Consumer Track

The Appellate Process

CONCURRENT SESSION

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BANKRUPTCY APPEALS - USEFUL REMINDERS AND CURRENT DEVELOPMENTS

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I. Introduction

This program addresses appellate practice issues for bankruptcy lawyers, both consumer and business practitioners, including recent decisions on finality of bankruptcy decisions for purposes of appeals, the ability to bypass intermediary appellate courts and take appeals directly to the circuit courts, equitable mootness and stays, and practical pointers for briefing and arguments.

II. Finality

Final as well as some interlocutory decisions of the bankruptcy court can be appealed. 28 U.S.C. § 158. Unlike the bankruptcy appellate panel or the district court, the court of appeals may only exercise jurisdiction over appeals that are final under 28 U.S.C. § 158(d)(1), with limited exceptions, as noted below.

A final order is one that "ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment." *In re Bender*, 586 F.3d 1159, 1163 (9th Cir. 2009) (citations omitted); *see also In re SK Foods, L.P.*, 676 F.3d 798 (9th Cir. 2012) ("A bankruptcy court order is considered final 'where it (1) resolves and seriously affects substantive rights and (2) finally determines the discrete issue to which it is addressed.'") (citations omitted)).

Bankruptcy cases involve litigation and resolution of many disputes; they are not simple two-party plaintiff-defendant lawsuits. The conclusion of bankruptcy cases depends on decisions on interim issues becoming final. Most circuits accordingly follow a flexible approach in determining whether an order is final for purposes of appeal in bankruptcy cases. *See e.g. In re Quigley Co.*, 676 F.3d 45, 51 (2d Cir. 2012) (bankruptcy orders are final if they "finally dispose of discrete disputes within the larger case"); *In re Bonner Mall Partnership*, 2 F.3d 899, 903-05 (9th Cir. 1993), *motion to vacate denied and cert. dismissed*, 513 U.S. 18 (1994); *In re Palm Coast*, 101 F.3d 253, 256 (2d Cir. 1996); *In re Blue Coal Corp.*, 986 F.2d 687, 689 (3rd Cir. 1993); *Brandt v. Ward Partners*, 242 F.3d 6, 13 (1st Cir. 2001). "[T]he concept of finality in bankruptcy cases, has traditionally been applied in a more pragmatic and less technical way . . . than in other situations." *McDow v. Dudley*, 662 F.3d 284, 287 (4th Cir. 2011). Under the flexible standard for determining whether an order is final, the circuit must determine "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm." *Bonner Mall*, 586 F.3d at 1164 (citations omitted).

In *Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809 (9th Cir. 2012), the Ninth Circuit acknowledged that "more flexible jurisdictional principles" apply in bankruptcy, but added that the more flexible standard "applies only to appeals from orders issued by a bankruptcy appellate panel or by a district court hearing an appeal from a bankruptcy court." The court then explained that "these flexible jurisdictional principles 'do not apply to [section 1291] appeals from district judges sitting in bankruptcy.'" (*i.e.* when the reference has been withdrawn). 672 F.3d at 813-14.

Where an appeal is interlocutory, the appellant should seek leave to appeal. See 28 U.S.C. § 158(a), Bankruptcy Rule 8003. A notice of appeal from a non-final interlocutory order is treated as a motion for leave to appeal. Bankruptcy Rule 8003(c). *See In re Hallwood Energy, L.P.*, 2013 WL 524418 (N.D.Tex.) for a good discussion of the standards for appellate acceptance of interlocutory appeals.

Case law on finality in particular fact situations in bankruptcy cases is extensive. It matters. Parties have a right to appeal final orders; interlocutory appeals are discretionary. If a ruling on a subject such as qualification to serve as an estate professional is not decided until the end of the bankruptcy case, the practical consequences may be extremely onerous. *See, e.g. In re Federated Department Stores*, 44 F.3d 1310 (6th Cir. 1995), where Lehman Brothers was held not disinterested as a financial advisor years after the plan was confirmed, and long after providing services throughout the bankruptcy case at a rate of $250,000/month, a substantial portion of which was ordered to be disgorged.

III. BAP or District Court as the Initial Appellate Court

Bankruptcy appeals generally entail a two-step process. The initial appeal is to the district court or bankruptcy appellate panel (in those circuits where BAPs have been created). 28 U.S.C. § 158. In the most circuits, the circuit judicial councils have not made the determinations required to proceed with appeals without a BAP. 28 U.S.C. § 158(b)(1). Each BAP panel consists of three bankruptcy judges from the circuit who hear appeals decided outside of their districts. Under the 1994 Reform Act, appeals are heard by the BAP unless the appellant, at the time of filing the appeal, or the appellee, within 30 days after service of the notice of the appeal, elects to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1). *See also* Amended Order Continuing The Bankruptcy Appellate Panel of the Ninth Circuit, as amended through May 9, 1992 (setting 30-day deadline for objecting to reference in cases filed before effective date of 1994 Reform Act); Bankruptcy Rule 8001(e); *In re Hupp*, 383 B.R. 476 (9th Cir. BAP 2008) (election to district court must be in a separate writing without anything extraneous). The election must be accomplished according to the rules, and cannot be circumvented by a second appeal of the same order to the district court. In re Woodman, 686 F.3d 1263 (10th Cir. 2012). If all parties to the appeal and the district court agree, the election to the BAP may be withdrawn. Bankruptcy Rule 8001(e)(2).

The precedential effect of BAP decisions is problematic. The BAP has held that its decisions are binding upon all of the bankruptcy judges of the Ninth Circuit. *In re Ball,* 185 B.R. 595, 597 (9th Cir. BAP 1995); *In re Sierra Pacific Broadcasters,* 185 B.R. 575, 578 n.7 (9th Cir. BAP 1995). *Accord In re General Associated Investors Ltd. Partnership,* 159 B.R. 756, 760-61 (Bankr. D. Ariz. 1993); *contra In re Junes,* 76 B.R. 795, 797 (Bankr. D. Or. 1987), *aff'd on other grounds,* 99 B.R. 978 (9th Cir. BAP 1989); *In re Kao,* 52 B.R. 452, 453 (Bankr. D. Or. 1985). The Ninth Circuit has not ruled on the issue, but has held that district courts, by virtue of their status as Article III courts, are not bound by the decisions of bankruptcy judges, even when the

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bankruptcy judges are sitting on the BAP as an appellate court. *Zimmer v. PBS Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1225 n. 3 (9th Cir. 2002) (noting that the binding nature of BAP decisions is still an open issue in the Ninth Circuit); *Bank of Maui v. Estate Analysis, Inc.,* 904 F.2d 470, 472 (9th Cir. 1990) (same). In 2010, the Ninth Circuit ruled that Bankruptcy Courts are not bound by District Court decisions from other districts within the Circuit, just as District Courts are not bound by other District Courts' decisions. *In re Silverman*, 616 F.3d 1001, 1005 (9th Cir. 2010). A California Bankruptcy Court recently reasoned that Congress' determination in BAPCPA that BAPs along with Bankruptcy Courts and District Courts can certify direct appeals to Circuit Courts under 18 U.S.C. § 158(d)(2) implies that none of their decisions are authoritative or precedential, and that only Courts of Appeals perform that role. *In re Rinard*, 451 B.R. 12, 21 (Bankr. C.D. Cal. 2011).

Considerations in determining whether to have the appeal heard by the BAP or the district court include:

- Bankruptcy judges constituting BAPs are more knowledgeable on Bankruptcy Code issues than district judges; district judges are likely to be more knowledgeable on state law issues (since all BAP judges will be chosen outside the district from which the appeal is taken)

- Local district court judges tend to know local bankruptcy judges better than other bankruptcy judges from outside the district

- BAPs may be faster than district courts at rendering decisions, since BAPs are not burdened by, *e.g.* criminal and immigration appeals; some district judges are quite prompt, but the likelihood of drawing a particular district judge is generally uncertain

- The BAP or the district court may have applicable precedent on point

- Circuit courts lack jurisdiction to hear appeals from BAPs and district courts over interlocutory orders under 28 U.S.C. § 158(d), but they can consider an interlocutory appeal from a district court's ruling on such an appeal under 28 U.S.C. § 1292(b)

IV. Direct Appeals to the Circuit Court

Appeals of final orders by district courts and BAPs may be taken to the court of appeals pursuant to 28 U.S.C. §§ 158(d)(1) and 1291. The court of appeals may exercise jurisdiction in interlocutory appeals from district court decisions under only 28 U.S.C. § 1292(b). *Connecticut National Bank v. Germain,* 503 U.S. 249 (1992). The court of appeals may not hear interlocutory appeals from BAP decisions. *In re Lievsay,* 118 F.3d 661, 662-63 (9th Cir. 1997).

Direct appeal from a bankruptcy court decision to a circuit court was authorized by BAPCPA upon certification and in the court of appeals' discretion. 28 U.S.C. § 158(d)(2). The statutory requirements grant discretion, if the bankruptcy court certifies that: (1) the order involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court, or if it involves a matter of public importance; (2) the order involves a question of law that requires resolution of conflicting decisions; or (3) an immediate appeal from the appeal may materially advance the progress of the case or proceeding. 28 U.S.C. § 158(d)(2)(A). There is a time limit of 60 days after the entry of the judgment, order, or decree for the parties to request certification. 28 U.S.C. § 158(d)(2)(E). If the certification is timely requested and then made, the court of appeals has discretion to authorize the direct appeal. 28 U.S.C. § 158(d)(2)(A). There are two separate filings required by the appellant, the notice of appeal and the petition for permission to appeal. If the latter is untimely, the circuit court has discretion to nevertheless accept the appeal. *Blausey v. U.S. Trustee*, 552 F.3d 1124, 1130-31 (9th Cir. 2009).

Applying the statutory standards, circuit courts accepting direct review have emphasized that an important issue of law that would materially advance the disposition of the case or clear up confusion in the bankruptcy courts. *See In re Davis*, 512 F.3d 856 (6th Cir. 2008); *Weber v. United States*, 484 F.3d 154 (2d Cir. 2007); *Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009); *In re Ennis*, 558 F.3d 343 (4th Cir. 2009). When that is not the case, or the circuit court wants to see the issue percolate through the district courts for analysis in various factual contexts, review may be denied. *In re Silver State Helicopters, LLC*, 566 F.3d 1177 (9th Cir. 2009); *In re Davis*, 512 F.3d 856 (6th Cir. 2008); *Weber v. United States*, 484 F.3d 154 (2d Cir. 2007).

A direct appeal may be barred by jurisdictional issues. The Seventh Circuit held in *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011) that because the bankruptcy court lacked constitutional authority to adjudicate the debtor's claim under *Stern v. Marshall,* and with a direct appeal there had been no district court final order, the circuit court lacked a statutory basis for appellate jurisdiction. If jurisdiction is questionable, direct review also may be denied as a matter of discretion. *In re Weaver*, 542 F.3d 257 (1st Cir. 2008) ("The existence of this serious jurisdictional question, and the substantial possibility that jurisdiction would ultimately be found lacking, means that allowing the appeal to proceed may not serve the purposes of section 158(d)(2), *i.e*., a rapid and definitive resolution of the underlying legal question by this court. Rather, if, as the bankruptcy court found in certifying this appeal, there are hundreds of cases pending in the Bankruptcy Court for the District of Massachusetts raising the same issue certified here, it would be preferable to resolve that issue in a case not raising the potentially fatal procedural problems presented here.").

V. Stay Pending Appeal and Mootness

A. Stays Generally, and Interim Stays to Seek a Stay Pending Appeal

The order being appealed may be immediately effective or may be subject to a brief stay. See Bankruptcy Rule 3020(e) (14 day stay of plan confirmation order); 4001(a)(3) (14 day stay of order granting stay relief); 6004(h) (14 day stay of sale order); and 7062; Fed. R. Civ. P. 62. Note that Rule 7062 is not automatically applicable in contested matters. Bankruptcy Rule 9014(c).

After any stay imposed by the rules, a party taking an appeal may need to seek a stay pending appeal in order to preserve appellate review and avoid mootness. See Bankruptcy Rule 8005. It is often difficult to obtain, and a required bond may also be expensive. For an excellent case explaining stays pending appeal, the types of stays, standards for approving and review of stay decisions, see *In re Wymer*, 5 B.R. 802, 805-07 (9th Cir. BAP 1980) (four part test); *In re*

Regatta Bay, LLC, 406 B.R. 875, 877 (Bankr. D. Ariz. 2009) (denying stay in lengthy analysis), *rev'd*, *In re Regatta Bay, LLC*, 2009 WL 5730501 (D. Ariz. 2009) (reversed on the merits; stay denied as moot); *see also In re Rhoten*, 31 B.R. 572, 577 (M.D. Tenn. 1982) (bankruptcy court decision to deny stay reviewed for abuse of discretion).

B. Statutory Mootness

When the appeal at issue concerns an asset sale, an "absolute mootness rule" by virtue of the statutory provisions in Bankruptcy Code § 363(m) has been applied. *In re Filtercorp, Inc.*, 163 F.3d 560, 576-77 (9th Cir. 1998) ("When a sale of assets is made to a good faith purchaser, it may not be modified or set aside unless the sale was stayed pending appeal," such that the question of whether the court can fashion effective relief under the constitutional mootness doctrine is immaterial.); *Onouli-Kona Land Co. v. Richards (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1172 (9th Cir.1988) ("[T]he trend is towards an absolute rule that requires appellants to obtain a stay before appealing a sale of assets."); *see* 11 U.S.C. § 363(m); cf. 11 U.S.C. § 364(e) (mootness from an order authorizing credit).

In the *Clear Channel* case, the Ninth Circuit BAP held that 11 U.S.C. § 363(m) moots only appeals challenging transfers of title, not other aspects of court-approved asset sales. *Clear Channel Outdoor, Inc. v. Knupfer* (*In re PW, LLC*), 391 B.R. 25 (9th Cir. BAP 2008). Subsequent decisions in other jurisdictions have rejected the BAP's mootness interpretation. *See, e.g. U.S. v. Asset Based Resource Group*, 612 F.3d 1017, 1019 n. 2 (8th Cir. 2010), finding *Clear Channel* "not persuasive" and citing *Official Comm. of Unsecured Creditors v. Anderson Senior Living Prop., LLC* (*In re Nashville Senior Living, LLC*), 407 B.R. 222, 231 (6th Cir. BAP 2009) ("*Clear Channel* appears to be an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the 'free and clear' aspect of a sale under § 363(f)"). In *In re Polaroid Corp.*, 611 F.3d 438, 441 (8th Cir. 2010), the circuit held that reversal of a sale order to preserve liens against the transferred assets, as the BAP allowed in *Clear Channel*, would in effect unwind the sale. It reasoned that "[a] provision is integral if the provision is so closely linked to the agreement governing the sale that modifying or reversing the provision would adversely alter the parties' bargained-for exchange." quoting *Official Comm. of Unsecured Creditors v. Trism, Inc. (In re Trism, Inc.)*, 328 F.3d 1003, 1007 (8th Cir. 2003)

C. Constitutional Mootness

An appeal is constitutionally moot when effective requested relief would be impossible. The court has no jurisdiction when there is no longer a case or controversy. *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034 (5th Cir. 1994) ("Generally, the mootness inquiry centers upon the concern that only live cases or controversies be decided by our courts. A controversy becomes moot in the traditional sense when, as a result of intervening circumstances, there are no longer adverse parties with sufficient interests to maintain the litigation."); *Richman v. Northeast Utils. Serv. Grp. (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469 (1st Cir. 1992) ("Jurisdictional concerns may arise from the constitutional limitations imposed on the exercise of Article III judicial power in circumstances where no effective remedy can be provided, or from a loss of jurisdiction over the res or the parties, before or during the appeal, which renders the appellate court powerless to grant the requested relief.")

D. Equitable Mootness

Equitable mootness is used to dismiss appeals when granting the requested relief would be possible but inequitable. *In re USA Commercial Mortgage Co.*, 2007 U.S. Dist. LEXIS 65264, *17-18 (D. Nev. 2007) (citing *Ewell v. Diebert*, 958 F.2d 276, 280 (9th Cir. 1992)). *See generally* Moore, *Federal Practice* at §§ 101.90 *et seq*., particularly § 101.95. Courts applying the equitable mootness doctrine to bankruptcy cases apply a multi-factor test, with minor variations among the circuits. The principal focus is on: (i) whether a stay has been obtained, or at least sought, (ii) whether there has been a comprehensive change of circumstances, such as substantial consummation of the reorganization plan in an appeal of a confirmation order, rendering effective relief impractical, imprudent, and/or otherwise inequitable, and (iii) whether the relief would affect the rights of third parties not before the court. *See, e.g., In re Focus Media, Inc.)*, 378 F.3d 916 (9th Cir. 2004); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981); *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996); *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994); *In re Paige*, 584 F.3d 1327 (10th Cir. 2009) (six factor test).

The Ninth Circuit recently appeared to impose a threshold requirement of seeking a stay pending appeal. *In re Thorpe Insulation Co.,* 677 F.3d 869 (9th Cir. 2012):

> We have not yet expressly articulated a comprehensive test, but our precedents have looked at whether a stay was sought, whether the plan has been substantially consummated, whether third party rights have intervened, and, if so, whether any relief can be provided practically and equitably. We endorse a test similar to those framed by the circuits that have expressed a standard: <u>We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights</u>. <u>If a stay was sought and not gained, we then will look</u> to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.

677 F.3d at 881 (emphasis added). However, in the Tenth Circuit, the Court expressly declined to find a stay request to be critical. *In re Stephens*, 2013 WL 151193 (10th Cir. (Okla.)) Rather, the court said that the effect that reversal would have on non-party creditors is the foremost concern to the court. There, in a case about the absolute priority rule in individual chapter 11 cases, reversal would likely result in conversion to chapter 7, under which either the appellant secured creditors would receive their property or the debtors would reaffirm the secured debts and retain the property, and non-party creditors would not be adversely affected either way. Notably, the court acknowledged that the debtors had devoted time and resources toward plan implementation, and reversing the confirmation order would likely preclude a successful reorganization. But the court was convinced that the case concerned a matter of public importance on which there was no controlling decision, and the appellants' argument was legally meritorious.

It is important to address whether some relief by the appellate court is possible, despite the absence of a stay, in considering equitable mootness. *See, e.g., In re Lett, Sr.*, 632 F.3d 1216

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(11th Cir 2011) (plan not substantially consummated and requested relief would not prejudice other parties, who would continue to receive their plan distributions); *Baker and Drake, Inc. v. Public Serv. Comm'n*, 35 F.3d 1348, 1351-52 (9th Cir. 1994) (appeal of consummated plan providing for debtor taxi company's drivers to become independent contractors not moot, because still "practical and equitable for [the debtor's] drivers to reassume employee status"); *In re Spirtos*, 992 F.2d 1004 (9th Cir. 1994) (holding that despite the appellant's failure to obtain a stay, the court could still fashion effective relief by ordering the debtor to disburse money which had been withheld as exempt from creditors because the case did not involve the rights of third parties not before the court).

In *In re SW Boston Hotel Venture, LLC,* 479 B.R. 210 (1st Cir. 2012), the Panel concluded that an appeal concerning the amount of a secured claim was not equitably moot, reasoning that although the Plan has been substantially consummated, the appellant was willing to accept alternative forms of relief that would not require an unraveling of the reorganization, and reversal of the plan confirmation order would not adversely affect any innocent third parties. See also *In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3rd Cir. 2010) where the Third Circuit said the appellate court must examine whether the foundation of the plan would be undermined by the appeal, and not merely whether a plan has been substantially consummated under the Bankruptcy Code definition.

A recent Second Circuit decision shows the importance of evidence on the possibility of effective relief despite plan consummation. *In re Charter Communications, Inc.,* 691 F.3d 476 (2nd Cir. 2012). The court said it would not rely solely on the debtor's conclusory predictions or opinions that the requested relief would doom the reorganized company. The appellants wanted to have the court order the debtor's principal shareholder to return certain settlement consideration and unwind third-party releases in that shareholder's favor. They argued that the court could order a prospective monetary award, without undoing the settlement, either payable by the insider or by the debtor. The court relied on evidence from "multiple witnesses" in concluding that these were essential to the settlement and formed the cornerstone of the plan. Thus, it could not achieve relief by a quick, surgical change to the confirmation order, and instead would cut the heart out of the reorganization.

E. Appellate Review of Bankruptcy and District Court Stay Rulings

There is a split among the circuits on the standard of review by an appellate court of a decision by the bankruptcy court or BAP or district court of an equitable mootness decision. In *In re United Prods., Inc.*, 526 F.3d 942 (6th Cir. 2008) the court stated:

> Although only clearly setting forth a *de novo* standard of review for equitable mootness determinations in an unpublished case, this Court has reviewed determinations of equitable mootness *de novo*. Such a standard of review is consistent with this Court's plenary review of the decisions of a lower court exercising its appellate jurisdiction. As a result, we review the Bankruptcy Appellate Panel's equitable mootness determination *de novo*.

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However, *In re Charter Communications, Inc.,* 691 F.3d 476 (2nd Cir. 2012) applied an abuse of discretion standard of review to the district ct order denying a stay, rather than de novo, while noting a circuit split. The Second Circuit distinguished an equitable mootness decision from one on the merits of the appeal. It also pointed out that in addressing mootness, the district court may rely on the bankruptcy court's factual findings, unless clearly erroneous, and if necessary receive additional evidence. *See also In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3rd Cir. 2010) (court reviewed for abuse of discretion the district court's decision that the appeal was equitably moot); *In re Paige*, 584 F.3d 1327 (10th Cir. 2009) ("[W]e adopt the abuse-of-discretion standard of review for determinations of equitable mootness in bankruptcy cases."); *In re Hilal*, 534 F.3d 498 (5th Cir. 2008) ("We conclude that the district court abused its discretion in dismissing this appeal for equitable mootness."); *In re Cont'l Airlines*, 91 F.3d 553 (3d Cir. 1996) ("We have generally stated that we exercise plenary review of a district court's decision on mootness. However, none of those cases involved a determination, like the one we review here, that an appeal following a consummated bankruptcy reorganization should be dismissed for equitable and prudential reasons even though some effective relief is available…. Because the mootness determination we review here involves a discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III, using ordinary review principles we review that decision generally for abuse of discretion. A particular case may also raise legal and/or factual issues interspersed with the prudential ones, and then the applicable review standard, plenary or clearly erroneous, will apply.").

II. Briefing Considerations

A. Standard of Review

The standard of review is critical to briefing on the merits. Findings of fact on appeal are subject to the clearly erroneous standard of review, and conclusions of law are reviewed *de novo*. Bankruptcy Rule 8013; *In re Johnston,* 21 F.3d 323, 326 (9th Cir. 1994). Discretionary decisions such as the amount of professional fees to be awarded, adequate protection decisions, the propriety of stay relief, and many other issues arising during administration of a bankruptcy case are reviewed for an abuse of discretion.

The Ninth Circuit has emphasized the difficulty of overturning findings of fact on appeal. "[W]e will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009). This refinement reflects the Circuit's longstanding understanding that clear error review is "significantly deferential" and that a lower court's factual findings must be accepted unless the reviewing court has a "definite and firm conviction" that it erred. *Rhoades v. Henry*, 596 F.3d 1170, 1177 (9th Cir. 2010).

A bankruptcy court necessarily abuses its discretion on an erroneous view of the law or clearly erroneous factual findings. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 404-05 (1990) (discussing abuse of discretion). Before reversal is proper under the abuse of discretion standard, BAP must be definitely and firmly convinced that the bankruptcy court committed a clear error of judgment. *In re Black)*, 222 B.R. 896, 899 (9th Cir. BAP 1998). *In re Bever*, 300 B.R. 262, 264 (6th Cir. BAP 2003).

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Circuit courts review BAP decisions and those of district courts sitting in an appellate capacity *de novo*, because both courts apply the same standard of review to underlying bankruptcy court judgments. *Johnston,* 21 F.3d at 326. Frame your brief in terms of the deference to the bankruptcy court's findings of fact and discretionary decisions and *de novo* review of all legal rulings.

When a district court reviews a bankruptcy court's proposed findings of fact and conclusions of law, which may occur more frequently after *Stern v. Marshall*, 131 S. Ct. 2596 (2011), the appellate standards of deference to the bankruptcy court as trial court do not apply. Insofar as the bankruptcy court considered and balanced the respective credibility of witnesses, however, such findings as a practical matter will be accorded more weight.

The standard of review may be critical to disposition of the appeal. In the Ninth Circuit, for example, the viability of separate classification of claims under a plan is an issue of fact, resulting in very deferential review. *Johnston*, 21 F.3d at 327.

B. Consider Your Audience

Bankruptcy Rules 8009 and 8010 describe the content and form of briefs. Appellate judges routinely express frustration with counsel or parties who omit critical pieces of the brief, such as the statement of jurisdiction, standard of review or statement of the case.

The appellate court generally has no understanding of the matter until reading the briefs and the appendix. Factual assertions in the statement of the case or other portions of the brief should be supported by citations to the excerpts of record designated and prepared under Bankruptcy Rule 8006 and 8007. Conversely, factual assertions not supported by the record may be ignored by or irritate the appellate court.

Unless the appeal is taken to the BAP, it is critical to realize that the audience consists of judges who are not immersed in the substance and practice of bankruptcy law. The brief must present the issues in the context of the overall Bankruptcy Code. Concepts bankruptcy lawyers consider basic, such as "property of the estate" and "administrative expenses" need to be explained, let alone difficult ones like "indubitable equivalent."

Bankruptcy judges are also used to financial hardship and its consequences, used to the principles entailed in valuing assets, and used to equitably balancing the needs and concerns of multiple parties in interest. That is not the diet of non-BAP appellate judges, and they can be expected to appreciate different nuances. Bankruptcy judges also tend to recognize the importance of deciding issues quickly. Cash collateral determinations can make or break prospects for reorganization, for example, and making a timely decision on sometimes inadequate briefing and little time to study new case law is par for the course. Appellate courts have the luxury of more time to reflect, and given the precedential value of their rulings, concern about the implications of their decisions in other cases. The different perspective of the appellate court should be taken into account in drafting the briefs.

Sound principles of general appellate practice are as important in bankruptcy appeals as other appeals, including focus on the standard of review in framing the arguments, telling the facts as a compelling story while being scrupulously accurate and including adverse facts in their context, define the issues in a manner useful to the court and organize the approach to one that the court can follow in its opinion, limit and prioritize your issues and arguments, avoid hyperbole and demeaning statements about opposing counsel and the bankruptcy judge, and don't overstate your authorities.

III. Oral Argument

Oral argument may be permitted by the appellate court. See Bankruptcy Rule 8012. When preparing for oral argument, narrow your scope to the most important points you can present well orally - and they may be different than those most important for briefing. Policy and consequences can be presented better orally than detailed statutory construction points and multi-step reasoning. The argument should have a theme that you can express through your affirmative statements and your answers to questions. Brainstorm the likely judges' questions, and hone your answers. Moot courts are extremely useful, and should be employed before every appellate argument. In addition to helping determine likely questions and better answers to questions, they help in preparing to complete the argument in the short period available (unlike most bankruptcy court arguments), not speaking too quickly, not reading from notes, maintaining eye contact, and other important appellate practices.

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AMICUS BRIEFS

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Amicus curiae briefs are governed by Federal Rule of Appellate Procedure 29 and Supreme Court Rule 37. Generally speaking, only briefs that bring new information or arguments are permissible. U.S. Sup. Ct. R. 37. Briefs that do not provide any additional information are viewed as burdensome and are therefore disfavored. *Id.*

A. Why Seek Amicus Briefs?

Amicus briefs provide a means for increased, more democratic participation in the court system. Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U. L. Rev. 315, 320 (2008); Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 Conn. L. Rev. 185, 197-98 (2009). Relative to litigation or lobbying efforts, amicus briefs are an inexpensive way to access the political process. Garcia, *supra* at 332. Moreover, because these briefs are not filed on behalf of a party, amicus can direct the court's attention to general policy considerations, beyond the issues raised by the parties. *Id.* at 323.

These briefs are also important where parties are either unrepresented or lack experienced counsel. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Additionally, amicus briefs are valuable where the outcome of the current case stands to impact another case in which the amicus has an interest. *Id.* Parties with a financial stake in the outcome for example industry or trade groups can also use amicus briefs in an effort to protect their interests. *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132-33 (3d Cir. 2002).

B. Disadvantages of Amicus Briefs

Critics argue that amicus briefs amplify the voices of already powerful interest groups. Garcia, *supra* at 331. Given the relative inexpense of amicus briefs, such briefs also increase access to the courts for monied interests. *Id.* "If well-heeled interest groups file amicus briefs unimpeded, the arguments of groups with lesser resources might be lost." *Id.*

The Solicitor General regularly files amicus briefs. *See* discussion, *infra*. Some critics argue that because the Solicitor General is appointed by the President, this frequent participation allows the introduction of partisan politics into the judiciary. Simmons, *supra* at 212.

Judge Richard Posner is perhaps the most visible and outspoken critic of amicus briefs. Garcia, *supra* at 326; John Harrington, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 Case W. Res. L. Rev. 667, 671 (2005). In a trilogy of cases, Judge Posner cites a number of reasons for opposing amicus briefs. *See Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000); *Ryan*, 125 F.3d 1062. First, these briefs impermissibly "duplicate the arguments made in the litigants' briefs." *Id.* at 1063. Second, amicus briefs add to the workloads of the courts, as well as the parties who have to respond. *Id.* Third, amicus briefs may be veiled "attempts to inject interest-group politics into the federal appellate process." *Nat'l Org. for Women, Inc.*, 223 F.3d at 617.[1]

C. Value of Amicus Briefs

Although a court is not required to consider issues raised solely by amicus, it may decide to do so. 4 Am. Jur. 2d Amicus Curiae § 7 (1962). Thus, an amicus brief may be a means of introducing novel issues. *See id.* Amicus briefs can raise new arguments not advanced by the parties. *Id.* In addition to introducing new arguments or issues, amicus curiae can also expound upon existing arguments. This is the case because amicus curiae often possess "unique information or perspective[s] that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan*, 125 F.3d at 1063. It is also unfair to solely characterize these briefs as burdensome. In fact, amicus briefs can serve interests of judicial economy because amicus may have access to resources beyond those of the court. Simmons, *supra* at 207.

In addition, amicus briefs can signify widespread support of a particular issue. Simmons, *supra* at 203. Each motion for leave to file requires the movant to state their interest in the case, as well as provide "the reason why an amicus brief is desirable." Fed. Cir. R. 29(b)(1)-(2). The contents of this statement, in some instances the mere identity of the parties, can add political pressure thereby lending credence to a viewpoint. Simmons, *supra* at 203. Amicus briefs also play an important role in strengthening the adversarial process by ensuring that opposing viewpoints are adequately represented. *Neonatology Associates*, 293 F.3d at 131.

D. Likely "Friends"

Federal courts are permitted to invite the filing of amicus briefs. *See* Fed. Cir. R. 29, Local Rule (directing the clerk to "maintain a list of bar associations and other organizations to be invited to file amicus curiae briefs" at the court's direction). Interest groups, governmental agencies, retired judges, lawmakers, and law professors are all prospects for amicus filings. So-called repeat

[1] Of particular interest to bankruptcy practitioners, the 9th Circuit Bankruptcy Appellate Panel has explicitly rejected this restrictive view toward amicus briefs. *In re Heath*, 331 B.R. 424, 430 & n.4 (B.A.P. 9th Cir. 2005).

filers, or those entities with a "strong and extensive record of Supreme Court advocacy," are good candidates "to attract the Court's attention." Simmons, *supra* at 203.

For example, groups such as the ACLU are often granted leave because of their lengthy record of advocacy and perceived expertise. *Id.* The Solicitor General regularly files amicus briefs on behalf of various governmental agencies. *See* U.S. Sup. Ct. R. 37(4) (permitting the Solicitor General to file amicus briefs without leave of the court). Legislators sometimes file amicus briefs in an attempt to persuade the court by highlighting portions of the legislative history. Garcia, *supra* at 330. Law professors also intervene with regularity. *See, e.g.*, Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 698-99 (2008) (reporting empirical data pertaining to amicus briefs and noting "that all of the Supreme Court respondents" along with "56.6% of Circuit Court respondents and 52.8% of District Court respondents" found law professors to be "moderately helpful" as amicus curiae).

There is some controversy over whether retired judges may file amicus briefs. Garcia, *supra* at 330–31. For example, in *Boumediene v. Bush*, 476 F.3d 934 (D.C. Cir. 2006), the majority refused to allow retired federal judges to file an amicus brief. Although the motion was unopposed, the order cited an Advisory Opinion from the Committee on judicial conduct. *Id.* The Opinion stated: "Judges should insure that the title 'judge' is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to describe accurately a person's status at a time pertinent to the lawsuit." *Id.* at 934-35. The dissent argued the leave should be granted because the motion was unopposed, there was a sufficient statement of interest, and the Advisory Committee statement was did not apply to filing of an amicus brief. *Id.* at 35 (Rogers, J., dissenting).

E. Conclusion

In sum, choose your friends wisely. Be sure to present something that is not already adequately addressed by the parties. And, as always, research the local culture to determine whether a particular court is receptive to such briefs lest your efforts be wasted.

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Appellate Decisions in Cases Litigated by the United States Trustee Program during Fiscal Year 2012

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I. Supreme Court Decisions in Cases the Program Helped Litigate

***Hall v. United States*, 132 S. Ct. 1882 (2012)**

Agreeing with the position of the United States, the Supreme Court, in a 5-4 decision, held that the federal income tax liability resulting from a chapter 12 farmer's postpetition farm sale was not "incurred by the estate" under 11 U.S.C. § 503(b)(1)(B)(i) and thus could not be collected or discharged through a chapter 12 plan. The Court explained that in chapter 12 cases postpetition federal income taxes fall outside of section 503(b) because chapter 12 estates are not taxable entities under 26 U.S.C. §§ 1398, 1399. Postpetition federal income tax liability is therefore not "incurred by the estate." The Court also relied on authority construing corresponding chapter 13 provisions in holding that postpetition taxes are not incurred by the estate.

***RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012)**

Agreeing with the position of the United States as amicus, the Supreme Court, in an 8-0 decision, held that a reorganization plan that proposed to sell secured property free and clear at an auction, but without allowing secured creditors the right to credit bid on the property, could not be confirmed under 11 U.S.C. § 1129(b)(2)(A)(iii). The Court stated that because clause (ii) of section 1129(b)(2)(A) specifically requires that creditors be allowed to credit bid under 11 U.S.C. § 363(k), the more general provisions of clause (iii) — allowing plan confirmation when creditors receive the "indubitable equivalent" of their claims — could not govern. The Court described clause (iii) as "a residual provision covering dispositions under all other plans — for example, one under which the creditor receives the property itself, the 'indubitable equivalent' of its secured claim." As such, the "general/specific canon explains that the general language of clause (iii), although broad enough to include it, will not be held to apply to a matter specifically dealt with in clause (ii)."

The Court rejected the debtor's argument that the general/specific cannon should not apply because clauses (ii) and (iii) offer different types of protection; the former procedural, the latter substantive. "What counts for application of the general/specific canon is not the nature of the provisions' prescriptions but their scope."

II. Circuit Court Decisions in Cases the Program Litigated

***CRG Partners Group v. Neary (In re Pilgrim's Pride Corp.)*, 690 F.3d 650 (5th Cir. 2012)**

Disagreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Fifth Circuit affirmed a bankruptcy court order awarding a $1 million bonus to a professional. On appeal, the United States Trustee argued that the Supreme Court's decision in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), governed lodestar fee enhancements in bankruptcy cases within the Fifth Circuit. In *Perdue*, a fee-shifting case, the Supreme Court held that a lodestar fee enhancement for "superior performance" or "exceptional results" may be granted only when the fee applicant can prove that the lodestar compensation is unreasonably low, such that it would be insufficient to attract competent counsel.

The Fifth Circuit affirmed the $1 million bonus. Although the court recognized that it had a long history of applying fee-shifting case law in bankruptcy cases, it could not apply *Perdue* for two reasons.

First, the court ruled that it was bound by its earlier precedent, which conferred bankruptcy courts with "broad discretion" to grant fee enhancements under the multi-factor test from *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). And although *Johnson* was a fee-shifting case, the court believed it would be inappropriate to extend *Perdue*'s limitations automatically into bankruptcy because section 330 allows bankruptcy courts to consider "all relevant factors."

Second, the court held that *Perdue* did not overrule the Fifth Circuit's "existing bankruptcy framework merely because the lodestar is used in both types of cases." It believed that *Perdue*'s restrictions were inconsistent with Fifth Circuit precedent and animated by concerns for protecting the taxpayer and encouraging settlements — concerns that, according to the court, did not apply in bankruptcy cases. And it suggested that because fee enhancements are typically granted only when there is a 100% payout to creditors, "there is no settling or losing party to protect from the discretion of the bankruptcy courts." In all, it concluded that the "significant textual and structural differences between fee-shifting and bankruptcy cases" were too great.

***McDow v. Dudley*, 622 F.3d 284 (4th Cir. 2011)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Fourth Circuit reversed and vacated a district court order dismissing the United States Trustee's appeal from a bankruptcy court order denying a motion to dismiss under 11 U.S.C. § 707(b). The district court held that, like a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the bankruptcy court's order was interlocutory because the question of whether the debtors would receive a discharge had yet to be decided.

The United States Trustee appealed the district court's decision to the Fourth Circuit, which reversed the district court's order. The Fourth Circuit explained that the determination of whether a case is abusive is a "mandatory threshold question" and a "discrete dispute" that must be determined at the outset of the case. In turn, section 707(b) creates a cause of action on whether the case is abusive; and an order denying such a motion "finally and conclusively resolves the issue," thus rendering the order appealable. The Fourth Circuit therefore remanded the case to the district court for consideration on the merits.

***Morris v. Quigley (In re Quigley)*, 673 F.3d 269 (4th Cir. 2012)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Fourth Circuit reversed and remanded a bankruptcy court order allowing a chapter 13 debtor to deduct payments on two secured debts under 11 U.S.C. § 1325's means test after the debtor stated her intent to surrender the collateral in her proposed chapter 13 repayment plan. The Fourth Circuit, following the Supreme Court's recent decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), held that the bankruptcy court should have considered the chapter 13 debtor's intent to surrender the property because the change in her projected disposable income was "known at the time of plan confirmation" and that failing to account for such changes would be a "senseless result."

***Onkyo Europe Elecs. GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3d 705 (6th Cir. 2012)**

Agreeing with the position of the United States Trustee Program as amicus, the United States Court of Appeals for the Sixth Circuit affirmed a bankruptcy court order ruling on a state-law fraudulent transfer counterclaim that the debtor raised as an affirmative defense to a creditor's proof of claim. The court ruled in the debtor's favor and, because the value of the fraudulent transfer judgment was greater than the creditor's proof of claim, the court disallowed the proof of claim and ordered the creditor to repay the remainder of the judgment in cash. The issue was whether the bankruptcy court had Article III authority to rule on the fraudulent transfer counterclaim under *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Sixth Circuit held that the bankruptcy court's ruling on the counterclaim did not violate Article III because (1) the creditor had filed a proof of claim, (2) it was necessary to resolve the fraudulent transfer issue in allowing or disallowing the proof of claim, and (3) the counterclaim did not require the bankruptcy court to resolve any additional issues. The court did not address whether the creditor waived its *Stern* argument, which was raised for the first time on appeal.

***In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Seventh Circuit affirmed a bankruptcy court order dismissing the chapter 11 debtor's case under 11 U.S.C. § 1112(b) for inability to reorganize. The debtor, a single-asset real estate holding company, proposed to substitute treasury bonds for the creditor's secured claim on the debtor's principal asset in a cramdown plan under 11 U.S.C. § 1129(b)(2)(iii). The Seventh Circuit held that the bonds were not the "indubitable equivalent" of the secured lender's mortgage, as required by section 1129(b)(2)(iii). The court also ruled that the bankruptcy court did not abuse its discretion by rejecting a belated proposal brought under 11 U.S.C. § 1129(b)(2)(i).

***Jones v. United States*, 467 F. App'x 815 (11th Cir. 2012)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Eleventh Circuit affirmed a district court order dismissing a plaintiff's tort claims against the United States under the Federal Tort Claims Act. The court held that the chapter 7 debtor was judicially estopped from pursuing the claim because she intentionally failed to disclose the claim in her bankruptcy schedules. The court explained that the district court did not abuse its discretion in applying judicial estoppel because the debtor was actively prosecuting the claim at the time she filed her petition for bankruptcy relief and did not disclose her bankruptcy case during discovery in the district court litigation.

***Miller v. U.S. Trustee (In re English Sheppard Realty Corp.)*, 481 F. App'x 691 (2d Cir. 2012)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Second Circuit affirmed a bankruptcy court order requiring an attorney to disgorge $146,000. In an earlier appeal, the Second Circuit ruled that the bankruptcy court did not abuse its discretion in holding that the attorney must disgorge money that he took in violation of an escrow order to satisfy the chapter 11 debtor's prepetition nonbankruptcy attorney's fees. But it reversed and remanded on the amount to be disgorged.

In this appeal, the attorney did not challenge how the $146,000 was calculated, but attempted to relitigate the merits of his liability and, for the first time on appeal, argued that the bankruptcy court lacked Article III authority to order disgorgement under *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Second Circuit rejected these arguments, holding that (1) there was no "cogent or compelling reason" to reconsider the decision of the previous panel and (2) the attorney had waived his *Stern* argument because it was raised for the first time on appeal.

***Phillips v. U.S. Trustee (In re Phillips)*, 460 F. App'x 625 (9th Cir. 2011)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Ninth Circuit affirmed a bankruptcy court order denying the debtor's discharge under 11 U.S.C. §§ 727(a)(4)(A) and (a)(2)(B) because the debtor failed to disclose a disability insurance claim that he was actively pursuing at the same time he commenced the bankruptcy case. The Ninth Circuit held that the bankruptcy court did not clearly err when it found that the debtor knowingly and fraudulently made material false oaths by failing to disclose the claim on his bankruptcy schedules and acted with intent to hinder, delay, or defraud his creditors. Accordingly, the debtor's discharge was properly denied under both subsections.

***Bank of Am., N.A. v. DeAngelis*, No. 11-56496 (9th Cir. Dec. 7, 2011)**

Agreeing with the position of the United States Trustee Program, the United States Court of Appeals for the Ninth Circuit dismissed for lack of jurisdiction an appeal from an order granting discovery under Fed. R. Bankr. P. 2004. The appellant, BANA, sought to challenge a Rule 2004 examination on BANA's bankruptcy court filings, as well as the policies and procedures BANA relied upon when making the filings. The subpoenas related to an investigation into proofs of claim filed in New Jersey, but were issued against BANA's corporate representatives in California. The Ninth Circuit dismissed the appeal for lack of jurisdiction, rejecting BANA's arguments that: (1) the Rule 2004 order was a final, appealable order; and (2) the Ninth Circuit had jurisdiction because it could review the district court's refusal to certify the appeal for interlocutory review as a collateral order or as a petition for mandamus.

III. District Court Decisions in Cases the Program Litigated

***ASARCO LLC v. Baker Botts (In re ASARCO LLC)*, 477 B.R. 661 (S.D. Tex. 2012)**

Agreeing in part with the position of the United States Trustee Program, the United States District Court for the Southern District of Texas affirmed a bankruptcy court's order awarding approximately $5 million in lodestar fee enhancements to two law firms, but reversed orders awarding fees for litigating the lodestar fee enhancements and for statutory interest on the awards under 28 U.S.C. § 1961 (providing for interest on money judgments in civil cases). The bankruptcy court awarded the lodestar fee enhancements because the firms obtained an exceptional result — winning a $7 billion judgment for the estate in a fraudulent transfer adversary proceeding, which in turn funded a 100% repayment to creditors. In ruling on the fee enhancements, the bankruptcy court declined to follow the Supreme Court's decision governing lodestar enhancements in fee-shifting cases, *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010).

On appeal, the district court disagreed with the Program and held that *Perdue* did not apply in bankruptcy cases. It explained that there was no clear authority for applying *Perdue*'s standard because (1) the Supreme Court has never held that its fee-shifting case law applies in bankruptcy cases and (2) although the Fifth Circuit often relies on fee-shifting case law in bankruptcy cases, circuit law does not automatically incorporate new developments in the lodestar test in the context of bankruptcy.

The district court then affirmed the lodestar fee enhancements under Fifth Circuit law. It agreed with the Program that Fifth Circuit law precludes lodestar fee enhancements based on results obtained in bankruptcy cases because it is impermissible to "double count" those factors under the bankruptcy specific version of the lodestar test. But it ruled that no doubling counting occurred in this case because the challenges the firms had to overcome in obtaining the $7 billion judgment were so rare and exceptional that those factors could not have been anticipated in the lodestar calculation.

Next, the district court agreed with the Program and held that section 330 does not permit fees for litigating fee enhancement requests because (1) there is no statutory obligation to seek a bonus and (2) it is not necessary to ensure that the professional receives reasonable compensation.

Finally, the district court agreed with the Program and reversed the award of post judgment interest under 28 U.S.C. § 1961. It held that a section 330 fee award is not a "money judgment" that is recovered in a civil case in district court, but rather an order of the bankruptcy court authorizing the estate to pay administrative expenses. In addition, the court agreed that interest was not available under the terms of the confirmed reorganization plan, and if the plan administrator fails to make a timely payment under the plan, the proper remedy is to seek relief through contempt of court.

***Daniels v. Agin*, 482 B.R. 1 (D. Mass. 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the District of Massachusetts affirmed a bankruptcy court order revoking the chapter 7 debtor's discharge under 11 U.S.C. § 727(d)(1). The bankruptcy court granted summary judgment on the United States Trustee's revocation claim under the doctrine of collateral estoppel because, in a related turnover proceeding, the court found that the debtor had deliberately failed to disclose the existence of two IRAs. The district court held that the bankruptcy court did not err in relying on collateral estoppel to revoke the debtor's discharge.

***Kun v. Mansdorf (In re Woodcraft Studios, Inc.)*, 464 B.R. 1 (N.D. Cal. 2011)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of California affirmed a bankruptcy court order denying attorney's fees and ordering disgorgement under 11 U.S.C. §§ 327, 329 and Fed. R. Bankr. P. 2014, 2016 because the attorney failed to disclose a conflict of interest. The attorney stated in his employment application that he had not represented the debtor before the case and held no adverse interests, but later requested nearly $4,000 for prepetition bankruptcy related services. The district court held that the attorney's failure to reveal his prepetition relationship with the debtor fully justified the bankruptcy court's decision to deny all fees and required the attorney to return the $5,000 retainer that the bankruptcy court allowed when it approved his employment.

***Mahanna v. Bynum*, 465 B.R. 436 (W.D. Tex. 2011)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Western District of Texas affirmed a bankruptcy court order dismissing the individual debtors' chapter 11 bankruptcy case under 11 U.S.C. § 1112(b) for cause and denying the debtors' request for conversion in lieu of dismissal. The debtors did not contest cause existed, but alleged they had an absolute right to convert their case under 11 U.S.C. § 1112(a), based on a statement made by the Fifth Circuit in *Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.)*, 844 F.2d 1142, 1161 (5th Cir. 1988). The district court disagreed, holding that the Fifth Circuit's statement was obviously dicta and there was no statutory basis for requiring a bankruptcy court to convert the case.

The court also rejected the debtors' argument that the section 1112(b) dismissal order was not a final, appealable order under the Supreme Court's recent decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The court explained that *Stern* concerned only a bankruptcy judge's authority to enter a final judgment on a state law counterclaim and "did not destroy all finality in bankruptcy courts." Finally, the court sua sponte imposed a total of $806 in sanctions against the debtors for bringing a frivolous appeal.

***Piazza v. Nueterra Healthcare Physical Therapy, LLC*, 469 B.R. 388 (S.D. Fla. 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Southern District of Florida affirmed a bankruptcy court order dismissing a chapter 7 debtor's case under 11 U.S.C. § 707(a) "for cause" because the debtor had filed the chapter 7 petition to avoid a judgment in favor of a creditor. The district court held that "for cause" included the possibility of bad faith as a matter of text, and noted that the interpretation was consistent with other provisions in the Bankruptcy Code and the clear majority of the case law.

***Procel v. U.S. Trustee (In re Procel)*, 467 B.R. 297 (S.D.N.Y. 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Southern District of New York vacated and remanded a bankruptcy court order converting a debtor's case from chapter 13 to chapter 7 under 11 U.S.C. § 1307(c) for bad faith, notwithstanding the debtor's motion to dismiss under 11 U.S.C. § 1307(b). The United States Trustee agreed that the bankruptcy court erred when it converted the case because it did not consider the Second Circuit's decision *In re Barbieiri*, 199 F.3d 616 (2d Cir. 1999), which held that chapter 13 debtors have an absolute right to dismiss. The United States Trustee stated that the Supreme Court's recent decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007) (holding that a debtor did not have an absolute right to convert from chapter 7 to chapter 13), did not explicitly overturn *Barbieiri*, so it remained valid circuit law. For that reason, the United States Trustee requested that the order be vacated and the case remanded, whereupon the debtor could again request dismissal under section 1307(b) and thus allow the bankruptcy court to evaluate the motion under the correct legal standard.

***In re Thomas*, 476 B.R. 579 (N.D. Cal. 2012)**

Agreeing in part with the position of the United States Trustee Program, the United States District Court for the Northern District of California reversed and remanded a bankruptcy court order disqualifying an attorney and requiring him to disgorge attorney's fees for failure to disclose payments under Fed. R. Bankr. P. 2014. The attorney did not disclose the existence of a retainer on his application materials, but did disclose it in other documents filed with the court.

The district court agreed with the Program that a bankruptcy court has the discretion to deny fees for failing to disclose a retainer under Fed. R. Bankr. P. 2014. But the court then disagreed with the Program and held that the bankruptcy court committed clear error because it was not aware of peripheral disclosures in the statement of financial affairs and fee application under Fed. R. Bankr. P. 2016 when it ruled. Accordingly, the district court remanded the case so the bankruptcy court could consider whether disqualification and disgorgement were appropriate in light of the peripheral disclosures.

***Winterhalter v. U.S. Trustee (In re The Harris Agency, LLC)*, 462 B.R. 514 (E.D. Pa. 2011)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Eastern District of Pennsylvania affirmed a bankruptcy court order (1) retroactively disqualifying the chapter 11 debtor's attorney under 11 U.S.C. § 327(a) for an actual conflict of interest and (2) requiring the attorney to disgorge fees earned after the disqualification under 11 U.S.C. § 328(c). In March 2009, shortly after the bankruptcy case had been commenced, the attorney represented a creditor in a district court case where both the debtor and the creditor were jointly liable. The attorney did not disclose this representation, and it was not revealed until after the attorney had been disqualified for a separate conflict of interest in May 2010 because his fees had been paid by another creditor.

The district court held that the attorney's representation in the district court case created an actual conflict of interest because it allowed the attorney to favor the interests of the creditor over of the interests of the estate. The court rejected the attorney's argument that res judicata and the law of the case doctrine prohibited the retroactive disqualification. It explained that the former did not apply because the orders were part of the same litigation and that the latter did not apply because the disqualification orders were for different reasons and supported by different evidence. In addition, the court held that the bankruptcy court had authority under 11 U.S.C.

§ 329(b) to order disgorgement of the fees paid by the creditor because "reasonable compensation necessarily implies loyal and disinterested service."

***Bank of Am., N.A. v. Landis (In re Molinar)*, No. 11-1338, 2011 WL 6104495 (D. Nev. Dec. 7, 2011)**

Agreeing in part with the position of the United States Trustee Program, the United States District Court for the District of Nevada affirmed in part and reversed in part a bankruptcy court order granting discovery under Fed. R. Bankr. P. 2004. On the main issue in the case, the district court agreed with the Program that the United States Trustee had standing to pursue a Rule 2004 examination to investigate BANA's mortgage servicing practices. But it disagreed with the Program on whether the scope of the Rule 2004 examination was too broad, holding that bankruptcy court abused its discretion by framing the scope of the examination too broadly.

***Bank of Am., N.A. v. U.S. Trustee (In re Hernandez)*, No. 11-3606 (C.D. Cal. Dec. 7, 2011)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Central District of California dismissed as moot BANA's appeal from an order granting discovery under Fed. R. Bankr. P. 2004. After BANA filed the appeal, the United States Trustee withdrew the subpoena and moved to dismiss the appeal as moot. The district court rejected BANA's argument that the issue was "capable of repetition, yet evading review." The court explained that under Ninth Circuit law the exception applied only in "exceptional circumstances . . . where the timing of a controversy is automatically such that proper judicial review cannot be made (e.g., pregnancy/abortion cases and labor disputes)." Accordingly, it held that the withdrawn subpoena was not such an exceptional circumstance.

***Bartok v. DeAngelis*, No. 11-3710, 2012 WL 664928 (D.N.J. Feb. 29, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the District of New Jersey affirmed a preliminary injunction entered against a bankruptcy petition preparer under 11 U.S.C. §§ 105(a), 110(j) based on the preparer's violation of section 110 in three cases and repeated noncompliance with the bankruptcy court's orders. The bankruptcy court previously imposed a preliminary injunction against providing "any activities" regulated by section 110. The court held that the preparer violated the preliminary injunction by providing "foreclosure advisory services" and broadened the injunction to apply nationwide based on evidence of similar misconduct in four other states.

The district court affirmed, holding that the preparer's foreclosure advisory practice violated section 110 because, even though it fell "short of finalizing a document for filing," it was "tantamount to serving as a petition preparer" and constituted the unauthorized practice of law. The district court also held that the scope of the injunction was appropriate. The court explained that the plain language of section 110(j) contains no geographic limitation and that the record supported the injunction because there was evidence that the preparer was active in five states and had advertised for its services nationwide.

***Frick v. U.S. Trustee (In re Frick)*, No. 3:11-898, 2012 WL 3206527 (D. Nev. Aug. 3, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the District of Nevada affirmed a bankruptcy court order denying the chapter 7 debtor's discharge under 11 U.S.C. § 727(a)(4)(A). Prepetition, the debtor transferred all of the assets in a wholly owned corporation to a newly formed corporation that was wholly owned by the debtor's brother. The new corporation then employed the debtor at a base salary of $400,000 per year. But, postpetition, the debtor testified that he had no connections to the new corporation.

The district court affirmed, holding that the record supported the finding that the debtor knowingly made false oaths. The court also rejected the debtor's argument that the false oaths were not material because he never received the compensation from the new company. The court explained that false oaths need not relate to an asset to be material and were in fact material here because they "prevented the trustees and creditors from investigating the truth" at the time.

***Gilbert v. First Citizens Bank and Trust Co.*, No. 4:12-95 (N.D. Ga. May 23, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of Georgia dismissed for lack of jurisdiction an appeal from a bankruptcy court order denying a chapter 7 debtor's motion to dismiss his case. The United States Trustee moved to dismiss the appeal because, under *Barben v. Donovan (In re Donovan)*, 532 F.3d 1134 (11th Cir. 2008), an order denying a motion to dismiss a chapter 7 case is not a final, appealable order.

***Hills v. McDermott (In re Wicker)*, No. 11-12373, 2012 WL 580481 (E.D. Mich. Feb. 22, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Eastern District of Michigan affirmed a bankruptcy court order imposing sanctions on an individual acting as a bankruptcy petition preparer and debt relief agency under 11 U.S.C. §§ 110, 526(c)(5)(B) for intentionally engaging in fraudulent, unfair, or deceptive practices. The individual was a repeat offender already subject to an injunction for previous abusive conduct, but secretly continued providing services by using a corporation with a different name. The individual asked the debtor to lie about his involvement in the case in both court filings and when giving testimony. The district court held that the bankruptcy court did not clearly err when it found that the individual's violations were intentional because it was "both logical and believable that [he] wanted to conceal his activities . . . because of the injunction" against him.

***Hyde v. U.S. Trustee*, No. 11-709 (N.D.N.Y. Nov. 28, 2011)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of New York dismissed for lack of jurisdiction the chapter 7 debtor's appeal from a bankruptcy court order denying his motion to dismiss the United States Trustee's adversary complaint to revoke and deny his discharge. The district court held that even though the debtor did not move for leave to appeal, it would treat his notice of appeal as a motion for leave to appeal. On the merits, however, the court held that the record did not support finding "the presence of exceptional circumstances" that would justify interlocutory review.

***Jennings v. U.S. Trustee*, No. 11-2160 (S.D. Cal. Aug. 16, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Southern District of California dismissed for lack of jurisdiction an appeal from a bankruptcy court order denying the chapter 7 debtor's motion to voluntarily dismiss his case. The district court held that the debtor did not timely file the notice of appeal, so the court did not have jurisdiction to hear the appeal.

***Jones v. U.S. Trustee*, No. 6:12-440 (D. Or. July 10, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the District of Oregon affirmed a bankruptcy court order revoking a chapter 7 debtor's discharge under 11 U.S.C. § 727(d)(1). The debtor did not disclose in his schedules or at his section 341 meeting that he co-owned a variety of businesses and property holding companies. The district court held that the bankruptcy court's decision was supported by the debtor's "course of conduct and pervasive pattern of dissembling with regard to material issues, both of which bear persuasive indicia of fraudulent intent."

***Kulakowski v. Walton (In re Kulakowski)*, No. 8:11-2323 (M.D. Fla. Sept. 13, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Middle District of Florida affirmed a bankruptcy court order dismissing the chapter 7 debtor's case under 11 U.S.C. § 707(b)(3)(B). The debtor was married, had no income, and was fully supported by her husband, who was not seeking bankruptcy relief. The debtor filed the petition to discharge over $136,000 in credit card debt, with approximately 20% of that debt incurred solely for her husband's benefit.

The district court ruled that the bankruptcy court did not abuse its discretion in including all of the husband's income when considering abuse under section 707(b)(3)(B)'s totality of the financial circumstances test. The court explained that, because the debtor pooled all of her assets and expenses with her husband, there was no reason to exclude it under a totality of the circumstances analysis.

***In re Marciano*, No. 11-8470 (C.D. Cal. July 26, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Central District of California dismissed for lack of jurisdiction an appeal from bankruptcy court orders denying (1) the individual debtor's motion to remove the chapter 11 trustee under 11 U.S.C. § 324 and (2) objecting to the chapter 11 trustee's motion to employ counsel under 11 U.S.C. § 327. The court held that the orders must be considered interlocutory under binding Ninth Circuit precedent.

***Montgomery v. U.S. Trustee*, No. 3:11-2312 (N.D. Tex. Aug. 13, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of Texas affirmed a bankruptcy court order dismissing the individual chapter 11 debtor's case under 11 U.S.C. § 1112(b) because the debtor defaulted on payments under the confirmed reorganization plan. The district court dismissed the appeals as moot because the debtor's arguments on appeal challenged the terms of the confirmed reorganization plan, which had become final and thus could not be revisited.

***Owner Mgmt. Serv., LLC v. U.S. Trustee (In re Owner Mgmt. Serv.)*, No. 12-2187 (C.D. Cal. Sept. 21, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Central District of California affirmed a bankruptcy court order converting the chapter 11 debtor's case to chapter 7 under 11 U.S.C. § 1112(b) for cause. The debtor agreed that cause existed, but argued that dismissal, not conversion, was the appropriate remedy. The district court ruled that the bankruptcy court did not abuse its discretion in selecting conversion over dismissal because the record showed that the appellant (1) repeatedly failed to disclose information in the case or otherwise comply with its obligations as a debtor-in-possession, (2) demonstrated bad faith conduct in a previous bankruptcy case, and (3) was engaged in seemingly fraudulent business practices.

***Paul Brenneke Qualified Personal Residence Trust v. U.S. Trustee*, No. 3:12-217 (D. Or. June 12, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the District of Oregon denied a chapter 11 debtor's motion to reconsider the court's earlier order dismissing the appeal for lack of prosecution. The debtor filed a notice of appeal from a bankruptcy court order dismissing its chapter 11 case, but did not file a statement of the issues or designation of the record as required under Fed. R. Bank. P. 8006. In turn, the bankruptcy court transmitted only certain parts of the record to the district court, but did not issue a certificate of readiness that, under the local rules, starts a forty-day deadline for filing the opening brief.

Approximately six weeks later, the district court entered an order to show cause why the appeal should not be dismissed for failure to file an opening brief. The debtor did not respond and the court dismissed the appeal. The debtor moved for reconsideration four days after the appeal was dismissed, alleging that it had attempted to file the missing documents and did not realize that the brief was due. The debtor simultaneously filed the missing documents and its opening brief with the motion for reconsideration.

The district court denied the motion because the debtor could not show that dismissal "was not appropriate" at the time the case was dismissed. The court stated that the debtor never responded to the show cause order and did not explain why its earlier neglect should be excused.

***Rahmi v. U.S. Trustee (In re Rahmi)*, No. 3:11-93 (N.D.W. Va. Apr. 10, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of West Virginia affirmed a bankruptcy court order dismissing an individual chapter 11 debtor's case under 11 U.S.C. § 1112(b) for inability to reorganize. The debtor previously owned a car dealership and two property development companies, but the businesses were liquidated in earlier business bankruptcy cases. The debtor argued that he was going to start a new body-shop business, but the bankruptcy court dismissed the case because he was unemployed, had no other source of income, and no unencumbered assets that could be used to fund a reorganization plan. The district court held that the bankruptcy court did not abuse its discretion in dismissing the case, describing the debtor's plan as "nothing more than a hope and a prayer."

***Shaikh v. DIVP Hospitality Vallejo, LLC (In re Shaikh)*, No. 11-6273, 2012 WL 3862450 (N.D. Cal. Sept. 5, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of California affirmed a bankruptcy court order imposing a $5,000 sanction against the chapter 7 debtor and his attorney under Fed. R. Bankr. P. 9011. The district court held that the bankruptcy court did not abuse its discretion in finding that the appellants brought the case in bad faith to obstruct a creditor's attempt to foreclose on property not owned by the debtor. The court also held that the amount of the sanction was not excessive because it was based on the creditor's reasonable costs in opposing the bad faith filing.

***In re Sheikh*, No. 11-6274 (N.D. Cal. July 18, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the Northern District of California dismissed for failure to prosecute an attorney's appeal from a bankruptcy court order imposing sanctions against the attorney. The appellant did not timely file an opening brief or respond to the district court's show cause order, so it dismissed the appeal. The court explained that it had authority to dismiss the appeal under "its inherent authority, Fed. R. Civ. P. 41(b), and Fed. R. Bankr. P. 8001(a)" and that "[f]ailure to prosecute diligently alone justifies dismissal, even where actual prejudice to the defendant is not shown."

***Williams v. U.S. Trustee (In re Williams)*, No. 6:12-671 (D. Or. Aug. 9, 2012)**

Agreeing with the position of the United States Trustee Program, the United States District Court for the District of Oregon affirmed a bankruptcy court order dismissing the chapter 7 debtor's case under 11 U.S.C. § 707(b)(2), (3). First, the district court held that the bankruptcy court did not err in finding that the case was presumptively abusive under the means test, rejecting the debtor's argument that the IRS National and Local Standards should not have been applied because they were not published under the APA. The court reasoned that the standards were binding because Congress had incorporated them and were thus not subject to the APA. The court also held that the bankruptcy court did not clearly err in finding bad faith under subsection (b)(2), because the debtor purchased a home immediately before filing for bankruptcy, and the ability to repay under subsection (b)(3), because the debtor had the ability to fund a chapter 13 plan.

IV. Bankruptcy Appellate Panel Decisions in Cases the Program Litigated

***Hopkins v. Asset Acceptance LLC (In re Salgado-Nava)*, 473 B.R. 911 (B.A.P. 9th Cir. 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit reversed and remanded a bankruptcy court order denying compensation for a chapter 7 trustee under 11 U.S.C. § 330. The chapter 7 trustee sought the maximum compensation allowed under 11 U.S.C. § 326(a) as a commission under 11 U.S.C. § 330(a)(7). But the bankruptcy court reduced the compensation by $600, finding that it was unreasonable for the trustee to charge his full rate for certain "simple, administrative tasks." The panel reversed, holding that section 330(a)(7) requires a trustee's compensation to be calculated as a commission and thus should be presumed reasonable unless extraordinary circumstances are present.

***In re Ingram*, 460 B.R. 904 (B.A.P. 6th Cir. 2011)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Sixth Circuit affirmed a bankruptcy court order dismissing a chapter 13 debtor's case under 11 U.S.C. § 1307(c) because the debtor failed to obtain credit counseling as required under 11 U.S.C. § 109(h)(1). The debtor started a credit counseling course but did not finish it until the day after he filed his bankruptcy petition. The court held that completing the credit counseling requirement is a necessary prerequisite for obtaining relief under the Bankruptcy Code, so dismissal was the proper remedy.

***Ng v. U.S. Trustee (In re Ng)*, 477 B.R. 118 (B.A.P. 9th Cir. 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit affirmed a bankruptcy court order dismissing the chapter 7 debtors' case under 11 U.S.C. § 707(b)(3)(B). On appeal, the court held that an ability to repay creditors constitutes abuse under section 707(b)(3)(B)'s totality of the financial circumstances test and that the record supported finding that the debtors had the ability to repay.

The bankruptcy appellate panel rejected the debtors' argument that the bankruptcy court could not consider a postpetition increase in their income under section 707(b)(3)(B). It explained that the statutory language requires the bankruptcy court to determine whether "the granting of relief" would constitute abuse and that "the granting of relief" refers to the entry of the discharge, not the filing of the bankruptcy petition. As a result, the bankruptcy court could consider any circumstances affecting their income and expenses that occur between the filing of the petition and the time of any decision on abuse under section 707(b)(3)(B).

The bankruptcy appellate panel also held that Fed. R. Bankr. P. 1017(e), which requires the United States Trustee to argue abuse "with particularity" in a motion to dismiss under section 707(b), did not preclude the bankruptcy court from continuing an evidentiary hearing when the debtors' financial circumstances changed shortly before the original hearing date.

***Swanson v. U.S. Trustee (In re Swanson)*, 476 B.R. 236 (B.A.P. 8th Cir. 2012)**

Disagreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel for the Eighth Circuit reversed and remanded a bankruptcy court order granting a judgment on the pleadings in favor of the United States Trustee on an adversary complaint to deny the debtor's discharge under 11 U.S.C. § 727(a)(3), (a)(5). The bankruptcy court granted judgment on the pleadings under Fed. R. Bankr. P. 7012(c) because the debtor's answer to the adversary complaint contained a blanket denial of the allegations without any response to specific allegations in the complaint. The bankruptcy appellate panel reversed, holding that the bankruptcy court erred in granting judgment on the pleadings because "the burden of coming forward with an explanation" for the loss of funds and lack of sufficient records "never shifted to the debtor." The court then remanded so the United States Trustee could move forward with the case.

***U.S. Trustee v. Tamm (In re Hokulani Square, Inc.)*, 460 B.R. 763 (B.A.P. 9th Cir. 2011)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit reversed a bankruptcy court order that included the value of a credit bid transaction as "moneys disbursed" when calculating the chapter 7 trustee's maximum compensation under 11 U.S.C. § 326(a). The bankruptcy court believed that, because a trustee could have structured the transaction to require a cash payment that would in turn be paid back to the creditors, the plain meaning of section 326(a) produced an absurd result. The court thus held that it could disregard the plain meaning of the statute.

The bankruptcy appellate panel disagreed, holding that the plain meaning of "moneys disbursed" requires the trustee to disburse cash, currency or its "functional equivalent," and there was no evidence in the record to support finding that credit bids were a functional equivalent of cash. The court explained that Congress deliberately selected this language to structure the incentives for case trustees, and while the means Congress chose may seem harsh, it could not be said that the result was absurd.

***Yehud-Monosson USA, Inc. v. Fokkena (In re Yehud-Monosson USA, Inc.)*, 458 B.R. 750 (B.A.P. 8th Cir. 2011)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel for the Eighth Circuit affirmed a bankruptcy court order converting the debtor's chapter 11 case under 11 U.S.C. § 1112(b) for bad faith. The debtor's principal and sole shareholder previously filed four chapter 11 cases within two years, all involving a related business entity with the same assets and liabilities as the present debtor. On appeal, the debtor argued that the bankruptcy court erred in finding bad faith based on the previous four filings because the debtor was allegedly distinct from the previous entities. The debtor also argued that because it was a wholly owned subsidiary of an allegedly charitable organization, its case could not be converted under 11 U.S.C. § 1112(c) (preventing conversion of a corporation that is not a "moneyed business").

The bankruptcy appellate panel rejected both arguments. First, it held that the bankruptcy court was not required to find that the debtor was the same entity that filed the previous four bankruptcy cases. The "substantial similarity was sufficient to support the bankruptcy court's determination that [the debtor] had its 'day in court' four times — in three different courts — and that the current filing was an abuse of process."

Second, the court held that the debtor could not rely on the status of its parent corporation to prevent conversion under section 1112(c). It explained that under Eighth Circuit law the test for whether a debtor is a moneyed corporation is determined by "the classification of the corporation by the state; the powers conferred upon it; and the character and extent of its main activities." It also clarified that how the debtor's parent corporation utilized the profits was irrelevant under the test. Accordingly, the debtor's case could be converted because it was incorporated as a for-profit entity and was engaged in plainly commercial, for-profit activities.

***In re Cline*, No. 11-8075 (B.A.P. 6th Cir. June 1, 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Sixth Circuit affirmed a bankruptcy court order dismissing a chapter 13 debtor's case under 11 U.S.C. § 1307(c) and imposing a two-year filing bar under 11 U.S.C. § 109(g) because the debtor refused to comply with discovery obligations. The debtor, a serial filer who had repeatedly refused to appear at depositions and comply with production requests, violated two court orders in the current case — one requiring her to appear at a deposition and produce documents, and the other requiring her to appear and show cause for failure to comply with the previous order. The court held that the bankruptcy court did not abuse its discretion in dismissing the case and imposing a filing bar because the record supported finding that the debtor's noncompliance was in bad faith and was prejudicial to the United States Trustee.

The court also rejected the debtor's argument that notice for the order to show cause was deficient because it was served by FedEx instead of by "mail" as required under Fed. R. Bankr. P. 9014(b). It explained that "delivery by FedEx is comparable to service by mail" and that due process requires only notice that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

***Cronkite v. Turner (In re Cronkite)*, No. 11-94 (B.A.P. 1st Cir. Mar. 8, 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel for the First Circuit dismissed for lack of standing an appeal from a bankruptcy court order approving the chapter 7 trustee's final report. Both the chapter 7 debtor and a losing bidder from an auction of estate property sought to challenge the order approving the sale, but they appealed from the order approving the trustee's final report instead of from the sale order. The court held that the appellants were not persons aggrieved by the order approving the final report because (1) the debtor did not show there would be a reasonable possibility of a surplus in the estate if the order was reversed on appeal and (2) the bidder did not show that her rights would be impaired or burdened by the order.

***Harrington v. Donahue (In re Donahue)*, No. 11-26, 2011 WL 6737074 (B.A.P. 1st Cir. Dec. 20, 2011)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel for the First Circuit affirmed a bankruptcy court order denying the debtors' discharge under 11 U.S.C. § 727(a)(4)(A) because the debtors falsely reported in their schedules and testified at their section 341 meeting that they owned a rental property. In fact, prepetition, they sold the property to the renter, provided the financing for the transaction, and were receiving monthly mortgage payments of $1,254.

On appeal, the debtors argued that they lacked the requisite intent because they disclosed the transaction as part of an earlier, 1,000 page document production. The bankruptcy appellate panel rejected this argument, holding that the record supported finding that they acted with reckless indifference to the truth, thus satisfying the intent requirement.

***Jim Slemons Hawaii, Inc. v. U.S. Trustee (In re Jim Slemons Hawaii, Inc.)*, No. 10-1284 (B.A.P. 9th Cir. Oct. 12, 2011)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit affirmed a bankruptcy court order: (1) dismissing the debtor's chapter 11 case under 11 U.S.C. § 1112(b) for inability to reorganize; and (2) denying all compensation for the debtor's attorney under 11 U.S.C. § 330(a)(4) because the attorney's services did not benefit the estate. The debtor's sole asset was a commercial lease that it sublet. The attorney, however, did not timely assume the lease under 11 U.S.C. § 365(d)(4), causing the lease to terminate as a matter of law and thus making the reorganization impossible. For that reason, the panel held that the record fully supported both dismissing the case and denying all compensation to the attorney.

***Marshall v. U.S. Trustee (In re Marshall)*, No. 12-1104 (B.A.P. 9th Cir. Apr. 3, 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit dismissed for lack of jurisdiction the pro se chapter 7 debtors' appeal from a bankruptcy court order denying their discharge. The debtors moved for permission to file an untimely notice of appeal, alleging they did not receive notice that a final order had been entered in their case. The court rejected this argument, holding that the failure to receive the notice is not an excuse for an untimely appeal because a party has an affirmative duty to monitor the docket. In addition, there was also no excuse in this case because the bankruptcy court announced its decision at a hearing, so the debtors could have filed a notice of appeal that would have automatically taken effect upon entry of the final order under Fed. R. Bankr. P. 8002(a).

***In re Quarm*, No. 11-8026 (B.A.P. 6th Cir. Oct. 24, 2011); *In re Young*, No. 11-8027 (B.A.P. 6th Cir. Oct. 24, 2011)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Sixth Circuit granted a stipulated dismissal of two consolidated appeals taken from bankruptcy court orders requiring the law firm Persels & Associates, LLC to disgorge $1000 in attorney's fees under 11 U.S.C. § 329. The stipulated dismissal was part of a global settlement order involving Persels and Consumer Law Associates, which concerned the firms' use of local counsel in bankruptcy cases. The settlement agreement resolving the appeals required the firms to: (1) disgorge fees received in seven separate bankruptcy cases for unlicensed practice of law; (2) stop engaging in the unlicensed practice of law in current cases; and (3) to make additional disclosures to the court and to prospective clients when undertaking a bankruptcy-related representation.

***Wasson v. U.S. Trustee (In re Wasson)*, No. 11-1709 (B.A.P. 9th Cir. Mar. 27, 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit dismissed for lack of jurisdiction an attorney's appeal from a bankruptcy court order suspending him from practice. The attorney's notice of appeal was filed two years after the suspension order was entered. He alleged that he did not receive notice of the suspension order because he had moved out of his home, but the service address on the suspension order was the same as the address (1) he used on pleadings he filed after his alleged move; and (2) on his California state bar and district court records.

Accordingly, the court held that there was no basis for excusing the untimely filing of the notice of appeal.

***Werry v. U.S. Trustee (In re Werry)*, No. 11-1525 (B.A.P. 9th Cir. July 31, 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit affirmed a bankruptcy court order holding that an attorney's receipt of a prepetition "advance payment" was a security retainer subject to review for reasonableness under 11 U.S.C. § 330. The court held that the payment was a security retainer under state law because (1) the retention agreement provided that the attorney would draw on the retainer as services were provided, (2) that any unearned portion of the retainer would be refunded to the debtor, and (3) the attorney could seek additional fees if the amount for the services exceeded the amount of the retainer.

***Wilson v. LB-RPR REO Holdings, LLC (In re Sacramento Apartment Holdings, LLC)*, No. 10-1294, 2012 WL 603650 (B.A.P. 9th Cir. Feb. 22, 2012)**

Agreeing with the position of the United States Trustee Program, the United States Bankruptcy Appellate Panel of the Ninth Circuit dismissed for lack of jurisdiction a chapter 11 debtor's appeal from a bankruptcy court order imposing sanctions under Fed. R. Bankr. P. 9011. The debtor's principal formed the debtor to receive property of the estate from a debtor in a separate bankruptcy case. The bankruptcy court first awarded sanctions to the United States Trustee for the bad faith filing, but later also awarded sanctions to a creditor. The debtor appealed from both orders at the same time, but the 14-day period for filing a notice of appeal from the United States Trustee's order had already lapsed. The bankruptcy appellate panel dismissed the appeal from the order in favor of the United States Trustee as untimely filed because the time to appeal from each order ran separately.