AMERICAN BANKRUPTCY INSTITUTE

Southwest Bankruptcy Conference

Bankruptcy Appeals

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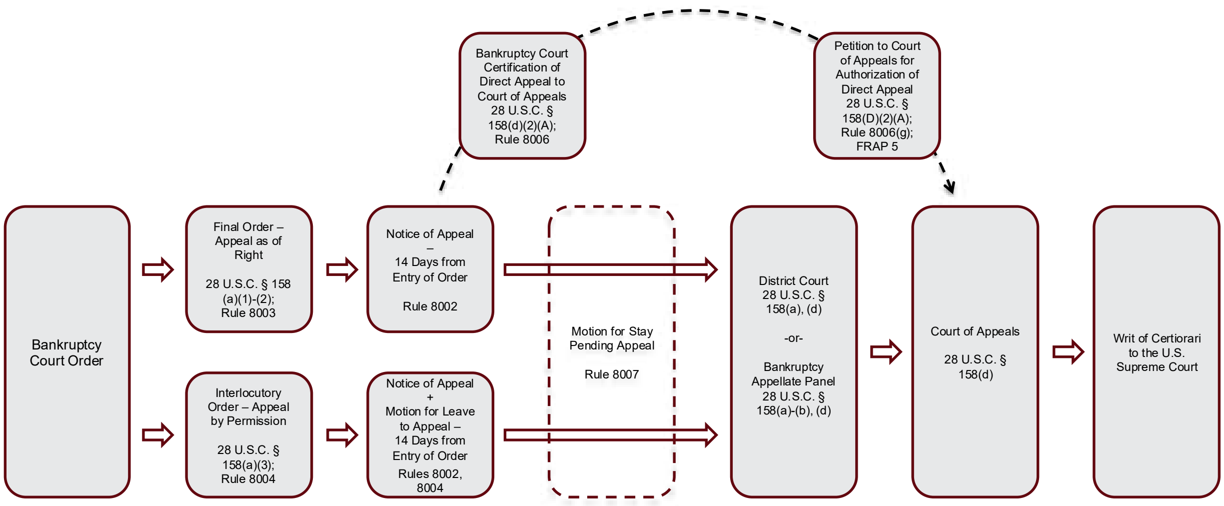
CONCURRENT SESSION

2025

Bankruptcy Appeals

Hon. Gary Spraker (Bankr. D. AK)
Jordan Kroop (Pachulski)
Geoff Goodman (Foley)
Emily Yaron (Snell & Wilmer)
Mike Neumeister (Cooley)

Progression of a Bankruptcy Appeal



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Navigating a Bankruptcy Appeal

- 28 U.S.C. § 158 provides for appeals of decisions in bankruptcy cases.
- District Courts and Bankruptcy Appellate Panels have jurisdiction to hear appeals:
  - From final orders (e.g., orders granting or denying relief from automatic stay, orders denying a motion to dismiss a bankruptcy case);
  - From non-final "interlocutory orders" issued under 11 U.S.C. § 1121(d) relating to an increase or decrease of the exclusivity period to file a plan of reorganization; and
  - With leave of the court, from other interlocutory orders.

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Navigating a Bankruptcy Appeal

- Under 28 U.S.C. § 158(d), the Courts of Appeals have jurisdiction to hear appeals of bankruptcy orders if the Bankruptcy Court (on motion or sua sponte) or all the appellants and appellees acting jointly, certify that:
  - The order involves either a question of law as to which there is no controlling decision by the Court of Appeals or the Supreme Court, or involves a matter of public importance;
  - The order requires resolution of conflicting decisions; or
  - An immediate appeal from the order may materially advance the case's progress.
- A motion seeking certification of an order for direct appeal must be made within 60 days after the order's issuance. 28 U.S.C. § 158 (d)(2); FRBP 8006.
  - If certification is entered, the appellant has 30 days to request permission from the Court of Appeals to file a direct appeal.
  - The Court of Appeals may (but need not) grant the request.

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Key Bankruptcy Rules Governing Appeals

- The Federal Rules of Bankruptcy Procedure govern bankruptcy appeals – specifically, Rules 8001 through 8028. The Rules describe procedural steps for perfecting an appeal and identify some of the critical differences between Bankruptcy Court appeals and District Court appeals, including:
- **Rule 8002** – A notice of appeal must be filed within 14 days after entry of the order being appealed.
- **Rule 8007** – A party must move first in the Bankruptcy Court for a stay of the order pending appeal (unless it can show that doing so would be impracticable). A stay request may also be made in the court where the appeal is pending, either before or after the Bankruptcy Court rules on the motion.
- **Rule 8009** – Within 14 days after filing the notice of appeal, the appellant must file a statement of issues to be presented on appeal and a designation of the record.
- **Rule 8018** – Provides for the default briefing schedule:
  - Appellant must file opening brief within 30 days after the docketing of the record on appeal.
  - Appellee must file answering brief within 30 days after service of appellant's brief.
  - Appellant may file reply brief within 14 days after service of appellee's brief.

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Key Differences Between the Bankruptcy Rules and the Federal Rules of Appellate Procedure

	Federal Rules of Bankruptcy Procedure	Federal Rules of Appellate Procedure
Time for Filing Notice of Appeal	14 days of entry of order (Rule 8002)	30 days of entry of order (Rule 4)
Record on Appeal	14 days of entry of order (Rule 8009)	Record consists of all documents filed in the case (Rule 10)
Statement of Issues on Appeal	14 days of entry of order (Rule 8009)	Only required when the record does not include the full transcript of proceedings below (Rule 10(b)(3)(A))
Briefing Schedule	• Appellant must file opening brief within 30 days after the docketing of the record on appeal • Appellee must file answering brief within 30 days after service of appellant's brief • Appellant may file reply brief within 14 days after service of appellee's brief (Rule 8018)	• Appellant must file opening brief within 40 days after the docketing of the record on appeal • Appellee must file answering brief within 30 days after service of appellant's brief • Appellant may file reply brief within 21 days after service of appellee's brief (Rule 31)

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Interlocutory vs. Final Orders

What's the difference?

- A ***final order*** generally resolves all issues in a case and ends it
- An ***interlocutory order*** is usually made during the course of a case and does not resolve all claims or issues

The flexibility of finality in bankruptcy

- The definition of finality is more flexible in bankruptcy due to its multi-proceeding nature
- A bankruptcy court order may be final even if the entire case is not over, as long as it resolves a discrete dispute
- This often makes it difficult to determine whether an order is interlocutory or final in the bankruptcy context

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Appealability in bankruptcy court

- A ***final order*** is generally immediately appealable as a matter of right
  - 28 U.S.C. § 158(a)(1) ("The district courts . . . shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . .")
  - 28 U.S.C. § 158(b)(1) – Applying this to BAPs
- An ***interlocutory order*** is usually not immediately appealable
  - However, an interlocutory order may be immediately appealed "with leave of court"
  - 28 U.S.C. § 158(a)(3) – ("The district courts . . . shall have jurisdiction to hear appeals . . . with leave of the court, from other interlocutory orders and decrees . . . .")

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How to appeal an interlocutory order

- Timely file a notice of appeal with the bankruptcy court under FRBP 8002
- Contemporaneously file a motion for leave to appeal under FRBP 8004
  - The order involves a controlling question of law;
  - There is a substantial ground for difference of opinion; and
  - Immediate appeal may materially advance the case
- Wait for a decision on the motion for leave to appeal
  - Parties may object
  - No hearing required
  - More likely to be denied than granted
  - If denied, movant must wait until a final order to raise the issue again

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Is the order interlocutory or final in bankruptcy?

Easy examples

- Partial summary judgment – An order granting partial summary judgment in an adversary proceeding is interlocutory because it does not dispose of all claims in the adversary proceeding. *In re Belli*, 268 B.R. 851 (B.A.P. 9th Cir. 2001); *In re Trinsum Group, Inc.*, 467 B.R. 734 (Bankr. S.D.N.Y. 2012).
- Disallowance of proof of claim – An order disallowing a proof of claim conclusively determines that creditor's right to payment from the estate, no further litigation is necessary on the issue, and it is a standalone adjudication within the larger bankruptcy case. *Katchen v. Landy*, 382 U.S. 323 (1966); *In re Westwood Shake & Single, Inc.*, 971 F.2d 387 (9th Cir. 1992).

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Question 1

The Chapter 13 debtor submits a proposed repayment plan. A creditor objects and the bankruptcy court holds a hearing. Following the hearing, the bankruptcy court denies the Chapter 13 debtor's repayment plan with leave to amend. Is the denial order interlocutory or final?

Vote now:
INTERLOCUTORY
or
FINAL

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Answer

- The denial order is likely interlocutory. It does not resolve the entire plan consideration process. The debtor may amend and propose another repayment plan. Conversely, had the bankruptcy court denied confirmation *without leave to amend* or approved the proposed repayment plan, those orders likely would have been final and immediately appealable by the debtor or objecting creditor.
  - *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015) (order denying confirmation of Chapter 13 plan with leave to amend is not a final order).

Question 2

A creditor moves for relief from the automatic stay so that it may continue with its state court lawsuit against the debtor (11 U.S.C. § 362(d)(1)). After full motion practice and a hearing, the bankruptcy court denies the creditor relief from the automatic stay. Is the denial order interlocutory or final?

Vote now:
INTERLOCUTORY
or
FINAL

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Answer

- The order denying relief from the automatic stay is likely final. It definitively disposes of a discrete dispute within the overarching bankruptcy case. It substantially affects the rights of the parties because it determines on a final basis where the litigation will proceed.
    - *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 46 (2020) (order denying motion for relief from the automatic stay to proceed with state court lawsuit was final, immediately appealable order because it "conclusively resolved the movant's entitlement to the requested relief").
    - *In re Mayer*, 28 F.4th 67 (9th Cir. 2022) (following *Ritzen*, order denying (without prejudice) creditor's motion for relief from the automatic stay to proceed with state court lawsuit was still final and immediately appealable).

Question 3

Shortly after the debtor files for Chapter 11 bankruptcy, a creditor moves to either convert the case to Chapter 7 or appoint a Chapter 11 trustee due to the debtor's alleged pre-petition conduct (11 U.S.C. § 1112(b)). The bankruptcy court denies the motion to convert to Chapter 7 or appoint a Chapter 11 trustee. Is the denial order interlocutory or final?

Vote now:
INTERLOCUTORY
or
FINAL

Answer

- The denial order is likely interlocutory. It is not a discrete proceeding before and apart from the bankruptcy case, it does not end the litigation on the merits and leave nothing for the bankruptcy court to do, and it does not seriously affect any parties' substantive rights.
  - *In re Southern California Research, LLC*, No. CC-22-1055-TSG, 2022 WL 12724560 (B.A.P. 9th Cir. Oct. 18, 2022) (Judges Taylor, Spraker, and Gan) (holding order denying motion for conversion or appointment of a trustee not final and declining leave to appeal interlocutory order).

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Does the answer change if the bankruptcy court denies a motion to dismiss?

- The denial of a motion to dismiss does not end the bankruptcy case in a typical sense – it simply proceeds.
- Yet, a denial of a motion to dismiss at the commencement of a bankruptcy may constitute an adjudication of the debtor's qualification for bankruptcy.
- In *In re Liu*, 611 B.R. 864, 881 (B.A.P. 9th 2020), the denial of a motion to dismiss for violation of 11 U.S.C. § 109(g) (*i.e.*, prior dismissal) was a final order for purposes of appeal.
- What about motions to dismiss for bad faith?

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Question 4 – final scenario

- A Chapter 11 debtor files a motion to sell property by auction. A timely opposition is filed. The bankruptcy court orally grants the motion to sell and reserves the debtor's request for a good faith determination under 11 U.S.C. § 363(m). The bankruptcy court enters an order approving the sale. The party opposing the sale files an appeal of the approval order. The auction is held a month later.
- After another hearing, the bankruptcy court enters another order finding the buyer purchased the property at the auction in good faith under 11 U.S.C. § 363(m). The objecting party again files an appeal of the good faith order.

Food for thought

- Was the first order, the second order, or both a final order for purposes of appeal?
- Did the first appeal properly challenge the good faith of the purchaser?
- Did the second appeal properly challenge good faith?

Is the discrete proceeding complete?

- *In re Hoover*, No. 22-35814, 2023 WL 5814810, at *1 (9th Cir. Sept. 8, 2023)
  - Lenders foreclosed on a house post-petition in which the debtor had rights under a trust established by her father, though the house was never transferred to her.
  - Debtor claimed foreclosure was a willful violation of the automatic stay, which raised the question whether the house was property of the bankruptcy estate and annulment of the stay.
  - The Ninth Circuit held it lacked jurisdiction over the willfulness of the stay violation despite an "interim" decision by the bankruptcy court because it deferred determination of damages.
  - Citing to *Bullard* and *Ritzen*, the Ninth Circuit determined "there was no completed 'proceeding' within the meaning of 28 U.S.C. § 158, from which an appeal could be taken at this time."

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When in doubt … appeal!

- *In re City of Desert Hot Springs*, 339 F.3d 782, 787 (9th Cir. 2003) ("In [*In re*] *Ryther*, 799 F.2d 1412, 1414 (9th Cir. 1986), we noted that if a litigant is unsure about the nature of an order, the litigant should file both a notice to appeal and a motion for leave to appeal before the BAP or district court.").

- *In re Linton*, 631 B.R. 882 (B.A.P. 9th Cir. 2021) ("If the finality status of an order is uncertain, the best course is to file a Notice of Appeal and a Motion for Leave to Appeal.").

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Bankruptcy Appellate Panels vs. District Court

The Statutory Basis for BAPs

- 28 U.S.C. § 158(b) provides:
  - The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

    (A) there are insufficient judicial resources available in the circuit; or

    (B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

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Which Jurisdictions Have BAPs?

- The following Circuits have BAPs
  - First Circuit
  - Sixth Circuit (certain Districts)
  - Eighth Circuit
  - Ninth Circuit
  - Tenth Circuit
- The Second, Third, Fourth, Fifth, Seventh and Eleventh Circuits do **not** have BAPs

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District Court Election (or lack thereof)

- **Appeal to BAP is the default position**
  - In Circuits with a BAP, an appeal will be heard by the BAP unless one of the parties **elects** to have the appeal heard by the District Court.
- **Procedure and Timing of Election – BR 8005 --** To elect to have an appeal heard by the District Court, a party must:
  - File a **statement of election** that conforms substantially with Official Form 417; and
  - Do so **timely** under 28 U.S.C. § 158(c)(1)
    - **Appellant** – When it files the notice of appeal
    - **Appellee** – Not later than 30 days after service of the notice of appeal

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Making the BAP vs. District Court Decision

- **Does bankruptcy experience matter?**
  - If you want experienced bankruptcy judges deciding the appeal, go to the BAP
    - E.g., Technical plan confirmation issues, 1111(b) etc.
  - If bankruptcy experience does not matter much OR the issue is a technical issue of non-bk law, possibly go to the District Court
    - E.g., Fraudulent transfer claim or breach of contract case

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Making the BAP vs. District Court Decision (cont'd)

- **What is your preferred timeline?**
  - BAPs sit at designated times and typically rule promptly
    - The Eighth Circuit BAP has committed to deciding cases within 60 days of submission.
    - The Ninth Circuit BAP's median time from submission to decision is about 30 days.
  - Some District Courts are known to sit on bankruptcy appeals for many months and sometimes even years due to the perception of more urgent matters on their dockets.
  - Does the case require a prompt decision?
  - Would your settlement leverage or position in the case benefit from a delay?

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Making the BAP vs. District Court Decision (cont'd)

- **Does oral argument matter?**
  - BAPs almost always grant oral argument
  - Oral argument is very uncommon in District Court appeals
  - **Hypothesis**: Appellants are more likely to need oral argument to strengthen their positions and explain why the Bk Court got it wrong?

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Making the BAP vs. District Court Decision (cont'd)

- **Is this the first appeal in the bankruptcy case? Will there likely be more appeals?**
  - An election to have the District Court hear an appeal is on an order by order basis.
  - As a result, in the same bankruptcy case, there could be one (or more) appeals heard by a BAP, while at the same time one (or more) appeals are being heard by the District Court.
  - This can be a long term strategy decision for a debtor in a large case that is likely to be dealing with multiple appeals

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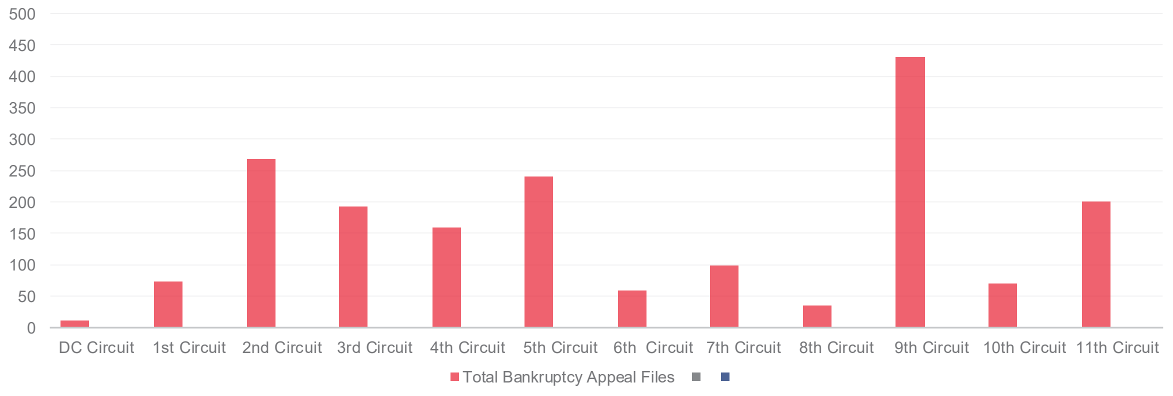
Total Bankruptcy Appeals for 12-Month Period ending 6/30/25



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Bankruptcy Appeals
for 12 Months Ending June 30, 2025

Appeals to District Court vs BAP (and Beyond)

	Total Appeals Filed	Appeals to Dist. Ct	Dist. Ct Appeals to Circuit	Percent Dist. Ct to Circuit	Appeals to BAP	BAP Appeals to Circuit	Percent BAP to Circuit	Direct Appeals to Circuit
1st Circuit	73	45	20	44%	28	7	25%	0
6th Circuit	58	38	8	21%	20	6	30%	0
8th Circuit	35	16	4	25%	19	1	5%	0
9th Circuit	**430**	**205**	**69**	**34%**	**225**	**41**	**18%**	**0**
10th Circuit	70	28	5	18%	40	6	15%	2

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Bankruptcy Appeals

for 12 Months Ending June 30, 2025

Appeals to District Court vs BAP (and Beyond) (cont'd)

	Total Bankruptcy Appeals	Appeals to Dist Ct	Dist Ct to Circuit	Percent Dist Ct to Circuit	Appeals to BAP	BAP Appeal to Circuit	Percent BAP to Circuit	Appeals Direct to Circuit
DC Circuit	10	10	3	30%	0	0	0	0
1st Circuit	73	45	20	44%	28	7	25%	0
2nd Circuit	268	264	65	25%	0	0	0%	4
3rd Circuit	192	182	51	28%	0	0	0%	10
4th Circuit	159	159	53	33%	0	0	0%	0
5th Circuit	240	239	52	22%	0	0	0%	1
6th Circuit	58	38	8	21%	20	6	30%	0
7th Circuit	99	96	10	10%	0	0	0%	3
8th Circuit	35	16	4	25%	19	1	5%	0
9th Circuit	430	205	69	34%	225	41	18%	0
10th Circuit	70	28	5	18%	40	6	15%	2
11th Circuit	200	198	59	30%	0	0	0%	2

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BAP Appeals

for 12-Month Period ending 3/31 2018-25

	2025	2024	2023	2022	2021	2020	2019	2018
1st	31	28	46	31	41	63	72	61
6th	24	23	30	29	39	30	46	36
8th	12	8	14	13	22	36	33	35
9th	**230**	**184**	**253**	**298**	**273**	**343**	**343**	**386**
10th	32	32	30	32	58	55	96	77
Total	**329**	**275**	**373**	**403**	**433**	**527**	**590**	**595**
Percent – Ninth Circuit	70%	67%	68%	74%	63%	65%	58%	65%

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BAP Merits Decisions
for 12 Months Ending 6/20/25

	Total	Affirmed	Dismissed	Reversed	Remanded	Other
1st	7	4	1	1	1	0
6th	3	3	0	0	0	0
8th	3	0	2	0	1	0
9th	**88**	**67**	**5**	**3**	**12**	**1**
10th	6	5	0	1	0	0
Total	**107**	**79**	**8**	**5**	**14**	**1**

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Appeals
for the period ending March 31, 2025

	BAP	District Ct.	Total
Alaska	1 (25%)	3 (75%)	**4**
Arizona	15 (44%)	19 (56%)	**34**
N. Cal.	25 (50%)	25 (50%)	**50**
E. Cal.	15 (68%)	7 (32%)	**22**
C. Cal.	70 (49%)	74 (51%)	**144**
S. Cal.	10 (42%)	14 (58%)	**24**
Hawaii	5 (38%)	8 (62%)	**13**
Idaho	0 (50%)	0 (50%)	**0**
Montana	2 (50%)	2 (50%)	**4**
Nevada	27 (55%)	22 (45%)	**49**
Oregon	9 (60%)	6 (40%)	**15**
E. Wash.	3 (27%)	8 (73%)	**11**
W. Wash.	20 (61%)	13 (39%)	**33**
TOTALS	**202 (50%)**	**201 (50%)**	**403**

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Other Statistics
from the 12 months ending 6/30/25

- Between 2019-2025, the Ninth Circuit BAP's affirmance rate has ranged between 82%-91% while the reversal rate has ranged between 3%-8%.
- The Ninth Circuit BAP published 15 decisions of its 88 decisions in 2025.
- The average time from filing of notice of appeal to disposition was 8.5 months, while the average time from oral argument to disposition ranged from .8 to 1.2 months depending on when the matter was submitted.

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Question 5

- Bob's vehicles leased 40 vehicles to the debtor pursuant to a master lease agreement. The debtor defaulted pre-petition and Bob's started trying to repossess the vehicles but was unable to do so pre-petition. When the debtor filed Ch. 11, it notified Bob's, but Bob's paralegal missed the notice. Two days later, Bob's found 4 vehicles on the street, repossessed them, and immediately sold the vehicles.
- The debtor filed claims against Bob's for violation of the automatic stay and to recharacterize the lease as a secured financing. The Bk Court entered judgment on both counts in favor of the debtor and Bob's appealed.
- Should Bob's elect the District Court for its appeal or proceed in the BAP?
- Should the Debtor elect the District Court if Bob's does not do so?

Vote Now:

(1) Bob's should elect the District Court	or	Bob's should elect the BAP
(2) Debtor should elect the District court	or	Debtor should elect the BAP

Question 6

- The debtor is a crypto firm that managed crypto assets for its customer base. Due to market fluctuations and some misconduct by an insider, the debtor had to file Ch. 11. Big Hedge Fund (BHF) was a "custodial" customer of the debtor that had $30m on deposit as of the Ch. 11 filing. BHF also received transfers from the debtor totaling $15m in the 90 days before Ch. 11.
- BHF filed a declaratory judgment action against the debtor, alleging that its $30m in deposits were held by the debtor in trust for BHF and are not property of the estate. The debtor disputed the claim, and also counterclaimed, alleging that the $15m in transfers were recoverable as preferences.
- The Bk Court ruled that the deposits were indeed property of the estate because of the lack of a trust relationship and commingling of funds. The Bk Court also held that the $15m transfer was not avoidable because it was protected pursuant to the safe harbors under § 546(e) and (g) of the Bankruptcy Code.
- Both sides appeal. The Ch. 11 case is now post-confirmation.
- Should BHF elect to go to the District Court? Should the estate do so?

Vote Now:

(1) BHF should elect the District Court	or	BHF should elect the BAP
(2) Debtor should elect the District court	or	Debtor should elect the BAP

Justiciability: Standing, Ripeness, and Mootness

Cases and Controversies Clause

- US Constitution, Article III, Section 2:
  - "The judicial power shall extend to all cases, in law and equity, arising under … the laws of the United States …" (the "**CCC**")
  - Applies to bankruptcy appeals because:
    - appeals are of orders arising under the Bankruptcy Code, a law of the United States
    - US District Courts and US Courts of Appeals are Congressionally established "inferior courts" under Art. III, § 1—"Article III courts"
    - Bankruptcy Appellate Panels (First, Sixth, Eighth, Ninth, and Tenth Circuits) are not Article III courts but courts have generally held that jurisdictional limitations arising under the CCC apply to BAPs
      - *But see Kiviti v. Bhatt,* 80 F.4th 520 (4th Cir. 2023) (Article III requirements are irrelevant in non-Article III courts; bankruptcy court could adjudicate a constitutionally moot issue)

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Concepts of Justiciability

- The CCC gives rise to three concepts that inform whether a dispute is a "case" within the jurisdiction of the federal courts—if the dispute is "justiciable":
  1. Ripeness
  2. Standing
  3. Mootness
- Some courts also consider finality to be a separate justiciability requirement—if a bankruptcy court order is not a "final" order, the appellate court may not hear the appeal unless it grants leave—but finality is better understood as a facet of ripeness
- We address final vs. interlocutory orders separately from this discussion

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Ripeness

- Unless a claim is ripe for adjudication, a court lacks subject matter jurisdiction under the CCC. *See, e.g., Oklevueha Native Am Church of Hawaii, Inc. v. Holder,* 676 F.3d 829 (9th Cir. 2012).
- Ripeness requirement prevents "the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *See, e.g., Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967).
- E.g.: *Toste v. Smedberg (In re Toste),* 2014 Bankr. LEXIS 3441 (BAP 9th Cir. Aug. 12, 2014):
  - Bankruptcy court lacked jurisdiction (and, therefore, so did the BAP) to determine the dischargeability of a debt under § 523(a)(6) in a Chapter 13 case because the debtor had not yet sought a § 1328(b) hardship discharge.
  - Unless and until the debtor seeks a hardship discharge, § 523(a)(6) is not an available basis for nondischargeability of a debt
  - Accordingly, consideration of nondischargeability was "premature at best"—that is, not ripe—not ripe for the bankruptcy court nor the BAP

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Ripeness (cont'd)

- Ripeness comes up almost always in this context—an appellate court holding that the bankruptcy court order was premature; that the bankruptcy court lacked subject matter jurisdiction because the matter was not ripe
- *In re UAL Corp.,* 468 F.3d 444, 452-53 (7th Cir. 2006):

  Indeed, it is impossible to see how an appeal ever could be dismissed as "unripe" … Ripeness is a quality of *disputes*, not of appeals. If the dispute … was not ripe for resolution, then the district court should have vacated [the bankruptcy court's] decision as premature. For appellate tribunals (including district judges deciding appeals in bankruptcy), the relevant doctrine is finality, not ripeness. *See United States v. Jose,* 519 U.S. 54 (1996). If the order is final, then an appeal is proper whether or not the dispute is ripe for resolution. A timely appeal filed after premature action by the lower court can lead to one of two actions: the appellate body vacates the premature decision, or the appellate body keeps the dispute under advisement until it becomes ripe and a decision properly may be rendered. *See Buckley v. Valeo,* 424 U.S. 1 (1976).

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Standing

- Two types of standing:
  1. **Constitutional** or Article III standing—
     the standing requirement arising under the CCC
  2. **Prudential** standing—
     a judge-created requirement to limit access to appeals only to "persons aggrieved"
- Standing is measured at the time the appeal is taken
  - Subsequent developments after the appeal is initiated only work one way: an appellant with standing can lose standing before the appellate ruling but an appellant without standing cannot gain standing after the appeal begins

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Article III Standing

- *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992): the "irreducible constitutional minimum of standing" has three components:
  1. **Injury** in fact—not conjectural or hypothetical; appellant must demonstrate a real or immediate threat of irreparable injury
  2. **Causation**—the matter in dispute directly caused of the injury
  3. **Redressability**—if favorable appellate decision can redress the injury, assuming claim has merit
- If winning the appeal will cure the injury, then this requirement is met
  This is typically an easier bar for an appellant to clear in bankruptcy contexts. If the appellant has any cognizable (especially financial) interest in the outcome of the case, and as long as redressability exists, appellant will have Article III standing
- Perhaps more than any other reason, the relative ease with which bankruptcy appellants can satisfy Article III standing is why the federal judiciary created the concept of "prudential standing

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Prudential Standing

- Originally a statutory concept built into the Bankruptcy Act, recognizing that bankruptcy courts were not Article III courts and not bound by traditional rules of judicial standing.
- 11 U.S.C. § 67(c), repealed in 1978 with the passage of the Bankruptcy Code: "A **person aggrieved** by an order of a referee may … file with the referee a petition for review …"
- Nearly all circuits have affirmed and reaffirmed that the "person aggrieved" standard continues to govern what is now called prudential standing in bankruptcy appeals.
- Test is generally regarded as "more exacting" than the test for Article III standing
  - An appellant with valid Article III standing can still lack prudential standing
  - Prudential standing requires a "higher causal nexus between act and injury than traditional standing …" *NexPoint Advisors v. Pachulski,* 74 F.4th 361 (5th Cir. 2023).
- An appellant must show it was **directly and adversely affected pecuniarily** by the bankruptcy court's order
- Rationale: "Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited. *In re Technicool,* 896 F.3d 382 (5th Cir. 2018).

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Prudential Standing (cont'd)

- Litigants and even a couple of lower court judges—Bankruptcy Judge Goldblatt among them—believe that the Supreme Court's decision in *Lexmark,* 572 U.S. 118 (2014), somehow sounded the death knell for prudential standing
  - *Lexmark* was a Lanham Act case that said courts may not "limit a cause of action that Congress has created merely because 'prudence' dictates."
  - But several Courts of Appeals have reaffirmed the vitality of prudential standing after *Lexmark*—including, for example, the Fifth Circuit in cases including *NexPoint v. Pachulski ("Lexmark* does not expressly reach prudential concerns in bankruptcy appeals and brought no change relevant here")—most in response to an appellant's argument that *Lexmark* vitiated prudential standing
  - No Court of Appeals has held that prudential standing is no longer good law, despite Judge Goldblatt, in dicta, recently saying, "prudential standing is not a thing."

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Appellate Standing vs. § 1109

- Standing—either standing in the bankruptcy court or Article III or prudential standing on appeal—has nothing to do with a right to be heard as a party in interest under Bankruptcy Code § 1109
- This critical distinction means, perhaps counterintuitively, that a party in interest can be heard in opposition of a motion in the bankruptcy court, lose, then lack standing to appeal the order
- Several Courts of Appeals have already held that § 1109 does nothing to confer appellate standing
- SCOTUS clarified it in *Truck Insurance* when it counseled a "capacious" interpretation of "party in interest" under § 1109 without once even mentioning the word "standing."

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Mootness

- Three kinds of mootness pertinent to bankruptcy appeals:
  1. Article III mootness—arises under the CCC
  2. Equitable mootness—inability to "unscramble the egg"
     - Distinct from redressability
     - Concerned with the **practical** inability to implement a reversal of the bankruptcy court order rather than the theoretical ability for a reversal to redress the injury
  3. Statutory mootness—arises by statute
     - § 363(m) (appeal of order approving sale of assets)
     - § 364(e) (appeal of order approving postpetition financing)

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Article III Mootness

- Article III Mootness is concerned with whether a real and current dispute between the parties exists
  - Sort of the opposite of ripeness
  - Appeals are moot if:
    - Events have occurred that render the appeal purely academic
    - One or both parties has lost a personal stake in the appeal's outcome
    - Court can fashion no meaningful relief—granting appellate relief will have no effect in the real world
- *Jaramillo v. Dill (In re Railyard Co., LLC),* 849 Fed. Appx. 227 (10th Cir. 2021):
  - Appeal of bankruptcy court's denial of recusal motion and approval of settlement
  - Bankruptcy case was closed, settlement had been fully consummated, and all estate assets had been liquidated and distributed
  - Appeal dismissed as constitutionally moot
- Not common—most appeals are heard before all these things take place, either as a practical matter or because the appellant has managed to obtain a stay of the bankruptcy court order pending appeal

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Equitable Mootness

- Instead, many bankruptcy appeals deal with transactions—particularly complex, multi-faceted transactions occurring under a confirmed Chapter 11 plan—that have closed where so many assets and money have changed hands among so many parties that reversing the order (say, a confirmation order) would do nothing as a practical matter because the many inter-related transactions cannot be undone
- The "egg can't be unscrambled" or the "genie can't be put back in the bottle"—we need a fresher metaphor
- In the bankruptcy context, it is a judge-made doctrine of appellate abstention that favors the finality of reorganizations and protects the inter-related multi-party expectations on which they're based

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Equitable Mootness (cont'd)

- Then-Judge Alito's dissent in *Continental Airlines* in the Third Circuit characterized the difference between constitutional mootness and equitable mootness thus:
  - Article III mootness concerns arise when a judicial ruling would have no effect; equitable mootness applies when a judicial ruling might have *too much* effect on the parties to a confirmed reorganization.
  - For this reason, Judge Easterbrook in the Seventh Circuit regards the term "equitable mootness" as a "misnomer."
- Appellate courts tend to apply equitable mootness "with a scalpel rather than an axe." Appellate review doesn't need to be declined entirely if, even when a plan has been substantially consummated, the court still can fashion some practicable relief.
- A practicable "fractional recovery" is better than no recovery at all

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Equitable Mootness (cont'd)

- Equitable mootness only applies to specific appellate claims, not the entire appeal. "In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole." *In re AOV Industries Inc*., 792 F.2d 1140, 1148, 253 U.S. App. D.C. 186 (D.C. Cir. 1986).
- Certifying an appeal directly to the Circuit Court of Appeals under 28 U.S.C. § 158(d)(2) also affects equitable mootness because Congress intended this prevision to expedite bankruptcy appeals and generate binding appellate precedent
- Courts—especially those, like the Fifth Circuit, more hostile to equitable mootness—tend to rely on a three-element test for assessing when an appeal may be equitably moot:
  1. Whether a stay has been obtained
  2. Whether the plan has been substantially consummated
  3. Whether the relief requested would affect either the rights of parties not before the court or the plan's success—in other words, whether the appellate court can craft relief for a specific appellate claim that would not impose significant adverse consequences to the reorganization

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Equitable Mootness (cont'd)

- This third element has been relied on to deny motions to dismiss appeals on equitable mootness grounds
- The Fifth Circuit has led the way in this regard by finding discrete components of a confirmed plan objectionable and reversing the confirmation order only as to those components
    - *See, e.g., In re Highland Capital Mgmt., L.P.,* 48 F.4th 419 (5th Cir. 2022), which, on direct appeal to the Court of Appeals, affirmed the confirmation order in all ways appellants opposed except for the plan's exculpation provision, which extended to non-debtors
    - This was the "scalpel" approach, allowing the confirmed plan to proceed as amended by the appellate tailoring of the exculpation provision

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Equitable Mootness (cont'd)

- While no Circuit Court of Appeals has entirely rejected the doctrine of equitable mootness—and some, like the Ninth, Tenth, and (in the Boy Scouts case) Third Circuits, have reaffirmed its vitality recently—hostility to the doctrine continues to grow and the trend seems to be in favor of invoking equitable mootness more sparingly and eschewing the notion that an appeal of a confirmation order is an "all or nothing" proposition
- For a thorough treatment of equitable mootness, *see In re BSA (Boy Scouts of America),* 137 F.4th 126 (2025).

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Statutory Mootness

- Bankruptcy Code § 363(m):

  The reversal or modification on appeal of an authorization … of a sale … of property does not affect the validity of a sale under such authorization to an entity that purchased … such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.
- In simple terms, an appeal of a sale order is statutorily moot if the bankruptcy court found the buyer to have been in good faith, the appellant didn't get a stay of the sale order, and the sale closed
- Statutory mootness of straightforward appeals of straightforward sale orders is uncontroversial and easy to understand
- Two issues raise more interesting questions:
  1. What if the appeal concerns an aspect of the sale order that doesn't have anything to do with reversing the sale itself, such as the assumption and assignment of a lease under § 365?
  2. Can the appeal of a settlement approved under Rule 9019 be statutorily moot under Bankruptcy Code § 363(m)?

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Statutory Mootness—Non-Sale Objections

- Often sale orders will grant relief related to asset sales but not granted under § 363
  - Assumption and assignment of contracts and leases under § 365
    - Ability to assume/assign under § 365(c)
    - Cure
    - Adequate assurance of future performance under § 365(b)(3) or (f)
  - Disposition of sale proceeds among creditors
- If appeal is of the non-asset-sale aspects of a sale order, the appeal might not be moot under § 363(m)
- Some courts will still invoke § 363(m) to moot the appeal by finding that the sale order approved a transaction that included § 365 relief that was "integral" and "non-severable" from the sale of assets under § 363
- Other courts have declined to dismiss appeals as moot if the appellate relief sought can be granted without disturbing the sale
  - *MOAC Mall Holdings LLC v. Transform Holdco LLC,* 598 U.S. 288 (2023)

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Statutory Mootness—Non-Sale Objections (cont'd)

- *MOAC Mall*, which came out of the Sears bankruptcy, addressed the question of whether § 363(m) was *jurisdictional*—that is, if an appellate court lacks jurisdiction to hear an appeal of a sale order because it might be statutorily moot
  - Mall landlord objected to a term in the sale order that allowed the buyer to designate lease assignments rather than the debtor and, when its lease was designated for assignment, that adequate assurance of future performance hadn't been established
  - Unanimous court held that § 363(m) is not jurisdictional—an appellate court is not deprived from hearing an appeal and even considering whether § 363(m) makes the appeal statutorily moot
  - § 363(m) is a "statutory limitation" on appellate relief, not a jurisdictional one—thus, an appellate court has jurisdiction to consider and either grant or deny a motion to dismiss on § 363(m) grounds

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Statutory Mootness—Non-Sale Objections (cont'd)

- On remand to the Second Circuit, the court held that the appeal was *not* statutorily moot (reversing the District Court on remand after SCOTUS ruling) because, by finding a failure of adequate assurance of future performance under the shopping center provisions of § 365(b)(3)(A) did not undermine the sale of assets under § 363(m)
- Also held that the appeal wasn't Article III moot because the appellate court still had relief it could grant without invalidating the sale or requiring assets that have left the estate to be put back
- Later appeal to Second Circuit affirmed District Court's ruling that the MOAC lease was not a "true lease" and, therefore, couldn't be assumed and assigned anyway

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Statutory Mootness—Settlements

- *Goodwin v. Mickey Thompson Entm't Group, Inc.,* 292 B.R. 415, 420–22 (BAP 9th Cir. 2003):
  - the settlement is in reality a purchase by the Settling Parties of a chose in action of the estate … We agree with the Third Circuit that the disposition by way of "compromise" of a claim that is an asset of the estate is the equivalent of a sale of the intangible property represented by the claim, which transaction simultaneously implicates the "sale" provisions under section 363"
  - One of the most consequential 9th Cir. BAP opinions maybe ever, as it has been adopted by at least the Fifth and Third Circuit Courts of Appeals
- Most settlements of estate causes of action should treated as a sale of the case of action to the defendant under § 363—this means:
  - § 363(m) applies to statutorily moot an appeal of a settlement approval order
  - An objector to the settlement must "overbid" the settlement amount or lose

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Faculty

Geoffrey S. Goodman is a partner and chair of Foley & Lardner LLP's Bankruptcy & Business Reorganizations Practice in Chicago. His practice covers broad areas of bankruptcy and insolvency law and has focused on commodities and securities bankruptcies, as well as health care and energy bankruptcies. He is also a member of the firm's Appellate Practice. Mr. Goodman has represented chapter 11 debtors, official creditors' committees, ad hoc committees, trustees, secured lenders, purchasers of assets and unsecured creditors in chapter 11 cases, including some of the largest chapter 11 cases in the country. In addition, he counsels clients in liquidations, workouts, assignments for the benefit of creditors and transactions, and he handles bankruptcy and creditors' rights litigation in both federal and state court. Mr. Goodman has extensive experience in the area of commodities and securities bankruptcies, having represented a consortium of customers holding over $100 million in claims in the *MF Global* bankruptcy case and serving as special commodities counsel to the chapter 7 trustee in the *Peregrine Financial Group, Inc.* bankruptcy. He also served as counsel to one of the largest creditors in the multi-billion dollar chapter 11 case of *In re Refco Inc.* in the U.S. Bankruptcy Court for the Southern District of New York and as counsel to an ad hoc committee of customers in the billion-dollar case of *In re Sentinel Management Group Inc.* in the U.S. Bankruptcy Court for the Northern District of Illinois. Mr. Goodman has counseled large mutual funds, hedge funds, futures commission merchants, exchanges and other entities in this area. His practice also covers the areas of health care and energy bankruptcies, having served as counsel to the debtor and large secured and unsecured creditors in significant health care cases, and as counsel to the creditors' committee in the large chapter 11 cases of coal companies Horizon Natural Resources Company, Trinity Coal Corp. and Black Diamond Mining Company LLC. Prior to joining Foley, Mr. Goodman clerked for Hon. Francis D. Murnaghan, Jr. of the U.S. Court of Appeals for the Fourth Circuit. He received his B.A. in political science with honors in 1996 from Illinois Wesleyan University and his J.D. *summa cum laude* in 1999 from the University of Illinois College of Law, where he was notes editor of the *Law Review* and elected to the Order of the Coif.

Jordan A. Kroop is an attorney with Pachulski Stang Ziehl & Jones in its New York office, where he represents debtors, creditors' committees and acquirers in chapter 11 cases for publicly traded and privately held companies throughout the country. His client work spans dozens of industries and has included such prominent chapter 11 engagements such as representing Highland Capital, the Russian Tea Room and the NHL's Arizona Coyotes as chapter 11 debtors; the creditors' committee in *Legacy Cares* (one of the largest Arizona-based chapter 11 cases in history) and significant creditors (including the Boston Celtics and the Milwaukee Bucks) in chapter 11 restructurings and cross-border proceedings. Mr. Kroop also has represented debtor-sellers and strategic acquirers in chapter 11 assets sales in transactions totaling several billion dollars. The author of a major bankruptcy treatise, several other books and dozens of articles on bankruptcy topics (one of which earned the *ABI Journal*'s Publication Award), he teaches information privacy and advanced chapter 11 practice as an adjunct professor of law at the Sandra Day O'Connor College of Law at Arizona State University, having also lectured on international commercial arbitration in Austria. Mr. Kroop is a Fellow of the American College of Bankruptcy, has been listed in *The Best Lawyers in America* every year since 2009 (including being named as *Best Lawyers*' Phoenix "Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law Lawyer of the Year" in 2017), and has been named a *Super Lawyer* every year since 2007 (including among its Southwest Top 50 for the last several years). A longtime ABI member he has co-chaired ABI's Southwest Bankruptcy Conference for the last four years. Avvo.com ranks Mr. Kroop as "Superb" (10 out of 10), and he is rated AV-Preeminent by Martindale-Hubbell. He received his A.B. *magna cum laude* in 1991 from Brown University and his J.D. in 1994 from the University of Virginia.

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Hon. Gary A. Spraker is Chief Bankruptcy Judge for the District of Alaska in Anchorage, initially sworn in on Oct. 4, 2012. He also has served as a visiting judge for Nevada since July 2013, hearing cases and conducting settlement conferences in both Las Vegas and Reno. In June 2017, Judge Spraker was appointed to the Ninth Circuit Bankruptcy Appellate Panel. Prior to taking the bench, he was a partner at Christianson & Spraker, where he focused on both consumer and commercial bankruptcy, representing trustees, debtors and creditors in chapter 7, 11 and 13 matters. Judge Spraker served for over a decade as chair of the Alaska Bankruptcy Section. Prior to moving to Alaska, he worked as an associate for Morrison & Foerster in Denver. Judge Spraker is a Fellow in the American College of Bankruptcy. He received his undergraduate degree from Stetson University and his J.D. from the University of Denver.

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