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BANKRUPTCY APPEALS

RICHARD B. LEVIN†

Public Law 95-598¹ has made sweeping revisions in the bankruptcy laws, from the court structure, through the administrative system, to the substantive law of bankruptcy. As part of the revised court system, Congress has prescribed completely new rules for appeals from bankruptcy judges' decisions. Three sections of the Judicial Code, added by the new law, govern appeals under the Bankruptcy Code. Sections 1334 and 1482² provide mandatory appellate jurisdiction (appeals as of right) to the district courts and appellate panels over appeals from "final judgments, orders, or decrees" of bankruptcy courts, and discretionary jurisdiction over appeals from "interlocutory orders and decrees" of bankruptcy courts.³ Section 1293(a) grants mandatory appellate jurisdiction to the courts of appeals over appeals from "final decisions" of bankruptcy appellate panels.⁴ Section 1293(b), somewhat redundantly,⁵ provides mandatory appellate jurisdiction over an appeal

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1. Pub. L. No. 95-598, 92 Stat. 2549 (1978)(codified at 11 U.S.C.A. (West 1979), in scattered sections of 28 U.S.C.A. (West Supp. 1979), and in scattered other titles), sometimes called the Bankruptcy Reform Act of 1978, or the Edwards Act, Klee, *The New Bankruptcy Act of 1978*, 64 A.B.A.J. 1865 (1978), enacted and codified the new substantive law of bankruptcy in title 11 of the United States Code, and made numerous amendments to title 28 of the United States Code (the Judicial Code) to establish a new bankruptcy court and administrative structure for bankruptcy cases.

This Article will be concerned almost exclusively with the Judicial Code amendments, which do not become formally effective until April 1, 1984, when the new bankruptcy courts established by § 201 of Public Law 95-598 come into existence. Pub. L. No. 95-598, § 402(b), 92 Stat. 2549 (1978). During a 4-1/2 year transition period from October 1, 1979, to March 31, 1984, however, most of the amendments to the Judicial Code, including those relating to appeals, will apply to the existing bankruptcy courts. Pub. L. No. 95-598, § 405, 92 Stat. 2549 (1978).

Appeals from orders made under the Bankruptcy Act will continue to be governed by §§ 24 and 39c of the Act, 11 U.S.C. §§ 47(e), 67(c) (1976)(repealed 1978), even though the orders are made or appeals taken after October 1, 1979. Pub. L. No. 95-598, § 403(a), 92 Stat. 2549 (1978).

2. 28 U.S.C.A. §§ 1334, 1482 (West Cum. Supp. 1979).

3. *Id.* § 1334(b). "Interlocutory judgments" are not included, because a judgment is by its nature a final determination. Compare *id.* §§ 1292(a) ("interlocutory orders") and 1334(b) ("interlocutory orders and decrees") with *id.* § 1482(b) ("interlocutory judgments, orders, and decrees"). But see 1 COLLIER ON BANKRUPTCY ¶ 3.03[7][d][i], at 3-297 (15th ed. L. King ed. 1979) (noting use of term "judgment" in § 1334(a) and its absence in § 1334(b), and suggesting that "judgment" be read into § 1334(b)). Similarly, "decree" should be deleted from §§ 1334(b) and 1482(b).

4. 28 U.S.C.A. § 1293(a)(West Cum. Supp. 1979).

5. As originally drafted and passed by the House, § 1293(b) would have granted only con-

from "a final judgment, order, or decree" of a district court or appellate panel, and mandatory appellate jurisdiction of an appeal from "a final judgment, order, or decree of a bankruptcy court . . . if the parties to such appeal agree to a direct appeal to the court of appeals."⁶

This Article will examine the four "w's" of the new appeals system: where to appeal, when to appeal, who may appeal, and what may be appealed. It will suggest interpretations of the rather scanty statutory language to make the appellate system workable, and will recommend further statutory changes and clarifications that better reflect a rational appellate structure.

I. WHERE: THE APPELLATE COURTS

Under the Bankruptcy Act, decisions of bankruptcy judges were reviewable only by the district court for the district in which the bankruptcy judge sat.⁷ Until 1973, review was by a petition for review under Section 39c of the Bankruptcy Act.⁸ In 1973, with the adoption of the Bankruptcy Rules,⁹ the procedure was conformed more to federal appellate procedure¹⁰ by requiring a notice of appeal¹¹ and other ordinary federal appellate procedures.¹² This change reflected a modification over the years of the relationship between the district judge and the bankruptcy referee—now the bankruptcy judge—from one of supervision of the bankruptcy referee by the district court to a relationship akin to that between a trial court and an appellate tribunal.¹³ Under the Bankruptcy Rules as they existed at the time of enactment of Public Law 95-598, bankruptcy judges' findings of fact were reversible

sent appellate jurisdiction from the bankruptcy court. 124 CONG. REC. H11,082 (daily ed. Sept. 28, 1978). That draft relied on §§ 1291 and 1293(a) to grant the courts of appeals jurisdiction over "final decisions" of the intermediate appellate tribunals. An excess of caution induced the Senate to add the additional language to 1293(b). *Id.* S17,405 (daily ed. Oct. 6, 1978). The language adds to the appellate scheme only to the extent that "final judgments, orders or decrees" are different from "final decisions." *See* 1 COLLIER ON BANKRUPTCY ¶ 3.03[7][d][v], at 3-309 to 3-310 (15th ed. 1979).

6. 28 U.S.C.A. § 1293 (West Cum. Supp. 1979).

7. Bankruptcy Act § 39c, 11 U.S.C. § 67(c)(1976)(repealed 1978).

8. *Id.*

9. 411 U.S. 991 (1973).

10. *See* Advisory Committee's Introductory Note to the Preliminary Draft, reprinted in COLLIER PAMPHLET EDITION, BANKRUPTCY RULES, Part 2, at 14, 16 (1979).

11. FED. BANKR. R. 801(a).

12. *See generally id.* 801-814; FED. R. APP. P.

13. *See* H.R. REP. NO. 595, 95th Cong. 1st Sess. 9 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963 (hereinafter cited as HOUSE REPORT); FED. BANKR. R. 810 (district court may no longer take new evidence on appeal).

only if clearly erroneous.¹⁴ Their conclusions of law were reviewable under the same standards as those applied to the review of the conclusions of district courts,¹⁵ and their judgments and orders became final unless a timely notice of appeal was filed.¹⁶

The Bankruptcy Commission¹⁷ proposed a continuation of the district court as the appellate forum.¹⁸ While recognizing that "review of a referee's order by a single district judge, who is primarily a trial judge, is anomalous,"¹⁹ issues of convenience for and expense to the parties, the light burden placed on the district courts by the numbers of appeals, and perhaps political considerations as well, led the Commission to recommend continuation of the system.²⁰

The House of Representatives disagreed. Under H.R. 8200,²¹ appeals from Article III bankruptcy courts ran directly to the courts of appeals.²² The House opposed appeals to the district court because that system was not "in conformity with general [federal] appellate practice,"²³ because it detracted from the stature of the new, independent bankruptcy courts,²⁴ because appeals from the single trial judge to another single trial judge seemed anomalous,²⁵ and because the House had made every effort in its bill to separate the bankruptcy court from what it felt was an unconcerned district court.²⁶

The Senate instead adopted the Commission's position.²⁷ It opposed appeals to the courts of appeals because of the time, cost, and distance from many bankruptcy courts to the locations where the courts

14. FED. BANKR. R. 810.

15. *Cf. id.*

16. *Id.* 803; Bankruptcy Act § 39c, 11 U.S.C. § 67(c)(1976)(repealed 1978).

17. Created by Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468, the Commission on the Bankruptcy Laws of the United States studied the operation of the bankruptcy laws and submitted a detailed report with a proposed "Bankruptcy Act of 1973" to the President, Congress, and the Chief Justice on July 30, 1973. COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137 93d Cong., 1st Sess. (1973), reprinted in App. 2 COLLIER ON BANKRUPTCY 1 (15th ed. 1979) [hereinafter cited as COMMISSION REPORT].

18. *Id.* Part I at 96-97; Part II at 48-50 (proposed § 2-210).

19. *Id.* Part I at 96.

20. *See id.* at 96-97; *id.* at 299-301 (separate statement of Weinfeld; J.).

21. H.R. 8200, 95th Cong., 1st Sess. (1977); 124 CONG. REC. H461, 478 (daily ed. Feb. 1, 1978).

22. H.R. 8200, 95th Cong., 1st Sess. §§ 237-40 (1977).

23. HOUSE REPORT, *supra* note 13, at 43.

24. *Id.* at 42.

25. *Id.* at 43.

26. *See id.* at 14.

27. S. 2266, 95th Cong., 1st Sess. § 216 (amending 28 U.S.C. § 1334) (1977); 124 CONG. REC. S14,745 (daily ed. Sept. 7, 1978).

of appeals sit, which, the Senate felt, might deter many litigants in small bankruptcy cases from appealing an erroneous bankruptcy court decision.²⁸ The Senate also opposed appeals directly to the courts of appeals because of the burden the additional appeals might place upon the already overburdened courts of appeals.²⁹

A compromise emerged. Appeals will generally run to the district court for the district in which the bankruptcy court sits.³⁰ This satisfied the Senate's concerns. Two alternatives, however, each to be triggered by different events, were added to satisfy the House's concerns.

First, Congress provided an alternate route for intermediate appeals to panels of three bankruptcy judges.³¹ This system was intended to meet the House's position that three judges, not one, should hear appeals, and that the district courts should not be involved. Because of the unusual and untried nature of the system, it was made experimental. The judicial council of each circuit³² is to designate the districts within the circuit, if any, in which the panel system is to apply.³³ Designations are to be made on a district-by-district basis and are not required to be circuit-wide.³⁴ The parties to an appeal will not have a choice between a panel and the district court. If the judicial council has designated a district as a panel district, all intermediate appeals will lie to the panel and none will lie to the district court.³⁵

The chief judge of the court of appeals for the designating circuit is to appoint the bankruptcy judges who will sit on the panels.³⁶ Judges from any district within the circuit may sit on an appellate panel for a district within the circuit,³⁷ and judges from outside the circuit may sit as well, if they are so designated by the Chief Justice under section 293 of title 28. There is no explicit venue rule for panels, but they must sit

28. See S. REP. NO. 989, 95th Cong., 2d Sess. 16, 18 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787 [hereinafter cited as SENATE REPORT].

29. *Id.* at 18.

30. 28 U.S.C.A. § 1334 (West Cum. Supp. 1979).

31. *Id.* §§ 160, 1482.

32. The judicial council of a circuit is the administrative governing body of each circuit. It is composed of all active circuit judges within the circuit and is presided over by the chief judge of the circuit. *Id.* § 332.

33. *Id.* §§ 160(a), 1334(a).

34. *Id.* § 160(a).

35. *Id.* §§ 1334, 1482.

36. *Id.* § 160(a).

37. *Id.* A judge may not, however, sit on a panel hearing an appeal from an order that he entered. *Id.*

at a place convenient to the parties to the appeal.³⁸

Second, a direct appeal to the court of appeals is permitted if the parties to the appeal consent.³⁹ Consent of the parties mollified the Senate's major objections because it eliminated the "protection of the litigants" rationale and the Senate's fear of a burden on the courts of appeals.⁴⁰ The House accepted this provision because it permitted the parties to avoid the time and expense of an intermediate appeal if both were determined to take the matter higher.⁴¹ If the parties do not agree to a direct appeal to the court of appeals, they will have no choice as to the intermediate panel. The intermediate tribunal will either be the appellate panel or the district court, as the judicial council of the circuit directs.

Under what circumstances would the parties agree to bypass the intermediate step? Often, the prevailing party at trial is interested in delay for the purpose of pressuring his adversary into a favorable settlement or abandonment of the appeal. In the bankruptcy context, however, there may be situations in which both parties are interested in speed. For example, if a trustee succeeds in invalidating a security interest,⁴² the secured party may seek a quick reversal. The trustee, anxious to close the case, may agree to a direct appeal. If the court approves a disclosure statement in a reorganization case⁴³ and an ap-

38. *Id.* § 160(c). The locale provision was designed to satisfy the Senate's concern about remoteness of appellate courts.

To date, the judicial council of the United States Court of Appeals for the Ninth Circuit has implemented the program for the Central District of California and the District of Arizona, *see* L.A. Daily Journal, Dec. 24, 1979, at 3, and the United States Court of Appeals for the First Circuit has implemented it for the Districts of Maine, Massachusetts, New Hampshire, and Rhode Island.

39. 28 U.S.C.A. § 1293(b)(West Cum. Supp. 1979).

40. The effect of the direct appeal alternative on the courts of appeals' dockets and caseload is likely to be minimal. In the few years before the enactment of the Bankruptcy Code, statistics indicated that there were about 325 bankruptcy appeals per year to the courts of appeals, out of an annual courts of appeals caseload of 18,000 cases, HOUSE REPORT, *supra* note 13, at 41-42. While it may be that the low number reflects the diversion of many appeals as a result of the intermediate appeal to the district court, the number is indicative of the number of cases in which the parties desire the authoritative decision of a court of appeals, whatever the result in the district court and whatever the time or cost involved. The statistics also indicate that approximately 1,100 cases per year are appealed from bankruptcy courts to the district courts. *Id.* Thus, the percentage of appeals that take both steps in bankruptcy cases is much higher than that for all types of litigation, in which 18,000 annual appeals are taken from approximately 180,000 civil and criminal cases in the district courts, *id.*, and numerous administrative agency decisions. This comparison suggests that those who take bankruptcy appeals are as much intent on a decision from a high appellate panel as they are on simply having a review of a bankruptcy judge's decision.

41. *See id.*

42. *See, e.g.*, 11 U.S.C.A. §§ 544, 547, 548 (West 1979).

43. *See id.* § 1125(b).

peal is taken, the plan proponent will likely want a quick appeal in order to confirm his reorganization plan in a reasonable time.⁴⁴ In other cases, if each party has determined to pursue an appeal beyond the intermediate stage if he loses, both may agree to save the time and expense of the intermediate step and go directly to the court of appeals.

The availability of a direct appeal may, however, have a counterproductive effect. An appellant who loses at the intermediate level may decide that it is in his best interest to settle at that point. An intermediate appeal in a bankruptcy case is generally far quicker than an appeal to the court of appeals. Thus, it may save time as well as expense in the long run for both parties to have the initial appeal made to the intermediate court. Only when the issues are extremely important⁴⁵ or the dollars involved very large can it be predicted with reasonable certainty at the time of entry of the trial court's judgment that both parties will want to take the matter to the court of appeals, whatever the time or cost involved.

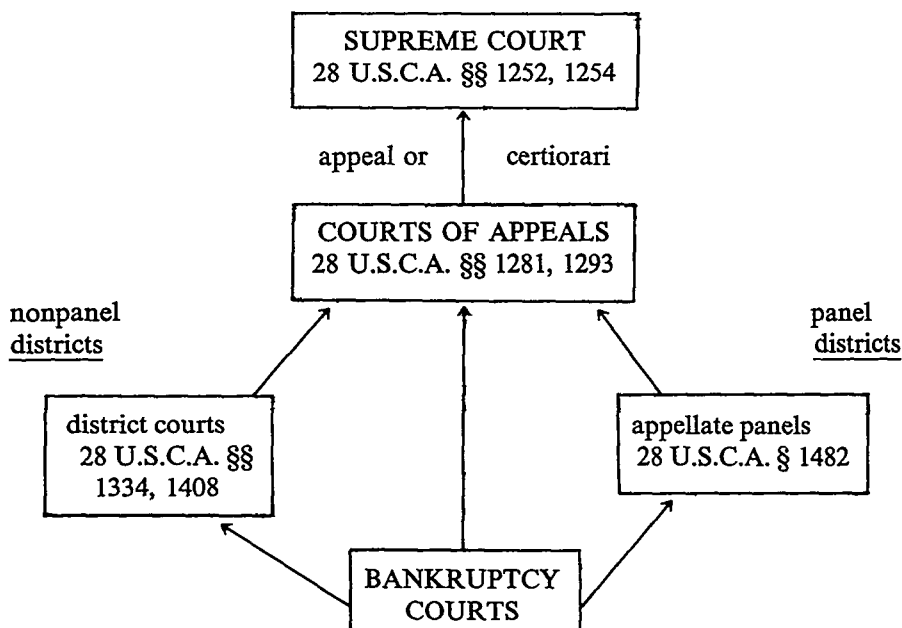
An appeal from a decision of an appellate panel in a panel district or from a district court in a nonpanel district lies to the court of appeals for the circuit in which the panel or district court is located.⁴⁶ The Supreme Court has jurisdiction over appeals from the courts of appeals.⁴⁷ The following diagram shows the complete system:

44. If the order approving the disclosure statement were not stayed pending appeal, however, *see* FED. BANKR. R. 805, the proponent's desire for speed might evaporate, unless he were worried that a reversal would invalidate a solicitation or confirmation already made.

45. *See, e.g.*, *United States v. Kras*, 409 U.S. 434 (1973).

46. 28 U.S.C.A. §§ 1293, 1294 (West Cum. Supp. 1979).

47. *Id.* §§ 1252, 1254.



II. WHEN: TIME FOR NOTICING AN APPEAL

Under section 39c of the Bankruptcy Act and Bankruptcy Rule 803, an order of the bankruptcy judge became final unless an appeal to the district court was noticed within 10 days.⁴⁸ There is no counterpart to section 39c under the Code or the title 28 provisions enacted by Public Law 95-598.⁴⁹ However, the Bankruptcy Rules remain in effect for cases under the Bankruptcy Code, to the extent not inconsistent with

48. 11 U.S.C. § 67(c)(1976)(repealed 1978); FED. BANKR. R. 803.

49. The statute itself only mentions time for an appeal in one instance. Section 2107 of title 28, if read literally, has the effect of prohibiting a notice of appeal from being filed more than 30 days after entry of the lower court judgment. The section is phrased in terms of jurisdiction, so apparently the Federal Rules of Appellate Procedure could not modify it. See 28 U.S.C.A. § 2107 (West Cum. Supp. 1979). Public Law 95-598 amended the section to include appeals from bankruptcy courts. The amendment should not have been made. While permitting a time shorter than 30 days, it suggests 30 days as the norm to the Rules Advisory Committee. Such a suggestion is unfortunate. Traditionally, appeals from bankruptcy courts have been made quickly to the district court. Appeals in bankruptcy matters were at one time required to be noticed in 30 days, while appeals in ordinary civil litigation could be noticed within 90 days. See *Lowenstein v. Reikes*, 54 F.2d 481, 482 (2d Cir. 1931). The same three-to-one ratio exists today to some degree. Compare FED. R. APP. P. 4 with FED. BANKR. R. 803. That speed and simplicity have been carried over into the new bankruptcy court system. While the additional time for a consensual direct appeal is salutary, the Rules Committee should be given flexibility and litigants should be given the speed that is so desirable in most bankruptcy cases. See *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966). Thus, section 2107 adds nothing.

the Code, until new Rules are promulgated.⁵⁰ Accordingly, Rule 803 will continue to apply to appeals to the district court in nonpanel districts.⁵¹

For a direct appeal to the court of appeals, the Federal Rules of Appellate Procedure prescribe a 30-day period for noticing an appeal.⁵² To coordinate the different time periods, as well as to protect the appellant from an appellee's delay, the Interim Rules have permitted the noticing of an appeal with the intermediate appellate court (panel or district court) within the 10-day period⁵³ and an automatic dismissal of the intermediate appeal upon the filing of the direct appeal.⁵⁴ This procedure also provides a method by which the appellant may demonstrate his actual intent to appeal in order to persuade the appellee to agree to a direct appeal.

There is a danger, however. If the court of appeals dismisses an appeal from an interlocutory order in a case that the appellate panel or district court might have heard under its discretionary jurisdiction,⁵⁵ the automatic dismissal of the intermediate appeal prevents the appellant from obtaining immediate appellate relief.⁵⁶ By the time the court of appeals acts, the time for noticing an appeal to the intermediate tribunal will surely have passed. In fact, so much time may have passed that continuation of the appeal, even at the intermediate level, from an interlocutory order that will later become appealable when a final order in the proceeding is entered would be unjust. The automatic dismissal of the intermediate appeal, however, imposes a heavy price on the appellant for his mistake in an area of law that is murky and fraught with exceptions.⁵⁷ The Rule is contrary to modern federal practice that per-

50. See Pub. L. No. 95-598, § 405(d), 92 Stat. 2549 (1978).

51. The applicability of Rule 803 and the other appellate rules was less clear in panel districts and with respect to direct appeals to the courts of appeals. Rules 802 and 803, specifying time for filing a notice of appeal and effect of failure to file, are general enough to encompass both alternate routes. They require, however, compliance with Rule 801, which applies only to appeals to the district court. Thus, suggested Interim Bankruptcy Rule 8006 has made the provisions of Rules 801-814 applicable to appeals to panels. FED. INTERIM BANKR. R. 8006.

52. FED. R. APP. P. 4.

53. See FED. INTERIM BANKR. R. 8006.

54. *Id.* 8007.

55. 28 U.S.C.A. §§ 1334(b), 1482(b)(West 1979).

56. 1 COLLIER ON BANKRUPTCY ¶ 3.03[7][d][v], at 3-308 (15th ed. 1979). The order would continue to be appealable at the time of entry of the final order in the proceeding. 9 MOORE'S FEDERAL PRACTICE ¶110.18 (2d ed. 1970). But see 2 COLLIER ON BANKRUPTCY ¶ 24.11, at 734.3-.4 (14th ed. 1975) (discretionary nature of appeals under new law may make cases cited there distinguishable, however).

57. See, e.g., *United States v. 243.22 Acres of Land*, 129 F.2d 678, 679-80 (2d Cir. 1942)

mits pleading in the alternative and other flexible procedures.⁵⁸ If the order appealed from is interlocutory, the intermediate court should be permitted to hear or to decline to hear the appeal after dismissal by the court of appeals, on grounds of time or fairness as well as on other grounds. This more flexible procedure is preferable to an absolute rule in the Rules of Bankruptcy Procedure.⁵⁹

III. WHO MAY APPEAL

A bankruptcy case is unlike ordinary civil litigation, in which two parties (or groups of parties) face each other across the courtroom, each attempting to persuade the triers of fact and law of the correctness of his position, and in which there is usually a winner and a loser. In that contest, there is seldom a dispute over who may appeal. While there is a small amount of case law on the issue,⁶⁰ there is no statutory guidance.

In a bankruptcy case, by contrast, numerous parties (or groups of parties) compete for a limited pool of assets. Many two-party disputes arise within this framework, but many disputes arise over the administration of the case and the assets involved, in which all parties to the case are to some degree interested. In addition, the outcomes of bankruptcy-related two-party disputes have varying degrees of effect on the other parties with an interest in the estate. For this reason, more guidance is needed in determining who may appeal a decision of a bankruptcy judge.

A. *Standards to Be Applied*

Under the Bankruptcy Act, "a person aggrieved" could appeal the decision of the bankruptcy judge to the district court.⁶¹ An extensive

(judgment of condemnation final and appealable even though compensation issue had not been determined).

58. See 2 MOORE'S FEDERAL PRACTICE ¶ 1.13[1] (2d ed. 1967).

59. The United States Court of Appeals for the Fifth Circuit has adopted a rule that effects reinstatement of an appeal already docketed in the intermediate tribunal when the direct appeal is filed if the court of appeals dismisses the direct appeal on the ground that it is not from a final order. 1 B.R. (Yellow) 20 (1980).

60. See, e.g., *Fuller v. Branch County Rd. Comm'n*, 520 F.2d 307 (6th Cir. 1975) (only a party aggrieved by an order may appeal); *United States v. McFaddin Express, Inc.*, 310 F.2d 799 (2d Cir. 1962) (stockholder of corporate party, not himself a party, may not appeal); *DeKorwin v. First Nat'l Bank*, 235 F.2d 156 (7th Cir. 1956) (attorney for party, not himself a party, may not appeal); *United States v. Adamant Co.*, 197 F.2d (9th Cir. 1952) (party must be aggrieved by judgment in order to appeal from it).

61. Bankruptcy Act § 39c, 11 U.S.C. § 67(c) (1976) (repealed 1978).

line of case law developed interpreting this sparse phrase.⁶² It was broadly construed, but required generally that the appellant have a direct and substantial interest in the decision from which he appealed.⁶³ In a two-party dispute, it was a simple matter to determine that the losing party had a direct and substantial interest that would justify an appeal. In a matter of administration or one that affected all parties in the bankruptcy case, however, the courts were required to examine the facts and the interests of the parties in greater detail. At a minimum, the appellant generally had to have participated in the proceeding below that led to the order being appealed.⁶⁴ The Act itself sometimes gave guidance. For example, if notice of a proposed sale or compromise was to be given to creditors generally,⁶⁵ it could be assumed that Congress intended that creditors have the right to object to the sale, both at the trial level and at the appellate level.⁶⁶

Statutory guidelines, however, are absent from Public Law 95-598. With the elimination of most notice provisions from the Bankruptcy Code,⁶⁷ even such general language as "person aggrieved" is gone. Undoubtedly, Congress's intent to make the new bankruptcy courts more like the federal district courts, the absence of any statutory standing definition for ordinary civil appeals, and the extensive case law construing "person aggrieved" led Congress to omit a statutory standing definition. Whatever the reason, the omission appears deliberate. No other explanation seems plausible in view of the detailed character of the remainder of the new law.

This omission, however, reflects a lack of understanding of the different considerations governing who may appeal in the bankruptcy context. The presence of numerous parties in a bankruptcy case necessitates guidance. Standards should be developed, either by Congress or

62. See 2A COLLIER ON BANKRUPTCY ¶ 39.19 (14th ed. 1974).

63. *Id.*

64. *In re Bender Body Co.*, 139 F.2d 128 (6th Cir. 1943) (successful bidder at sale not permitted to intervene in appeal brought by and attempted to be dismissed by another party); *Rose v. Bank of America*, 86 F.2d 69 (9th Cir. 1936) (bankrupt was not a party to the proceeding before the bankruptcy court in which the order appealed from was entered); *In re Wister & Co.*, 38 Am. B.R. 215 (3d Cir. 1916); *In re Mifflinburg Body Co.*, 54 F. Supp. 560 (M.D. Pa. 1944) (attorney for creditors not permitted to appeal in his own name, though creditors appeared below); *In re Pepper's Fruit Co.*, 24 F. Supp. 119 (S.D. Cal. 1938) (appeal of two creditors who did not appear before referee dismissed).

65. Bankruptcy Act § 58a(4), 11 U.S.C. § 94(a)(4) (1976) (repealed 1978); FED. BANKR. R. 203(a)(2).

66. Cf. 2A COLLIER ON BANKRUPTCY ¶ 39.18, at 1492 (14th ed. 1974) (fact that allowance of compensation is to be determined only after notice to creditors indicates that allowance is a contested matter that may be appealed).

67. See HOUSE REPORT, *supra* note 13, at 292-93.

the courts, based on three criteria: extent of the interest of the appellant, need for accountability of the officers of the estate, and economy and efficiency of the system. These three criteria sometimes point in different directions. They must, therefore, be balanced in particular cases.

The criterion of the extent of the interest of the appellant is one with which courts are familiar. It is the major component of "person aggrieved." A person with a direct and substantial interest at stake should be given the opportunity to appeal to protect that interest. The standard must include "direct" as well as "substantial."⁶⁸ In some instances, the dollars involved may be small, but the direct effect of an adverse decision so great that an appeal should lie.⁶⁹ In others, the dollars may be substantial though the effect only indirect.⁷⁰ This balancing is part of construing "person aggrieved."

The same interest at the same "distance" from the controversy, however, may make a person "aggrieved" as to one controversy but not as to another. For example, a general creditor may appeal from an order confirming a sale of property⁷¹ or approving a compromise,⁷² but may not appeal from a ruling on an objection to a claim.⁷³ His interest in the dispute is indirect in both instances. He will receive only a small percentage of the resulting benefit or loss to the estate. Nevertheless, he is permitted to appeal in one case and not the other. The difference may be justified by the need for accountability of the officers of the estate.

A trustee is the representative of and acts for the benefit of the unsecured creditors.⁷⁴ In most disputes involving the estate, he is charged with protecting the estate's interest. To permit all beneficiaries of the estate (creditors) to assume that responsibility would breed

68. See 2A COLLIER ON BANKRUPTCY ¶ 25.08 (14th ed. 1974).

69. *E.g.*, *United States v. Kras*, 409 U.S. 434 (1973).

70. Only a trustee may appeal from allowance of a claim, no matter how large the dollar effect on a particular creditor, *In re Shaw's Plumbing & Heating Co.*, 5 B.C.D. 1048 (W.D. Va. 1979) (unsecured creditors holding over 25% of allowed claims not permitted to appeal allowance of another claim, notwithstanding their substantial pecuniary stake), 2A COLLIER ON BANKRUPTCY ¶ 25.08, at 929, ¶ 39.19, at 1497-98 (14th ed. 1974), unless "the trustee has refused to do so and the district court has authorized the creditor to proceed in the trustee's name." *Ross v. Drybrough*, 149 F.2d 676, 677 (2d Cir. 1945).

71. *In re Haywood Wagon Co.*, 219 F. 655 (2d Cir.), *cert. denied*, 238 U.S. 625 (1914).

72. *In re Kansas City Journal-Post Co.*, 144 F.2d 816 (8th Cir. 1944); *Drexel v. Loomis*, 35 F.2d 800 (8th Cir. 1929) (preferred stockholder appeal).

73. See note 67 *supra*.

74. See *Atkins v. Wilcox*, 105 F. 595 (5th Cir. 1900); 2A COLLIER ON BANKRUPTCY ¶ 47.02 (14th ed. 1974).

chaos.⁷⁵ On the other hand, to prohibit creditors from becoming involved in certain matters would leave the trustee unaccountable. This most often occurs when the trustee is not adverse to any other party appearing in the matter. For example, on an application to compromise, the trustee and his former opponent approach the bankruptcy court with a common interest. If a creditor, or some other party with a similarly indirect interest in the bankruptcy court's decision, is not permitted to object, the trustee is not accountable, and the bankruptcy court will be deprived of a source of arguments against the proposed order.⁷⁶

The need for economy and efficiency in the bankruptcy system requires these limitations on who may appeal. Were there no such need, every party with any interest in the case could appeal every issue that arises. With dozens or hundreds of creditors in each case, and perhaps equally numerous equity interests,⁷⁷ such a system might quickly break down. Thus, judicial economy requires that only those whose presence is dictated by the other two factors be permitted to appeal.

These three considerations, as well as prior practice under the Bankruptcy Act and Bankruptcy Rules, provide the basis on which to determine who may participate in the proceeding before the bankruptcy court. They also provide the guidelines for who may appeal: as a general rule, those who have enough of an interest in the proceedings below to be heard have a sufficient interest to be permitted to appeal. When combined with the rule that only a person who actually participated below may appeal,⁷⁸ which is soundly based on the principle that an issue may be raised on appeal only if raised below,⁷⁹ standing will be almost completely defined.

These principles apply relatively easily to cases under the Bankruptcy Code. In adversary proceedings—seeking relief from the automatic stay,⁸⁰ objecting to discharge⁸¹ or dischargeability,⁸² seeking

75. See *Amick v. Mortgage Security Corp.*, 30 F.2d 359 (8th Cir. 1929).

76. See *In re First Colonial Corp. of America*, 544 F.2d 1291, 1297 (5th Cir.), cert. denied, 431 U.S. 904 (1977) (shareholder of bankrupt corporation permitted to appeal from award of fees to trustee); *In re Columbus Brass & Aluminum Co.*, 283 F.2d 160, 162 (7th Cir. 1960) (appeal by creditor from order appointing trustee permitted because appellant was only one in position to raise issue).

77. See HOUSE REPORT, *supra* note 13, at 11.

78. See note 64 *supra*. This rule may differ, however, if the objecting party did not receive proper notice of the proceedings below and of his opportunity to object to the action proposed to be taken. In that case, the requirements of due process outweigh those of judicial efficiency and certainty.

79. See *Singleton v. Wulff*, 428 U.S. 106 (1976).

80. 11 U.S.C.A. § 362 (West 1979); FED. BANKR. R. 701(6).

recovery of property from or for the estate,⁸³ and the like—only the two parties, plaintiff and defendant, will be permitted to appeal. In other matters, the change in the role of the bankruptcy court from that of administrator and supervisor to dispute-decider⁸⁴ will make application and enforcement of the appellate standing rule easier.

Most acts authorized to be done in a case under the Bankruptcy Code are to be done, either by the court or by the trustee, “after notice and a hearing.”⁸⁵ That phrase affords all interested parties the opportunity to air objections at the trial level before the contemplated acts are taken. The bankruptcy court will not be involved in most administrative matters unless such an objection is made, and the dispute thus framed is brought to the court for decision.⁸⁶ When the bankruptcy court resolves the dispute, the issue of who may appeal becomes simple—a losing party who appeared below and no other.

B. Exceptions

There are three exceptions to the general rules of who may appeal. The Securities and Exchange Commission may not appeal from any order in a Chapter 11 reorganization case.⁸⁷ The SEC is given an important role to play in reorganization cases,⁸⁸ though it most likely will become involved only in cases in which there is a class of public debt or equity.⁸⁹ It is permitted to appear in the case to raise and be heard on any issue,⁹⁰ but it is prohibited from taking an appeal.⁹¹ The SEC has no financial stake in a reorganization case and, therefore, has little incentive to speed the case along to completion. It may be more interested in establishing precedents or general principles to guide future cases. Permitting appeals for this reason alone could cause serious damage to the real parties in interest in the case—those with dollars at

81. 11 U.S.C.A. § 727 (West 1979); FED. BANKR. R. 701(4).

82. 11 U.S.C.A. § 523 (West 1979); FED. BANKR. R. 701(7).

83. FED. BANKR. R. 701(1).

84. See HOUSE REPORT, *supra* note 13, at 4.

85. 11 U.S.C.A. § 102(1) (West 1979).

86. HOUSE REPORT, *supra* note 13, at 107-08.

87. 11 U.S.C.A. § 1109(a) (West 1979).

88. *Id.*; 124 CONG. REC. H11,100 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); HOUSE REPORT, *supra* note 13, at 228-29.

89. *Bankruptcy Act Revision: Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., Pt. 4, at 2155-56 (1976), reprinted in 6 BANKRUPTCY REFORM ACT OF 1978—A LEGISLATIVE HISTORY, (A. Resnick & E. Wypyski eds. 1979) [hereinafter cited as *Hearings*].

90. 11 U.S.C.A. § 1109(a) (West 1979).

91. *Id.*

stake—who are interested in a quick conclusion to the case so that they can be paid sooner.⁹² Thus, the SEC is prohibited from taking an appeal from or otherwise seeking review of an order of the bankruptcy court. If those with money at stake wish to appeal despite the consequent delay, however, the SEC is not prohibited from joining in the appeal.⁹³

The Interstate Commerce Commission, the Department of Transportation, and certain state and local regulatory commissions have a similar role in railroad reorganization cases.⁹⁴ For the same reasons, these agencies are prohibited from appealing, but they may join in an appeal filed by another entity with a real interest in the case.

In Chapter 11 cases, the proponent of the reorganization plan must obtain the approval of the court of a disclosure statement before soliciting consents to a reorganization plan.⁹⁵ Frequently, plans will provide for the modification of existing securities or issuance of new securities.⁹⁶ The disclosure statement is designed in part to further the goal of federal and state securities laws of ensuring that those asked to take or modify securities have "adequate information"⁹⁷ on which to base a decision.⁹⁸ Both the SEC and state securities regulatory agencies have an interest in seeing that a disclosure statement meets the statutory requirement of "adequate information." Thus, they may appear and be heard in any hearing concerning approval of the disclosure statement,⁹⁹ but may not seek review of "any order approving a disclosure state-

92. See HOUSE REPORT, *supra* note 13, at 229; *Hearings, supra* note 89, at 2169 (statement of the S.E.C.).

93. See *Hearings, supra* note 85, at 2169. The SEC has taken the position that the provision in Chapter X, Bankruptcy Act § 208, 11 U.S.C. § 608 (1976) (repealed 1978), that the SEC "may not appeal . . . in any such proceeding" was a prohibition only on appeal from Chapter X matters. "On those occasions when a securities law problem has arisen in a Chapter X proceeding, we have not regarded the limited status accorded to the SEC under Section 208 as applicable." *Hearings, supra* note 85, at 2169. Like the Bankruptcy Commission's bill, see COMMISSION REPORT, *supra* note 17, pt. II, at 48 (proposed § 2-210(a)(2)(B)) (SEC "may not appeal from any judgment or order of a bankruptcy court."), § 1109(a) of the Code contains a more absolute prohibition. 11 U.S.C.A. § 1109(a) (West 1979). The SEC's general regulatory powers do not give it a roving license to intervene and appeal in non-bankruptcy cases. The fact of a reorganization case, in which the SEC is given a limited right of appearance, should not provide the "camel's nose" to permit appeal. The statutory language that the SEC "may not appeal from any . . . order . . . entered in the case," *id.* § 1109(a), evidences a clear congressional intent to follow the Commission's recommendation.

94. 11 U.S.C.A. § 1164 (West 1979).

95. *Id.* § 1125(b).

96. See HOUSE REPORT, *supra* note 13, at 221.

97. 11 U.S.C.A. § 1125(a)(1) (West 1979).

98. HOUSE REPORT, *supra* note 13, 226-27.

99. 11 U.S.C.A. § 1125(d) (West 1979).

ment.”¹⁰⁰ The reason is the same as the one given for the general rule prohibiting the SEC from taking appeals in Chapter 11 cases.¹⁰¹

The prohibition applies only to orders *approving* a disclosure statement.¹⁰² While this limitation could be attributed to a drafting error, it is more likely based on an accurate perception of the interest of the SEC and state securities agencies. Their interest is nearly always in ensuring full disclosure. Therefore, it is unlikely that an agency would object to a holding that disclosure statement does not contain enough information. Moreover, if the proponent did not wish to appeal such an order, no other entity would have an appealable interest.¹⁰³

C. *The United States Trustee*

In eighteen pilot districts established by Congress, the United States trustee is required to “supervise the administration of cases . . . under . . . title 11.”¹⁰⁴ In these districts the United States trustee is the “enforcement officer” in bankruptcy cases, overseeing the operation of businesses in reorganization cases and the liquidation of assets in Chapter 7 cases to be certain that the conduct of the case is proper under the requirements of the Bankruptcy Code.¹⁰⁵ Like the SEC, his constituency is the “public interest,” but a different aspect of the general public interest—the proper functioning of the bankruptcy system.¹⁰⁶ Though he is not explicitly granted the standing to appear and raise and be heard on any issue in a bankruptcy case, his general interest and his supervisory role, as well as the Suggested Interim Bankruptcy Rules,¹⁰⁷ permit him to do so. There is no limit, however, on his right to appeal. In spite of his lack of pecuniary interest in a case, he should be permitted to appeal, just as any other party who may appear

100. *Id.*

101. HOUSE REPORT, *supra* note 12, at 229.

102. See 11 U.S.C.A. § 1125(d) (West 1979).

103. The limitation on appeals should not be read too narrowly. The order approving a disclosure statement will be a “final order in a proceeding in a case under title 11,” and thus will be appealable as a matter of right. A securities agency, however, may not appeal from that order. Similarly, the agency should not be permitted to seek review by any other method, such as by extraordinary writ. See 11 U.S.C.A. § 305(c) (West 1979); 28 *id.* §§ 1471(d), 1478(b) (order “not reviewable by an appeal or otherwise”). In addition, the court may enter interlocutory orders during the course of the disclosure statement proceeding. Under the spirit of the prohibition on appeal, the agencies should not be permitted to appeal from such interlocutory orders. The SEC is so prohibited under 11 *id.* § 1109(b); the same should apply to state agencies under *id.* § 1125(d).

104. 28 *id.* § 586(a)(3).

105. HOUSE REPORT, *supra* note 13, at 101, 109.

106. *Id.*

107. FED. INTERIM BANKR. R. X-1005(a).

below is permitted to do so. His interest in establishing precedent for future cases will be tempered by his understanding of the needs of the particular case, based on his frequent involvement in bankruptcy cases, and his institutionalized bias and statutory duty to see the system work not only as a whole but in particular cases as well.

IV. WHAT MAY BE APPEALED

As a general rule in federal appellate practice, only final orders are appealable.¹⁰⁸ There are, however, limited exceptions to this rule. The two major statutory exceptions are for interlocutory orders granting or denying injunctions¹⁰⁹ and for interlocutory orders certified by the district court as presenting "a controlling question of law," the resolution of which "may materially advance the ultimate termination of the litigation."¹¹⁰ The two major case law exceptions are the *Foray v. Conrad* rule,¹¹¹ permitting appeals from interlocutory orders that dispose of substantive rights if delay would result in irreparable injury,¹¹² and the *Cohen* rule¹¹³ or "collateral order doctrine," permitting appeals from interlocutory orders that will not be merged into or lead to the final order in the case.¹¹⁴

The exception for injunctions is rooted in the possibility of irreparable and immediate harm from the imposition or refusal of an injunction or preliminary injunction, and in the fact that such an order grants "part or all of the ultimate relief sought."¹¹⁵ As a practical matter, the imposition or denial of the temporary injunction may moot further proceedings. The certification exception is to further the spirit, if not the letter, of the final judgment rule—that is, to promote efficiency in judicial administration by preventing piecemeal appeals.¹¹⁶ In some cases, an interlocutory decision of a controlling question of law may deter-

108. 28 U.S.C. § 1291 (1976); 9 MOORE'S FEDERAL PRACTICE ¶ 110.06 (2d ed. 1975).

109. 28 U.S.C. § 1292(a)(1) (1976).

110. *Id.* § 1292(b).

111. *See Foray v. Conrad*, 47 U.S. (6 How.) 201 (1848) (appeal permitted from interlocutory decree requiring turnover of property, even though further proceedings for accounting of profits had been ordered but not completed).

112. *See United States v. 243.22 Acres of Land*, 129 F.2d 678 (2d Cir. 1942) (condemnation proceeding); 9 MOORE'S FEDERAL PRACTICE ¶ 110.11 (2d ed. 1975).

113. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (order denying motion to require plaintiff to post security appealable as final decision under § 1291).

114. *See Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975) (order quashing subpoena duces tecum in court other than one in which main action was pending appealable under *Cohen*); 9 MOORE'S FEDERAL PRACTICE ¶ 110.10 (2d ed. 1975).

115. 9 MOORE'S FEDERAL PRACTICE ¶ 110.20[1], at 232 (2d ed. 1975).

116. *See S. REP. NO. 2434*, 85th Cong. 2d Sess. 2-3 (1958).

mine the outcome of the case and, therefore, should be appealable before an extensive and time-consuming trial.¹¹⁷

A. Final Orders

In bankruptcy cases, the only "final order," if the order closing the case can meaningfully be called a final order,¹¹⁸ is relatively unimportant. All the decisions made in the course of administration of the case, however, are final in the sense that they cannot later be undone.¹¹⁹ Waiting until the close of the case would effectively deny the right of appeal in important matters, just as waiting in *Cohen* or *Forgay* would have done.¹²⁰ Disputes relating to selection of a trustee,¹²¹ relief from the automatic stay,¹²² sales or use of property,¹²³ allowance of claims,¹²⁴ and many other issues are mooted unless challenged and overturned before the case proceeds. Decisions in these disputes are not "merged" into the final order, and any appeal to correct them at the final order stage is largely meaningless. As a result, bankruptcy law has relied on a combination of three alternatives to a strict final order rule: total abolition of the rule, redefinition of the unit of litigation by which the final order rule is measured, and qualification of or exception to the rule.

First, under the Bankruptcy Act, the final order rule was totally suspended for appeals from the bankruptcy courts to the district court, and any order was reviewable,¹²⁵ subject only to some discretion in the district court or court of appeals to decline to hear the matter if it was

117. *Id.*; H.R. REP. NO. 1667, 85th Cong., 2d Sess. 1 (1958).

118. See 11 U.S.C.A. § 350 (West 1979).

119. See *Rupert Hermanos, Inc. v. Puerto Rico*, 118 F.2d 752, 757 (1st Cir. 1941) (appeal from order appointing receiver and vesting him with certain powers; court stated, "In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination.").

120. See *In re Brissette*, 561 F.2d 779, 782 (9th Cir. 1977) ("[c]ertain interlocutory decisions may effectively determine the ultimate outcome or finally resolve rights and duties of parties in a manner not susceptible to meaningful review on appeal from the final judgment.").

121. 11 U.S.C.A. § 702 (West 1979); see *In re Columbus Brass & Aluminum Co., Inc.*, 283 F.2d 160 (7th Cir. 1960) (appeal from referee's order appointing trustee permitted); 2 COLLIER ON BANKRUPTCY ¶ 24.13[1], at 738-39 (14th ed. 1975).

122. 11 U.S.C.A. § 362 (West 1979); see 2 COLLIER ON BANKRUPTCY ¶ 24.20, at 748-50 (14th ed. 1975).

123. 11 U.S.C.A. § 363 (West 1979); see 2 COLLIER ON BANKRUPTCY ¶ 24.18, at 743-45 (14th ed. 1975).

124. 11 U.S.C.A. § 502 (West 1979); see 2 COLLIER ON BANKRUPTCY ¶ 24.19, at 745-48 (14th ed. 1975).

125. Bankruptcy Act § 39c, 11 U.S.C. § 67(c) (1976) (repealed 1978); see 2A COLLIER ON BANKRUPTCY ¶ 39.21, at 1511 (14th ed. 1974).

too early to do so or if the matter was "trivial."¹²⁶ Second, when the final order rule was not abolished, the units of litigation were redefined as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy"¹²⁷ for purposes of appeals from the district courts to the courts of appeals. Third, final orders in both kinds of units were made appealable as of right, and interlocutory orders were made appealable as a matter of right in "proceedings."¹²⁸ These two distinctions, however, produced much litigation¹²⁹ and little efficiency.

The new bankruptcy law abolishes these distinctions and relies on a different combination of options for avoiding the impractical effect of a strict final order rule. First, there is no provision suspending *in toto* the final order rule for appeals from the bankruptcy court. Second, the unit of litigation is defined in simpler terms. Third, interlocutory appeals are discretionary in all instances.¹³⁰

The elimination of the broad appellate jurisdiction of former section 39c is consistent with the change in the status of the bankruptcy court brought about by the new law.¹³¹ A general supervisory power of review of any order of the bankruptcy court was appropriate when the bankruptcy court acted as an administrative arm of the district court (as it did until 1938) or as a subordinate judicial arm (as it did until 1978), though less so in the latter case.¹³² The elevation of the bankruptcy court in the 1978 legislation, however, requires greater respect for the proceedings of the bankruptcy court and abolition of the power of continual supervision and review. The rule now is that only final

126. *Good Hope Refineries v. Brashear*, 588 F.2d 846 (1st Cir. 1978) (denial of motion to quash summons and to dismiss held trivial; appeal dismissed); *City of Fort Lauderdale v. Freeman*, 197 F.2d 122 (5th Cir. 1952) (order continuing trustee in possession of leased premises pending appeal held trivial; appeal dismissed); *In re McDougal*, 17 F.R.D. 2 (W.D. Ark. 1955) (denial of motion to dismiss involuntary petition for want of jurisdiction held not appealable). See *In re Durensky*, 519 F.2d 1024 (5th Cir. 1975) (denial of motion to dismiss tax determination application of bankrupt did not determine substantive rights and therefore held not appealable); *Baldonado v. First State Bank of Rio Rancho*, 549 F.2d 1380 (10th Cir. 1977) (semble); *In re Hotel Governor Clinton*, 107 F.2d 398 (2d Cir. 1939) (order of reference to hear and report held not appealable).

127. Bankruptcy Act § 24a, 11 U.S.C. § 47(a) (1976) (repealed 1978).

128. *Id.*

129. See, e.g., *In re Brissette*, 561 F.2d 779, 781 (9th Cir. 1977) (dispute over exemptions held "proceeding"); *United Kingdom Mut. S.S. Assur. Ass'n. v. Liman*, 418 F.2d 9, 10 (2d Cir. 1969) (objection to claim and counterclaim held "controversy"). Compare 2 COLLIER ON BANKRUPTCY ¶ 24.12, at 736-38 (14th ed. 1974) with *id.* ¶ 24.28, at 766-69.

130. 28 U.S.C.A. §§ 1334(b), 1482(b) (West Cum. Supp. 1979).

131. See HOUSE REPORT, *supra* note 13, at 11-21; SENATE REPORT, *supra* note 28, at 15-18.

132. See HOUSE REPORT, *supra* note 13, at 8-9; Order Transmitting Rules of Bankruptcy Procedure, 93 S. Ct. 3081, 3083 (1973) (Douglas, J., dissenting) (referees are "administrative arms of the bankruptcy court").

orders are appealable as a matter of right.¹³³

The unit of litigation by which finality will be measured is a "proceeding arising under title 11 of the United States Code or arising in or related to a case under title 11."¹³⁴ A "case under title 11" is the umbrella under which all other matters take place.¹³⁵ It is initiated by the filing of a petition under title 11 in the bankruptcy court,¹³⁶ and terminated by an order dismissing or closing the case.¹³⁷ Everything that occurs in the bankruptcy court between these two events is treated as a "proceeding arising in or related to" the bankruptcy case.¹³⁸ This broad phrase encompasses everything that was formerly known as an adversary proceeding, contested matter, administrative matter, proceeding in bankruptcy or controversy arising in a proceeding in bankruptcy.¹³⁹ Congress used the broadest possible language to include the broadest possible scope of matters. Even matters that can be heard only in the bankruptcy court are included within "proceedings" rather than "the case." For example, a motion to dismiss a bankruptcy case, an application for allowance of fees and a hearing on an involuntary petition are all proceedings within the umbrella of the title 11 case.¹⁴⁰

These adjustments of the final order rule for the bankruptcy context fit well within the federal appellate scheme. The treatment of orders in proceedings in bankruptcy cases as final and appealable is consistent with both the letter and the spirit of *Forgay v. Conrad* and *Cohen*.¹⁴¹ Usually, those proceedings are collateral to the course of administration of a bankruptcy case, in the sense that the order is not merged into the final decree, or result in orders that could cause irrepa-

133. 28 U.S.C.A. §§ 1334, 1482 (West 1979).

134. See 28 U.S.C.A. § 1471(b) (West Cum. Supp. 1979) (defining jurisdiction of the court, although this phrase is not used in the appellate jurisdiction sections).

135. See *id.* § 1471(a).

136. 11 U.S.C.A. §§ 301-304.

137. *Id.* §§ 305, 350, 707, 927, 1112, 1307.

138. HOUSE REPORT, *supra* note 13, at 445.

139. *Id.*

140. See 11 U.S.C.A. §§ 303, 330, 707, 927, 1112, 1307 (West 1979). However those matters are categorized, a ruling on them may determine and seriously affect substantive rights. See note 126 *supra*. As such they should be appealable as of right. Labeling them "proceedings" is neither necessary nor sufficient to make the last order in the matter a "final order" and therefore appealable, but if the unit of litigation is defined as "proceeding" and these matters are within that definition, then an order for relief on an involuntary petition, *id.* § 303(h), or an order dismissing the petition are equally final and appealable; an order granting a motion to dismiss a case in which relief has been ordered or an order denying it are equally final and appealable, even though an order denying the motion does not prevent its renewal at a later stage in the case; and an allowance or denial of fees, *id.* § 330, is final and appealable.

141. See *In re Brissette*, 561 F.2d 779, 782 (9th Cir. 1977) (exemption dispute held "proceeding").

rable harm to the losing party if he had to wait to appeal until the end of the bankruptcy case. In practical application, these appellate rules work efficiently and promote substantial justice.

For example, an adversary proceeding initiated under Part VII of the Bankruptcy Rules by a complaint, and conducted in form much like a civil action under the Federal Rules of Civil Procedure,¹⁴² is a "proceeding arising in or related to a case under title 11."¹⁴³ But within that proceeding, there will be numerous interlocutory orders, relating to discovery, pretrial motions and motions brought within the adversary proceeding.¹⁴⁴ At the end of the adversary proceeding, there will be a final judgment.¹⁴⁵ That final judgment disposes of all issues in the adversary proceeding and is appealable as a matter of right, as are final judgments of the district courts in civil actions.¹⁴⁶ Any interlocutory order entered during the adversary proceeding is appealable as a matter of discretion of the intermediate appellate court,¹⁴⁷ though certification by the bankruptcy court is not necessary, as it is for interlocutory appeals from the district courts.¹⁴⁸

Next, there is a large group of issues that are disposed of in bankruptcy cases in proceedings called "contested matters" under the Bankruptcy Rules.¹⁴⁹ These are normally initiated by motion,¹⁵⁰ objection,¹⁵¹ or application,¹⁵² and relate to matters that involve the actual administration of the bankruptcy case, rather than collateral disputes over rights to property that do not affect the progress of the case itself. Contested matters include disputes relating to selection of a trustee,¹⁵³ objections to claims,¹⁵⁴ objections to proposed sales of prop-

142. FED. BANKR. R. 701-772; Prefatory Note to Bankruptcy Rule 701, *reprinted in* 2 COLLIER PAMPHLET EDITION 201 (1979).

143. HOUSE REPORT, *supra* note 13, at 445.

144. *See, e.g.*, FED. BANKR. R. 726-737.

145. *Id.* 754.

146. 28 U.S.C.A. §§ 1334(a), 1482(a) (West Cum. Supp. 1979).

147. *Id.* §§ 1334(b), 1482(b). It is unlikely that many such orders will be granted review, for the same reason that few interlocutory orders are certified under *id.* § 1292(b). *See* 1 COLLIER ON BANKRUPTCY ¶ 3.03[7][d][5] (15th ed. 1979).

148. 28 U.S.C.A. § 1292(b) (West Cum. Supp. 1979). The new appellate rules become more important in light of the expanded jurisdiction of the bankruptcy court. *See id.* § 1471(b), (c). Many actions that would have been heard as plenary matters in the state courts or federal district courts, with a right of appeal from the final judgment, will now be heard as adversary proceedings in the bankruptcy court.

149. *See* FED. BANKR. R. 914.

150. *Id.*

151. *E.g., id.* 306 (objection to claim).

152. *E.g., id.* 221(a) (removal of trustee or receiver).

153. *Id.*

erty,¹⁵⁵ examination of attorney's fees,¹⁵⁶ motions to dismiss or convert a case,¹⁵⁷ objections to claimed exemptions,¹⁵⁸ and the like. Each of these proceedings presents a distinct and severable controversy that is properly called a "proceeding arising in or related to a case under title 11." Each such proceeding may to a greater or lesser degree be governed by the adversary proceeding rules of Part VII of the Bankruptcy Rules.¹⁵⁹ Each may involve more than one hearing, such as might be found on a simple motion. Each may involve orders of the bankruptcy court that do not dispose of the issue entirely, but merely affect the progress of the proceeding or dispose of preliminary or partial matters. Each results in a final disposition, however, adjudging the rights of the parties to the dispute and thereby indirectly affecting all other parties to the bankruptcy case.

In the context of the bankruptcy case as a whole, these proceedings are mere steps in the settlement of the bankruptcy estate. In that sense, they are interlocutory and to a degree are merged into the final order in the case.¹⁶⁰ When viewed as distinct and severable proceedings, however, the order disposing of each matter is a final order in a "proceeding arising in or related to a case under title 11." As such, it is appealable as of right,¹⁶¹ just as a final order in a civil action or an adversary proceeding is. These orders dispose of the rights of adverse parties finally and completely and will not be rendered moot or insignificant by later developments in a case, as discovery orders might be in an adversary proceeding or civil action.¹⁶²

B. Interlocutory Orders

For interlocutory appeals, the statute does not contain a procedure similar to the certification procedure contained in section 1292(b) of title 28, relating to appeals from interlocutory orders of the district courts. Nor does it contain mandatory jurisdiction for certain orders, as in section 1292(a). Interlocutory appeals are completely discretion-

154. *Id.* 306.

155. *See id.* 606.

156. *Id.* 220.

157. *E.g., id.* Chapter XI Rule 11-42.

158. *Id.* 403(c).

159. *Id.* 914.

160. This may have caused the Ninth Circuit incorrectly to consider a disposition of an exemption dispute as an interlocutory order. *See In re Brissette*, 561 F.2d 779 (9th Cir. 1977).

161. 28 U.S.C.A. §§ 1334(a), 1482(a) (West Cum. Supp. 1979).

162. 9 MOORE'S FEDERAL PRACTICE ¶ 110.07, at 109 (2d ed. 1975).

ary with the appellate court.¹⁶³ The appellant does not need to obtain the certificate of the bankruptcy judge before such an appeal may be prosecuted, but he must persuade the intermediate tribunal that the interlocutory appeal should be heard. Nevertheless, the intermediate tribunals will most likely look to the same standards that govern appealability under section 1292(b).¹⁶⁴ If the appeal is likely to save time and expense, involves a "controlling question of law" and will "materially advance the ultimate termination of the litigation,"¹⁶⁵ the court should grant a hearing.

The statute permits appeal of interlocutory orders or decrees to the district court or the appellate panel, but not directly to the court of appeals.¹⁶⁶ This distinction follows in part the distinction between sections 24a and 39c of the Bankruptcy Act.¹⁶⁷ Under those sections, more orders were appealable to the district court than were appealable to the court of appeals. A final decision of the district court in an appeal from a final order of a bankruptcy court in either a proceeding in bankruptcy or a controversy arising in a proceeding in bankruptcy was appealable as of right under section 24a. Whether it was also appealable under section 1291 of title 28 made little difference. Interlocutory orders, however, were appealable only in proceedings in bankruptcy, so the applicability of section 1292 of title 28 was an important issue for controversies arising in proceedings in bankruptcy. The courts determined that it did apply.¹⁶⁸

Two issues in this respect arise under the 1978 legislation. First, does section 1291 apply to permit an appeal from a "final decision" of a district court that has heard an appeal from an interlocutory order of a bankruptcy court under section 1334(b)? If so, does section 1293(a) permit an appeal from a similar "final decision" of an appellate panel? Section 1293(b) permits appeals from "a final judgment, order, or decree" of either a district court or an appellate panel.¹⁶⁹ This provision, however, adds nothing. "Decision" is just as broad as "judgment, order, or decree."¹⁷⁰ In fact, the original draft of the appellate proposal

163. 28 U.S.C.A. §§ 1334, 1482 (West Cum. Supp. 1979).

164. 1 COLLIER ON BANKRUPTCY ¶ 3.03[7][d][v], at 3-303 to 3-306 (15th ed. 1979).

165. 28 U.S.C.A. § 1292(b) (West Cum. Supp. 1979).

166. *Id.* § 1293(b).

167. See Bankruptcy Act §§ 24a, 39c, 11 U.S.C. §§ 47(a), 67(c) (1976) (repealed 1978).

168. See *McGonigle v. Foutch*, 51 F.2d 455 (8th Cir. 1931); 2 COLLIER ON BANKRUPTCY ¶ 3.03[b] (15th ed. 1979); 9 MOORE'S FEDERAL PRACTICE ¶ 110.19[5] (2d ed. 1970).

169. 28 U.S.C.A. § 1293(b) (West Cum. Supp. 1979).

170. Compare *In re Tiffany*, 252 U.S. 32 (1920) and *Natta v. Zletz*, 379 F.2d 615 (7th Cir.

did not include the language in section 1293(b), but instead relied exclusively on the "final decision" language in sections 1291 and 1293(a).¹⁷¹ The language in section 1293(b) was added at the last minute, without explanation.¹⁷²

One could argue that "final decision" in section 1293(a) is different from "final decision" generally in section 1291. A "final decision" of a trial court disposes of the case before it. A "final decision" of an appellate court also disposes of the case before it, but "the case before the appellate court," especially in a bankruptcy context, may well be different from what it is in the ordinary civil—section 1291—context. The only "case before the appellate court" is the appeal, even if from an interlocutory order. It is not the entire case pending before the trial court. When the appellate court renders its decision, and when it enters its judgment or order thereby disposing of all matters before it, the decision or judgment is final, even though that final decision or judgment is not final within the context of the case or proceeding before the trial court.¹⁷³

Based on this reading, both section 1291 and section 1293(a) grant the courts of appeals mandatory jurisdiction over final decisions of district courts or bankruptcy appellate panels when one of those intermediate tribunals has accepted an appeal from an interlocutory order of a bankruptcy court. Whether Congress intended this result is unclear. The legislative history is silent. The addition of the language relating to appellate panels and district courts in section 1293(b) could be interpreted as a re-emphasis of the concept of finality as a prerequisite to jurisdiction in the courts of appeals, but it equally could be read as suggesting that "final decision" in section 1291 and 1293(a) is something more than "final judgment" in section 1293(b).

The second issue is the applicability of section 1292, which permits appeals from certain interlocutory orders of the district courts.¹⁷⁴ Does

1967) with *Turtle v. Institute for Resource Management, Inc.*, 475 F.2d 925 (D.C. Cir. 1973). But see *Fox v. City of West Palm Beach*, 383 F.2d 189 (5th Cir. 1967).

171. See 124 CONG. REC. H11,082 (daily ed. Sept. 28, 1978).

172. See *id.* at S17,405 (daily ed. Oct. 6, 1978).

173. But see *In re Licek Potato Chip Co.*, 599 F.2d 181, 184-85 n.6 (7th Cir. 1979):

The bankruptcy judge does not stand in the same relationship to the district court that the district court does to this court. He is an officer of the district court, appointed by that court, 11 U.S.C. § 62(a), and deriving his jurisdiction and powers from that court, 11 U.S.C. § 66. *Heiser v. Woodruff*, 150 F.2d 867, 868 (10th Cir.) *cert. denied*, 326 U.S. 778, 66 S.Ct. 271, 90 L.Ed. 471 (1945). Parties before the bankruptcy judge are before the district court.

174. 28 U.S.C.A. § 1292 (West Cum. Supp. 1979).

section 1292 apply to an order of the district court when it acts as an appellate court under section 1334? If not, is it inapplicable because the decisions of district courts under section 1334 are "final,"¹⁷⁵ or is it inapplicable because section 1293 occupies the bankruptcy field to the exclusion of sections 1291 and 1292? There is nothing in the statute to suggest the latter rationale. To the contrary, the analysis above suggests that section 1293 is not exclusive. Nor does the former rationale appear persuasive. The decision of the district court is final in the case that it has before it—that is, the bankruptcy appeal.

However, if neither rationale supports exclusivity and section 1292 applies, as it did under the Bankruptcy Act,¹⁷⁶ then it provides different rules of appealability for orders of a district court than for orders of an appellate panel. It is safe to assume that Congress did not intend different standards of appealability depending upon whether a judicial council instituted an appellate panel program within a particular district. There is no legislative history to support such a conclusion. Moreover, what legislative history there is relating to appellate panels makes clear that Congress intended only to provide an alternate and experimental route of appeal, both to satisfy the opponents of the district court appellate process and to experiment with a compromise between court of appeals and district court jurisdiction over bankruptcy appeals.¹⁷⁷

This reasoning suggests that section 1292 does not apply to appeals from district court decisions under section 1334. It should follow that section 1291 also does not apply. The sections are parallel, and the exclusivity of section 1293 should render both sections 1291 and 1292 inapplicable. In that case, section 1293(a), modeled upon section 1291, would apply to appellate panels, and comparable language would be missing with respect to appeals from district courts. The only remaining alternative is to treat "final decisions" as encompassing only decisions on appeals from "final orders, judgments, or decrees" of bankruptcy courts. To do so, however, renders sections 1291 and 1293(a) nugatory. The 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 re-drafting is essential.

175. See note 174 and accompanying text *supra*.

176. See note 168 and accompanying text *supra*.

177. Cf. 124 CONG. REC. H11,107 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); *id.* S17,424 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

C. Injunctions and Trustees

In federal equity practice, interlocutory orders in two classes of cases have been made appealable as of right to provide greater protection to litigants. In these cases, delay could work irreparable injury and substantial injustice. The first class consists of orders relating to injunctions, preliminary injunctions, and temporary restraining orders.¹⁷⁸ Like the orders in *Forgay v. Conrad*,¹⁷⁹ orders granting or refusing injunctive relief, especially at an early stage of an action, can effectively dispose of the rights of the parties. The second class consists of orders appointing or continuing receivers.¹⁸⁰ They may also have an irreparable effect on the property or business of a defendant or debtor.

Orders similar to these two kinds of orders arise frequently in the bankruptcy context. The former is embodied in automatic stay litigation,¹⁸¹ the latter in orders relating to the appointment of a trustee in involuntary cases and Chapter 11 reorganization cases.¹⁸² No special provision, however, has been made for appeals from interlocutory orders in these kinds of proceedings, though they are appealable as a matter of discretion under the interlocutory appeals provisions.¹⁸³

Generally, no special provision will be required. An order granting relief from the automatic stay will be a final order or judgment in the adversary proceeding in which such relief is sought, and therefore appealable as a matter of right, whether the relief is granted after the final hearing or after the preliminary hearing held within thirty days after the request for relief from the stay is made.¹⁸⁴ Similarly, an order denying relief will be a final order, but only if made after the final hearing.¹⁸⁵ However, if at the preliminary hearing the court orders the

178. 28 U.S.C.A. § 1292(a)(1) (West Cum. Supp. 1979).

179. 47 U.S. (6 How.) 201 (1848).

180. 28 U.S.C.A. § 1292(a)(2) (West Cum. Supp. 1979).

181. 11 U.S.C.A. § 362 (West 1979).

182. *Id.* §§ 303(g), 1104, 151104.

183. 28 U.S.C.A. §§ 1334(b), 1482(b) (West Cum. Supp. 1979).

184. *Id.* §§ 1334(a), 1482(a) (West Cum. Supp. 1979). See 11 U.S.C.A. § 362(e) (West 1979) (preliminary hearing must be held within 30 days after request for relief from stay).

185. An order finally denying relief from the stay is usually without prejudice to renewal of the request for relief, because facts may change during a case to warrant granting a new request. See, e.g., *In re Pitts*, 5 B.C.D. 1129 (C.D. Cal. 1979). Thus, it might be argued that such a denial is an interlocutory order. That argument goes too far. An order dismissing a claim for relief as premature is a final order disposing of a civil action, especially where the claim is for an injunction against threatened damage, even though the threat and therefore the claim may later mature and merit a new action. Similarly, a request for relief from the stay, analogized to an opposition to a motion for a preliminary injunction in an action for an injunction, HOUSE REPORT, *supra* note 13, at 344, is an adversary proceeding begun by complaint, FED. INTERIM BANKR. R. 7001, the denial of which is by judgment, FED. BANKR. R. 755, which finally disposes of the proceeding.

stay continued in effect pending the final hearings, that order is interlocutory and appealable as a matter of discretion only. The preliminary hearing procedure was devised for the protection of the party seeking relief from the stay,¹⁸⁶ both by giving that party a quick decision and also a decision that could be reviewed by an appellate court, even though the bankruptcy court might delay the final hearing. Here the statute falls short. The discretion of the appellate court to hear the appeal may be small comfort to a secured creditor whose collateral is being dissipated quickly, through the operation of a business or otherwise. The bankruptcy judge's order is no different from an order granting or continuing a preliminary injunction. Irreparable injury may occur unless the injured party can have quick recourse to an appellate court.

A similar analysis applies to a request for appointment of a trustee to assume possession, management, and control of the debtor's business and assets.¹⁸⁷ The order appointing a trustee is appealable as a matter of right, because it is a final order in a proceeding—the motion, application, or complaint seeking appointment of a trustee—and finally disposes of that issue. Denial of a request for appointment of a trustee is also final, even though the request may be renewed later in the case if facts change. Otherwise, appeal would only be discretionary. This would comport with section 1292(a)(2), which makes appealable only orders *appointing* receivers. Still, such orders should be appealable as a matter of right in order to protect creditors against improper management of an estate.¹⁸⁸

D. Exceptions to Appealability

The Bankruptcy Code and the Judicial Code except one kind of order from those that may be appealed from in a bankruptcy case. Any order by a bankruptcy court relating to abstention from hearing a particular case¹⁸⁹ or proceeding¹⁹⁰ or to remand of a proceeding to another court after removal to the bankruptcy court¹⁹¹ may not be reviewed on appeal or otherwise.

186. HOUSE REPORT, *supra* note 13, at 344.

187. See 11 U.S.C.A. §§ 303(g), 1104, 151104 (West 1979).

188. It is no answer to say that a discretionary appeal suffices because the same factors that merit reversal of the order denying appointment may also merit the granting of a discretionary appeal.

189. 11 U.S.C.A. § 305(c) (West 1979).

190. 28 U.S.C.A. § 1471(d) (West Cum. Supp. 1979).

191. *Id.* § 1478(b).

Under the Bankruptcy Act, the bankruptcy court had limited jurisdiction.¹⁹² One of the 1978 Act's major reforms was to expand the jurisdiction of the court to include all civil proceedings related to a bankruptcy case.¹⁹³ Congress recognized, however, that such an expansion might bring to the bankruptcy court proceedings that were better heard elsewhere. For example, cases presenting a complicated or novel question of state law would more properly lie in the state court; similarly, the federal district court would be a more appropriate forum for deciding cases that demand specialized judicial expertise, such as anti-trust or patent litigation.¹⁹⁴ In some limited circumstances, an administrative agency would be better equipped to decide a question. For these reasons, Congress explicitly included the doctrine of *Thompson v. Magnolia Petroleum Co.*¹⁹⁵ in the jurisdictional grant.¹⁹⁶ *Thompson* required the bankruptcy court to abstain from hearing a state real property law question, to remit the matter to the state court, and to abide by that court's interpretation of the state law involved.¹⁹⁷ The codification of the doctrine in the Judicial Code does not *require* abstention as *Thompson* did, but *permits* it,¹⁹⁸ notwithstanding the broad grant of jurisdiction to the bankruptcy courts.¹⁹⁹ The decision whether to abstain from hearing a particular proceeding, or to remand a proceeding that has been removed to the bankruptcy court from another court, is left in the sound discretion of the bankruptcy court. For this reason, the decision is made nonreviewable, by appeal or otherwise (such as by petition for mandamus). Litigation over abstention could equal the volume of litigation over jurisdiction under the Bankruptcy Act if these decisions were appealable and a general body of law grew in this area. However, if the matter is left to the discretion of the bankruptcy court, based on the facts of each case, delay because of appeals and incentive to litigate the issue in the first instance may be minimized.²⁰⁰

192. Bankruptcy Act § 23, 11 U.S.C. § 46 (1976) (repealed 1978); see *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

193. HOUSE REPORT, *supra* note 13, at 43-52.

194. *Id.* at 51.

195. 309 U.S. 478 (1940).

196. 28 U.S.C.A. § 1471(d) (West Cum. Supp. 1979); see HOUSE REPORT, *supra* note 13, at 51.

197. 309 U.S. at 483-84.

198. 28 U.S.C.A. § 1471(d) (West Cum. Supp. 1979).

199. See *id.* § 1471(b), (c) (granting "original but not exclusive" jurisdiction to the bankruptcy courts).

200. To some degree, an order relating to abstention or remand may be reviewable. For example, if the bankruptcy court abstains for a reason other than "in the interest of justice," *id.* § 1471(d), such as a crowded docket, a reviewing court may issue a writ of mandamus to correct the error. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Thus, if the

V. A STATUTORY PROPOSAL

The appellate sections of the Judicial Code are vague, uncertain, incomplete, and inconsistent. Derivation of a proper and sensible appellate system from the statutory language, though possible, is difficult at best. Mindful of the dangers at the other extreme—too detailed a formula for appellate jurisdiction and practice—an adequate draft of an appellate system should deal with the following issues: standing, whether appeals are discretionary or mandatory, some definition of the unit of litigation, the extent to which the final order rule applies and what matters should be excepted from the general rules.

To solve the problems discussed and address the issues listed, section 1293, 1334 and 1482 of the Judicial Code should be redrafted as follows:

§ 1293. Bankruptcy appeals.

(a) The courts of appeals shall have jurisdiction of appeals from final decisions of the district courts and of panels designated under section 160(a) of this title with respect to appeals to such courts or panels from final judgments, orders, or decrees of bankruptcy courts in proceedings arising under title 11 or arising in or related to cases under title 11.

(b) The courts of appeals may permit appeals from final decisions of the district courts or of panels designated under section 160(a) of this title with respect to appeals to such courts or panels from interlocutory orders of bankruptcy courts in proceedings arising under title 11 or arising in or related to cases under title 11.

(c) Notwithstanding sections 1334(a) and 1482(a) of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of a bankruptcy court if the parties to the appeal agree to a direct appeal to the court of appeals.

(d) Sections 1291 and 1292 of this title do not apply to appeals from decisions or orders of the district court with respect to appeals from judgments, orders, or decrees of the bankruptcy courts.

bankruptcy court relies on the statute, it is immune from attack, no matter how incorrect its decision. But if it deviates and establishes its own ground for abstention or remand, mandamus may lie.

§ 1334. Bankruptcy appeals.

(a) The district courts shall have jurisdiction of appeals from final judgments, orders, or decrees of bankruptcy courts in proceedings arising under title 11 or arising in or related to cases under title 11.

(b) The district courts may permit appeals from interlocutory orders of bankruptcy courts in proceedings arising under title 11 or arising in or related to cases under title 11.

(c) A party that has not appeared in a proceeding before the bankruptcy court may not appeal from any judgment, order, or decree entered in such proceeding, unless such party did not have notice or actual knowledge of the proceeding in time to permit appearance in the proceeding.

(d) This section does not apply in judicial districts for which panels have been designated under section 160(a) of this title.

(e) The district courts shall have jurisdiction of appeals from interlocutory orders of the bankruptcy courts continuing the stay provided under section 362 of title 11, or granting, continuing, modifying, refusing or dissolving an injunction, or refusing to dissolve or modify an injunction.

§ 1482. Appeals.

(a) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from final judgments, orders, or decrees of bankruptcy courts in proceedings arising under title 11 or arising in or related to cases under title 11.

(b) Panels designated under section 160(a) of this title may permit appeals from interlocutory orders of bankruptcy courts in proceedings arising under title 11 or arising in or related to cases under title 11.

(c) A party that has not appeared in a proceeding before the bankruptcy court may not appeal from any judgment, order, or decree entered in such proceeding, unless such party did not have notice or actual knowledge of the proceeding in time to permit appearance in the proceeding.

(d) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from interlocutory orders of the bankruptcy courts continuing the stay provided under sec-

tion 362 of title 11, or granting, continuing, modifying, refusing or dissolving an injunction, or refusing to dissolve or modify an injunction.

Enactment of these provisions by some future Congress would correct the defects that the Ninety-Fifth Congress, in its haste, overlooked in its creation of the new bankruptcy appellate system.