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Federal Discretionary Appeals

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INTRODUCTION

This paper explores three types of permissive, discretionary appeals authorized by statute and federal procedural rules: (i) appeals of interlocutory orders under 28 U.S.C. § 1292(b); (ii) appeals of class certification orders under Federal Rule of Civil Procedure 23(f); and (iii) direct and interlocutory bankruptcy appeals. Although the purpose of these various appeal provisions overlap, the procedural requirements and mechanics differ for each. To pursue a section 1292(b) appeal, the appellant must satisfy all of the statute's requirements, persuade the district court to certify its order on this basis, and obtain the court of appeals' permission to pursue the appeal. A 23(f) appeal, in contrast, does not (i) require district court certification, or (ii) mandate consideration of the section 1292(b) factors. A direct bankruptcy appeal, which allows the parties to bypass the district court in seeking review of a bankruptcy court order, requires a showing of only one of the statutory factors (similar but not identical to the 1292(b) requirements) and also permits certification by agreement of the parties. Once either the bankruptcy court or district court has certified the case for direct appeal, the court of appeals then decides whether to exercise its discretion and decide the appeal. This paper details the procedural requirements of these provisions and identifies the substantive issues that have recently been the subject of these discretionary appeals.

I. Interlocutory Appeals Under 28 U.S.C. § 1292(b)

A. The Statute.

28 U.S.C. § 1292(b) authorizes the court of appeals to exercise jurisdiction over appeals from interlocutory orders as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (emphasis in original). Under section 1292(b) a party seeking immediate appellate review of an interlocutory order must first obtain a certification from the district court that the order warrants interlocutory review. The party must then obtain leave from the court of appeals to pursue an appeal of the order.

B. Certification Requirements in the District Court and Court of Appeals.

To obtain certification in the district court, the appellant must satisfy the following requirements: (i) the order involves a controlling question of law, (ii) there is a substantial ground for difference of opinion on that controlling legal question, *and* (iii) immediate appeal would materially advance the termination of the litigation. A survey of Fifth Circuit cases reveals little discussion of these factors, and most recent decisions contain only a passing reference to the statute and a brief discussion of the scope of review. Other circuits (the Seventh and Eleventh in particular) have attempted to limit the scope of section 1292(b) to deal with apparent liberal use of the provision and have provided extensive views on at least some of the section 1292(b) factors.

Although the Fifth Circuit has never written extensively on these factors, it has observed a distinction between "a 'controlling question of law' as opposed to a question of fact or matter for the discretion of the trial court." *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096-97 (5th Cir. 1970); *see also Clark-Dietz & Assocs.-Engr's v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) ("[N]one of the questions is particularly difficult and most appear to be merely fact-review questions inappropriate for § 1292(b) review. Even those questions that are legal may be foreclosed by the fact findings of the district court."). The Eleventh Circuit (agreeing with the Seventh Circuit's approach) has explained a controlling legal question as an issue of statutory or constitutional interpretation or the "meaning" of a regulation or common-law doctrine in contrast to whether a fact question exists sufficient to defeat summary judgment. *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1258 (11th Cir. 2004) (citing *Arenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674 (7th Cir. 2000)). A question of law does not involve application of "settled law to fact" and "does not mean any question the decision of which requires rooting through the record in search of the facts or of genuine issues of fact." *McFarlin*, 381 F.3d at 1258. Section 1292(b) applies to "pure" legal questions that an appellate court "can decide quickly and cleanly without having to study the record." *Arenholz*, 219 F.3d at 677. Although courts have struggled to define what constitutes a substantial ground for difference of opinion, it is clear that the parties' disagreement does not rise to the level required by the statute. Whether an immediate appeal would materially advance the termination of the litigation turns on whether "resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1259.

Neither the rules nor the statute provide a deadline for seeking certification in the district court. *Richardson Elecs., Ltd. v. Panache Broadcasting of Pa., Inc.*, 202 F.3d 957, 958-59 (7th Cir. 2000). The Seventh Circuit has warned, however, that "[a] district judge should not grant an inexcusably dilatory request. . . ." *Id.* If the district court certifies the order for appeal, the appellant has only 10 days to file a petition for permission to appeal under Federal Rule of Appellate Procedure 5. *But see Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 162 (1984) (Stevens, J., dissenting) (noting that a second certification order renews the 10-day timetable); *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981) (agreeing that an order certified for appeal can be recertified if the 10-day time period passes without the filing of the petition). A notice of appeal does not confer jurisdiction on the court to decide an interlocutory appeal. *Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180 (5th Cir. 1985).

A petition for permission to appeal is a filing requesting that the circuit court hear the interlocutory appeal. The petition must comply with Federal Rule of Civil Procedure 32(c)(2) (governing the form of "other papers") and cannot exceed 20 pages exclusive of the certificate of interested persons (or corporate disclosure statement), proof of service and the attached district court orders. FED. R. APP. P. 5(c). The petition must contain the following sections: (a) the facts necessary to understand the question presented; (b) the question itself; (c) the relief sought; (d) the reasons why the appeal should be allowed and is authorized by statute or rule; (e) attached copies of the order the party is seeking to appeal and any order certifying the order for interlocutory appeal. FED. R. APP. P. 5(b). A response or any cross-petition is due within 7 days after the petition is served. FED. R. APP. P. 5(b)(2). Rule 5 also provides that an interlocutory order can be amended to include the 1292(b) certification statement. FED. R. APP. P. 5(a)(3). The time to file a petition for permission to appeal runs from the date of the amended order satisfying section 1292(b). Any filings fees associated with prosecuting the appeal are not due until the court of appeals grants permission to appeal. FED. R. APP. P. 5(d). These fees are payable to the district court clerk, and only after these fees are paid will the circuit court docket the appeal. FED. R. APP. P. 5(d)(3). After docketing, the record is forwarded to the court of appeals and the appeal is then handled and processed as any other ordinary appeal. FED. R. APP. P. 5(d)(3). All additional appellate deadlines run from the date on which the court of appeals grants permission to appeal. FED. R. APP. P. 5(d)(2). A notice of appeal is not required. FED. R. APP. P. 5(d)(2).

The failure to seek interlocutory review under section 1292(b) does not waive issues for appeal after final judgment although there is authority in the Fifth Circuit that a party should request 1292(b) certification before filing a mandamus petition in the court of appeals. *In re El Paso Elec. Co.*, 77 F.3d 793, 795 (5th Cir. 1996) ("[W]e conclude that El Paso could have sought certification [under section 1292(b)] from the district court. . . . [W]e conclude that El Paso does not lack an 'adequate alternative means to obtain the relief they seek' and is therefore not entitled to the extraordinary remedy of mandamus."); *see also Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261 (5th Cir. 2001).

C. Scope of Review

In reviewing an interlocutory order under section 1292(b), the court of appeals' review is not limited to the *issues* specifically certified by the district court; rather, the court of appeals can review "any question that is included within the order that contains the controlling question of law identified by the district court." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05 (1996). The appellate court, however, cannot go beyond the certified order and review other orders issued in the case. *Id.* at 205. The court of appeals' review is limited to deciding controlling legal questions. *See* 28 U.S.C. § 1292(b). As a result, the court of appeals will not review, for example, whether there is sufficient evidence to create a genuine issue of material fact. *Malbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) ("[O]ur review is limited to the narrow question of statutory interpretation raised by Crown in both its brief before us and its memorandum in support of the motion for summary judgment.").

D. Section 1292(b) Practice in the Fifth Circuit

Attached to this paper as Appendix A is a chart detailing the legal issues and procedural posture of cases certified and accepted for review by the Fifth Circuit since January 2004. This chart also identifies recent United Supreme Court cases certified under section 1292(b). Based on the recent decision from the Fifth Circuit, interlocutory orders in the removal/remand, summary judgment, and motion to dismiss context have been frequently reviewed by the Fifth Circuit. The types of controlling legal issues that have been reviewed varies – from preemption, federal jurisdiction, insurance coverage disputes, statutory construction, and assorted "issues of first impression" under federal law. In 2005-06, the Fifth Circuit received 31 petitions for permission to appeal under section 1292(b). JUDICIAL WORKLOAD STATISTICS, UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT, Enclosure F (July 2005-June 2006); *see also* UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT, JUDICIAL WORKLOAD STATISTICS, Appendix F (1999) (27 petitions for permission to appeal filed). This relatively low number of petitions (compared to the 8966 appeals brought to the court during this timeframe) suggests that the district courts are effectively identifying the cases that warrant immediate appeal. *See* DANA LIVINGSTON COBB, *Permissive Interlocutory Appeals in State Court*, at p. 4, 12th ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, UNIVERSITY OF TEXAS SCHOOL OF LAW (2002) (noting that the Fifth Circuit frequently agrees with the district courts' use of the 1292(b) procedure and the rare use of the procedure by the district courts); *id.* at 15 ("The Fifth Circuit grants permission to appeal in a surprisingly high percentage of the section 1292(b) petitions filed each year.").

Beyond addressing the scope of its appellate review, the Fifth Circuit has never set forth a "set" standard for determining whether to grant permission to appeal. This is not uncommon. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3930 (2007) ("Most decisions invoking § 1292(b) may tacitly reflect this [flexible] view of the statute, since they certify or decline to certify appeals, and grant or deny permission to appeal, with no more than a recital of the statutory terms."); *id.* (noting the "many decisions that act on § 1292(b) appeals without extended discussion"); *but see McFarlin v. Conseco Servs.*, 381 F.3d 1251 (11th Cir. 2004) (setting forth a coherent section 1292(b) standard and vacating motion panel's grant of permission to appeal, stating "[t]he antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case.").[1] Indeed, the Fifth Circuit has rarely issued opinions denying a petition for permission to appeal. *But see AT&T v. MCI Commn's*, 748 F.2d 799 (5th Cir. 1984); *Clark-Dietz & Assocs.-Engr's v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983); *Burge v. St. Tammany Parish Sherriff's Office*, No. 97-00044, 1997 U.S. App. LEXIS 41413 (5th Cir. April 14, 1997). In its only decision containing a prolonged discussion denying a 1292(b) appeal, the Fifth Circuit explained:

> As they are posed, none of the questions is particularly difficult and most appear to be merely fact-review questions inappropriate for § 1292(b) review. Even those questions that are legal may be foreclosed by the fact findings of the district court.

[1] The Eleventh Circuit's decision in *McFarlin* appears to be a reaction to "liberal" and "expansive" use of section 1292(b), a problem that does not currently exist in the Fifth Circuit given the relatively few Rule 5 petitions filed each year.

> Moreover, while an immediate appeal may save the district court time because reversal might preclude a hearing on damages and affirmance might induce settlement, an immediate appeal may delay judgment and thus penalize the appellees if prejudgment interest is ultimately not allowed, thereby causing a hardship to at least one of the parties. In addition, we are unable to perceive that ultimate determination will be advanced because decision of the appeal, even in the present favorable state of our docket, will require four to six months. *See* Note, Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b), 88 Harv.L.Rev. 607, 627 (1975).
>
> . . . . The basic rule of appellate jurisdiction restricts review to final judgments, avoiding the delay and extra effort of piecemeal appeals. Section 1292(b) appeals are exceptional. They are permitted only when there is a substantial difference of opinion about a controlling question of law and the resolution of that question will materially advance, not retard, ultimate termination of the litigation. Those requirements have not been demonstrated. *See generally* Note, *supra*, at 618-28.

Clark-Dietz, 702 F.2d at 69.

Decisions from across the country are all over the map on what types of orders are properly the subject of a section 1292(b) appeal. Commentators have, however, identified the following types of cases as best suited for interlocutory review:

- "Those rejecting—or, without final judgment, accepting—challenges to subject matter jurisdiction, justiciability, personal jurisdiction or venue. . . ."
- "Orders deferring the exercise of jurisdiction may likewise be suitable for appeal. . . ."
- "Plainly dispositive questions going to the merits of the case may be raised by motions to dismiss, for judgment on the pleadings, for summary judgment, or like devices."
- "Appeals have frequently been allowed on the question whether the plaintiff has stated a claim if the problem is a difficult one of substantive law, rather than one of properly pleading a claim sought to be brought. . . ."
- "Matters of defense may be similarly suited for appeal, whether the effort is to defeat the entire claim or to limit the issues that remain to be tried. Among the defenses that regularly provide occasions for § 1292(b) appeal are limitations, release, immunity, and res judicata."

CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3931 (2007).

II. Interlocutory Appeals of Class Certification Orders under Rule 23(f).

A. Introduction.

Subsection (f) of Federal Rule of Civil Procedure 23 (the class action rule) gives courts of appeals discretion to grant interlocutory review of district court orders granting or denying class certification. This paper analyzes the standards for allowing interlocutory appeals under Rule 23(f), current issues regarding the scope of appellate review, and other procedural issues, with a particular focus on Fifth Circuit jurisprudence. Although the Fifth Circuit is one of the few circuits that has not clearly articulated the standard it will apply in deciding whether to grant permission to appeal under Rule 23(f), the attached chart (Appendix "B") shows that it has granted approximately 80% of timely-filed non-prisoner petitions from December 1, 1998 through May 16, 2007.

B. Rule 23(f).

In 1978, the Supreme Court decided *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), which held that orders relating to class certification are not independently appealable prior to final judgment under 28 U.S.C. § 1291. After that, litigants were forced to seek interlocutory appeal by way of more restrictive avenues, such as mandamus and permissive appeals under § 1292(b). *See* 28 U.S.C. §§ 1651(a), 1292(b).

However, in 1998, Federal Rule of Civil Procedure 23 was amended to allow for interlocutory appeals of class certification decisions. FED. R. CIV. P. 23(f). Rule 23(f), which became effective December 1, 1998, gives the federal circuit courts discretion to grant such an appeal. The Rule states:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23(f). The Rule significantly relaxes the standards for appellate review of class action certification. The Advisory Committee's notes to Rule 23(f) observe that Rule 23(f) is designed on the model of § 1292(b) but highlight two significant differences: (1) there is no requirement for district court certification; and (2) it does not include the potentially limiting requirements of § 1292(b)—that the district court order involve a controlling issue of law on which a substantial ground for a difference of opinion exists and that an immediate appeal may materially advance the ultimate termination of the litigation. *Id.* (advisory committee's note). On the other hand, the Rule addresses concerns about the disruptiveness of interlocutory appeals by providing a short window of ten days in which an appellant must file the appeal.

C. Standards for Granting Permission to Appeal a Class Certification Decision.

1. The Advisory Committee's Guidance.

Because the rule itself is silent regarding when an interlocutory appeal should be permitted, the Advisory Committee's notes direct the courts of appeals to "develop standards for granting review." *Id.* (advisory committee's note). Indeed, the drafters intended the circuit courts to enjoy "unfettered discretion" to grant or deny permission to appeal based on "any consideration that the court of appeals finds persuasive." *Id.* (advisory committee note). Despite this wide open grant of discretion and the absence of any articulated standards in the rule itself, the Advisory Committee suggested that "[p]ermission is most likely to be granted" when the class certification decision "turns on a novel or unsettled question of law," or when, as a practical matter, "the decision on certification is likely dispositive of the litigation." *Id.* However, the note warns, that permission will almost always be denied "when the certification decision turns on case-specific matters of fact and district court discretion." *Id.*

Thus, according to the drafters, appeal-worthy cases are those in which a denial of certification would force a plaintiff to expend costs far greater than the prospects of a small individual recovery, or those in which the grant of certification would pressure a defendant to settle rather than take the risk of "potentially ruinous liability." In other words, Rule 23(f) breathed new life into the death-knell doctrine (for plaintiffs) and the reverse death-knell doctrine (for defendants) that had been rejected by the Supreme Court in *Coopers & Lybrand*. *See* 437 U.S. at 463. Additionally, the Advisory Committee's reference to "novel or unsettled question[s] of law" mimics the "controlling issue of law" requirement under § 1292(b). Using the Advisory Committee note as a starting point, most courts of appeals (with the notable exception of the Fifth Circuit) have developed their own version of the appropriate standard.

2. The Fifth Circuit's Lack of an Articulated Standard for Granting Rule 23(f) Interlocutory Appeals.

Until very recently, the Fifth Circuit had not provided its practitioners any guidance on the standard that would apply for granting Rule 23(f) petitions.[2] In fact, none of the Fifth Circuit's 23(f) opinions have comprehensively outlined a list of factors the Court should consider. However, the chart attached as an appendix to this paper provides an overview of the types of cases in which the Fifth Circuit has allowed or denied interlocutory review under Rule 23(f). The available statistics are favorable for parties seeking permission to appeal. Based on a review of cases available on Westlaw and Lexis, from December 1, 1998 (the date on which Rule 23(f) became effective) until May 16, 2007, 35 petitions have been filed requesting permission to appeal a class certification order. Of those 35 petitions, 28 have been granted, 5 have been denied, and 2 are currently pending.

The closest the Fifth Circuit has come to setting a standard was its recent opinion reversing class certification in *Regents of the University of California v. Credit Suisse First*

[2] However, in one of its first Rule 23(f) cases, the Fifth Circuit upheld the constitutionality of Rule 23(f) interlocutory appeals. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 974 (5th Cir. 2000).

Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007), *cert. filed*, (Mar 05, 2007, No. 06-1341). In that case, the plaintiffs sought certification of their secondary securities liability claims against Enron's banks. The Fifth Circuit cited the unsettled-question-of-law and settlement-pressure standards articulated by the Advisory Committee and rejected the plaintiffs' argument that the motions panel improvidently granted leave to appeal. *Id*. at 379. It reasoned that the pressure on the defendant banks to settle was "particularly acute" because plaintiffs were seeking to hold the banks liable "for nearly the entirety of securities losses stemming from the Enron collapse." *Id*. at 379. Thus, according to the Fifth Circuit, it was appropriate to provide appellate review before an erroneous class certification decision coerced settlement. *Id*.

Moreover, the Court held that the case gave rise to "unsettled questions of law concerning the entanglement of the merits with the class certification decision, as well as the district court's theory of 'deceptive act' liability underlying its finding that common issues of reliance predominate," issues that were not especially contingent on facts likely to be further developed at trial. *Id*. at 379-80. Having concluded that both of the Advisory Committee's suggested criteria had been met, but without expanding on them, the Fifth Circuit proceeded to consider the merits of the rule 23(f) appeal. *See* part D(2), *infra*, for more thorough discussion of the case.

Thus, when asking for permission to appeal certification orders in the Fifth Circuit, litigants should start by arguing the criteria set forth in the Advisory Committee notes. From there, it is helpful to turn to the standards articulated by other courts of appeals for further guidance.

3. Standards for Granting Permission to Appeal Class Certification Decisions Articulated by Other Courts of Appeals.

The Seventh Circuit's decision in *Blair v. Equifax Check Services*, 181 F.3d 832 (7th Cir. 1999), was the first decision to address the standards for accepting Rule 23(f) appeals. In *Blair*, the court rejected the adoption of a bright-line rule for granting review and instead identified three general categories of cases in which the grant of appeal under Rule 23(f) would be appropriate. *Id*. at 834. The first category comprises the death-knell cases: cases in which the class certification order effectively terminates the litigation. For the plaintiff, this occurs when certification has been denied and the representative plaintiff's claim is too small to be economically viable by itself. *Id.*

The second category arises when the grant of a certification order can effectively end litigation by forcing the defendant to settle (the so-called "reverse death-knell" situation). Noting that the reviewing court "must be wary lest the mind hear a bell that is not tolling," the Seventh Circuit added a slight qualification to these first two categories, requiring the party seeking leave to appeal to also demonstrate that the district court's decision was "questionable." *Id*. at 835.

The third category in which appeal would be appropriate is where the class certification order implicates an unresolved legal issue concerning class actions and an appeal would assist the development of a "fundamental issue" in the law. *Id*. Echoing one of the Advisory

Committee's primary motivations in adopting the rule, the court reasoned that, because many class actions are settled or resolved in a way that precludes decision on procedural matters, "some fundamental issues about class actions are poorly developed." *Id.*; FED. R. CIV. P. 23 (advisory committee's note). In this third category, the Seventh Circuit held that it is less important that the district court opinion be questionable, as "[l]aw may develop through affirmances as well as reversals." *Id.*

Following the Seventh Circuit's lead, the First, Second, Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits have all weighed in, with some refinement of the *Blair* standards.[3] *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 292-94 (1st Cir. 2000); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139-40 (2d Cir. 2001); *Newton v. Merrill Lynch*, 259 F.3d 154, 163-65 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 143-46 (4th Cir. 2001); *In re Delta Air Lines*, 310 F.3d 953, 957-60 (6th Cir. 2002) (per curiam); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957-61 (9th Cir. 2005); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104-05 (D.C. Cir. 2002).

The First Circuit's approach in *Waste Management Holdings, Inc. v. Mowbray* seems to be among the narrowest of the standards. 208 F.3d at 292-94. The First Circuit largely adopted *Blair*'s methodology with one restriction. *Id.* at 293. Because of the ease with which issues of law can be framed as "fundamental," and because so many class certification decisions turn on "familiar and almost routine issues," the First Circuit narrowed the third category to include only "those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case."[4] *Id.*

The broadest of the standards seems to be that adopted by the Eleventh Circuit in *Prado-Steiman v. Bush*. 221 F.3d at 1274-76. In *Prado-Steiman*, the Eleventh Circuit elaborated on the *Blair* standard and adopted five guideposts for Rule 23(f) review:

(1) whether the certification ruling is likely to sound the death knell of the litigation;

[3] The Eighth, Tenth, (and arguably Fifth) Circuits have not yet elaborated standards for appeal under Rule 23(f). *See, e.g., Liles v. Del Campo*, 350 F.3d 742, 746 (8th Cir. 2003) (refusing to undertake the task of refining that circuit's standard, concluding that an interlocutory appeal would be premature in that case).

[4] The First Circuit later defined the criteria for deciding whether to permit an interlocutory appeal with respect to defendant classes. *See Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 38-39 (1st Cir. 2003). It held that such appeals are warranted when one of three circumstances exists: (1) denial of certification effectively disposes of the litigation because the plaintiff's claim would only be worth pursuing as against a full class of defendants and the district court's certification ruling is problematic; (2) an interlocutory appeal would clarify an important and unsettled legal issue that would likely escape effective end-of-case review; or (3) an interlocutory appeal is a desirable vehicle either for addressing special circumstances or for avoiding manifest injustice. *Id.* at 39.

(2) whether the district court's certification decision contains a substantial weakness, such that it likely was an abuse of discretion;

(3) whether the appeal presents an unsettled legal question that is of specific and general importance, *e.g*., issues likely to evade review, issues that are involved in related actions, and interests that affect the public interest;

(4) the nature and status of the litigation before the district court, *e.g*., the status of discovery, the pendency of relevant motions, and how long the matter has been pending; and

(5) the likelihood that future events will make immediate appellate review more appropriate, *e.g*., a change in financial status of a party or ongoing settlement negotiations.

Id. The second factor serves as a sliding scale: the more questionable the district court's decision, the less the remaining four factors need weigh in. *Id*. at 1274- 75 & n. 10. Moreover, the court recognized the possibility that when the district court's certification decision is clearly wrong, Rule 23(f) review "may be warranted even if none of the other factors supports granting the Rule 23(f) petition." *Id*. at 1275.

The Fourth Circuit, in *Lienhart v. Dryvit Systems, Inc*., 255 F.3d 138 (4th Cir.2001), adopted the Eleventh Circuit's sliding scale analysis, but stated that when a class certification decision is manifestly erroneous, review is warranted regardless of the remaining factors. *Id.* at 145-46.

The court in *Lorazepam* neatly categorized the subtle differences among the circuits into three categories. *See* 289 F.3d at 104. First, it explained, the Third and Fourth Circuits permit appeal if the district court's decision is erroneous, regardless whether the other factors governing appeal under Rule 23(f) are present. *See id.* (citing *Newton*, 259 F.3d at 165 and *Lienhart*, 255 F.3d at 145-46). Second, the First and Seventh Circuits allow appeal when a petition raises an unsettled and fundamental question of law, regardless whether the district court likely erred. *Id.* (citing *Mowbray*, 208 F.3d at 293 and *Blair*, 181 F.3d at 835). And third, the First and Seventh Circuits caution that interlocutory appeal of an unsettled question of law is appropriate only when that question may evade effective appellate review at the end of the trial court proceedings. *Id.*

D. The Scope of a Rule 23(f) Appeal: Can the Appellate Court Review Merits Issues that Overlap with Certification Issues?

In the class certification appeal context, the area in which the Fifth Circuit has provided the most guidance is with regard to whether such review can and should involve an inquiry into the merits of the case. In *Regents of the University of California*, the recent Enron class certification opinion, the Fifth Circuit rejected the plaintiffs' argument that it should accept the district court's view of the underlying theories of liability as valid for the purposes of the interlocutory appeal. 482 F.3d at 380. Instead, the Fifth Circuit held that it was appropriate to

address arguments that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision. *Id.* at 380. And in its May 16, 2007 decision in *Oscar Private Equity Investments v. Allegiance Telecom, Inc*., the court reiterated its view that overlapping merits issues must be fully addressed at certification when it held that loss causation must be established at the class certification stage by a preponderance of all admissible evidence. *See* No. 05-10791, 2007 WL 1430225 (5th Cir. May 16, 2007).

Some background is helpful to fully understand the impact of the Enron and *Oscar Private Equity* decisions.

1. The Level of Factual and Legal Inquiry Required in Class Actions.

In *Eisen v. Carlisle & Jacquelin*, the Supreme Court held that Rule 23 did not authorize courts "to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. 156, 177 (1974). This prompted some courts to hold that, at the certification stage, trial courts were not permitted to weigh competing evidence and were instead required to confine their review to the allegations raised in the complaint. *See In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 134-135 (2d Cir. 2001) (holding that "a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" at certification); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n. 7 (10th Cir. 1999) (recognizing that "when deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true").

In fact, until recently in the Second Circuit, plaintiffs were required only to make 'some showing' of the certification requirements, at least when they were 'enmeshed' with the merits. *See In re Visa Check*, 280 F.3d at 134-135. But in *In re IPO Securities Litigation*, the Second Circuit abandoned its "some showing" standard, holding instead that the trial court must be persuaded that the facts relating to certification have been established. 471 F.3d 24, 40 (2d Cir. 2006). According to the Second Circuit, *Eisen*'s former ban on any consideration of the merits at the certification stage now only applies "when a merit's issue is unrelated to a Rule 23 requirement." *Id*. at 41.

Even before the Second Circuit's *IPO* decision, a majority of circuit courts (including the Fifth Circuit) had reached that same conclusion. According to these courts, a district court is not limited to the allegations raised in the complaint, and should instead make whatever legal and factual inquiries are necessary to an informed determination of the certification issues. *See Unger v. Amedisys Inc*., 401 F.3d 316, 321 (5th Cir. 2005); *see also Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 166 (3d Cir. 2001); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004); *West v. Prudential Sec., Inc*., 282 F.3d 935, 938 (7th Cir. 2002); *Szabo v. Bridgeport Machs., Inc*., 249 F.3d 672, 675-76 (7th Cir. 2001); *Cooper v. Southern Co*., 390 F.3d 695, 712 (11th Cir. 2004). In support of this more demanding inquiry at the class-certification stage, many of these courts relied on two Supreme Court decisions addressing the rigor with which courts must assess the existence of the Rule 23 requirements. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) (stating that since "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," a court must conduct a "rigorous

analysis" in which it "may be necessary for the court to probe behind the pleadings"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (stating that district courts are required to take a "close look" at the parties' claims and evidence in making their Rule 23 decisions).

For example, in *Unger*, the Fifth Circuit acknowledged that district courts have an obligation to take a "close look," to conduct a "rigorous analysis," and to "find" (and not merely assume) that the legal and factual requirements of Rule 23 have been satisfied. 401 F.3d at 321 (quoting *Amchem*, 521 U.S. at 615, *Falcon*, 457 U.S. at 161, and FED. R. CIV. P. 23(b)(3))." The Court acknowledged that while class certification hearings should not be mini-trials on the merits of the class or individual claims, "'[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Id.* (quoting *Castano v. Am. Tobacco Co*., 84 F.3d 734, 744 (5th Cir.1996)).

In *Langbecker v. Elec. Data Sys. Corp*., 476 F.3d 299 (5th Cir. 2007), the Fifth Circuit extended this analysis to the appellate court's level of inquiry into the validity of the district court's legal rulings as well. Reasoning that "[s]everal of the court's legal rulings underpin its conclusion that these claims are amenable to class certification," the court held that the class certification is put at risk if the district court erred in any of its threshold legal decisions.

2. *Regents of the University of California v. Credit Suisse.*

In *Regents of the Univ. of California*, the Fifth Circuit reversed the district court's order granting class certification in a securities fraud action arising out of allegedly deceptive conduct of several defendant banks. In their Rule 23(f) appeal, the banks challenged the district court's theory of § 10(b) "deceptive act" liability underlying its finding that common issues of reliance predominated. In response, the plaintiffs argued that the court was obligated to accept the district court's underlying theories of liability as valid because the scope of review was "bridled by Rule 23(f)." *Id*. at 380. The Fifth Circuit rejected plaintiffs' argument, explaining:

> The scope of our review is limited, but it is not quite so circumscribed as plaintiffs say. Although we may not conduct an independent inquiry into the legal or factual merit of this case as though we were reviewing a motion under Federal Rule of Civil Procedure 12(b)(6) or 56, we may address arguments that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision. . . . The text of [Rule 23(f)] makes plain that the sole order that may be appealed is the class certification; "no other issues may be raised." The fact that an issue is relevant to both class certification and the merits, however, does not preclude review of that issue. . . . The analysis under Rule 23 must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental.

Id. at 381. The court further explained that *Eisen*'s "no merits inquiry" rule did not mandate a different conclusion. In *Eisen*, the district courts had conducted wide-ranging inquiries into the merits of claims as part of the class certification decision without reference to the criteria for

class certification. The prohibition against looking into the merits therefore did not apply to evaluations of the merits that overlap with consideration of the requirements for class certification. *Id*. Thus, the court concluded, "[i]n a rule 23(f) appeal, this court can, and in fact must, review the merits of the district court's theory of liability insofar as they also concern issues relevant to class certification." *Id*. at 381.

The court went on to conclude that the district court's definition of "deceptive act" was integral to its conclusion that the predominance requirement of Rule 23(b)(3) had been satisfied. Without its broad conception of liability for "deceptive acts," the district court could not have found that the class was entitled to rely on the fraud-on-the-market theory. And without a presumption of class-wide reliance, plaintiffs would have to prove individual reliance on the defendant banks' conduct. *Id*. at 383. Ultimately the Fifth Circuit ruled that the district court's legal rulings underlying its class certification decision were erroneous and that Enron's banks did not have any primary liability under Rule 10b-5. *Id.* at 385-87.

3. *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*

Oscar Private Equity is another important "hot-off-the press" securities class action case in which the Fifth Circuit arguably expanded the scope of review in Rule 23(f) appeals. *See Oscar Private Equity Investments v. Allegiance Telecom, Inc*., No. 05-10791, 2007 WL 1430225 (5th Cir. May 16, 2007). In *Allegiance*, the court acknowledged "the lethal force of certifying a class of purchasers of securities enabled by the fraud-on-the-market doctrine," and held that plaintiffs must establish loss causation at certification stage in order to trigger the fraud-on-the-market presumption that gives rise to class-wide reliance sufficient to satisfy Rule 23(b)'s predominance requirement. (Slip Op. at 2, 7.) In so holding, the court rejected the district court's conclusion that the class certification stage was not the proper time for defendants to rebut the fraud-on-the-market presumption, explaining that "[d]istrict courts often tread too lightly on Rule 23 requirements that overlap with the 10b-5 merits, out of a mistaken belief that merits questions may never be addressed at the class certification stage" and out of an unfounded reliance on *Eisen*. (Slip Op. at 14.)

The Fifth Circuit noted that changes to Rule 23(c)(1)(A) and the Private Securities Litigation Reform Act supported its decision to insist upon a greater showing of loss causation to sustain certification, explaining:

> These concerns have shaped the evolution of class certification and Rule 23. Rule 23(c)(1)(A) no longer demands that the district court rule on class certification "as soon as practicable," but instead insists only upon a ruling "at an early practicable time." FED. R. CIV. P. 23(c)(1)(A)(2003), (revised). And although Rule 23 still recognizes that a class may be "altered or amended," it no longer characterizes the class certification order as "conditional," explaining, in the advisory committee notes, that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." FED. R. CIV. P. 23 Advisory Committee Notes to the 2003 Amendments. These subtle changes, as well as the less-subtle PSLRA, recognize that a district court's certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it.

(Slip Op. at 12-13.) The Fifth Circuit concluded that loss causation must be established at the class certification stage by a preponderance of all admissible evidence. *Id*. at 16.

Justice Dennis dissented, taking the position that proof of loss causation is not related to the Rule 23 inquiry through the fraud-on-the-market presumption, and therefore it is not relevant to the district court's Rule 23 inquiry. Slip Op. at 40. Therefore, he concluded, "the majority's decision dramatically expands the scope of class certification review in this circuit to effectively require a mini-trial on the merits of plaintiffs' claims at the certification stage." *Id*. at 38.

E. Procedural Issues Related to Rule 23(f) Petitions.

1. Timeliness of Rule 23(f) Petitions.

According to Rule 23(f), all petitions seeking permission to appeal a district court order granting or denying a motion to certify a class must be appealed within ten days of the entry of that order. FED. R. CIV. P. 23(f). Where an appeal is proper under Rule 23(f), a party is prohibited from seeking review under § 1292(b) in order to circumvent the ten-day limitation. *See Richardson Elecs., Ltd. v. Panache Broadcasting of Pa., Inc*., 202 F.3d 957, 959 (7th Cir. 2000).

Federal courts have consistently held that a motion for reconsideration tolls the time for appeal, but only if the motion is made within the time for appeal. *See McNamara v. Felderhof*, 410 F.3d 277 (5th Cir. 2005) ("[A] Rule 59 motion to reconsider filed within the ten-day limit set forth in rule 23(f) tolls the period for appeal until the district court rules on that motion."); *see also Shin v. Cobb County Bd. of Educ*., 248 F.3d 1061, 1065 (11th Cir. 2001); *Blair v. Equifax Check Servs*., 181 F.3d 832, 837 (7th Cir. 1999); *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). Note, however, that the Seventh Circuit would allow a Rule 23(f) appeal made within ten days after a district court materially alters a class pursuant to a belated motion for reconsideration, while the Eleventh Circuit would deny the Rule 23(f) petition as untimely in the same situation. *Shin*, 248 F.3d at 1065; *Gary*, 188 F.3d at 893.

Moreover, courts of appeals agree that the ten-day filing period under Rule 23(f) does not include weekends or legal holidays under Federal Rule of Civil Procedure 6(a). *See Shin*, 248 F.3d at 1065; *Blair*, 181 F.3d at 837; *Gary*, 188 F.3d at 893. However, it could be argued that Federal Rule of Appellate Procedure 26(a) governs, in which case legal holidays and weekends would be counted unless the period is less than seven days. FED. R. APP. P. 26(a).

2. No Automatic Right to a Stay of District Court Proceedings.

One additional important procedural aspect of Rule 23(f) is that proceedings are not automatically stayed at the district court level upon a grant of review under Rule 23(f). FED. R. CIV. P. 23(f). If a stay is desired, the party seeking a Rule 23(f) appeal should first seek a stay from the district court. *Id.* (advisory committee's note). If the district court denies the stay, the party can seek a stay from the appellate court. However, if a stay is denied at the district court level, it is unlikely that an appellate court will grant a stay due to the direction of the Advisory Committee's note that the circuit court give the district court's determination "considerable

weight." *Id.*; *see also Blair*, 181 F.3d at 835 (stating that stays will be infrequent and will depend on whether "the probability of error in the class certification decision is high enough that the costs of pressing ahead in district court exceed the costs of waiting"). Rule 23(f) and the Advisory Committee's Note are both silent as to whether the non-moving party can seek a stay under Rule 23(f).

III. Discretionary Bankruptcy Appeals

A. Introduction

An appeal of a bankruptcy decision involves unique procedural and jurisdictional considerations. Bankruptcy appeals are different from an ordinary federal court appeal because of the unusually quick time frame for perfecting and briefing the appeal and the likelihood that such an appeal may be subject to substantive[5] review by two appellate courts (the district court or Bankruptcy Appellate Panel[6] and the court of appeals). In 2005 Congress added an additional wrinkle to appellate review of bankruptcy court decisions, permitting a party to directly appeal such rulings to the court of appeals. The following is an overview of this new direct appeal provision, including the standard for obtaining certification, the mechanics of taking an appeal directly to the court of appeals, and discusses the first set of decisions to construe this new provision. There is also a discussion of interlocutory bankruptcy appeals and how interlocutory appeals are handled under the direct appeal provision.

In 2005, as a part of the Bankruptcy Abuse and Consumer Protect Act of 2005 ("BACPA"), Congress amended section 158(d) (the jurisdictional statute for bankruptcy appeals brought in the court of appeals) to provide for a *discretionary* direct appeal from the bankruptcy court to the court of appeals. This new provision took effect 180 days after enactment (October 17, 2005) and applies only to bankruptcy cases filed after on or after October 17, 2005. BACPA, § 1501(a); *In re McKinney*, 457 F.3d 623, 624 (7th Cir. 2006) (dismissing attempted direct appeal under BACPA because the amendments do not apply "to bankruptcy proceedings filed

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[5] However, bankruptcy appeals "often languish in the district courts until they become moot" making dual appellate review illusory in some instances. *See* Testimony of Hugh Ray, Former Chair of Business Bankruptcy Committee of the Business Law Section of the American Bar Association, 1999 WL 1079983 (Nov. 2, 1999).

[6] Bankruptcy court orders may be appealed in the first instance to the district court or the Bankruptcy Appellate Panel. In the Fifth Circuit, district courts decide bankruptcy appeals. Only the First, Sixth, Eighth, Ninth and Tenth Circuits have Bankruptcy Appellate Panels, and, other than in the Ninth Circuit, Bankruptcy Appellate Panels are rarely used. *Judicial Business of the United States Courts*, at Table B-10 (stating that, of the 989 bankruptcy appeals decided by a Bankruptcy Appellate Panel in 2004, 645 of those appeals took place in the Ninth Circuit). "In the 12-month period that ended March 31, 2004, district judges nationwide received 2,838 bankruptcy appeals and [Bankruptcy Appellate Panels] received 1,006." David R. Weinstein, *What's a BAP and Why Did I Go There?* at 4, Section of Business Law, American Bar Association (Aug. 8, 2005). Even when a Bankruptcy Appellate Panel is in place, a party may elect to appeal to the district court instead. 28 U.S.C. § 158(c)(1); FED R. BANKR P. 8001(e).

before the effective date of the provision, which was October 17, 2005"); *In re Blumeyer*, No. 4:06CV1681 CDP, 2007 U.S. Dist. LEXIS 5037, at *4 (Bankr. E.D. Mo. Jan. 24, 2007) (same); *In re Berman*, 344 B.R. 612, 615 (B.A.P. 9th Cir. 2006) (same).

Section 158(d)(2) "will allow parties, under certain circumstances, to bypass intermediate appellate review by a district court or a bankruptcy appellate panel of a bankruptcy judgment or order, including an interlocutory order, and obtain direct circuit court review of the bankruptcy court decision." Hon. Dennis Montali, *Revised Bankruptcy Appellate Procedures under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (presented to the Section of Business Law, American Bar Association Aug. 8, 2005).

One of the principal reasons for this change was "widespread unhappiness with the paucity of settled bankruptcy-law precedent." *Weber v. United States Trustee*, Docket No. 06-3722-mb, 2007 U.S. App. LEXIS 8609, at * 5 (2d Cir. April 13, 2007). Congress also enacted the direct appeal provision because (i) of "the time and cost factors attendant to the present appellate system," and (ii) "decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value." H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005); *see also Weber*, 2007 U.S. App. LEXIS 8609, at * 5, 8 (stating direct-appeal provision designed to resolve legal – not fact-intensive – questions and that "Congress hoped that [this provision] would permit us to resolve controlling legal questions expeditiously and might foster the development of coherent bankruptcy-law precedent").[7]

B. The Direct Appeal Provision

Under 28 U.S.C. § 158(d)(2)(A), the court of appeals has jurisdiction over appeals "described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel" *or* the parties jointly certify that (i) the judgment "involves a question of law as to which there is no controlling decision of the court of appeals of the circuit or of the United States Supreme Court, or involves a matter of public importance," (ii) the judgment "involves a question of law requiring resolution of conflicting decisions," or (iii) "an immediate appeal [would] . . . materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. 158(d)(2)(A)(i)-(iii). Only one of the three certification requirements must be met for the lower court to certify a direct appeal to the court of appeals.

The bankruptcy court, district court, or Bankruptcy Appellate Panel "shall" make the certification if (i) on its own or on a party's motion the court determines that *any* of the above circumstances are satisfied, or (ii) the court receives a request by a majority of appellants and majority of appellees to make the certification. Thus, the lower courts have no discretion to decline to certify an appeal if one of the certification requirements is satisfied or a majority of appellants and a majority of appellees agree that certification is appropriate. A party seeking

[7] For a comprehensive discussion of the legislative history and purpose of the direct appeal provision, *see* Hon. Dennis Montali, *Revised Bankruptcy Appellate Procedures under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (presented to the Section of Business Law, American Bar Association Aug. 8, 2005).

certification under this provision must file such a motion within 60 days of the judgment. 28 U.S.C. § 158(d)(2)(E). Keep in mind that the notice of appeal, however, is due within 10 days – not 60 days. *See* FED. R. BANKR. P. 8002; *See In re Virissimo*, 332 B.R. 208, 208 n.1 (Bankr. D. Nev. 2005) (certification without perfection of appeal does not allow a party to obtain direct-appeal review by the circuit court); Interim Rule 8001(f), Committee Note (noting that a notice of appeal is required in direct appeals of bankruptcy court orders). An appeal under section 158(d) "does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective [court] . . . issues a stay of such proceeding pending the appeal." 28 U.S.C. § 158(d)(2)(D).

Review at the court of appeals is discretionary. 28 U.S.C. § 158(d)(2)(A). To obtain review by the court of appeals, the appellant must file a petition for permission to appeal in the court of appeals under Federal Rule of Appellate Procedure 5. BACPA, § 1233(b)(3). That petition must – in addition to complying with Rule 5 – (i) "be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and (ii) have attached a copy of the certification." *Id.*, § 1233(b)(4). Section 158(d)(2) does not create any standards applicable to the court of appeals' decision to dispose of the petition for permission to appeal.

In deciding whether to pursue a direct appeal, it useful to consider both the legislative history as well as the usual strategic considerations in requesting the court of appeals to decide an appeal subject only to the court's *discretionary* review (including the court of appeals' caseload and track-record in granting interlocutory-appeal requests). *See* H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005) (stating that "[t]he courts of appeals are encouraged to authorize direct appeals in these circumstances [where grounds for certification exist]"). It is also useful to consider the relatively few number of bankruptcy appeals decided by the courts of appeals annually in determining whether the court will have any interest in taking the appeal. *See, e.g., United States Court of Appeals Fifth Circuit*, *Judicial Workload Statistics, Clerk's Annual Report*, Enclosure A (July 2005-June 2006) (stating that only 103 – or 1.32% – of the appeals pending in the Fifth Circuit in 2005-2006 involve bankruptcy matters).

C. Procedural Rules

Until formal rules are adopted, section 1233(b) of the Act establishes the following temporary procedural rules for direct appeals to the court of appeals, the majority of which address the application of Federal Rule of Appellate Procedure 5 to direct appeals:

(b) Procedural Rules.--

(1) Temporary application.-- A provision of this subsection shall apply to appeals under section 158(d)(2) of title 28, United States Code, until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended under chapter 131 of such title.

(2) Certification.-- A district court, a bankruptcy court, or a bankruptcy appellate panel may make a certification under section 158(d)(2) of title 28, United States Code, only with respect to matters pending in the respective bankruptcy court, district court, or bankruptcy appellate panel.

(3) Procedure.-- Subject to any other provision of this subsection, an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28, United States Code, shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure. For purposes of subdivision (a)(1) of rule 5--

(A) a reference in such subdivision to a district court shall be deemed to include a reference to a bankruptcy court and a bankruptcy appellate panel, as appropriate; and

(B) a reference in such subdivision to the parties requesting permission to appeal to be served with the petition shall be deemed to include a reference to the parties to the judgment, order, or decree from which the appeal is taken.

(4) Filing of petition with attachment.-- A petition requesting permission to appeal, that is based on a certification made under subparagraph (A) or (B) of section 158(d)(2) shall--

(A) be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and

(B) have attached a copy of such certification.

(5) References in rule 5.--For purposes of rule 5 of the Federal Rules of Appellate Procedure--

(A) a reference in such rule to a district court shall be deemed to include a reference to a bankruptcy court and to a bankruptcy appellate panel; and

(B) a reference in such rule to a district clerk shall be deemed to include a reference to a clerk of a bankruptcy court and to a clerk of a bankruptcy appellate panel.

(6) Application of rules.-- The Federal Rules of Appellate Procedure shall apply in the courts of appeals with respect to appeals authorized under section 158(d)(2)(A), to the extent relevant and as if such appeals were taken from final judgments, orders, or decrees of the district courts or bankruptcy appellate panels exercising appellate jurisdiction under subsection (a) or (b) of section 158 of title 28, United States Code.

BACPA, Pub. L. No. 109-8, § 1233(b), 119 Stat. 23, 202-04 (uncodified temporary procedural rules).

On October 13, 2005 and again October 1, 2006, the Advisory Committee and Committee on Rules of Practice and Procedure issued Interim Rules to provide guidance on various aspects of BACPA, including some parts of the new direct appeal provision, pending adoption under the Rules Enabling Act. Interim Rules 8001(f) & 8003(d). The various bankruptcy courts in Texas have adopted these rules. *See, e.g., In re Adoption of Interim Bankruptcy Rules*, General Order 2005-04 (Bankr. N.D. Tex Oct. 13, 2005). The highlights of these interim rules are:

- Under Rule 8001(f)(1), certification by the bankruptcy court is not effective until a notice of appeal is filed. Because of the "short time limit to file the petition with circuit clerk [10 days], subdivision (f)(1) provides that entry of a certification on the docket does not occur until an effective appeal is taken under Rule 8003(a) or (b)." Committee Note.

- Rule 8001(f)(2) addresses where the certification is to be made: If the case is pending in the bankruptcy court, only the bankruptcy court can certify the case for direct appeal. Likewise, if the case is pending in the district court, only the district court can certify the case for direct appeal. This rule "adopts a bright-line test for identifying the court in which the matter is pending." Committee Note.
- Rule 8001(f)(2) outlines the procedure for a joint certification by the appellants and appellees, urging parties to use the official form
- Rule 8001(f)(3) sets forth the requirements, in terms of form, contents, service, and filing, for a party's certification request and any response to that request.
- Rule 8001(f)(4) addresses the court's power to certify on its "own initiative."
- Rule 8003(d) "solve[s] the jurisdictional problem that could otherwise ensue when a district court or bankruptcy appellate panel has not granted leave to appeal under 28 U.S.C. § 158(a)(3)." Committee Note. Under the rule, if the court of appeals authorizes a direct appeal, that authorization is "deemed to satisfy the requirement for leave to appeal."

D. Decisions Under the New Direct Appeal Provision

1. Cases Certified for Direct Appeal.

***In re Salazar*, 339 B.R. 622 (Bank. S.D. Tex. 2006):** The bankruptcy court was presented with a novel Chapter 13 question – whether "ineligible" debtors who did not first seek credit counseling (as the revised Bankruptcy Code requires) are entitled to the protection of the Bankruptcy Code's automatic-stay provision – and on its own certified the case for direct appeal to the Fifth Circuit. The bankruptcy court focused on the importance of the questions presented and the lack of authority on that question in the Fifth Circuit in opting to certify a direct appeal under section 158(d)(2)(A)(i):

> Pursuant to 28 U.S.C. § 158(d)(2), the Court certifies this decision for direct appeal to the United States Court of Appeals for the Fifth Circuit. Based on a review of case law in this and other jurisdictions, as well as a consideration of the importance of this matter for many consumer debtors and their creditors, the Court believes that direct appeal of the present order is appropriate under § 158(d)(2)(A)(i). . . .

Id. at 634. The bankruptcy court, however, cautioned the parties that "certification in no way alters a party's ordinary requirements in filing a notice of appeal" and also reminded the parties that a supplement, containing a short statement of the basis of the bankruptcy court's certification may be appropriate. *Id*. The Fifth Circuit subsequently denied the petition for permission to appeal as moot because "Petitioners consented to an Agreed Order essentially settling the dispute." *In re Salazar*, 193 Fed. Appx. 281, 283 (5th Cir. 2006).

***In re Jones*, 352 B.R. 813 (Bankr. S.D. Tex. 2006):** The bankruptcy court, on its own initiative, certified for direct appeal to the Fifth Circuit its order dismissing debtors' bankruptcy petition for failure to complete a credit counseling course within 180 before filing for bankruptcy,

acknowledging that its decision "creates a split between bankruptcy judges in this district." 352 B.R. at 814.

***In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006):** The bankruptcy court certified its order striking – but not dismissing – debtors' Chapter 7 and 13 bankruptcy cases based on their failure to obtain credit counseling before seeking bankruptcy protection, as required by BACPA. Because the bankruptcy court's decision was "at odds" with the results reached in other bankruptcy courts within the Second Circuit, the bankruptcy court "determined that it is appropriate to certify these questions to the Second Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A)(ii) and Interim Fed. R. Bankr. R. 8001(f)(4)." 345 B.R. at 505. The bankruptcy trustee, however, declined the invitation to appeal the bankruptcy court's refusal to dismiss directly to the Second Circuit and instead sought review from the district court in the first instance. *Adams v. Finlay*, 06 Civ. 6039 (CLB), 2006 U.S. Dist. LEXIS 81591, at * 3 (S.D.N.Y. Nov. 3, 2006) ("The Bankruptcy Court certified three related questions directly to the Court of Appeals for the Second Circuit, but the Trustee did not pursue the certification, seeking instead appellate review in the first instance in the District Court.") (appeal dismissed for lack of standing).

***In re Virissimo*, 332 B.R. 208 (Bankr. D. Nev. 2005):** The bankruptcy court, again on its own, certified the following question to the Ninth Circuit: Do the 2005 revisions to the Bankruptcy Code, which limit the amount of the homestead available to those who have owned their homestead less than 1215 days, apply to Nevada debtors? 332 B.R. at 209:

> This court fully recognizes and appreciates the work done by, and expertise of, the bankruptcy appellate panel and the district court in hearing and deciding appeals from the bankruptcy court. This court is also fully cognizant of the tremendous workload of the Ninth Circuit Court of Appeals. However, the issue presented in this case is one which will recur in Nevada as well as other districts in the Ninth Circuit and will impact the administration of bankruptcy estates until the issue is ultimately decided. As this involves the statutory construction of a hotly contested provision of BACPA and is a matter of first impression, there is no question that the Court of Appeals will ultimately be required to determine the question. Hence not merely one, but all three, of the criteria specified in § 158 exist and justify an immediate appeal in this case.

Id.

Although the use of section 158(d) has thus far been limited to certification of issues arising under the recent changes to the Bankruptcy Code (such as the credit counseling requirements), as time passes, parties will likely use this provision for direct appeals of long-standing, unresolved questions and other important bankruptcy issues.

2. Decisions Declining to Certify for Direct Appeal.

***Weber v. United States Trustee*, Docket No. 06-3722-mb, 2007 U.S. App. LEXIS 8609 (2d Cir. April 13, 2007):** Despite certification by the bankruptcy court, the Second Circuit declined to exercise its discretionary jurisdiction to decide whether an increase in the New York

homestead exemption should apply retroactively because the Court did not "perceive a conflict of such a nature that creates uncertainty in the bankruptcy courts." *Id*. at *16 (observing that "all three of the courts within this circuit to have considered the question have held that New York's homestead exemption applies retroactively"). This decision contains an extensive discussion of the legislative history and purpose of the direct-appeal provision and provided the following guidance of when the Second Circuit would be most likely to accept a direct appeal:

> We will be most likely to exercise our discretion to permit a direct appeal where there is uncertainty in the bankruptcy courts (either due to the absence of a controlling legal decision or because conflicting decisions have created confusion) or where we find it patently obvious that the bankruptcy court's decision is either manifestly correct or incorrect, as in such cases we benefit less from the case's prior consideration in the district and we are more likely to render a decision expeditiously, thereby advancing the progress of the case. On the other hand, we will be reluctant to accept cases for direct appeal when we think that percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision.

2007 U.S. App. LEXIS 8609, at *15.

***In re Berman*, No. 04-45436, 2007 Bankr. LEXIS 65 (Bankr. D. Mass. Jan. 5, 2007)**: The bankruptcy court denied a request to certify because "the Court does not find that any of the circumstances enumerated in clause (i), (ii), or (iii) exist here."

***In re Fields*, Case No. 05-60595/JHW, 2006 Bankr. LEXIS 4090 (Bankr. D. N.J. Oct. 24, 2006):** The bankruptcy court declined to certify a question related to the violation of the automatic-stay provision because: "The question of law involved in this case is directly answered by the statutory provisions cited above. I am not aware of conflicting decisions regarding the termination of the automatic stay by operation of law following abandonment of property by the trustee. The material advancement of the progress of the case is not implicated."

***In re Waczewski*, Case No. 6:06bk-00620-KSJ, 2006 Bankr. LEXIS 1234 (Bankr. M.D. Fla. May 5, 2006)**: Although noting that section 158(d)(2) did not apply, the court nevertheless addressed the availability of direct appeal and concluded that it would not certify its order for direct appeal, noting "a party seeking a direct appeal certainly must show something more than that a direct appeal would expedite the resolution of the appellate issues."

***In re Marrama*, 345 B.R. 458 (Bankr. D. Mass. 2006):** The bankruptcy court refused to certify its order dismissing a debtor's Chapter 13 case because he had an already-pending Chapter 7 case in which he was denied a discharge. The bankruptcy court analyzed the 158(d)(2) factors as follows:

> I granted the motion to dismiss because I determined that the Debtor could not meet the eligibility requirements. I did not address what constitutes a contingent debt because none of the debts which I used in my calculation were debts that the Debtor described as contingent. It appears that the Debtor's issue with the decision

> is that I could not look to the amounts of the outstanding nondischargeable debts set forth in his pending Chapter 7. While there is no controlling case law in this circuit, the case law above reflects that there is no significant dispute regarding the applicable standard for looking at pending cases. This is not an issue of significant proportion or one that is certain to arise repeatedly. Therefore, I cannot conclude that the Debtor has met the first criteria. As for the second, I am not convinced that the purpose behind certification is to enable a litigant to obtain a binding decision from a circuit court on every adverse ruling from this court. As for the third prong, I cannot determine that a ruling from the First Circuit, as opposed to an appeal to the BAP or the district court would materially advance this appeal. Accordingly, I will not certify the matter to the First Circuit.

345 B.R. at 474.

E. Interlocutory Orders

To appeal an interlocutory order, a party must file a notice of appeal in compliance with Rule 8001(a) and a motion for leave to appeal. FED. R. BANKR. P. 8001(b). A motion for leave to appeal must contain: (i) a statement of facts; (ii) a statement of the issues to be presented on appeal and the relief sought; (iii) a statement of why leave to appeal should be granted; and (iv) a copy of the order the party seeks to appeal. FED. R. BANKR. P. 8003(a). The appellee has 10 days to file an answer to the motion for leave to appeal. *Id.* The clerk of the bankruptcy court will transmit the notice of appeal, the motion for leave to appeal, and any answer to the motion after the time to file an answer has passed. FED. R. BANKR. P. 8003(b). Neither section 158(a)(3) nor Rule 8003 require the bankruptcy court to certify the case for interlocutory appeal; the decision about whether an interlocutory appeal should go forward rests with the district court.

Rule 8003(c) provides a safety valve if the appellant files a notice of appeal but does not file the required motion for leave to appeal. Under Rule 8003(c), the district court may (i) grant leave to appeal even without a motion for leave to appeal on file, or (ii) order the appellant to file a motion for leave. FED. R. BANKR. P. 8003(c).

Although section 158 does not specify the criteria for determining whether to grant leave to hear an interlocutory appeal in a particular case, many courts have adopted by reference the standard set forth in 28 U.S.C. § 1292(b), which dictates the circumstances under which courts of appeals may accept interlocutory appeals from district courts. *See Ichinose v. Homer Nat'l Bank*, 946 F.2d 1169, 1177 (5th Cir. 1991) (assuming without deciding that the § 1292(b) test applies). Under section 1292(b), an interlocutory appeal may be granted when (1) the order appealed from involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). In contrast to the new direct appeal provision, even if one of the section 1292(b) factors is satisfied, leave to appeal is not appropriate. *See Atlantic Textile Group, Inc. v. Neal*, 191 B.R. 652, 653-54 (E.D. Va. 1996) (all three parts of test must be satisfied for leave to be appropriate); *see also In re IBI Sec. Service, Inc.*, 174 B.R. 664, 670 (E.D.N.Y. 1994) (an issue of first impression in the Second Circuit, which qualified under the second prong, was insufficient to warrant interlocutory review).

District courts are guided by the basic policy that appellate review should be postponed until after the entry of final judgment, and that "exceptional circumstances" must exist that warrant an interlocutory appeal. *Powers v. Montgomery*, NO. CIV.A.3:97-CV-1736-P, 1998 WL 159944, at *2 (N.D. Tex. Apr. 1, 1998) ("Leave to appeal a bankruptcy court's interlocutory order should be granted only in circumstances which justify overriding the general policy of not allowing such appeals."); *In re Hunt Int'l Resources Corp.*, 57 B.R. 371, 372 (N.D. Tex. 1985). "Interlocutory appeals are not favored because they interfere with the overriding goal of the bankruptcy system, namely, the expeditions resolution of pressing economic difficulties." *Powers*, 1998 WL 159944, at *2; *see also Katchen v. Lundy*, 382 U.S. 323, 328 (1966); *In re Durensky*, 519 F.2d 1024, 1028 (5th Cir. 1975); *In re Hayes Bankruptcy*, 220 B.R. 57, 59 (N.D. Iowa 1998) ("[D]istrict courts exercise this discretionary power of [interlocutory] review with care, and with an eye toward safeguarding the bankruptcy court's role as the initial and in some respects primary forum for the adjudication of bankruptcy disputes.").

Determining finality is a threshold question and is often overlooked in the frenzy following an adverse ruling by the bankruptcy court. Frequently, there is a little time to engage in a comprehensive analysis of finality after a decision has been issued (remember, you only have 10 days to perfect the appeal). The initial decision will be whether to file a notice of appeal or – if the order is merely interlocutory – to file a motion for leave to appeal. *See infra* at pp. 8-9 (discussing the procedure for pursuing an interlocutory appeal).

Finality in the bankruptcy context involves a different inquiry than in an ordinary federal appeal. *See In re Orr*, 180 F.3d 656, 659 (5th Cir. 1999) ("There is, therefore, a lower threshold for meeting the 'final judgments, orders, and decrees' appealability standard under 28 U.S.C. §158(a) than there is for the textually similar 'final decisions' appealability standard under 28 U.S.C. § 1291."). The Fifth Circuit has explained the "unique" considerations at play in a bankruptcy appeal warranting a more flexible view of finality:

> [T]he unique nature of bankruptcy proceedings, combined with the public policy interest in promoting successful reorganizations, often favors tolerance of greater procedural flexibility in bankruptcy cases. Concepts of finality, for example, are less concrete in the bankruptcy context and, thus, principles disfavoring appeal of orders that do not dispose of an entire case are often less rigorously adhered to in bankruptcy cases.

Texas Comptroller of Pub. Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.), 303 F.3d 571, 580 (5th Cir. 2002). In rejecting the usual rule for finality, the Fifth Circuit has made the following observations about the needs of the bankruptcy system and the preservation of the resources of the judicial system and the parties:

> [A] determination that appellate jurisdiction arises only when the bankruptcy judge enters an order which ends the entire bankruptcy case, leaving nothing for the court to do but execute the judgment, would substantially frustrate the bankruptcy system. This is so particularly when, as here, one independent decision materially affects the rest of the bankruptcy proceedings. Separate and discrete orders in many bankruptcy proceedings determine the extent of the

> bankruptcy estate and influence creditors to expend or not to expend effort to recover monies due them. The reversal of such an order would waste exorbitant amounts of time, money, and labor and would likely require parties to start the entire bankruptcy process anew. This potential waste of judicial and other resources has influenced this Court and other courts of appeals to view finality in bankruptcy proceedings in a more practical and less technical light.

England v. Fed. Deposit Ins. Corp. (In re England), 975 F.2d 1168, 1171 (5th Cir. 1992). To be final, the order "must constitute either a final determination of the rights of the parties to secure the relief they seek, or a final disposition of a discrete dispute within the larger bankruptcy case." *In re Bartee*, 212 F.3d 277, 282 (5th Cir. 2000) (citations and internal quotations omitted); *see In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (containing a comprehensive discussion of finality for purposes of appeal).

The Fifth Circuit has addressed whether particular orders are final in numerous cases. *See, e.g., In re Orso*, 283 F.3d 686, 690 (5th Cir. 2002) ("The bankruptcy court's denial of an objection to a debtor's claim of exemption is a final order, subject to immediate appeal."); *In re Bartee*, 212 F.3d at 283 ("Recognition that the denial of a Chapter 13 plan can be a final order is all but compelled by considerations of practicality."); *In re Orr*, 180 F.3d at 659 (5th Cir. 1999) (order granting summary judgment based on contention that "the tax liens do not attach to . . . post-discharge income distributions from" a trust is final); *In re Cajun Elec.*, 119 F.3d at 154 (order approving settlement "brings to an end the protracted litigation over the River Bend nuclear project and various other claims among" the parties); *In re Chunn*, 106 F.3d 1239, 1241 (5th Cir. 1997) ("orders granting relief from a § 362 automatic stay are final and appealable"); *In re Cajun Elec. Co-Op, Inc.*, 69 F.3d at 748 (holding than an order appointing a trustee is a Chapter 11 case is final); *In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 734 (5th Cir. 1995) ("[T]he order granting the motions to file untimely proofs of claim is final and appealable because, unlike the cases cited above, the bankruptcy court was left with no dispute or issue to resolve after entering the order."); *In re England*, 975 F.2d at 1172 ("An order which grants or denies an exemption will be deemed a final order for the purposes of 28 U.S.C. § 158(d)."); *Moody v. Empire Life Ins. Co. (In re Moody)*, 849 F.2d 902, 904 (5th Cir. 1988) (holding that an order allowing a claim or priority that determines the amount due to a creditor is final); *In re Louisiana World Exposition Inc.*, 832 F.2d 1391, 1396 (5th Cir. 1987) (holding that an order finally determining an adversary proceeding is appealable); *In re Lift & Equip. Serv., Inc.*, 816 F.2d 1013, 1015 (5th Cir. 1987) (explaining that an order recognizing a creditor's security interest is final).

The Fifth Circuit has held that other types of orders do not satisfy even the relaxed finality standard. *See*, *e.g.*, *Comm. of Unsecured Creditors v. Interfirst Bank Dallas, N.A. (In re Wood & Locker, Inc.)*, 868 F.2d 139, 144 (5th Cir. 1999) ("We therefore hold that given the clear mandate of Bankruptcy Rule 7054, no appeal may be taken from a bankruptcy court order that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties in an adversary proceeding absent Rule 54(b) certification--even if the order would be considered final if it arose in another context."); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1155 (5th Cir. 1988) ("order approving a disclosure statement is not a final order for purposes of appeal but instead is an interlocutory order"); *S.C. of Okaloosa, Inc. v. Sunnyside Timber LLC*,

81 Fed. Appx. 840 (5th Cir. 2003) ("The order granting the motion to enforce a settlement agreement was interlocutory.").

F. Interlocutory Appeals under the Direct Appeal Provision

Before the recent direct appeal amendments, the court of appeals could not review an interlocutory bankruptcy court order absent a section 1292(b) certification from the district court. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 252-54 (1992); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1156 n.18 (5th Cir. 1988). In contrast, under current law, a bankruptcy appellate panel's interlocutory order is not subject to review under section 1292(b). *See Lievsay v. Western Fin. Sav. Bank (In re Lievsay)*, 118 F.3d 661, 662 (9th Cir. 1997). Under the new direct appeal provision, an interlocutory bankruptcy court order may be appealed directly to the court of appeals. Hon. Dennis Montali, *Revised Bankruptcy Appellate Procedures under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, at 7 (presented to the Section of Business Law, American Bar Association Aug. 8, 2005) at 7 (stating that section 158(d) "expand[s] the jurisdiction of the circuit court to allow it to hear . . . interlocutory orders of the bankruptcy court"). The text of section 158(d)(2) provides that "[t]he appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a)" of section 158 if the other section 158(d)(2) requirements are met.

The language of the statute does not address the need for first obtaining certification under section 158(a)(3). The Interim Rules, however, provide that if the court of appeals accepts a direct appeal certified by the bankruptcy court and the motion for leave is still pending in the district court, the motion for leave is deemed granted. Interim Rule 8003(f).

The decision in *Simon & Schuster, Inc. v. Adv. Mktg. Serv., Inc.*, Adv. Proc. No. 07-50004, 2007 Bankr. LEXIS 563 (Bankr. D. Del. Feb. 27, 2007) explores an issue that can arise when the underlying order is interlocutory in nature and the only way to effectively prosecute an appeal is to request certification under section 158(d)(2) and file a motion for leave to appeal under section 158(a)(3) and Rule 8003. That is precisely what Simon & Shuster did here in seeking review of an order denying its motion for a temporary restraining order. 2007 Bankr. LEXIS, at * 5 (noting the simultaneous filing of a notice of appeal, motion for leave to appeal, and request for certification). The motion for leave to appeal was transmitted to the district court for disposition there. The request for certification remained pending in the bankruptcy court. *Id.* at * 9 (stating that under Interim Rule 8001(f)(2), a matter remains pending in the bankruptcy until the district court grants leave to appeal under section 158(a)(3)). The bankruptcy court ultimately deferred consideration of the request for direct appeal certification so that the district court could decide whether (i) an interlocutory appeal should be permitted under section 158(a)(3), and (ii) direct appeal was available. *Id.* at * 16-17.

The court reached this conclusion apparently based on its assessment that standards for both a 158(a)(3) motion and 158(d)(2) certification are "*virtually identical*." *Id.* at 13 (emphasis in original); *id.* at 13-14 (requiring the bankruptcy court "to perform the same analysis generally reserved for the district court"). That is, there is no reason for the bankruptcy court to step on the district court's toes and decide the certification question before the district court has that opportunity (after first granting leave to appeal). *Id.* at 14 (asserting that ruling otherwise "is

contrary to the hierarchy of the court system"). The statute and the Interim Rules, however, allow the bankruptcy court to certify an interlocutory order for direct appeal while a motion for leave to appeal is pending. And as noted above, the question of certification for direct appeal to the court of appeals and whether to grant a motion for leave to appeal to the district court (typically decided under section 1292(b) standards) involve different considerations.

As a result, although seemingly inconsistent, under the applicable legal standards, a question could be worthy of certification directly to the court of appeals but not for resolution by the district court in an interlocutory appeal. A question could also, in the court of appeals' view, not warrant direct appeal, but nevertheless merit interlocutory consideration by the district court. *Id*. at 15; Interim Rule 8003(d), Committee Note. Whether a court of appeals, however, exercises its purely discretionary jurisdiction based on a petition for permission to appeal may involve different considerations than the decision to certify the question for direct appeal in the first instance. *See, e.g., Weber*, 2007 U.S. App. LEXIS 8609, at * 16 ("While it was not improper for the bankruptcy court to permit the parties to request leave to file a direct appeal and to certify the appeal, we decline to exercise our discretion to hear this appeal."). Interim Rule 8003(d) resolves these thorny issues by granting the court of appeals' authority to decide a direct appeal even if leave to appeal has not been granted by the district court under section 158(a)(3) as long as the bankruptcy court has certified the order for direct appeals but also permitting the motion for leave to appeal to be decided by the district court if the court of appeals declines to accept the direct appeal. Interim Rule 8003(d) ("If leave to appeal is required by 28 U.S.C. § 158(a) and has not earlier been granted, the authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal."); Committee Note. Courts' treatment of attempted direct, interlocutory appeal will be an interesting issue to watch as jurisprudence under section 158(d)(2) develops.

G. Withdrawal of the Reference

One other inconsistency that may arise as a result of the enactment of the direct appeal provision involves appeals to the court of appeals from the district court when the district court has exercised its original, as opposed to appellate jurisdiction, under section 157(d). *See* 28 U.S.C. 157(d) (empowering the district court to withdraw the reference to the bankruptcy court). The new direct appeal provision applies only to appeals under section 158(d). When the district court has exercised its original jurisdiction, the court of appeals' jurisdiction is grounded in either section 1291 (final judgment) or section 1292(b) (interlocutory appeals). *See* 28 U.S.C. §§ 1291, 1292(b); *In re Owens Corning*, 419 F.3d 195, 203 n.9 (3d Cir. 2005); *In re Cajun Elec. Power Co-Op, Inc.*, 119 F.3d 349, 353 (5th Cir. 1997) ("Because the district court did not sit as a bankruptcy appeals court but heard the case itself as a court of bankruptcy, 28 U.S.C. § 158(d) does not confer appellate jurisdiction on this court. Instead, our jurisdiction is governed by 28 U.S.C. §1291."). Thus, interlocutory appeals from the district court when the court has exercised its original jurisdiction must satisfy the more rigorous interlocutory appeal provision contained in section 1292(b). *See* 28 U.S.C. § 1292(b).