The World of Interlocutory Bankruptcy Appeals

A Response to "Inconvenient Bankruptcy Appeals" appearing in the HLS Bankruptcy Roundtable

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The article "Inconvenient Bankruptcy Appeals" appearing in *The Bankruptcy Strategist* (Dec. 1, 2024) and reprinted in the Harvard Law School Bankruptcy Roundtable (Retrieved from https://bankruptcyroundtable.law.harvard.edu/2025/02/18/inconvenient-bankruptcy-appeals/), provided an excellent opportunity to expand on the several viewpoints by legal practitioners and judges alike on the important considerations involving interlocutory appeals from bankruptcy courts.

Contrary to Mr. Cook's view that bankruptcy courts have 'devised a test for their discretion' to hear interlocutory appeals 'that effectively makes their review a matter of their own convenience,' judges consistently apply the appropriate statutory and decisional standards for hearing such interlocutory appeals. Although meeting the high bar set by statute and precedent may at times frustrate litigants, these standards balance the 'safety valve' role that such appeals can play with the federal interests served by a general rule of waiting for final judgments to avoid piecemeal litigation that clogs the courts.

It would be a mistake to simply believe that an interlocutory appeal is analogous to the child who, dissatisfied with the direction of parent #1, runs to parent #2, seeking to play them off against each other. Appropriately exercised, they may resolve litigation effectively and efficiently.[1] However, the underlying problem with all interlocutory appeals is that they introduce delay by interfering with the activity in the trial court before the trial court can enter a "final order" that triggers an appeal as of right.

While the prior BRT article suggested that district courts and bankruptcy appellate panels (BAP) often find it "inconvenient" to undertake interlocutory appeals (thus the title), much good comes from a discussion, and the opportunity to explore the nature of interlocutory appeals should not be missed. Thus, in response to the prior article, some history, standards of analysis on the decisions to take up interlocutory appeals, and finally a demonstration that district courts and BAPs are doing their work quite well, is in order.

[1] Let us remember that simply filing an interlocutory appeal doesn't mean that the disappointed party is correct or that the bankruptcy court was in error. Some might believe (and have witnessed) the occasional filing of an interlocutory appeal as a litigation strategy, rent seeking from an opponent. These are filed when the goal is not to achieve justice or correct a legal error, but to delay proceedings, exhaust the other party's resources, or extract a settlement. The costs (court time, legal fees, delays) are largely borne by the opposing party and the public (via clogged courts), while the rent seeker potentially benefits from delay or nuisance value.

The History of Interlocutory Appeals and Approaches

The history of interlocutory appeal analysis in U.S. federal courts is a story of balancing judicial efficiency against the rights of litigants to challenge important legal decisions before final judgment. Under the Judiciary Act of 1789, federal appellate jurisdiction was strictly limited to final judgments (except in rare instances such as injunctions).[2] Derived from the laws and practice of the United Kingdom, the idea was rooted in the final judgment rule; that is, appeals must wait until the case is fully resolved.[3]

The Evarts Act of 1891 created the U.S. Circuit Courts of Appeals and gave them power to review decisions.[4] Yet, it retained the finality principle, reaffirming that appeals should follow final decisions unless Congress allowed otherwise. Exceptions began to appear including criminal appeals and injunction orders (reviewable immediately under specific statutes).

The Judicial Code of 1925 (the “Judges’ Bill”) gave the Supreme Court more discretion over its docket and reinforced its appellate flexibility. The Judges’ Bill expanded discretionary certiorari jurisdiction for the Supreme Court, but not generally for appellate courts or interlocutory appeals. It did not change interlocutory appeals at the district or circuit level in any meaningful way.

And then, in 1949, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, was decided. The Supreme Court introduced the "collateral order doctrine," a key judicial exception to the final judgment rule and which allowed appeals that (1) conclusively determine an issue, (2) resolve important questions separate from the merits, and (3) would be effectively unreviewable on appeal from a final judgment. This was the first major judicial mechanism to allow interlocutory review without statutory permission.

28 U.S.C. § 1292 (1958 onward)

Congress codified limited interlocutory appeals through § 1292(a), allowing immediate appeals of orders granting/denying injunctions.[5] Section 1292(b) permits district courts to certify orders for interlocutory appeal if (1) a controlling question of law is involved, (2) there is substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation.

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[2] The final judgment rule is a foundational principle of federal appellate jurisdiction, codified primarily in 28 U.S.C. § 1291. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts...". The meaning is that a party may only appeal a decision of a federal district court after the case is resolved in full—i.e., when there is a “final judgment” that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. There are exceptions: Statutory exceptions (e.g., 28 U.S.C. § 1292), Collateral order doctrine (*Cohen v. Beneficial Industrial Loan Corp.,* 1949), Rule 54(b) certifications for partial judgments, and Mandamus or certified questions.

[3] The modern approach of appeals in the U.K. can be reviewed here: https://uk.practicallaw.thomsonreuters.com/w-003-5884.

[4] The Evarts Act (26 Stat. 826, enacted March 3, 1891) included the creation of nine new Courts of Appeals (one for each judicial circuit). These became the intermediate appellate courts for most federal appeals, which relieved pressure on the Supreme Court by diverting routine appeals. It created the structure we know today.

[5] 28 U.S.C. § 1292 (Sept.2, 1958).

Where do appeals from Bankruptcy Courts to District Courts or BAPs fit into this?

As Mr. Cook correctly notes, bankruptcy appeals are governed primarily by 28 U.S.C. § 158, not § 1292. 28 U.S.C. § 158(a) sets out that district courts (and BAPs) have jurisdiction to hear appeals related to final and interlocutory orders of bankruptcy courts. In addition, under § 158(d), the U.S. Court of Appeals have jurisdiction to hear appeals from final orders of a district court or BAP.

Interlocutory appeals from bankruptcy courts are guided by § 158(a)(3), which in pertinent part provides "[t]he district courts of the United States shall have jurisdiction to hear appeals...with leave of the court, from other interlocutory orders and decrees[]." This gives district courts or BAPs discretionary authority to hear interlocutory appeals from bankruptcy courts. District courts and BAPs utilize § 1292(b) as a framework for determining whether an interlocutory appeal should be permitted to proceed.

Where does § 1292 come in?

To be clear, § 1292(b) never applies to bankruptcy court orders. It applies when a court is reviewing interlocutory orders entered by the district court or BAP. Section 1292(b) governs interlocutory appeals from district courts or BAPs to the circuit courts. If a party seeks to appeal an interlocutory decision from a district court sitting in review of a bankruptcy court, it must comply with § 1292(b). Also, the district court must certify the order, and the court of appeals must grant permission to appeal.[6]

As shown by the decisions referred to here and by Mr. Cook, the district courts and BAPs routinely avail themselves of the logical reasoning and analyses presented in cases addressing § 1292(b). They do not appear to muddle the two separate provisions, and indeed a survey of the cases cited by the "Inconvenient" article establishes that courts typically demonstrate careful adherence to the standards and are carefully considering established decisions and approaches to make their informed decisions.[7]

Survey of the District Courts' and BAPs' analyses under § 158(a)(3).

Now more than ever, it is easy to discern the standard for courts to entertain interlocutory bankruptcy appeals. District courts and bankruptcy appellate panels have discretion to review interlocutory appeals per § 158(a)(3). And while it is it true that "[t]he statutory language of [28 U.S.C. § 158] provides no guidance as to how that discretion should be exercised," *In re Hebb*, 53 B.R. 1003, 1006 (D. Md. 1985), courts have overwhelmingly relied on § 1292(b) in making their decisions and are now doing so consistently.[8]

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[6] It should be noted that the collateral order doctrine (from *Cohen*) also applies to bankruptcy appeals under appropriate conditions.

[7] Although outside the purview of this article, it would be interesting to know the percentage of interlocutory appeals presented to district courts and BAPs that correctly cite the known circuit standards for accepting an appeal in the middle of a case.

[8] The "Inconvenient" article cited to a variety of cases as evidence of inconsistency in handling interlocutory appeals, but those cases dealt with whether orders were "final". *See In re AIG Fin. Products Corp.*, 2024 WL 810051 (D. Del. Feb. 27, 2024) (analyzing a bankruptcy appeal regarding an order denying dismissal of a chapter 11 case under § 158(a)(1), *not* (a)(3), because Third Circuit precedent held

Appellants may be understandably frustrated with the §§ 158(a)(3) and 1292(b) standards—they are a high bar to meet. But "[i]nterlocutory appeals in bankruptcy cases should be the exception, rather than the rule [as] interlocutory appeals contravene the judicial policy opposing piecemeal litigation and cause delay and disruption." *In re Energy Conversion Devices, Inc.*, 638 B.R. 81, 89 (E.D. Mich. 2022). Hence, appellants must make a showing of exceptional circumstances. *Id.*; *In re Rodriguez-Martinez*, 541 B.R. 539, 541 (D.P.R. 2015) ("[T]he First Circuit has instructed courts to grant leave sparingly and only in exceptional circumstances.") (internal citation omitted); *Arochem Corp. v. Arochem Corp.*, 198 B.R. 425, 427 (D. Conn. 1996) ("'[E]xceptional circumstances' must exist that warrant an interlocutory appeal."), *aff'd*, *In re Arochem Corp.*, 176 F.3d 610 (2d Cir. 1999); *In re Maison Royale LLC*, 2024 WL 2699994 at *5 (E.D. La. May 23, 2024) ("[D]istrict courts reviewing bankruptcy appeals are cautioned against reviewing interlocutory orders unless in 'exceptional circumstances.'"). In reviewing a First Circuit BAP case, the Supreme Court noted: "[w]hile discretionary review mechanisms such as these [§§ 1292(b) and 158(d)] 'do not provide relief in every case, they serve as useful safety valves for promptly correcting serious errors' and addressing important legal questions." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 507 (2015) (*citing Mohawk Industries*, *Inc v. Carpenter*, 558 U.S. 100, 111 (2009)).[9] As § 158 itself does not (and should not) expressly outline how district courts and BAPs should exercise their discretion, the courts across all circuits rely on § 1292(b) as a "safety valve" for interlocutory bankruptcy appeals.

For instance, the First Circuit's district courts and BAP adopted the § 1292(b) standard in exercising their discretion under § 158(a)(3). Decades ago, the First Circuit BAP recognized that "Section 158 provides no express criteria to guide our discretion, but most courts utilize the same standards as govern the propriety of district courts' certification of interlocutory appeals to the circuit courts under § 1292(b)." *In re Bank of New England Corp.*, 218 B.R. 643, 652 (B.A.P. 1st Cir. 1998). The BAP accordingly applied the correct standard by relying on § 1292(b). *Id.* The district courts in the First Circuit apply the same standards. *Northeast Sav., F.A. v. Geremia*, 191 B.R. 275, 277 (D.R.I. 1995) ("Courts construing the interlocutory provision of 28 U.S.C. § 158 have adopted the standards of review for certification of interlocutory appeals pursuant to 28 U.S.C. § 1292(b)."); *In re Murray*, 116 B.R. 6, 8 (D. Mass. 1990) ("Courts, however, have generally applied the standards applicable for certifying appeals from district courts to courts of appeals under 28 U.S.C. 1292(b)."); *Matter of Giguere*, 188 B.R. 486, 488 (D.R.I. 1995) (applying the elements derived from § 1292(b) to an interlocutory appeal under § 158(a)(3)).

The First Circuit's district courts and BAP continue to adhere primarily to § 1292(b) guidance in addressing interlocutory bankruptcy appeals. *See, e.g., Ablitt & Caruolo, P.C. v. Michaud*, 2006 WL 1788329 (D.N.H. Jun. 27, 2006) ("[M]ost courts utilize the same standard as

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that such a denial is "final" for purposes of appellate review); *In re Johns-Manville Corp.*, 68 B.R. 155 (S.D.N.Y. 1986) (finding a decision in a core proceeding, per §§ 157(b)(1) and 158(c), is subject to review by a district court in the same way as appeals from district courts to courts of appeals)*; see also In re Overly-Hautz Co.*, 81 B.R. 434 (N.D. Ohio 1987) (treating a decision from a "core proceeding" as final for purposes of appeals). Others predated the existence of § 158(a)(3). *See In re Hadar Leasing Intern. Co., Inc.*, 14 B.R. 819 (S.D.N.Y. 1981); *In re Landmark Capital Co.*, 29 B.R. 220 (S.D.N.Y. 1982). And though the author is right to be concerned that those decisions from the 1980s are inconsistent with the §§ 158(a)(3) and 1292(b) application, the remaining cases cited are consistent with our observation that there is now a consistent and discernable standard for courts to review.

[9] In fact, the First Circuit BAP case underlying *Bullard v. Blue Hills Bank* also analyzed § 158(a)(3) and relied on the § 1292(b) standard in its analysis. *Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 494 B.R. 90, 95 at n.5 (B.A.P. 1st Cir. 2013).

govern the propriety of district courts' certification of interlocutory appeals to the circuit courts under §1292(b)."); *PR Recovery and Development JV, LLC v. Lopez-Lopez*, 2023 WL 2713902 (D.P.R. Mar. 29, 2023) ("The 'application of [Section] 158(a)(3) review of interlocutory orders mirrors application of [28 U.S.C.] § 1292(b).'"); *Ameriquest Mortg. v. Pingaro*, 2004 WL 6030769 at *3 (B.A.P. 1st Cir. Jun. 7, 2004) (applying § 1292(b)). This standard is unchanging since the early 2010s. *See, e.g., Rivera v. BLD Realty, Inc.*, 2024 WL 4754191 (D.P.R. Nov. 12, 2024) ("Application of § 158(a)(3) review of interlocutory orders mirrors application of [28 U.S.C.] § 1292(b)."); *In re Martinez*, 541 B.R. 539, 541 (D.P.R. 2015) ("The First Circuit has made clear that the "[a]pplication of [section] 158(a)(3) review of interlocutory orders mirrors application of [28 U.S.C.] § 1292(b).'"); *Canadian Pacific Railway Company v. Keach*, 2017 WL 484733, at *3 (D. Me. Oct. 26, 2017) (applying § 1292(b) elements under § 185(a)(3) at the district court); *In re Bailey*, 592 B.R. 400, 408 (B.A.P. 1st Cir. 1998) (applying the same standard).

The First Circuit courts are hand-in-hand with the others. District courts and BAPs from each circuit continue to apply § 1292(b) standards to § 158(a)(3) appeals; this is consistent within the last decade.[10] Outcomes in applying the § 1292(b) standards to an appeal under § 158(a)(3) may differ greatly as they will depend on the circumstances presented before the district courts or BAPs.[11] Nonetheless, the "safety valve" is universal and clear: reviewing courts may hear an interlocutory bankruptcy appeal if (1) it involves a controlling question of law, (2) a substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. The evidence is that the courts are applying the correct standard consistently.[12]

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[10] *See, e.g., In re Bailey*, 592 B.R. at 408-09 (collecting cases); *Navient Solutions, LLC v. Homaidan*, 2022 WL 17252459, at *5 (E.D.N.Y. Nov. 28, 2022) (Second Circuit district court); *In re Paragon Offshore PLC*, 2020 WL 1815550, at *2 (Del. April 9, 2020) (Third Circuit district court); *Thomas v. Grigsby*, 556 B.R. 714, 720 (D. Md. 2016) (Fourth Circuit district court); *Genter v. Reed (In re Genter)*, 2020 WL 3129637, at *3 (N.D. Tex. June 12, 2020) (Fifth Circuit district court); *In re Energy Conversion Devices, Inc.*, 638 B.R. at 88 (Sixth Circuit district court); *In re Lane*, 591 B.R. 298, 306 (B.A.P. 6th Cir.); *Fund Recovery Servs., LLC. v. Kitchen*, 652 F.Supp.3d 942, 944 (N.D. Ill. 2023) (Seventh Circuit district court); *First Sec. Bank and Trust Co. v. Vegt*, 511 B.R. 567, 577 (N.D. Iowa 2024) (Eight Circuit district court); *In re Arch Coal, Inc.*, 592 B.R. 853, 856 (B.A.P. 8th Cir. 2018); *Ad Hoc Committee of Holders of Trade Claims v. PG&E Corporation*, 614 B.R. 344, 251-52 (N.D. Cal. 2020) (Ninth Circuit district court); *Hoag Urgent Care-Tustin, Inc. v. Opus Bank (In re Hoag Urgent Care-Tustin, Inc.*, 2018 Bankr. LEXIS 3145, at *8 (B.A.P. 9th Cir. Oct. 11, 2018); *HRV Santa Fe, LLC v. Juniper BL Holdco, LLC*, No. 24-0657 KG-GBW, 2025 U.S. Dist. LEXIS 49401, at *5 (D.N.M. Mar. 18, 2025) (Tenth Circuit district court); *In re Larson*, 466 B.R. 147 (B.A.P. 10th Cir. 2012); *HMD Am., Inc. v. Magno (In re SAM Industrias S.A.)*, 655 B.R. 245, 252 (S.D. Fla. 2023) (Eleventh Circuit district court).

[11] Only the First, Sixth, Eighth, Ninth, and Tenth Circuits have BAPs.

[12] *See, e.g., In re Martinez*, 541 B.R. 539 (D.C.R. 2015) (denying leave for interlocutory appeal on an order denying a debtor's application to employ her former attorney as the notary public for sale of debtor's property because there was no substantial ground for difference of opinion); *In re Maison Royale, LLC*, 2024 WL 2699994, at *16 (E.D. La. May 23, 2024) (denying leave to appeal on an order denying a motion to dismiss because it involved fact-intensive inquiries and disputes that could not be characterized as a question of pure law and would not reduce the amount of litigation); *In re Amir*, 436 B.R. 1, 8-9 (B.A.P. 6th Cir. 2010) (granting leave for appeals of orders denying motions to dismiss because they involved controlling questions of law on which there was a substantial ground for difference of opinion); *In re Pacific Forest Products Corp.*, 335 B.R. 910 (S.D. Fla. 2005) (granting leave for appeal of an order granting a trustee's motion for partial summary judgment).

As Shakespeare wrote about grappling with difficult or ambiguous questions:

> “O, it is excellent
> To have a giant’s strength, but it is tyrannous
> To use it like a giant.”

William Shakespeare, *Measure for Measure*, Act 2, Scene 2. He captures the difficulty of wielding legal authority fairly—especially when the "right" answer isn’t obvious. But courts continue to try and get it right.