order at issue is fully within the discretion of the bankruptcy court, and resolution of the underlying issue . . . is unlikely to have a substantial impact on the ongoing proceedings"); *In re Davis*, 512 F.3d 856, 858 (6th Cir. 2008) ("In this case, material advancement is not a factor to be considered. Further, the extent of the conflict is unclear."); *Weber v. U.S. Tr.*, 484 F.3d 154, 161-62 (2d Cir. 2007) ("In sum, we think that prior consideration by the district court would be beneficial and there is no compelling reason for this court to address the issue in the first instance.").

¹¹⁶ However, this accounting does not reflect instances where the lower court denied certification on issues that arguably deserved direct review.

¹¹⁷ Failure to file a timely notice of appeal was an issue both times the First Circuit addressed the matter in *In re Weaver*. See *Weaver v. Harmon Law Offices, P.C. (In re Weaver)*, 319 F. App'x 1, 2 n.3 (1st Cir. 2009) (stating that among "[t]he problems identified in the order to show cause [was] the defendant's failure to file a timely petition for leave to take a direct appeal in this court as required by Fed. R. Bankr. P. 8001(f)(5)"); *Weaver v. Harmon Law Offices, P.C. (In re Weaver)*, 542 F.3d 257, 258 (1st Cir. 2008) (rejecting a direct appeal because plaintiff failed to file a timely notice of appeal as required by Bankruptcy Rule 8001(f)(1)). Although the Sixth Circuit was also concerned by a failure to file a timely notice of appeal, the court did not decide the issue because it found the case did not warrant a direct appeal on its merits. See *In re Davis*, 512 F.3d at 858 ("[T]he extent of the conflict is unclear.").

§ 158(d)(2) did not apply retroactively.¹¹⁸ In another, the court of appeals found that it could not hear the direct appeal because the matter was moot.¹¹⁹

B. *Treatment of § 158(d)(2) Procedure by the Circuit Courts of Appeals*

As discussed above, the courts of appeals have denied direct appeals when parties failed to file a timely notice of appeal as required by Bankruptcy Rule 8001(f)(1).¹²⁰ However, when possible, the courts of appeals have treated other procedural errors as “technical” in order to exercise review over the direct appeal. Indeed, in the three instances discussed below, courts were inclined to adjudicate unresolved questions of law notwithstanding procedural errors. These cases suggest that the courts have largely embraced Congress’s aim and are willing to use their discretion to create a predictable body of precedent in bankruptcy law.

For instance, in *In re Turner*, the bankruptcy court clerk filed the certification order, the trustee’s request for certification, and a short record in the court of appeals. According to Rule 5 of the Federal Rules of Appellate Procedure, however, the *parties* should have filed the notice of appeal.¹²¹ Judge Posner of the Seventh Circuit, writing for the majority, argued that the material transmitted by the bankruptcy court clerk included everything that a petition for review from the parties would have contained.¹²² Because the error was technical in nature, Judge Posner maintained that under a theory of “functional

¹¹⁸ See *In re McKinney*, 457 F.3d 623, 624 (7th Cir. 2006) (“The Act provides, with immaterial exceptions, that it ‘shall not apply with respect to cases commenced under title 11, United States Code, before the effective date of this Act.’” (quoting 28 U.S.C. § 1501(b)(1) (2006))).

¹¹⁹ See *Salazar v. Heitkamp*, 193 F. App’x 281, 282 (5th Cir. 2006) (“Treating Petitioners’ notice as a request for permission to appeal under Fed. R. App. P. 5(a)(1) . . . we conclude that their appeal would be moot and deny permission.”).

¹²⁰ See *supra* notes 117-19 and accompanying text (detailing cases in which courts have denied direct appeals due to procedural failings). Note that Rule 2 of the Federal Rules of Appellate Procedure allows the court of appeals—“to expedite its decision or for other good cause”—to “suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).” FED. R. APP. P. 2. Rule 26(b) of the Federal Rules of Appellate Procedure exempts issues of time limits from this grant of discretion. FED. R. APP. P. 26(b).

¹²¹ See *In re Turner*, 574 F.3d 349, 352 (7th Cir. 2009) (finding that although a request for certification should generally be filed by the appellant, it was permissible for the clerk of the bankruptcy court to transmit the petition).

¹²² See *id.* (“No purpose behind the statutory requirements for perfecting a direct appeal to the court of appeals in a bankruptcy case was disserved.”).

equivalence” the court of appeals could proceed with the case.¹²³ This tactic was similar to the one the Ninth Circuit adopted in *Blausey v. United States Trustee*.¹²⁴ *Blausey* and *In re Turner* are distinguishable from the *In re Weaver* cases (where failure to file a timely notice of appeal was regarded as material) because in *In re Weaver*, the First Circuit received either nothing from the parties or only the certification order from the district court.¹²⁵

Similarly, the Fifth Circuit held that failure to obtain certification from the proper court was “technical in nature” and thus did not prevent the direct appeal from moving forward in the court of appeals.¹²⁶ Because the district court granted certification before the matter was docketed in that court, the case was still “pending” in the bankruptcy court, which should have issued certification according to Interim Bankruptcy Rule 8001(f)(2).¹²⁷ However, because both courts indicated that they wished to certify the direct appeal, and because the error “[did] not affect the substantial rights of the parties,” the Fifth Circuit allowed the matter to proceed.¹²⁸

¹²³ See *id.* at 352-53 (citing the test the Supreme Court established in *Torres v. Oakl- and Scavenger Co.*, 487 U.S. 312, 316-17 (1988)).

¹²⁴ 552 F.3d 1124 (9th Cir. 2009). As in *In re Turner*, the parties failed to file a petition for review, but the certification order and the record mistakenly transmitted by the bankruptcy court clerk were deemed to be acceptable. See *id.* (agreeing to exercise jurisdiction over the direct appeal in part because the courts were involved in the “posture that created the procedural ambiguity”). Reviewing *Blausey*, Judge Posner argued: “[I]t would be pointless to create a circuit split over so transitory, so ephemeral, an issue, and to do so in attempted vindication of a harsh rule that has no basis in any case, or in practical need, or no consideration of justice or efficiency.” *In re Turner*, 574 F.3d at 354. Both cases, however, included a dissent that argued that the failure was jurisdictional. *Id.* at 356 (Van Bokkelen, J., dissenting); *Blausey*, 552 F.3d at 1134 (Gorsuch, J., dissenting).

¹²⁵ When the First Circuit addressed the matter in *In re Weaver* for the first time, the appellants unsuccessfully argued that the certification order should constitute a timely notice of appeal. *Weaver v. Harmon Law Offices, P.C. (In re Weaver)*, 542 F.3d 257, 257 n.1 (1st Cir. 2008). The second time, the parties applied for direct appeal but were simply too late. *Weaver v. Harmon Law Offices, P.C. (In re Weaver)*, 19 F. App’x 1, 2 (1st Cir. 2009). As mentioned previously, failure to file a timely appeal was also a problem in *In re Davis*, but the Sixth Circuit ultimately decided against the direct appeal on its merits. See *supra* note 117 (discussing the court’s decision to deny review).

¹²⁶ See *Ad Hoc Grp. of Timber Noteholders v. Pac. Lumber Co. (In re Scotia Pac. Co.)*, 508 F.3d 214, 220 (5th Cir. 2007) (“[T]his error is technical in nature, does not affect the substantial rights of the parties, and prompts us to exercise our discretion in favor of proceeding to the merits of this appeal.”).

¹²⁷ *Id.* at 219.

¹²⁸ *Id.* at 220.

C. The Success of § 158(d)(2)

As discussed in Part II, Congress's two motivating objectives behind passing § 158(d)(2) were (1) to create binding precedents in bankruptcy law and (2) to create a faster, less costly mechanism for bankruptcy appeals. According to Professor Bartell's recent study of the case law, both goals have been achieved.¹²⁹

First, final decisions by the circuit courts of appeals—which are easier to reach upon direct appeal—have resolved many of the thorniest issues in bankruptcy law and created binding precedent. After reviewing each area of the law that has been examined on direct appeal, Bartell noted that “[n]ot only did the direct appeals . . . provide a single, definitive rule applicable throughout the circuits where the appeals took place, but they also provided thoughtful opinions that could be considered by courts in other circuits where no uniform rule had been established.”¹³⁰ Direct appeals have also accelerated matters so that some of the most difficult issues in bankruptcy law may come “before the highest court in the land.”¹³¹

Second, after comparing the median time for two-tiered bankruptcy appeals against direct appeals, it is apparent “that § 158(d)(2) has been effective at shaving months off the appeal process for direct bankruptcy appeals.”¹³² According to Professor Bartell's study,

direct appeals of bankruptcy cases are generally resolved in the circuit court more quickly than the median time for all bankruptcy appeals to the circuit court, and are always resolved more quickly than the time that would have been necessary for both an appeal to the district court or BAP and an appeal to the circuit court . . .¹³³

¹²⁹ Bartell, *supra* note 11, at 207-08 (concluding that § 158(d)(2) is “significantly reducing the time necessary to obtain a final determination on appeal from the circuit court” and is “proving effective at providing a definitive resolution of issues of law”).

¹³⁰ *Id.* at 189.

¹³¹ *Id.* at 196. For example, on the matter of disposable income, direct appeals created a circuit conflict that “was highlighted in the petition for writ of certiorari in *Hamilton v. Lanning*.” *Id.* (citing Petition for Writ of Certiorari, *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010) (No. 08-0998)). The petition noted that the Eighth and Tenth Circuits interpreted “disposable income” as discussed in section 1325(b)(1)(B) of BAPCPA in a manner that “directly” conflicted with the Ninth Circuit. Petition for Writ of Certiorari, *supra*, at 8. Subsequent to the publication of Professor Bartell's study, the Supreme Court decided *Hamilton v. Lanning* and held that courts “may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.” *Hamilton*, 130 S. Ct. at 2478.

¹³² Bartell, *supra* note 11, at 184.

¹³³ *Id.*

These findings, however, do not resolve the inherent tension between speed and the right to review in bankruptcy appellate law. While direct appeals are generally faster than the traditional two-tiered appellate structure, in individual cases even the two-tiered structure may move too quickly to provide an opportunity for adequate review. Therefore, when a matter has been certified for direct appeal, it is critical that the court of appeals also consider whether a stay should be granted to prevent the issue at hand from becoming moot. This is the focus of Part VI.

VI. THE ROLE OF THE LOWER COURTS: THE IMPACT OF STAYS AND THE DOCTRINE OF EQUITABLE MOOTNESS

The existing case law suggests that when a lower court chooses to certify a direct appeal, the circuit courts have found the matter to be worthy of review by a court that can create binding precedent. However, due to the current construction of § 158(d)(2), this review does not always occur. If the lower court grants certification for direct appeal but rejects the motion for a stay pending that appeal, the matter may become moot before it reaches the circuit court. This outcome not only denies the individual appellant the opportunity for review by an Article III court,¹³⁴ but also undermines Congress's intent to create predictable precedent in bankruptcy law.

As mentioned previously, the lower courts do not have the same discretion to grant a certification for direct appeal under § 158(d)(2) as courts of appeals have to grant the appeal.¹³⁵ If a request meets any of the statutory requirements or if a majority of both parties petition for certification, the lower court "shall" grant certification for direct appeal.¹³⁶ The lower courts do, however, have the discretion to either

¹³⁴ The equitable mootness doctrine

represents a type of "judicial anomaly" in that it allows appellate courts to avoid their obligation to exercise the jurisdiction granted by Article III. This constitutes a radical concept because . . . a party takes no action whatsoever to relinquish a right to adjudication of her claim. Instead, a court voluntarily refrains from adjudicating the rights of the parties to the appeal solely due to the implications of its decision on the rights of third parties.

Murphy, *supra* note 12, at 45.

¹³⁵ See *supra* notes 58-61 and accompanying text (noting that the district court must certify an appeal if one of the statutory requirements of § 158(d)(2)(A)(i)-(iii) is met).

¹³⁶ 28 U.S.C. § 158(d)(2)(B) (2006). However, this is not meant to suggest that the lower courts must grant all requests for certification. It is still within the authority of the court to determine whether any of the three statutory requirements exist; if not, it will deny the certification. It should also be noted that if a one of the lower courts

grant or deny a stay pending appeal under § 158(d)(2)(D).¹³⁷ While this provision also allows the courts of appeals to grant a stay, parties must request a stay from the bankruptcy judge first pursuant to Bankruptcy Rule 8005.¹³⁸ In most instances where a lower court is asked to consider both a certification for direct appeal and a stay pending that appeal, the answer will be the same: either both will be granted¹³⁹ or both will be denied.¹⁴⁰ This result is logical, since a matter worthy of direct certification would also likely merit a stay pending appeal.¹⁴¹ However, this result does not always occur; in *In re Pacific Lumber Co.*, “[n]either the bankruptcy court nor a [Fifth Circuit] motions panel . . . stayed plan confirmation pending appeal.”¹⁴²

(for instance, the bankruptcy court) denies the request, the party may still request certification from the district court or the BAP. See, e.g., *Berman v. Kessler* (*In re Berman*), Nos. 04-45436, 05-42285, 2007 WL 43973, at *2 (Bankr. D. Mass. Jan. 5, 2007) (“The Bankruptcy Court is not the final gatekeeper of this direct appeal process. On its face Section 158(d)(2) does not prohibit a party to a properly filed appeal from seeking certification from the Bankruptcy Appellate Panel or the District Court.”).

¹³⁷ 28 U.S.C. § 1292(b) also allows the district court to choose whether to stay the proceedings.

¹³⁸ See FED. R. BANKR. P. 8005 (“A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.”).

¹³⁹ See, e.g., *In re Amaravathi Ltd. P’ship*, Bankr. No. 09-32754, Civ. No. 09-1908, 2009 WL 2342749, at *1 (S.D. Tex. July 29, 2009) (granting a stay pending appeal, on its own motion, after certifying a party’s request for direct appeal); *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 368 (Bankr. S.D.N.Y. 2008) (“[O]n its own motion, the Court stays its decision so that the parties will have an opportunity to appeal. If the parties desire, the Court will include in an order a certificate supporting an immediate appeal to the Court of Appeals.”).

¹⁴⁰ If a matter is not certified for direct appeal, there is no need for a stay. See, e.g., *Am. Home Mortg. Inv. Corp. v. Lehman Bros. Inc.* (*In re Am. Home Mortg. Invest. Corp.*), 408 B.R. 42, 44-45 (D. Del. 2009) (denying the stay pending appeal and the certification for direct appeal); *In re Marrama*, 345 B.R. 458, 460 (Bankr. D. Mass. 2006) (denying both the stay and request for direct appeal); *In re Waczewski*, No. 06-00620, 2006 WL 1594141, at *5-6 (Bankr. M.D. Fla. May 5, 2006) (denying the stay and the certification for direct appeal because § 158(d)(2) does not apply retroactively).

¹⁴¹ When asked about § 158(d)(2)(D), Stephanie Freeman, a staff attorney on the Tenth Circuit BAP, remarked that she “[did not] see why [the] lower court would deny the stay.” Interview with Stephanie Freeman, *supra* note 53. She explained that if a motion was certified for a direct appeal it would likely be granted a stay pending appeal. In her opinion, a certification without a stay is unlikely (“[it] probably wouldn’t happen that way”). *Id.* However, *In re Pacific Lumber Co.* is evidence that this can and does occur.

¹⁴² *Bank of N.Y. Trust Co. v. Official Unsecured Creditors’ Comm.* (*In re Pac. Lumber Co.*), 584 F. 3d 229, 236 (5th Cir. 2009); see also *infra* notes 186-96 and accompanying text (detailing the procedural posture that led to this result). Following *In re Pacific Lumber Co.*, the Fifth Circuit again confronted the situation where a Bankruptcy Court certified the direct appeal without staying the final confirmation order.

Although no scholar has discussed it at length, a few have briefly expressed concern that the discretion to deny motions for stays pending appeals may undermine the intent of § 158(d)(2) to bring certainty to the bankruptcy field. In their article on the standards governing stays, Richard Kanowitz and Michael Klein highlighted that “[t]he delay inherent in prosecuting appeals of bankruptcy court orders . . . may render [direct appeals under § 158(d)(2)] meaningless where the activity or action authorized by the order appealed from has not been stayed pending appeal.”¹⁴³ Another scholar, George Kuney, was even more cynical:

Perhaps [direct appeals] will have the beneficial effect of speeding resolution of questions of law on a circuit-wide basis. However, they miss the point entirely in terms of most use, sale, or lease; financing; or plan confirmation orders where a quick cell phone call from the courthouse—‘the order has been entered’—triggers a closing or loan funding—‘pull the trigger’—that itself moots the appeal of the order, authorizing the transaction. Give any good lawyer a tool like that and she will use it.¹⁴⁴

Thus, a tension between § 158(d)(2) and Article III arises when a lower court can certify a motion for direct appeal to the court of appeals (likely on a “controlling” issue of law or to resolve a conflict amongst the courts) *and at the same time* deny a motion to grant a stay pending appeal. As a result, the case could move forward despite the lower court’s acknowledgment that at least one matter deserves review by a court that can create binding precedent.¹⁴⁵ Of course, this would not be a problem if the issue truly were a discrete matter that did not affect any other part of the case.¹⁴⁶ However, the possibility remains that if the case moves forward, further appeals may be moot. This out-

See Schaefer v. Superior Offshore Int’l, Inc. (*In re* Superior Offshore Int’l, Inc.), 591 F.3d 350, 353 (5th Cir. 2010). The Court, in another opinion by Chief Judge Jones, quickly determined that the equitable mootness doctrine did not bar review, applying the standard put forth in *In re Pacific Lumber Co.* of “whether the court can fashion effective relief without interfering with the finality of a confirmed plan.” *Id.* (citing *In re Pac. Lumber*, 584 F.3d at 240).

¹⁴³ Richard S. Kanowitz & Michael A. Klein, *The Divergent Interpretation of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders*, 17 NORTON J. BANKR. L. & PRAC. 557, 557 (2008).

¹⁴⁴ George W. Kuney, *Slipping into Mootness*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 267, 280 (William L. Norton, Jr. ed., 2007).

¹⁴⁵ Because the parties must bring motions for stays, this result could also occur if a lawyer was not astute enough to file a petition for a stay pending appeal simultaneously with the request for certification for direct appeal. However, the lower court could still grant the stay on its own accord.

¹⁴⁶ *See supra* note 91 (recognizing that various steps of the bankruptcy process are “distinct and conclusive”).

come would not only deny the court of appeals an opportunity to adjudicate but would also prevent the appealing party from having its matter reviewed by an Article III court.¹⁴⁷

The problem created by stays, mootness, and direct appeals is one inherent in almost all bankruptcy procedure: balancing fairness and the right of review (especially by an Article III court) against the urgency of the proceedings. As Stephanie Freeman, an attorney at the Tenth Circuit BAP, remarked, the “point of bankruptcy is [that] it is speedy.”¹⁴⁸ Therefore, the opportunity to deny stays is also necessary to ensure that the case continues to move forward and that the rights of the other parties, those not requesting the direct appeal, are respected.¹⁴⁹ It is central to bankruptcy that parties can rely on final orders so that they may continue with their business.¹⁵⁰ However, procedures meant to address the urgency of the proceedings are often in direct conflict with the right to review and may undermine the long-term intent of Congress to bring certainty to the bankruptcy field.

A. *The Doctrine of Equitable Mootness and the Impact on Direct Appeals*

Failure to grant a stay pending appeal may undercut the aim of § 158(d)(2) because of the doctrine of equitable mootness.¹⁵¹ The

¹⁴⁷ See Knight, *supra* note 18, at 265 (characterizing the improper denial of review by an Article III court as undermining the legitimacy of bankruptcy appeals); cf. Crabb, *supra* note 15, at 138 (“Even in the earliest days of the colonies, when American courts combined administrative, legislative and judicial functions, the right to appeal was a central feature.”).

¹⁴⁸ Interview with Stephanie Freeman, *supra* note 53.

¹⁴⁹ See KNIBB, *supra* note 16, § 14.5, at 355 (“If proceedings in the bankruptcy courts had to stop during every appeal, the process would take years to complete.”).

¹⁵⁰ See Patrick M. Birney, *Bankruptcy Rule 9024: Paper Tiger or Powerful Procedural Tool When Stacked Against the Bankruptcy Code*, 18 NORTON J. BANKR. L. & PRAC. 363, 365 (2009) (“A primary theme within our current bankruptcy system is the significant importance of finality in orders and judgments.” (footnote omitted)).

¹⁵¹ Three types of mootness are relevant in the bankruptcy context: constitutional mootness, equitable mootness, and statutory mootness. Equitable mootness, which is the focus of this Comment, is broader than constitutional mootness but narrower than statutory mootness (which applies under 11 U.S.C. § 363(m) to good-faith purchasers). It is more likely that a court will confront equitable mootness on direct appeal; for example, this was the doctrine that was discussed in detail in *In re Pacific Lumber Co.* See *infra* notes 162-80 and accompanying text. Constitutional mootness prevents an Article III court from issuing an advisory opinion. According to this doctrine, litigants must have a stake in the outcome during the entire case. To prevent a matter from being constitutionally moot, it must “(1) present a real legal controversy, (2) genuinely affect an individual, and (3) have sufficiently adverse parties.” Kunej, *supra* note 144, at 268. Equitable mootness is a broader doctrine that reflects an unwillingness (not an inability) to grant an alternative outcome because it would be inequitable. *Id.* at 269.

doctrine of equitable mootness, like other aspects of bankruptcy, embodies the tensions inherent in this area of the law:

Refusing to address the merits of an appeal based on equitable mootness deprives a party from an adjudication of its rights where jurisdiction is constitutionally proper; whereas disregarding equitable mootness can allow the appeal of one interested party to clog the entire bankruptcy process thereby impeding the debtor's emergence and potentially affecting the interest of thousands of stakeholders.¹⁵²

Thus, by refusing to grant a stay pending a direct appeal, it is likely that the lower court is exhibiting a preference for expediting the litigation, potentially at the expense of ensuring meaningful review.

The doctrine of equitable mootness usually applies only when a party appeals a final bankruptcy order or judgment.¹⁵³ According to the doctrine, if actions take place during the appeal that preclude the court from providing the party with the requested relief, the appeal is moot.¹⁵⁴ The doctrine recognizes that if parties move forward (for example, with a reorganization), it would be inequitable to reverse the transaction, especially if this would affect third parties (for example, after the sale of a property).¹⁵⁵ However, if an appeal is moot, thus preventing the district court or the court of appeals (on direct appeal) from hearing the matter, the party will not have the opportunity to have its objection reviewed by an Article III court.¹⁵⁶ Therefore, failure to stay proceedings pending appeal effectively allows determinations by the bankruptcy court, an Article I court, to escape not only Article III review, but also any review whatsoever.¹⁵⁷

¹⁵² Murphy, *supra* note 12, at 45.

¹⁵³ Birney, *supra* note 150, at 366.

¹⁵⁴ *Id.*

¹⁵⁵ See Corrine Ball, *Appeals of Confirmation Orders and the Doctrine of Equitable Mootness* (recognizing that the doctrine is rooted in “the equitable principles that underlie almost every aspect of the bankruptcy code”), in 1 30TH ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY & REORGANIZATION 83, 91 (PLI Commercial Law & Practice, Course Handbook Ser. No. A-905, 2008); see also Daniel J. Artz, *Equitable Mootness in Bankruptcy Appeals: A Constitutionally Questionable Doctrine*, LAWTOPIC.ORG (Nov. 22, 2006), <http://www.lawtopic.org/article.cfm?ID=243> (noting that the doctrine of equitable mootness “can also be applied . . . when the settlement impacts objecting third-parties’ rights”).

¹⁵⁶ See *Manges v. Seattle-First Nat’l Bank* (*In re Manges*), 29 F.3d 1034, 1038-39 (5th Cir. 1994) (“[M]ootness’ is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions.”).

¹⁵⁷ See Murphy, *supra* note 12, at 45-46 (expressing concern that equitable mootness can extinguish a party’s right to appellate review); Knight, *supra* note 18, at 265 (explaining the manner in which equitable mootness can preclude review). Then-Judge

Though the doctrine is “widely recognized and accepted,”¹⁵⁸ there is still debate as to when equitable mootness should apply.¹⁵⁹ The “lack of uniformity” on this question across the circuits means that a party may be “deprived of an opportunity to have a court . . . even reach the merits of an appeal based largely on the location in which the case is filed.”¹⁶⁰ The Fourth Circuit adopted a four-factor “totality of circumstances” test:

- (1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated;¹⁶¹ (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other

Alito, while sitting on the Third Circuit Court of Appeals, wrote a dissenting opinion in *In re Continental Airlines* describing equitable mootness as “permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief.” 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting).

¹⁵⁸ *In re Cont'l Airlines*, 91 F.3d at 559 (majority opinion). In a footnote, the majority stated that because the doctrine is “well accepted, there is little discussion in the case law of its historical basis.” *Id.* at 558 n.1.

¹⁵⁹ See Ball, *supra* note 155, at 91 (“Although all circuits currently recognize the doctrine of equitable mootness, the tests . . . to determine the doctrine’s applicability vary.”).

¹⁶⁰ Murphy, *supra* note 12, at 46.

¹⁶¹ “Substantially consummated” is defined in § 1101(2) of the Bankruptcy Code as

(A) [a] transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) [an] assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) [the] commencement of distribution under the plan.

11 U.S.C. § 1101(2) (2006). Although substantial consummation may be the “primary factor,” “[it] is still only a factor and is not dispositive of whether the court will consider the case equitably moot.” Kuney, *supra* note 144, at 270.

According to the Second Circuit, the substantial-consummation factor will not make an appeal moot if

- (a) the court can still order some effective relief, (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity, (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court, (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings, and (e) the appellant pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Frito-Lay, Inc. v. LTV Steel Co. (*In re Chateaugay Corp.*), 10 F.3d 944, 952-53 (2d Cir. 1993) (alterations in original) (citations omitted) (internal quotation marks omitted).

equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties.¹⁶²

The Fifth and Sixth Circuits combine the third and fourth factors, creating a three-part test.¹⁶³ The Third Circuit, which has maintained that the doctrine “is limited in scope and should be cautiously applied,”¹⁶⁴ includes a fifth factor: “the public policy of affording finality to bankruptcy judgments.”¹⁶⁵ This addition is critical, as it will “most often militate toward a finding of equitable mootness, especially in larger and public company bankruptcies that affect the interests of many third parties.”¹⁶⁶

Although the differences in the tests are slight, the practical application of equitable mootness still creates uncertainty. As courts may fashion partial relief, it can be difficult to tell when mootness will occur. For instance, while confirmation of a reorganization plan is typically considered final, a party may be released from liability if doing so would not upset the rest of the plan.¹⁶⁷ The ambiguity surrounding when equitable mootness should apply affects direct appeals and undermines Congress’s intent in instituting § 158(d)(2). Although a wise lawyer would request a stay when filing for certification of direct appeal, failure to do so (because of the uncertainty of mootness) may prevent the court of appeals from hearing the merits of the case (and thus resolving a matter deemed to require clarification by the lower court). In addition, the lower court could also simply deny the stay pending appeal, regardless of the threat of mootness.¹⁶⁸

B. *The Power of the Lower Courts: To Grant or Deny a Stay*

Like so much in bankruptcy, there is uncertainty regarding the application of stays as well: “Although the factors considered by courts in determining a stay pending appeal are fairly well-established,

¹⁶² *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002).

¹⁶³ See *Kuney*, *supra* note 144, at 269-70 (citing *In re Am. HomePatient, Inc.*, 420 F.3d 559, 563 (6th Cir. 2005), and *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994)) (analyzing the tests that the Fifth and Sixth Circuits adopted).

¹⁶⁴ *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 185 (3d Cir. 2001) (quoting *In re PWS Holding*, 228 F.3d 224, 236 (3d Cir. 2000)).

¹⁶⁵ *Id.*

¹⁶⁶ *Kuney*, *supra* note 144, at 270.

¹⁶⁷ *Id.*

¹⁶⁸ See *supra* note 63 and accompanying text (noting that lower courts are given this authority expressly by statute).

the application of those factors is far from uniform.”¹⁶⁹ Stays are also often critical for review,¹⁷⁰ which in turn is necessary to establish a predictable body of precedent.

Bankruptcy Rule 8005 governs stays pending appeal.¹⁷¹ Although Rule 8005 requires that the request be made in the bankruptcy court first, it contains little guidance for what a party must do to receive a stay.¹⁷² Instead, courts have turned to the standard for granting preliminary injunction motions and to Rule 8 of the Federal Rules of Appellate Procedure, which governs stays of district court orders by circuit courts.¹⁷³ In general, courts analyze the following factors: (1) whether the movant is likely to succeed on appeal; (2) whether there is a risk to the movant of irreparable injury if a stay is denied; (3) whether (and to what extent) the other party will be harmed if a stay is granted; and (4) any public interest considerations.¹⁷⁴ However, there is substantial disagreement about how these factors should be weighed, or if stays should only be granted if all four requirements are met.¹⁷⁵

In the context of § 158(d)(2), a strong argument could be made that a stay should be issued. For direct appeals, it would be difficult to determine whether the movant would succeed on the appeal, as required by the first factor. As noted earlier, courts of appeals usually authorize direct appeals to resolve uncertainty. On direct appeal, reversals are more likely;¹⁷⁶ therefore, lower courts may have more difficulty estimating the movant’s likelihood of success on the merits. Because review by the court of appeals is essential to the long-term aims of § 158(d)(2), one could also argue that creating certainty in the bankruptcy field is encompassed by the public interest factor.

The second and third factors again highlight the tension in bankruptcy appeals between the desire of one party to proceed quickly and the desire of others for review by an Article III court. Note, however, that the threat of equitable mootness, according to some courts, con-

¹⁶⁹ Kanowitz & Klein, *supra* note 143, at 557-58.

¹⁷⁰ *See id.* at 557 (“[T]he viability of appellate review of bankruptcy court orders is usually dependent upon the entry of a stay that preserves the status quo during the pendency of the appellate process.”).

¹⁷¹ FED. R. BANKR. P. 8005.

¹⁷² *See* Kanowitz & Klein, *supra* note 143, at 558 (stating that Rule 8005 does not “set forth the standard that a party must satisfy to obtain a stay pending appeal”).

¹⁷³ *See id.* (describing the tests from which various courts have drawn).

¹⁷⁴ *Id.* at 559.

¹⁷⁵ *See id.* at 559-63 (summarizing the different approaches used by courts).

¹⁷⁶ *See supra* notes 109-12 and accompanying text (explaining that there is a high rate of reversal on direct appeal).

stitutes an “irreparable injury” as mentioned in the second factor.¹⁷⁷ While the interaction between equitable mootness and irreparable harm is a matter of some debate (and admittedly, the majority of courts have determined mootness alone is not sufficient),¹⁷⁸ one court recently found that “[t]he strong possibility of mootness based on substantial consummation of a bankruptcy plan means that absent a stay . . . many bankruptcy court confirmation orders will be immunized from appellate review *even if* the remaining stay factors are satisfied.”¹⁷⁹ Though fair treatment of other parties may still suggest that the court deny a stay, this must be weighed against the benefits of guaranteeing that a matter, especially one worthy of certification for direct review, reach a court that is capable of crafting binding precedent.

The *Griggs* rule does not remedy the problem. In 1982, the Supreme Court determined in *Griggs v. Provident Consumer Discount Co.* that “[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”¹⁸⁰ Though courts have determined that *Griggs* applies to bankruptcy,¹⁸¹ it does not prevent a case from moving forward to the point where a decision by an appellate court could be “inequitable.” For instance, a reorganization plan like the one present in *In re Chrysler* is a final order that does not invoke the *Griggs* rule.¹⁸² The

¹⁷⁷ See, e.g., ACC Bondholder Grp. v. Adelpia Commc’ns Corp. (*In re Adelpia Commc’ns Corp.*), 361 B.R. 337, 348 (S.D.N.Y. 2007) (“[W]here the denial of a stay pending appeal risks moot[ing] any appeal of *significant* claims of error, the irreparable harm requirement is satisfied.”).

¹⁷⁸ See Kanowitz & Klein, *supra* note 143, at 561 (“A majority of courts have ruled that merely invoking equitable mootness is not sufficient to demonstrate irreparable harm.”); see also Ball, *supra* note 155, at 95 (“Courts often grapple with the interplay of the doctrine of equitable mootness and the irreparable harm element of a stay analysis. Both doctrines are seemingly intertwined, making definitive resolution of either difficult.”).

¹⁷⁹ *In re Adelpia Commc’ns*, 361 B.R. at 349 (emphasis added).

¹⁸⁰ 459 U.S. 56, 58 (1982); see also Catherine Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 NOTRE DAME L. REV. 2053, 2054 (2009) (discussing the application of the *Griggs* rule and the appropriate role of the district court after a notice of appeal has been filed).

¹⁸¹ See, e.g., Tex. Comptroller of Pub. Accounts v. Transtexas Gas Corp. (*In re Transtexas Gas Corp.*), 303 F.3d 571, 579 (5th Cir. 2002) (stating that the *Griggs* rule “applies with equal force to bankruptcy cases”); Neary v. Padilla (*In re Padilla*), 222 F.3d 1184, 1190 (9th Cir. 2000) (“[T]he Trustee’s timely filing of its notice of appeal of the BAP’s decision to this court conferred jurisdiction on this court and divested both the BAP and the bankruptcy court of control over those aspects of the case involved in the appeal.”).

¹⁸² Cf. *In re Padilla*, 222 F.3d at 1190 (“[T]he trial court . . . retains jurisdiction to implement or enforce the judgment or order . . .”). Note that postconfirmation ap-

lower court, in deciding the matter, has already completed all of its tasks and thus does not need to be “divested” of the right to act; the parties are still allowed to move forward with the plan. By proceeding with the plan, one party may effectively moot the right of the other to request review by the court of appeals, thus undermining an opportunity to create precedent. This was the subject of a recent court of appeals decision, *In re Pacific Lumber Co.*¹⁸³

VII. CASE STUDY: *IN RE PACIFIC LUMBER CO.*

In re Pacific Lumber Co. presents one example in which a lower court certified a matter for direct appeal while denying the party’s related motion for a stay pending that appeal.¹⁸⁴ As such, it provides useful insights regarding the interaction between direct appeals and the equitable mootness doctrine. While the Fifth Circuit was able to narrowly tailor the equitable mootness doctrine to review some (but not all) of the matters on direct appeal, this case highlights the potential threat to direct review by the courts of appeals, thus undermining the initial objectives of § 158(d)(2). *In re Pacific Lumber Co.* also highlights that this situation likely will arise again, and thus decision-makers should consider it as they craft the next set of rules to govern § 158(d)(2).¹⁸⁵

In re Pacific Lumber Co. concerned a Chapter 11 reorganization plan for two timber companies in Northern California.¹⁸⁶ After considering various proposals from the parties, the bankruptcy court confirmed a plan offered by Mendocino Redwood Company (MRC) and Marathon Structured Finance Fund (Marathon). The plan allowed operations to continue under new ownership.¹⁸⁷ The Bank of New York Trust Company, as the “Indenture Trustee” representing secured bondholders, filed a request for certification for direct appeal and a motion to stay the confirmation plan pending appeal.¹⁸⁸ Although the

peals are “the context in which the doctrine [of equitable mootness] most often arises.” Murphy, *supra* note 12, at 38.

¹⁸³ 584 F.3d 229 (5th Cir. 2009).

¹⁸⁴ *Id.* at 229-30.

¹⁸⁵ In fact, the issue has already arisen again in the Fifth Circuit. See *supra* note 142 (discussing *In re Superior Offshore Int’l, Inc.*, 591 F.3d 350 (5th Cir. 2010)).

¹⁸⁶ *In re Pac. Lumber*, 584 F.3d at 229.

¹⁸⁷ *Id.* at 237.

¹⁸⁸ *Id.* at 239. “The Indenture Trustee asserted on appeal contentions of three types: those challenging the treatment of their security interests; those challenging the plea confirmation procedures; and those relating to other specific plan terms.” *Id.*

bankruptcy court granted the request for a direct appeal, it refused to issue the stay.¹⁸⁹ Instead, the bankruptcy court granted the Bank of New York a ten-day stay to request relief from the Fifth Circuit Court of Appeals.¹⁹⁰ The motions panel of the circuit court also denied the stay pending appeal.¹⁹¹ As a result, within sixty days (the time allowed to request a certification for direct appeal), the two timber companies were dissolved and their assets transferred to new entities.¹⁹²

By the time the matter reached the court of appeals,¹⁹³ the Fifth Circuit was forced to consider whether the doctrine of equitable mootness prevented it from hearing the appeal. In its analysis, the court was careful to assess the impact of § 158(d)(2), as well as Congress's intent for that provision.¹⁹⁴ The Fifth Circuit warned that "Congress's purpose may be thwarted if equitable mootness is used to deprive the appellate court of jurisdiction over a properly certified appeal."¹⁹⁵ Although the bankruptcy court's actions (certifying the direct appeal without granting the stay pending appeal) appeared inconsistent, the court of appeals recognized that the lower court was merely trying to balance two often incompatible aims—preserving the right to review while also hastening a proceeding towards its final conclusion.¹⁹⁶ Still, the court ultimately suggested that review by the court of appeals and the opportunity to create meaningful precedent should have been prioritized:

Although the exigencies of the case appeared to demand prompt action, simply denying a stay seems to have been, and often will be, too simplistic a response. A plan may be designed to take effect . . . after a lapse of sufficient time to initiate appellate review. A supersedeas bond may be tailored to the scope of the appeal. An appeal may be expedited. As with all facets of bankruptcy practice, myriad possibilities exist. Thus, substantial legal issues can and ought to be preserved for review.¹⁹⁷

¹⁸⁹ *Id.*

¹⁹⁰ *In re Scotia Dev., LLC*, 2008 WL 2811479, at *1 (S.D. Tex. July 21, 2008).

¹⁹¹ *In re Pac. Lumber*, 584 F.3d at 239.

¹⁹² *Id.* at 242.

¹⁹³ Chief Judge Edith Jones, whose article is cited earlier in this Comment, wrote the majority opinion. *Cf. supra* notes 16, 35 and accompanying text (citing an article by Chief Judge Jones recognizing the need to move quickly in bankruptcy proceedings and the need for flexibility in permitting appeals).

¹⁹⁴ The court noted that "[t]he twin purposes of the provision were to expedite appeals in significant cases and to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy." *In re Pac. Lumber*, 584 F.3d at 241-42.

¹⁹⁵ *Id.* at 242.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 243.

This warning provides useful guidance for courts to bear in mind when similar situations arise in the future.

In its resolution of the case, the court decided that equitable mootness did not prevent it from considering the treatment of the noteholders' secured claims.¹⁹⁸ Although the court of appeals ultimately determined that the bankruptcy court had decided correctly, the court of appeals suggested that if it had reversed, "adverse appellate consequences were foreseeable to [MRC/Marathon] as sophisticated investors who opted to press the limits of bankruptcy confirmation and valuation rules."¹⁹⁹ The court also felt empowered to examine the legality of the nondebtor exculpation and release clause.²⁰⁰ The clause was intended to shield the parties that took on the debt of the two original timber companies from any negligence that occurred during the bankruptcy.²⁰¹ The court determined that the clause "must be struck except with respect to the Creditors Committee and its members,"²⁰² which did not impact anything except potential future litigation. Finally, the court remanded an issue of unpaid intercompany administrative priority claims.²⁰³ The court noted that it was entitled to do so "[b]ecause awarding relief on the full \$11 million would seem not to imperil a reorganization involving hundreds of millions of dollars."²⁰⁴

The Fifth Circuit also found that it was barred from considering some matters. The court simply dismissed the substantial-consideration claim as "easily disposed of" and thus did not even address whether the claims were moot.²⁰⁵ The court did not adjudicate two other issues, one regarding the artificial impairment of a class of claims and the other involving the gerrymandering of two classes of unsecured claims. Though the court noted that these decisions were "even more troubling" and that "[t]he bankruptcy court's findings that Class 8 claims are necessary to sustain the reorganization are odd," the court was forced to dismiss the appeals due to the doctrine of equitable mootness.²⁰⁶

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 244.

²⁰⁰ *See id.* at 251-52 (deciding that the equitable mootness doctrine did not apply and considering the issue on its merits).

²⁰¹ *See id.* at 252 (discussing the intent of the release clause).

²⁰² *Id.* at 253.

²⁰³ *Id.* at 250.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 251.

This case should stand as a warning about the power of the doctrine of equitable mootness to undermine the policies behind direct appeals. Although the Fifth Circuit, in this instance, was able to “apply equitable mootness with a scalpel rather than an axe,”²⁰⁷ courts of appeals in the future could be barred from addressing claims critical enough to warrant direct appeal. Therefore, lower courts, practitioners, and rulemakers should consider the value of stays *in concert with* direct appeals to establish predictable precedent in bankruptcy law and achieve the long-term aims of § 158(d)(2).

VIII. RECOMMENDATIONS

In the wake of the financial crisis, it is especially important that procedures are in place to ensure that individuals and corporations can move forward. Without the appropriate precedents, bankruptcy law will continue to be confusing and unpredictable. Direct appeals provide one important procedural mechanism to expedite bankruptcy appeals. However, *In re Pacific Lumber Co.* illustrates how the freedom of the lower courts to grant or deny stays pending appeal has the potential to undermine the aims of Congress, erring too heavily in favor of efficiency while jeopardizing concerns of equity. In light of the threat of the doctrine of equitable mootness, the current incarnation of § 158(d)(2) does not adequately protect individual appellants’ right to Article III review. In addition, despite evidence that courts of appeals have granted direct appeals in the instances Congress imagined, failure to grant a stay pending appeal may prevent a matter worthy of direct review from reaching a court capable of crafting binding precedent. As rulemakers and practitioners reconsider where to strike the balance between speed and the opportunity for meaningful review in bankruptcy appeals, the authority to grant or deny stays pending direct appeal must be at the forefront of the debate.

This Comment recommends that an automatic ten-day stay be granted to allow the courts of appeals the opportunity to conduct an initial review to determine whether equitable mootness is a concern.²⁰⁸ If the circuit court finds that an issue deemed worthy of review in the lower court’s certification of the direct appeal could be moot without judicial intervention, the court of appeals should issue its own stay

²⁰⁷ *Id.* at 240; see also Murphy, *supra* note 12, at 44 (discussing the Fifth Circuit’s “restrictive” application of the equitable mootness doctrine in *In re Pacific Lumber Co.*).

²⁰⁸ Notably, the motions panel in *In re Pacific Lumber Co.* rejected a ten-day stay, though it did not provide the reasons for this decision. *In re Pac. Lumber*, 584 F.3d at 236.

pending appeal under Bankruptcy Rule 8017(c).²⁰⁹ Arguably, this solution may slow down individual bankruptcy proceedings. However, current timing provisions in the Bankruptcy Rules could be altered to mitigate this. For instance, the time for parties to petition the circuit court for permission to appeal could once again be shortened from thirty days to ten days.²¹⁰ As no reason has been given for increasing the time period²¹¹ and the time limitation for interlocutory appeals under § 1292(b) remains at ten days,²¹² this provision should be rewritten to reflect the urgency of most bankruptcy proceedings.

Although this Comment has focused on the interplay between stays and the doctrine of equitable mootness, rulemakers and courts should consider other ways to balance efficiency and the need for meaningful review by an Article III court. In *In re Pacific Lumber Co.*, the court recommended setting a later date for the reorganization plan to take effect, allowing sufficient time for appellate review.²¹³ In addition, a court could order an appeal to be expedited, as evidenced by the June 5, 2009, decision by the Second Circuit in *In re Chrysler*.²¹⁴ Finally, courts could reevaluate the doctrine of equitable mootness; for instance, courts could embrace a “restrictive” interpretation of the doctrine akin to that articulated by the Fifth Circuit in *In re Pacific Lumber Co.*²¹⁵ This conception of the doctrine would favor “protecting an appellant’s right to adjudication except in those exceptional circumstances where the effects of the appeal will derail a confirmed plan.”²¹⁶

As the rulemakers continue to consider changes to the Appellate Rules and the Bankruptcy Rules, the lessons of direct appeals are particularly salient. This Comment adds to the discussion of ways in which bankruptcy procedure in general, and § 158(d)(2) in particular, may be crafted to balance the competing aims of efficiency versus fairness and the urgency of proceedings versus the right to review.

²⁰⁹ See FED. R. BANKR. P. 8017(c) (“This rule does not limit the power of a court of appeals . . . to stay proceedings during the pendency of an appeal . . .”).

²¹⁰ Cf. FED. R. BANKR. P. 8001(f)(5).

²¹¹ See *supra* note 67 and accompanying text (noting that the minutes from the Bankruptcy Conference do not explain the increase to thirty days).

²¹² 28 U.S.C. § 1292(b) (2006).

²¹³ See *In re Pac. Lumber*, 584 F.3d at 243 (“A plan may be designed to take effect . . . after a lapse of sufficient time to initiate appellate review.”).

²¹⁴ See *supra* notes 1-8 and accompanying text (summarizing the *In re Chrysler* proceedings).

²¹⁵ See Murphy, *supra* note 12, at 44 (explaining that the Fifth Circuit articulated a more “restrictive interpretation”).

²¹⁶ *Id.* at 47.

Ongoing study of the use of direct appeals within the bankruptcy context is warranted, especially as the number of such cases continues to increase in each circuit. For now, as the Advisory Committee on Bankruptcy Rules and the Appellate Rules Committee consider the direct appeals procedure, it is important that the concerns mentioned in this Comment—the value of Article III review, stays, timing, and the threat of mootness—remain central to all future conversations.