Appellate Jurisdiction of Interlocutory Appeals in Bankruptcy 28 U.S.C. Section 158(d): A Case of Lapsus Calami

Judy Beckner Sloan

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol40/iss2/4

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
The United States Courts of Appeals are courts of limited jurisdiction which generally follow specific statutory provisions. In the area of bankruptcy, however, the provisions are incomplete and confusing.

Although the Bankruptcy Reform Act of 1978 (1978 Act) clarified the bankruptcy laws of the United States, the United States Supreme Court later found the fundamental structure of the bankruptcy courts unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* Congress corrected the structural infirmities in 1984, but failed to eliminate a problem *Marathon* created in the jurisdictional scheme of the appellate courts under the 1978 Act. Consequently, the courts have struggled with the appellate jurisdiction of interlocutory appeals of bankruptcy matters available under 28 U.S.C. § 158(d).

---

* Professor, University of Toledo College of Law. B.A. 1967, University of Chicago; J.D. 1975, University of Maryland. Special thanks to Martin J. Miller, a third year law student at the University of Toledo, for his invaluable aid as my research assistant on this project. I am also grateful for the help of my colleague, Dean Lawrence Ponoroff, for his suggestions and encouragement and Malcolm M. Gaynor of Schwartz, Cooper, Kalb & Gaynor, Chicago, Illinois, for his guidance on bankruptcy appeals.

5. 28 U.S.C. § 158(d) (1988); see text accompanying notes 75, 77-100.
The Supreme Court’s recent handling of *Insurance Co. of Pennsylvania v. Ben Cooper, Inc.* has amplified the exigency of this question. In *Ben Cooper*, the Court granted certiorari on June 28, 1990 and had scheduled the case for oral argument on December 3, 1990, to determine, among other things, the question of jury trials in the bankruptcy courts. The United States, however, intervened and questioned the jurisdiction of the Court of Appeals. The Supreme Court, agreeing that a jurisdictional problem existed, vacated and remanded the case to the Second Circuit “for consideration of the jurisdictional issue raised by the United States.”

There appears to be no answer regarding the jurisdiction of interlocutory appeals that will fit into the present statutory framework, and circuit courts have even resorted to the extraordinary writ of mandamus as a means of resolving the problem. Because the circuits are split in this critical area, this Article proposes a statutory solution that permits courts of appeals com-

---

8. See infra notes 133-41 and accompanying text (discussing the interlocutory nature of this appeal).
9. *Ben Cooper*, 111 S. Ct. at 425. The opinion of the Court reads, in its entirety:

The United States, whose motion to intervene filed in this Court on September 28, 1990 was granted, has raised a question concerning the Court of Appeals’ jurisdiction over this case and hence a question about our own jurisdiction. Because the Court of Appeals should address the jurisdictional issue in the first instance, we vacate the judgment of the United States Court of Appeals for the Second Circuit and remand the case for consideration of the jurisdictional issue raised by the United States.

Id. (citation omitted).

On January 22, 1991, the Second Circuit held that it did indeed have jurisdiction and reinstated its previous judgment. *In re Ben Cooper*, 924 F.2d 36, 38 (2d Cir. 1991); see infra text accompanying note 138. The petitioner, Insurance Company of Pennsylvania, has filed a petition for certiorari. The Supreme Court, however, recently denied the Solicitor General’s request for expedition of the petition. *Insurance Co. of Pennsylvania v. Ben Cooper, Inc.*, 111 S. Ct. 1100 (1991). Thus, it appears the Court is in no hurry to decide the merits of the case.

10. See, e.g., *Capitol Credit Plan, Inc. v. Shaffer*, 912 F.2d 749, 751 (4th Cir. 1990) (no interlocutory appeal allowed because section 158(d) exclusively governs appellate jurisdiction of case originating in bankruptcy court); *In re Kaiser Steel Corp.*, 911 F.2d 380, 386 (10th Cir. 1990) (same); *In re Topco, Inc.*, 894 F.2d 727, 735 n.12 (5th Cir. 1990) (same); *In re Apex Oil Co.*, 884 F.2d 343, 346-47 (8th Cir. 1989) (same); *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989) (same); *In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986) (same); *In re TCL Investors*, 775 F.2d 1516, 1517 (11th Cir. 1985) (same); *In re American Colonial Broadcasting Corp.*, 758 F.2d 794, 800 (1st Cir. 1985) (same); cf. *In re Benny*, 791 F.2d 712, 716-18 (9th Cir. 1986) (no jurisdiction for court of appeals to hear interlocutory appeal; however, both sections 158(d) and 1291 are alternate sources of jurisdiction); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (same). *But see In re Jartran, Inc.*, 886 F.2d 859, 864-65 (7th Cir. 1989) (section 1292(b) allows interlocutory appeal to court of appeals from bankruptcy court). There were 594,567 bankruptcy filings in the United States in 1988. 1988 DIRECTOR ADMIN. OFF. U.S. COURTS ANN. REP. at Table F-1.
plete appellate jurisdiction, including interlocutory appeals, in bankruptcy cases and proceedings.

This Article summarizes the general jurisdiction of the courts of appeals. Then, this Article considers the changes made by the Bankruptcy Reform Act of 1978 along with the available legislative history. Next, this Article outlines the present statutory construction of the Bankruptcy Amendments of 1984, which can be considered a "slip of the pen" or lapsus calami. Finally, this Article proposes a workable solution by concluding that Congress should amend the relevant statutory provisions to allow for complete appellate jurisdiction.

I. GENERAL JURISDICTION OF THE COURTS OF APPEALS

A. The "Final Order" Rule

As a general rule, appellate courts may only hear appeals from "final decisions" of the lower courts. Courts often interpret this "final order" rule to mean that an order is appealable only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." This rule prevents the piecemeal litigation that would occur under a less stringent standard.

Although the final order rule can at times produce discomfiting results, in the majority of cases the rule's benefits far outweigh its shortcomings. The rule helps to prevent parties from facing bankruptcy brought on by constant

11. Appeals of federal cases are a statutory right provided for by 28 U.S.C. § 1291 which states, in part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.


13. See, e.g., Cobbledick v. United States, 309 U.S. 323, 325 (1940), where the Court stated:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Id.
premature appeals by wealthier adversaries.\(^{14}\) In addition, many appeals from nonfinal orders may turn out to be unnecessary because appellants win favorable final judgments from trial courts.\(^{15}\) In the end, the final order rule ensures the economical and efficient operation of the appellate process.

**B. Exceptions to the "Final Order" Rule**

**1. Interlocutory Decisions**

The primary statutory exception to the final order rule is 28 U.S.C. § 1292.\(^{16}\) Subsection (a) of this statute permits appeals of specific types of interlocutory orders: those "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions,"\(^{17}\) those "appointing receivers, or refusing orders to wind up receiverships,"\(^{18}\) and those "determining the rights and liabilities of the parties to admiralty cases."\(^{19}\)

Subsection (b) of 28 U.S.C. § 1292 permits discretionary appeals of interlocutory orders when both the district court and the court of appeals agree that such an appeal is appropriate.\(^{20}\) To be suitable for appeal under this

---

15. Id. at 431.
16. 28 U.S.C. § 1292 states in pertinent part:
   (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
   (1) Interlocutory orders of the district courts . . . , or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
   (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships . . . ;
   (3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases . . . .
(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order . . .: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district court judge or the Court of Appeals or a judge thereof shall so order.
17. Id. § 1292(a)(1).
18. Id. § 1292(a)(2).
19. Id. § 1292(a)(3).
20. Id. § 1292(b).
subsection, the interlocutory order in question must "involve[ ] 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."\(^\text{21}\)

Both the specific exceptions of section 1292(a), as well as the provision for discretionary appeals under section 1292(b), recognize the need for flexibility in determining which orders are appealable. By permitting narrow exceptions to the finality requirement, the final order rule becomes less severe.\(^\text{22}\)

2. The All Writs Statute

The All Writs Statute provides the other statutory exceptions to the final order rule, the extraordinary writs of mandamus and prohibition.\(^\text{23}\) While a writ of mandamus commands the trial court to act and the writ of prohibition forces the trial court to cease acting, appellate courts can use both to review trial court orders that are otherwise not appealable. When appellate courts use the writs in this way, they are essentially equivalent remedies.\(^\text{24}\)

As their names imply, the use of these writs is a drastic measure, and should "be invoked only in extraordinary situations."\(^\text{25}\) The United States Supreme Court, in Allied Chemical Corp. v. Daiflon, Inc., reiterated that in order for a writ to be granted, the aggrieved party must show that he has "no other adequate means to attain the relief he desires."\(^\text{26}\) In the majority of cases, federal courts use the writs "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."\(^\text{27}\) Because of these strict limitations, federal courts rarely issue the writs of prohibition and mandamus. That circuit courts use them more frequently to dispose of bankruptcy appeals indicates that the statutory scheme is defective.\(^\text{28}\)

\(^{21}\) Id.
\(^{23}\) 28 U.S.C. § 1651(a) (1988). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id.
\(^{24}\) Ex Parte Simons, 247 U.S. 231, 239 (1918).
\(^{26}\) Id. at 35.
\(^{27}\) Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).
\(^{28}\) See infra notes 87-95 and accompanying text (discussing cases that use the writ of mandamus).
3. The Collateral Order Doctrine

The collateral order doctrine also offers a narrow exception to the final order rule. Appellate courts use it occasionally to permit appeals of orders that are not final in the traditional sense. The Supreme Court first stated the doctrine in *Cohen v. Beneficial Industrial Loan Corporation* and recently reinforced its validity in *Gulfstream v. Mayacamus Corporation*. In *Gulfstream*, the Court outlined a three-pronged test to determine when an order falls within the limited scope of the collateral order doctrine. "First, the order must 'conclusively determine the disputed question.' Second, the order must 'resolve an important issue completely separate from the merits of the action.' Third and finally, the order must be 'effectively unreviewable on appeal from a final judgment.' "

For an order to be appealable under the doctrine, it must meet each of these requirements. Although judges have criticized the collateral order exception, it remains a viable deviation from the finality requirement.

---

29. 337 U.S. 541 (1949).

The Court, however, did overrule the Enelow-Ettelson doctrine, which courts had used in the past as a judicial expansion of 28 U.S.C. § 1292(a)(1). Under this doctrine, federal courts considered orders that stayed or denied the stay of injunctions involving "a historically legal action on the basis of a historically equitable defense or counterclaim;" therefore, because the federal courts considered these orders, they were appealable under § 1292(a)(1). *Gulfstream*, 485 U.S. at 281. The Court held that the Enelow-Ettelson doctrine was "unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals." *Id.* at 283.

For further criticism of the Enelow-Ettelson doctrine, see Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986), where Judge Posner stated:

"Experience since the cases establishing the Enelow-Ettelson doctrine were decided, coupled with later decisions by the Supreme Court concerning related issues of appealability, and a statutory change in the jurisdiction of the courts of appeals—all occurring against a background of extraordinarily rapid growth in the workload of those courts—have made clear that the doctrine is arbitrary, mischievous, and devoid of contemporary utility."

*Id.*

32. *Id.* (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 11-13 (1983)).
33. See, e.g., Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986), where Judge Posner criticized the three-pronged test of the doctrine.

Although the test first stated in *Cohen* remains canonical, as with so many multi-'pronged' legal tests it manages to be at once redundant, incomplete, and unclear. The second 'prong' is part of the third. If the order sought to be appealed is not definitive, an immediate appeal is not necessary to ward off harm; there is no harm yet. The first 'prong' seems unduly rigid; if an order unless appealed really will harm the appellant irreparably, should the fact that it involves an issue not completely separate from the merits of the proceeding always prevent an immediate appeal?
II. LEGISLATIVE HISTORY OF APPEALS UNDER THE BANKRUPTCY REFORM ACT OF 1978

Prior to 1978, the Bankruptcy Act of 189834 regulated much of the field of bankruptcy law. The Bankruptcy Reform Act of 197835 (1978 Act) completely revised the old bankruptcy laws,36 which "had been rendered obsolete by social, legal, and economic permutation."37 The product of nearly ten years' work, the 1978 Act changed both the substantive and procedural laws of bankruptcy. The Act's legislative history contains thousands of pages covering the role of the bankruptcy courts and personal bankruptcy matters.38 Few pages, however, address appeals under the 1978 Act.39

The legislative history of the 1978 Act began in July 1970, with the formation of the Commission on Bankruptcy Laws of the United States.40 The commission submitted a report to Congress in July 1973, and its proposed Bankruptcy Act was introduced as a bill in both the House41 and the Senate.42 A competing bill proposed by the National Conference of Bankruptcy Judges was also introduced in the House.43 After numerous subcommittee hearings and several amendments by both the House and the Senate, the two groups and members of Congress compromised on their positions.44

The compromise, which many prominent constitutional authorities, including Chief Justice Warren Burger, opposed, concerned the elevation of

---

Id. (emphasis in original).
38. Aaron, supra note 36, at 22.
39. See infra notes 48-64 and accompanying text (discussing the appellate process under the 1978 Act).
44. As one commentator has noted, however, many of the provisions in the Act appear to have come from the National Bankruptcy Conference, a private nonprofit organization. Aaron, supra note 36, at 2.
the status of the bankruptcy courts. The final version of the Act removed many administrative functions from the workload of the bankruptcy judges. It also established independent bankruptcy courts as adjuncts of the district courts, without granting bankruptcy judges the status of Article III judges.

With this change in the structure of the bankruptcy courts, Congress enacted changes in the appellate procedures for bankruptcy proceedings. Under the old Bankruptcy Act, the bankruptcy judges acted as referees and all of their decisions were reviewable by district courts. Many believed that this structure undermined the independence of the bankruptcy judges. Thus, the House proposed that all appeals from the new bankruptcy judges go directly to the courts of appeals. The Senate opted for the Bankruptcy Commission’s proposal, which would continue the practice of appealing bankruptcy cases to the district courts. As a compromise, Congress created three separate avenues of appeal.

First, under the 1978 Act, Congress gave district courts jurisdiction over “appeals from all final judgments, orders, and decrees of bankruptcy courts.” The statute also gave district courts jurisdiction over “appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court.”

Bankruptcy appellate panels would have provided another route of appeal. Before Congress amended 28 U.S.C. § 160, the circuit council for each circuit could have created such appellate panels. Each panel would

46. The opposition eventually proved to be correct, however, and this structure was found to be unconstitutional in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). For the current structure of the bankruptcy courts, see infra notes 65-75 and accompanying text.
47. Article III, section 1 of the United States Constitution states: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.
52. Id. § 1334(b), 92 Stat. 2549, 2668.
54. The statute provided in pertinent part:
have been comprised of three judges and could have heard appeals under the same standards as those of the district courts.55

The final avenue of appeal from the bankruptcy courts was directly to the courts of appeals.56 Title 28, section 1293(b) provided for appeals “from a final judgment, order, or decree of a bankruptcy court” if both parties agreed to such an appeal.57 Section 1293 also provided for appeals to the courts of appeals from “all final decisions” of bankruptcy appellate panels,58 and for appeals from a “final judgment, order, or decree” of an appellate panel or a district court.59

A complete review of the legislative history of the 1978 Act reveals little concerning the appellate role of the courts in bankruptcy matters. Significantly, the original draft of section 1293 contained only the provisions regarding appeals from “final decisions” of appellate panels and the “consent” jurisdiction over direct appeals from the bankruptcy courts to the courts of appeals.60 Under the 1978 Act, however, parties could still use 28 U.S.C. § 1291 to appeal final decisions of the district courts hearing appeals from bankruptcy courts. Congress added the additional language of section 1293(b), pertaining to appeals from a “final judgment, order, or decree of an appellate panel... or a District Court,” without comment.61

The Sixth Circuit focused on this element of the legislative history of section 1293 to determine whether section 1291 could be used for bankruptcy appeals.62 In In re Salem Mortgage Co., the court reasoned that because

---

(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district.


55. Id. § 1482, 2659, 92 Stat. 2549, 2671.

(a) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

(b) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.

Id.

56. Id. § 1293(b), 92 Stat. 2549, 2667.

57. Id.

58. Id. § 1293(a), 92 Stat. 2549, 2667. “The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.” Id.

59. Id. § 1293(b), 92 Stat. 2549, 2667.


62. In re Salem Mortgage Co., 783 F.2d 626 (6th Cir. 1986) (although Salem Mortgage was decided after the Bankruptcy Amendments and Federal Judgeship Act of 1984, the court
section 1293 would have been the route of appeal from the district courts under the earlier proposed version of the 1978 Act, "Congress certainly appears to have assumed that section 1291 would be available for bankruptcy appeal[s] . . . ." The court, however, failed to explain why Congress made the change. Accordingly, its reasoning should be viewed with skepticism.

The legislative history regarding appeals under the 1978 Act is lacking, and it is difficult to discern congressional intent in enacting section 1293. Further, many of the problems regarding appellate jurisdiction under the original 1978 Act continue under the 1984 version. As Mr. Levin summarized in his article: "[t]he best one can conclude from these conflicting signals is that the appellate system was hastily constructed and drafted in the final legislative days of the Ninety-Fifth Congress and that redrafting is essential."64

III. JURISDICTION OF THE COURTS OF APPEALS UNDER THE 1984 AMENDMENTS

A. Jurisdiction of Bankruptcy Judges

In the wake of Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,65 Congress hastily adjusted the jurisdiction of the bankruptcy courts in an attempt to conform with the United States Supreme Court's interpretation of Article III requirements.66 Section 1334 of Title 28 grants "original and exclusive jurisdiction" to the district courts "of all cases under title 11."67 Section 1334 further grants district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."68 Under 28 U.S.C. § 157, however, "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11" that the district courts refer to them.69 Pursuant to section 158, district courts or bankruptcy appellate

63. Id. at 632 n.15.
64. Levin, supra note 61, at 990.
66. See supra notes 45-47 and accompanying text.
68. Id. § 1334(b).

   (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

   (b)(1) Bankruptcy judges may hear and determine all cases arising under title 11 and all core proceedings arising under title 11, or arising in a case under title 11,
Interlocutory Appeals In Bankruptcy

panels, where created, can review the orders and judgments that bankruptcy judges enter in these cases and proceedings. In addition, section 158 permits appeals of interlocutory orders of bankruptcy judges to the district court, but only "with leave of court." Bankruptcy proceedings are characterized as either "core" or "non-core" proceedings. In core proceedings, the bankruptcy court judges may enter

referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.


70. 28 U.S.C. § 158 states, in pertinent part:

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.


71. Id.

72. Congress provided guidance as to what constitutes a core proceeding in 28 U.S.C. § 157(b)(2), which states:

Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharge;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.
final judgments, subject only to timely appeals to the district courts.\textsuperscript{73} In non-core proceedings, however, bankruptcy judges need the parties' consent in order to enter final judgments.\textsuperscript{74} Otherwise, bankruptcy judges may only "submit proposed findings of fact and conclusions of law to the district court[s]," and the district courts enter final judgments upon consideration of bankruptcy judges' opinions.\textsuperscript{75}

\textbf{B. Jurisdiction of the Courts of Appeals in Bankruptcy}

Title 28, section 158(d) governs the jurisdiction of the courts of appeals in bankruptcy matters. That section provides that "the courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section."\textsuperscript{76} Section 158(d) resembles 28 U.S.C. § 1291, which governs the jurisdiction of the courts of appeals in ordinary civil matters, in that both codify the traditional final order rule.\textsuperscript{77}

Despite the similar language, courts have consistently stated that "bankruptcy proceedings justify a distinctive and more flexible definition of finality."\textsuperscript{78} The relaxed standard is justified because "certain proceedings in a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} 28 U.S.C. § 157(b)(2). "Non-core" proceedings include, for example, a breach of contract action, \textit{In re} World Solar Corp., 81 Bankr. 603 (S.D. Cal. 1988); an action by the government for violation of environmental regulations, U.S. v. ILCO, Inc., 48 Bankr. 1016 (N.D. Ala. 1985); and a malpractice claim against an attorney, \textit{In re} Environmental Research & Dev., 46 Bankr. 774 (S.D.N.Y. 1985).
\item \textsuperscript{74} 28 U.S.C. § 157(b).
\item \textsuperscript{75} 28 U.S.C. § 157(c)(2).
\item Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.
\item \textsuperscript{76} 28 U.S.C. § 157(c)(1).
\item A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
\item \textsuperscript{77} 15 C. WRIGHT, A. MILLER & E. COOPER, \textsc{Federal Practice and Procedure} § 3906, at 425 (1976); \textit{see supra} notes 11-22 and accompanying text for a discussion of the final order rule.
\item \textsuperscript{78} 16 C. WRIGHT, A. MILLER & E. COOPER, \textsc{Federal Practice and Procedure} § 3926, at 112 (1990 Supp.); \textit{see e.g.}, \textit{In re} American Mariner Indus., Inc., 734 F.2d 426, 429 (9th Cir. 1984) (interpreting congressional intent to require "courts to conclusively and expedi-
bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions to them should be appealable as of right." 79 The only "true" final judgments in bankruptcy matters are the closing of cases or proceedings, which render moot many important decisions made in the process. 80 Accordingly, the courts have usually been more lenient in determining what is a final order in bankruptcy for appellate purposes. 81

C. The Relationship of Section 158(d) to Sections 1291 and 1292

As was the case under the 1978 Act, 82 the courts have struggled, without the benefit of legislative history, for an answer to whether 28 U.S.C. §§ 1291

| 1991 | Interlocutory Appeals In Bankruptcy | 277 |


discretely adjudicate . . . complaints for relief from the automatic stay . . . [requiring] [i]mmediate appeal from decisions of the bankruptcy appellate panel"). But see In re Magic Circle Energy Corp., 889 F.2d 950, 953 (10th Cir. 1989) (holding "to the more traditional view of finality [to] . . . further] the policy underlying the finality doctrine by controlling piecemeal adjudication and eliminating delays caused by interlocutory appeals").


80. Levin, supra note 61, at 983; see In re Apex Oil Co., 884 F.2d 343 (8th Cir. 1989), where the court stated:

The factors used in deciding the finality of a bankruptcy order are the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) a later reversal on that issue would require recommencement of the entire proceeding.

Apex Oil, 884 F.2d at 347; see also In re Chateaugay Corp., 880 F.2d 1509, 1511 (2d Cir. 1989) (stating that "discrete claims are often resolved at various times over the course of the proceedings").

81. See, e.g., In re Spillane, 884 F.2d 642, 645 (1st Cir. 1989) (award of attorney's fees is final where the attorney is no longer involved in case); Chateaugay Corp., 880 F.2d at 1512 (order denying relief from automatic stay is final because it is identical to permanent injunction); In re Moody, 817 F.2d 365, 366 (5th Cir. 1987) ("turnover order, in a separate adversary proceeding, compelling a defendant to turn over property in his possession . . . is a final order"); In re Kaiser, 791 F.2d 73, 74 (7th Cir. 1986) (order by bankruptcy judge declaring property to be included in bankrupt's estate is final as to persons claiming interest in the property), cert. denied, 479 U.S. 1011 (1986); In re Boomgarden, 780 F.2d 657, 660 (7th Cir. 1985) (order granting relief from automatic stay is final); In re Amatex Corp., 755 F.2d 1034, 1041 (3d Cir. 1985) (district court's refusal to appoint representative for future asbestos claimants is final); In re Marin Motor Oil, Inc., 689 F.2d 445, 448 (3d Cir. 1982) (district court's grant of motion to intervene under 11 U.S.C. § 1109(b) is final). But see In re Watson, 884 F.2d 879, 880 (5th Cir. 1989) (order imposing sanctions on party is not final); In re Chateaugay Corp., 826 F.2d 1177, 1179 (2d Cir. 1987) (order granting or denying withdrawals under § 157(d) is not a final appealable order); In re Benny, 791 F.2d 712, 718-19 (9th Cir. 1986) (district court order upholding constitutionality of 1984 bankruptcy amendments is not final); In re Delta Services Ind., 782 F.2d 1267, 1269-72 (5th Cir. 1986) (order approving interim trustee is not final).

82. See In re Adirondack Ry. Corp., 726 F.2d 60, 64 (2d Cir. 1984) (discussing sections 1291 and 1292 in the bankruptcy appeal context); In re Regency Woods Apartments, Ltd., 686
and 1292 are available for bankruptcy appeals under the 1984 amendments. At one time, at least two circuits, the Fifth and Ninth Circuits, interpreted 28 U.S.C. § 158(d) to be comprehensive and exclusive. These circuits stated that the courts of appeals could only exercise jurisdiction over bankruptcy appeals by means of section 158(d). The Fifth Circuit expressly held that neither section 1291 nor section 1292 were available in bankruptcy cases.

In In re Teleport Oil Co., the Ninth Circuit ruled that the appellant could not use section 1292 to appeal the district court's refusal to stay the appointment of a trustee. The court stated "[i]f § 1291 still applied to final bankruptcy orders, § 158 would be superfluous. It is evident that Congress intended § 158 to be the exclusive basis of jurisdiction in the appellate courts in bankruptcy matters." Thus, the court held that parties could use neither section 1291 nor section 1292 in bankruptcy appeals. While the court indicated that the availability of a writ of mandamus and the relaxed finality standard lessened the harshness of its holding, it nevertheless refused to permit the appeal.

The Fifth Circuit, in In re Barrier, specifically followed the Ninth Circuit's Teleport decision. In Barrier, the United States District Court for the Southern District of Mississippi denied a stay pending appeal of the bankruptcy court's confirmation of the debtor's reorganization plan. The United States Court of Appeals for the Fifth Circuit ruled that the district court's denial of the stay was interlocutory and stated that 28 U.S.C. § 1292 did not apply. Nevertheless, the court granted a writ of mandamus order-
ing the district court to grant the stay because the court of appeals believed there was "a serious potential for irreparable harm." More recent decisions of these circuits, however, have limited the effects of Teleport and Barrier.

The courts that have continued to rely on sections 1291 and 1292 for bankruptcy appeals are at the other end of the spectrum. The significance of these decisions is that they permit the federal courts to use section 1292 to permit appeals of interlocutory bankruptcy orders. The Seventh Circuit reached this conclusion in In re Moens because of the absence of contrary evidence of congressional intent. The court stated:

While the section of the new bankruptcy code dealing with appeals to the court of appeals does not specifically provide for such interlocutory appeals, there is nothing in the statute or in its legislative history which indicates that Congress intended to foreclose such review. Given the absence of any significant limitation in the language of section 1292(b), we would expect the Congress to have taken such action if in fact it intended such a limitation.

The Moens court failed, however, to address the concerns of those courts that found section 158(d) to be the exclusive means for appellate jurisdiction. Similarly, courts that have adopted the approach of Moens have also provided insufficient rationales for their decisions.

94. Id. "This case is extraordinary because, as we have found, there is no other avenue of appeal available to [the creditor], because there is a serious potential for irreparable harm in the absence of a stay, and because the district court abused their discretion in denying relief." Id.

The Fifth Circuit also issued a writ of mandamus in In re First South Sav. Ass'n, 820 F.2d 700 (5th Cir. 1987).

95. See infra text accompanying notes 113-18.

96. In re Goodman, 873 F.2d 598, 601-02 (2d Cir. 1989); In re Southern Indus. Banking Corp., 872 F.2d 1257, 1259 (6th Cir. 1989); In re Rare Coin Galleries of America, Inc., 862 F.2d 896, 898 (1st Cir. 1988); In re Salem Mortgage Corp., 783 F.2d 626, 632 (6th Cir. 1986); In re Moens, 800 F.2d 173, 176-77 (7th Cir. 1986).

97. See, e.g., In re Sinclair, 870 F.2d 1340 (7th Cir. 1989). In Sinclair, the court had previously denied the appeal of the district court's affirmance of the bankruptcy court's denial of the debtor's request to convert from Chapter 11 to Chapter 12. In re Sinclair, 863 F.2d 885 (7th Cir. 1988). The Seventh Circuit accepted the second appeal, however, after the district court certified the order for appeal under 28 U.S.C. § 1292(b). Sinclair, 870 F.2d at 1340 n.*

98. 800 F.2d 173 (7th Cir. 1989).

99. Id. at 177 (citation omitted).

100. See supra notes 82-95 and accompanying text.

101. In re Topco, Inc., 894 F.2d 727, 737 (5th Cir. 1990); In re Goodman, 873 F.2d 598, 601-02 (2d Cir. 1989); In re Southern Indus. Banking Corp., 872 F.2d 1257, 1259 (6th Cir. 1989); In re Rare Coin Galleries of America, Inc., 862 F.2d 896, 898 (1st Cir. 1988); In re Salem Mortgage Corp., 783 F.2d 626, 632 (6th Cir. 1986); In re Benny, 791 F.2d 712, 718 (9th Cir. 1986).
D. Withdrawals of the Reference and Non-Core Proceedings

Additional problems arise when the district court withdraws the reference to the bankruptcy court or when the court enters a judgment in a non-core proceeding. Both of these issues have arisen out of the aftermath of Marathon\(^{102}\) and the resultant restricted bankruptcy court jurisdiction.

Under 28 U.S.C. §§ 157 and 1334,\(^{103}\) "district courts exercise original jurisdiction in bankruptcy actions, but may automatically refer these matters to bankruptcy courts."\(^{104}\) Section 157(d), however, provides for withdrawal of this reference, thereby revesting jurisdiction of the case or proceeding in the district court.\(^{105}\) Withdrawal of the reference is mandatory "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."\(^{106}\) In all other situations, withdrawals of the reference are discretionary.\(^{107}\) Once a district court grants a withdrawal of the reference, it acts "as a court of original jurisdiction."\(^{108}\)

The situation is similar when district courts render judgments in non-core proceedings.\(^{109}\) Unless the parties agree to renderings of final decisions by the bankruptcy courts, the district courts will enter final judgments.\(^{110}\)

Any order that a district court enters after a withdrawal of the reference, or in a non-core proceeding (absent the parties consent under section 157), originates in the district court; by its express terms, section 158(d) is not available for an appeal.\(^{111}\) As the Third Circuit stated in an analogous situation:

---

102. See Levin, supra note 61, at 990; supra text accompanying note 62.
104. In re Powelson, 878 F.2d 976, 979 (7th Cir. 1989).
105. 28 U.S.C. § 157(d) provides:
   
   The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

106. Id.
107. Id.
108. Powelson, 878 F.2d at 979.
109. See 28 U.S.C. § 157(b)-(c); supra notes 72-75 and accompanying text.
110. 28 U.S.C. § 157(c).
111. Capitol Credit Plan of Tenn., Inc. v. Shaffer, 912 F.2d 749, 752 (4th Cir. 1990); Powelson, 878 F.2d at 980.
This result illustrates the gap existing in the procedure Congress created to govern bankruptcy appeals. Section 158(a) grants the district courts appellate authority over rulings entered by bankruptcy judges. Additional review in the courts of appeals of the district judges' appellate dispositions is then explicitly authorized in section 158(d). However, no provision addresses the courts of appeals' authority to review orders entered by the district courts in their non-appellate bankruptcy role.  

To circumvent this "gap" in the 1984 amendments, the courts have consistently looked to section 1291 as a basis for appellate review. Even the Fifth and Ninth Circuits, which at one point expressed the belief that section 158(d) was the only applicable provision for bankruptcy appeals, now embrace this interpretation.

In *In re Benny*, while not expressly overturning *Teleport*, the Ninth Circuit appeared to limit its application of the section 158(d) "exclusivity" rule to cases in which district courts or bankruptcy appellate panels acted pursuant to section 158(a) or (b). In *Benny*, the court held that parties could use section 1291 for appeals in bankruptcy cases when the district court was not reviewing decisions of bankruptcy judges. The district court in *Benny* had withdrawn the reference to a constitutional issue from the bankruptcy judge and decided the issue on its own.

---

112. United States v. Nicolet, Inc., 857 F.2d 202, 204 (3d Cir. 1988). *Nicolet* did not involve a withdrawal of the reference. There, the district court was acting as a court of original jurisdiction. *See also In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1395 (5th Cir. 1987) ("When the district court sits in bankruptcy, section 158 does not apply.").

113. *Powelson*, 878 F.2d at 979-80.

114. *See supra* notes 84-95 and accompanying text.

115. *See, e.g.*, Browning v. Navarro, 887 F.2d 553, 557 (5th Cir. 1989); *In re Benny*, 791 F.2d 712, 718 (9th Cir. 1986).

116. 791 F.2d 712 (9th Cir. 1986).

117. *See In re Teleport Oil Co.*, 759 F.2d 1376 (9th Cir. 1985); *supra* notes 87-90 and accompanying text.

118. *Benny*, 791 F.2d at 718.

[A]ppeals in bankruptcy cases may be taken to this court pursuant to section 158(d) only if the order appealed from is within the scope of section 158(a), a bankruptcy court order appealed to a district court.

The general provisions for the appeal of final orders of district courts, 28 U.S.C. § 1291, provides a possible alternative basis for jurisdiction over these two appeals. A number of courts, including our own, have found this provision appropriate for review of bankruptcy decisions not falling within the scope of section 158.

*Id.*

119. *Id.* at 715; *see also In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (finding that section 1291 was available in bankruptcy "cases not referred to bankruptcy judges under section 157. . . . Congress is unlikely to have *sub silentio* removed the right to appellate review in these cases.").
In the same fashion, the Fifth Circuit recently stated in *In re Topco, Inc.* that "[b]oth Section 1291 and Section 158 govern appeals to courts of appeals from district court decisions when district courts sit as bankruptcy appellate courts. Only Section 1291 governs appeals from district court decisions when district courts sit as bankruptcy trial courts."  

The Tenth Circuit, in *Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, examining appeals of "non-core" matters, followed reasoning similar to that of the Fifth Circuit in *Topco*. The Teton court recognized that "[s]ection 158(d) contains no provision for appellate review of final district court orders entered in non-core proceedings under [section] 157(c)(1)" because the district court is not hearing an appeal from a final decision of the bankruptcy court under section 158(a). The court concluded that if section 158(d) were the sole source of jurisdiction in bankruptcy appeals, then the courts of appeals would not have jurisdiction to hear appeals from district court decisions of non-core matters. The court stated that it could find "no indication that Congress intended [section] 158(d) to act as a limitation on the general jurisdiction of appellate courts under [section] 1291."  

At first glance, this holding would appear insignificant because courts have held that finality under section 1291 is measured by the same liberalized standards used to examine orders entered in bankruptcy matters under section 158(d). Once a circuit court finds section 1291 applicable, however, it follows that section 1292 is available for interlocutory appeals of orders that originate in the district court. The majority of the circuits, though, would only use section 1292 for interlocutory appeals of orders originating in the district courts. These circuits conclude that if section 1291, and therefore by analogy section 1292, applied to all bankruptcy appeals, section 158(d) would be superfluous. The United States Court of Appeals for the Fourth Circuit, based on its holding in *Capitol Credit Plan of...*  

---

120. *In re Topco, Inc.*, 894 F.2d 727, 737 (5th Cir. 1990).
121. 818 F.2d 1521 (10th Cir. 1987).
122. *Id.* at 1524 n.2.
123. *Id.*
124. *Id.*; see also *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985).
125. See United States v. Nicolet, 857 F.2d 202, 204 (3rd Cir. 1988); Tringali v. Hathaway Mach. Co., 796 F.2d 553 (1st Cir. 1986); *In re UNR Indus.*, Inc., 725 F.2d 1111 (7th Cir. 1984). *But cf.* *In re Hawaii Corp.*, 796 F.2d 1139 (9th Cir. 1986) (liberalized rules of finality for bankruptcy appeals do not apply to § 1291 appeals).
126. *In re Lieb*, 915 F.2d 180, 183 (5th Cir. 1990); *In re Atencio*, 913 F.2d 814, 816 (10th Cir. 1990); Capitol Credit Plan of Tenn., Inc., 912 F.2d 749, 752 (4th Cir. 1990); *In re Kaiser Steel Corp.*, 911 F.2d 380, 387 (10th Cir. 1990); *In re Topco*, 894 F.2d 727, 735 n.12 (5th Cir. 1990); *In re Benny*, 791 F.2d 712, 716 (9th Cir. 1986).
127. See, e.g., *Kaiser Steel Corp.*, 911 F.2d at 386.
Interlocutory Appeals In Bankruptcy

Tennessee, Inc. v. American Financial Services Association,\textsuperscript{128} is apparently the only court that has attempted to justify this result on other grounds. That court held that judicial economy and "symmetry in the appellate system" adequately support its conclusion that section 1292 should not be used for orders that originate in the bankruptcy court.\textsuperscript{129}

Using sections 1291 and 1292 to appeal orders originating in the bankruptcy courts would, however, only render section 158(d) partially superfluous. Without section 158(d), there would be no provision providing for appeals from decisions of the bankruptcy appellate panels. The Fourth Circuit's reasoning is also questionable because legislative history does not indicate that Congress intended such a result.\textsuperscript{130} When district courts withdraw the references, the issues that they decide are generally identical to those upon which bankruptcy judges would have conclusively ruled.\textsuperscript{131} If section 1292 applies in one instance, arguably it should apply in the other. Judicial economy is also thwarted because the circuit courts continue to use the extraordinary writ of mandamus to get around the problem.\textsuperscript{132}

The United States Supreme Court also has recognized that a problem does exist, as its recent decision in Insurance Co. of Pennsylvania v. Ben Cooper, Inc.\textsuperscript{133} indicates. While most courts consistently have held that orders withdrawing the reference are not final appealable orders,\textsuperscript{134} at least one circuit

\textsuperscript{128} 912 F.2d 749 (4th Cir. 1990).
\textsuperscript{129} Id. at 753.

Allowing a second level of interlocutory review will further delay the proceedings, and it may be used solely to harass the opposing party. In addition, the appellate process is already quite costly to the parties. . . . Very little would be gained by adding yet another layer of interlocutory review.

. . . . Indeed, this . . . produces symmetry in the appellate system for bankruptcy cases. Whether the case begins in the bankruptcy court or the district court, the law would provide for an interlocutory appeal in the next highest court, with appeals allowed to go higher only after a final decision has been reached.

\textit{Id.}

\textsuperscript{130} See \textit{supra} text accompanying note 99.
\textsuperscript{131} See \textit{In re} King Memorial Hosp., Inc., 767 F.2d 1508, 1510 (11th Cir. 1985) ("[m]otions to withdraw reference from the bankruptcy court under [§ ] 157(d) essentially only determine the forum in which final decisions will be reached").
\textsuperscript{132} In re Kaiser Steel Corp., 911 F.2d 380, 388 (10th Cir. 1990) (mandamus granted for review of the district court's affirmance of the bankruptcy court's denial of a jury trial).
\textsuperscript{133} 111 S. Ct. 425 (1990). For the text of the opinion, see \textit{supra} note 9.
\textsuperscript{134} See, e.g., \textit{In re} Chateaugay Corp., 826 F.2d 1177 (2d Cir. 1987); \textit{In re} Moens, 800 F.2d 173 (7th Cir. 1986); \textit{In re} Dalton, 733 F.2d 710 (10th Cir. 1984). The Ninth Circuit Court of Appeals compared a withdrawal to a venue transfer order, which "may not be appealed until final judgment." \textit{In re} Kemble, 776 F.2d 802, 806 (9th Cir. 1985). A withdrawal of the reference has, however, been reviewed by way of writ of mandamus. See \textit{In re} Powelson, 878 F.2d 976, 981 (7th Cir. 1989); \textit{Kemble}, 776 F.2d at 806 n.5.
has held that federal courts may certify orders withdrawing the reference to bankruptcy courts for interlocutory appeal under section 1292(b).\textsuperscript{135} The Tenth Circuit reasoned that, because the orders withdrawing the references originate in district courts, section 1292 should apply.\textsuperscript{136}

In an unprecedented decision, however, the Second Circuit recently reviewed a district court’s withdrawal of the reference without ever establishing its jurisdictional basis.\textsuperscript{137} While in the past the Second Circuit wavered on whether section 1292 is available for bankruptcy appeals,\textsuperscript{138} its decision in \textit{Ben Cooper} referred neither to section 1292 nor to section 158(d) to establish its jurisdiction.\textsuperscript{139} The United States Supreme Court vacated the judgment and remanded the case to the Second Circuit so that it could resolve the omitted jurisdictional question.\textsuperscript{140} The Second Circuit, after establishing its jurisdiction,\textsuperscript{141} recently returned \textit{Ben Cooper} to the Supreme Court. Assuming the Supreme Court agrees with the Second Circuit’s reasoning, it can address the important issue of jury trials in the bankruptcy court, an integral part of the case.\textsuperscript{142}

\textsuperscript{135} \textit{Kaiser Steel Corp.}, 911 F.2d at 380; \textit{In re Dalton}, 733 F.2d 710 (10th Cir. 1984).

\textsuperscript{136} \textit{Kaiser Steel Corp.}, 911 F.2d at 387. The court in \textit{Kaiser} did, however, state that section 1292 could not be utilized for orders originating in the bankruptcy court. \textit{Id.} at 386.

\textsuperscript{137} \textit{In re Ben Cooper}, 896 F.2d 1394 (2d Cir. 1990).

\textsuperscript{138} One panel of the Second Circuit used, without comment, section 1292 for an appeal of the district court’s refusal to dissolve an injunction of the bankruptcy court. \textit{In re Goodman}, 873 F.2d 598, 601-02 (2d Cir. 1989). Another panel of the same circuit, however, recently recognized the jurisdictional problem that exists, and indicated that section 1292 may not be applicable when the order being appealed from originated in the bankruptcy court. \textit{In re Sonnax Indus., Inc.}, 907 F.2d 1280, 1283 n.1 (2d Cir. 1990); \textit{see also} Germain v. Connecticut National Bank, 926 F.2d 191, 193 (2d Cir. 1991) ("[I]t would overly stretch section 1292 to hold that an order entered by such an appellate panel [of bankruptcy judges] under section 158(b) might be subject to review as an interlocutory injunction under section 1292(a)(1) or discretionary review after certification under section 1292(b).").

\textsuperscript{139} \textit{Ben Cooper}, 896 F.2d at 1396. Interestingly, the three judges that heard \textit{Ben Cooper} were not involved in \textit{Goodman}, 873 F.2d at 599, or \textit{Sonnax Indus.}, 907 F.2d at 1281. On the same day as \textit{Ben Cooper}, this panel also decided a similar case which allowed an appeal of the district court’s affirmance of the bankruptcy court’s denial of a motion for transfer of venue. \textit{In re Manville Forest Product’s Corp.}, 896 F.2d 1384, 1386 (2d Cir. 1990). Even though such an order is clearly interlocutory, the court nevertheless allowed the appeal without comment.

\textsuperscript{140} 111 S. Ct. 425 (1990).

\textsuperscript{141} In the \textit{Ben Cooper} remand, the Second Circuit implied that either section 158(d) or section 1291 provided its jurisdiction. The court accomplished its result by merging the interlocutory withdrawal of the reference into the “final order” of the district court granting permissive abstention. \textit{In re Ben Cooper}, 924 F.2d 36, 38 (2d Cir. 1991). The petitioner, Insurance Co. of Pennsylvania, filed a petition for certiorari. The Court, however, recently denied the Solicitor General’s request for expedition of the hearing, which indicates the Court is in no hurry to decide the merits. Insurance Co. of Pennsylvania v. Ben Cooper, Inc., 111 S. Ct. 1100 (1991).

\textsuperscript{142} \textit{Ben Cooper}, 896 F.2d 1394 (2d Cir. 1990).
Many courts have avoided these problems by permitting appeals under sections 1291 and 1292 in all bankruptcy matters, from either the district court or the bankruptcy court orders.\textsuperscript{143} Congress acknowledged these multiple routes of appeal when it amended the statutes barring appeals in certain bankruptcy abstentions and remands after removal.\textsuperscript{144} While Congress has included sections 158(d), 1291, and 1292 in the list of forbidden routes when appeal is barred, it has yet to indicate which of the three are appropriate routes when appeal is permitted.

Simply interpreting sections 1291 and 1292 to apply to all bankruptcy appeals, however, still forecloses the possibility of interlocutory appeals from decisions of the bankruptcy appellate panels because these panels are excluded from the provisions of sections 1291 and 1292.\textsuperscript{145} This may explain the Ninth Circuit's position on section 1292's applicability when the district courts, or bankruptcy appellate panel, act in an appellate capacity, because this is the only circuit in which such panels exist.\textsuperscript{146} The panels' appellate capacity, however, equals that of district courts in reviewing decisions of the bankruptcy judges and makes such a result difficult to justify.\textsuperscript{147}

\textsuperscript{143} See supra notes 96-101 and accompanying text.

\textsuperscript{144} Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 309, 104 Stat. 5089, 5113. Prior to this enactment, 11 U.S.C. § 305(c), 28 U.S.C. § 1334(c)(2), and 28 U.S.C. § 1452(b), contained the phrase "not reviewable by appeal or otherwise." Congress added the language "by the court of appeals under section 158(d), 1291 or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title" to each of these statutes. See Pub. L. No. 101-650, § 309, 104 Stat. at 5113.

\textsuperscript{145} L. PONOROFF & S. SNYDER, COMMERCIAL BANKRUPTCY LITIGATION ¶ 4.03, at 4-26 (1989).

\textsuperscript{146} One panel of the Ninth Circuit, however, recently found it had jurisdiction of an appeal from a final order of a bankruptcy appellate panel under both sections 1291 and 158(d). See In re Riverside-Linden Investment Co., 925 F.2d 320, 322 (9th Cir. 1991).

\textsuperscript{147} See 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3926, at 116 (Supp. 1990), where the authors stated:

Even though appellate panels are composed of three bankruptcy judges, it is difficult to be confident that access to the court of appeals should depend on whether the first appellate review is had in the district court or an appellate panel. If appeal is available from district courts but not from appellate panels, moreover, parties may be less willing to resort to appellate panels.

\textit{Id.; see also} Bermant & Sloan, supra note 53.

The January 1990 tentative report of the Federal Courts Study Committee of the Judicial Conference recommends that each circuit establish bankruptcy appellate panels, and the Judicial Improvements Act of 1990, signed by the President on December 1, 1990, and effective upon enactment, provides that 28 U.S.C. § 158(d) be amended to allow the Judicial Council of two or more circuits to establish intercircuit bankruptcy appellate panels. Pub. L. No. 101-650 § 305, 104 Stat. at 5105. Therefore, the necessity of their inclusion in the statutes governing bankruptcy appeals is of even greater import.
The recent amendment to Rule 6(a) of the Federal Rules of Appellate Procedure indicates further judicial concern about bankruptcy appeals. 148 Although it neither addressed nor provided a solution to the problem posed by this Article, subdivision (a) would appear to support the now universal conclusion that 28 U.S.C. § 1291 is the applicable statute for appeals when the district court is exercising original jurisdiction in bankruptcy matters. 150

The Supreme Court has the power "to prescribe general rules of practice and procedure ... for cases in the United States district courts ... and courts of appeals," 151 and such rules "shall not abridge, enlarge or modify any substantive right." 152 Congress increased significantly the Court's power with a new sentence added to conclude section 2072(b): "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 153 Nevertheless, the Court does not attempt to use this power to address interlocutory appeals in bankruptcy cases. The Court does not mention interlocutory appeals in bankruptcy matters and thus does not address or solve the problems previously outlined. 154 Two circuits have ruled upon the use of section 1292 for bankruptcy appeals since the new Rule 6 went into effect, and neither circuit mentioned the provisions of the new rule as having any bearing on its decision. 155

IV. PROPOSED STATUTORY REVISIONS

While the problem may seem complex, the solution is rather simple. As previously stated, there is no apparent reason why interlocutory orders to the courts of appeals should only be permitted when the district court is

148. FED. R. APP. P. 6 advisory committee's note.
149. The advisory committee's note states that "[t]his subdivision is included to avoid uncertainty arising from the question of whether a bankruptcy case is a civil case ... Subdivision (a) makes it clear that [the Rules of Appellate Procedure] apply to an appeal from a district court bankruptcy decision." FED. R. APP. P. 6 advisory committee's note.
150. FED. R. APP. P. 6 (a) provides, "An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions," FED. R. APP. P. 6(a).
152. Id. § 2072(b).
153. Id. This sentence is the famous supersession clause which Representative Kas- tenmeier saw as an unconstitutional "trump" of existing statutes. See 134 CONG. REC. H10,440 (daily ed. Oct. 19, 1988).
154. Rule 6(b) makes most of the other Rules of Appellate Procedure applicable to appeals from a district court or bankruptcy appellate panel pursuant to 28 U.S.C. § 158(d). See FED. R. APP. P. 6(b).
155. Capitol Credit Plan of Tenn., Inc. v. Shaffer, 912 F.2d 749 (4th Cir. 1990); In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990).
sitting in original jurisdiction. In addition, interlocutory appeals are permitted from the bankruptcy courts to the district courts (or bankruptcy appellate panels), therefore, arguably, they should be permitted in the courts of appeals. Interpreting the present construction merely to permit the use of section 1292 is insufficient because that section's provisions do not account for the presence of the bankruptcy appellate panels. As the Fourth Circuit recently stated, "[a] simple clarifying amendment could resolve the split among the circuits." The solution proposed is the amendment of 28 U.S.C. § 158(d) to state that: "The courts of appeals shall have jurisdiction in bankruptcy cases and proceedings pursuant to 28 U.S.C. §§ 1291 and 1292." Congress could then amend sections 1291 and 1292 to account for appeals from the bankruptcy appellate panels.

V. CONCLUSION

The current scheme of bankruptcy appeals has caused the circuit courts great difficulty. The confusion is best illustrated by the fact that some courts resort to using the writ of mandamus and other jurisdictional statutes to resolve the problem. As this Article suggests, Congress should correct the defect in the jurisdictional scheme by amending section 158(d) to include jurisdiction under sections 1291 and 1292, and amending sections 1291 and 1292 to permit appeals from the bankruptcy appellate panels. The change

156. See Capitol Credit, 912 F.2d at 753; supra text accompanying note 131.
158. See Capitol Credit, 912 F.2d at 753; supra text following note 129.
159. Capitol Credit, 912 F.2d at 754.
160. The statutes would read, for example, with inserted new language italicized:

§ 1291. Final decisions of district courts and bankruptcy appellate panels

The courts of appeals (other than the United States Courts of Appeals for the Federal Circuit) shall have jurisdiction from all final decisions of the district courts of the United States, the bankruptcy appellate panels, . . . .


§ 1292. Interlocutory decision
(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the bankruptcy appellate panels, . . . .

(b) When a district judge, or a bankruptcy appellate panel, in making in a civil action an order not otherwise appealable under the section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

proposed in this Article would eliminate the waste of judicial time and resources in the critical area of bankruptcy.