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Access to Justice and the Denial of Stay in a Pending Bankruptcy Appeal: Reviewability by the Courts of Appeals

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ACCESS TO JUSTICE AND THE DENIAL OF STAY IN A PENDING BANKRUPTCY APPEAL: REVIEWABILITY BY THE COURTS OF APPEALS

ROBERT J. LANDRY, III*

When a party in a bankruptcy case seeks to appeal an adverse final judgment from a bankruptcy court, the ability to stay the effect of that judgement is of utmost importance. As with other appeals, the bankruptcy appellate process is long; and often, particularly in bankruptcy proceedings involving distributions of money and property, the appeal may be moot before a ruling by an appellate court because the judgement has been carried out. This risk of mootness impacts the ability to have an appellate court provide relief if it finds the appeal to have merit. This raises access to justice concerns generally, but the concern is exacerbated because the ability to obtain a stay pending appeal in a bankruptcy case varies among the circuits and from case to case within a circuit. This article details the current state of the law and the access to justice concerns that arise in this context. The author offers a rules-based solution to ensure that appellant has the same procedural ability to seek a stay pending appeal regardless of the location in which the particular circuit an appeal arises.

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I. INTRODUCTION

Obtaining a stay pending appeal is of utmost importance to most parties adversely impacted by a trial court order that wish to challenge the trial court order on the merits through the appellate process. Without a stay of the order on appeal, the concern is that if the appeal is successful on the merits, an appellant will be left without any meaningful relief from the appellate court. The worry is that the appeal may be moot by the time the appellate court reaches the merits of the appeal. Mootness arises if a court cannot grant effective relief.¹ The appeal will essentially be for naught.

This concern of mootness and the significance of obtaining a stay are particularly important in bankruptcy appeals.² Fortunately, the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) expressly provide that a party may seek a stay of a bankruptcy court order pending appeal from the bankruptcy court.³ If that order is denied,⁴ a stay of the bankruptcy court order can be sought from the district court or, if applicable, the bankruptcy appellate panel (“BAP”).⁵ If the appellant obtains a stay pending appeal from

1. See *Mills v. Green*, 159 U.S. 651, 653 (1895); see also Charles Tabb, *Lender Preference Clauses and the Destruction of Appealability and Finality: Resolving a Chapter 11 Dilemma*, 50 OHIO ST. L.J. 109, 126 (1989) (recognizing that mootness arises when it is “impossible for the appellate court to give meaningful, effective relief because of changed circumstances.”).

2. See *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) (explaining that, in the context of an order confirming a plan of reorganization, equitable mootness may prevent an appellate review of the bankruptcy court order confirming the plan); see also Eleanor H. Gilbane, *Investing in an Appeal: The Dilemma Facing an Appellant of Confirmation Orders*, 32 AM. BANKR. INST. J. 38, 38 (2013) (discussing the potential of equitable mootness in the context of the confirmation of a Chapter 11 plan).

3. FED. R. BANKR. P. 8007(a)(1)(A).

4. *Id.* 8007(a)(1) (stating a stay pending appeal initially should be sought in the bankruptcy court); see *id.* 8007(b)(2) (providing that a motion may be made in the district court or BAP if a showing is made of the impracticality of seeking relief from bankruptcy court or that the motion is pending in bankruptcy court); *id.* (concluding that in rare cases a denial of a stay by the bankruptcy court may not have occurred).

5. *Id.* 8007(b)(1) (providing for motion in district court or BAP).

the bankruptcy court, district court, or BAP, the mootness concerns are alleviated while the stay is in effect.⁶

The focus of this article is on a scenario that arises when a stay pending appeal is denied by the bankruptcy court, the district court, or BAP, and the underlying appeal of the bankruptcy court order on the merits is pending in the district court⁷ or BAP.⁸ Under these facts, the appellant's mootness concern and ability to obtain meaningful relief if the appellant is successful on the merits of the appeal are not alleviated. The difficulty for the appellant exists because a court of appeals' appellate jurisdiction to review a district court or BAP denial of the stay is suspect, as the denial of a stay may not be an appealable final order,⁹ or an appealable injunction,¹⁰ or warrant the issuance of a writ of mandamus,¹¹ and is not authorized by the Bankruptcy Rules¹² or the Federal Rules of Appellate Procedure.¹³

There appears to be only one scholarly article, published thirty years ago, that has meaningfully addressed this specific issue — the appellate jurisdiction of the courts of appeals in this context — in detail.¹⁴ Although

6. See also, *infra* notes 95–98 and accompanying text. See generally FED. R. BANKR. P. 8025 (explaining that if the appellant has an adverse ruling from the district court or BAP, and the appellant appeals that order to the court of appeals, a stay will need to be sought to alleviate mootness concerns on the leg of the appeal).

7. 28 U.S.C. § 158(a) (2018) (granting jurisdiction over bankruptcy appeals to district court).

8. *Id.* § 158(b) (granting jurisdiction over bankruptcy appeals to BAP, if applicable); see *id.* § 158(d)(2) (detailing that in a direct appeal the appellant will have the opportunity to seek a stay from the bankruptcy court and the court of appeals); see also FED. R. BANKR. P. § 8007(a)–(b) (providing authority to seek stay from bankruptcy court and from the court of appeals in a direct appeal). This article does not address a direct appeal from the bankruptcy court to the court of appeals.

9. See discussion *infra* Section II.A.1 (discussing the ability to appeal under 28 U.S.C. § 158(d)(1)).

10. See *infra* notes 53–79 and accompanying text (describing the circuit split with respect to review as an interlocutory order).

11. See discussion *infra* Section II.D (discussing the scope of reviewability under the Bankruptcy Rules).

12. See discussion *infra* Sections II.D.2–3 (differentiating the powers granted to appellate courts under the Bankruptcy Rules).

13. See *infra* notes 102–03 and accompanying text (noting the jurisdictional limitations of authorizing review under the Federal Rules of Appellate Procedure).

14. See James M. Grippando, *Circuit Court Review of Orders on Stays Pending Bankruptcy Appeals to U.S. District Courts or Appellate Panels*, 62 AM. BANKR. L.J. 353, (1988) (noting the issue has gained more attention in recent years in practitioner oriented journals); see, e.g., Gilbane, *supra* note 2, at 38 (recognizing the “dilemma” facing appellants in bankruptcy appeals in the denial of stay context with confirmation orders); Brian Wells, *Appeal-Proof: Court of Appeals Jurisdiction Over Order Concerning Stays Pending Appeal*, WEIL BANKR. BLOG (Sept. 27, 2012) [hereinafter *Appeal-Proof*], <https://business-finance-restructuring.weil.com/jurisdiction/appeal->

Grippando's article provided a solid baseline and clear guidance on how to analyze this issue, it is still unsettled, and divergent courts of appeals' case law on this issue has developed and continues to arise.¹⁵ The different approaches employed the courts of appeals and disparate ability of parties to review the denial of a stay or request a stay from the courts of appeals raise access to justice concerns.¹⁶

This Article is organized as follows: Part I examines potential bases of appellant jurisdiction for a court of appeals to review the denial order of stay pending appeal by a district court or BAP to consider a motion to stay the bankruptcy court order is set forth. Part II offers a critique of the divergent approaches and the underlying legal issues in the stay analysis employed by the courts of appeals and the resulting issue of access to justice they raise. Part III suggests a detailed reform that will ensure uniformity in terms of access to justice in seeking a stay from the courts of appeals when a stay is denied by the district court or BAP. Finally, Part IV provides conclusions and suggestions.

II. JURISDICTIONAL ARGUMENTS TO REVIEW DENIAL OF STAY

A. Review as a Final Decision

1. Not a Final Decision under 28 U.S.C. § 158(d)(1)

Under 28 U.S.C. § 158(d)(1),¹⁷ in a bankruptcy appeal to the district court¹⁸ or BAP,¹⁹ “[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) [by district courts] and (b) [by BAPs] of this section.”²⁰ The

proof-court-of-appeals-jurisdiction-over-orders-concerning-stays-pending-appeal/
Brian Wells, *Court Refuses to Apply “Divestiture Doctrine” in Denying Creditors’ Committee Stay Pending Appeal*, WEIL BANKR. BLOG (May 23, 2018), <https://business-finance-restructuring.weil.com/jurisdiction/court-refuses-to-apply-divestiture-doctrine-in-denying-creditors-committee-stay-pending-appeal/>.

15. See *infra* p. 29.

16. See *infra* notes 151–52 and accompanying text. See generally Portia Pedro, *Stays*, 106 CALIF. L. REV. 869 (2018) (providing a detailed analysis of problems with the current state of the law pertaining to obtaining a stay pending appeal in the non-bankruptcy context, recognizing the procedural problems and hurdles with obtaining review of a denial of stay and the significant impact that has on parties and the legal system); *id.* (implying that the issues raised, and concern for a meaningful opportunity to appeal on the merits, highlight the broader problem of how a lack of review of a denial of stay can constitute an access to justice issue).

17. 28 U.S.C. § 158(d)(1) (2018).

18. See *id.* § 158(a) (detailing jurisdiction of district court in bankruptcy appeals).

19. See *id.* § 158(b) (detailing jurisdiction of BAP in bankruptcy appeals).

20. *Id.* § 158(d)(1); see *In re Gugliuzza*, 852 F.3d 884, 889–91 (9th Cir. 2017) (“28

only basis for a court of appeals to have jurisdiction under § 158(d)(1) is if both the bankruptcy court and district court or BAP have entered final decisions.²¹ For a judgment or order to be final, it must be “one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.”²²

A deny of a stay by a district court or BAP does not end the litigation on the merits. Such an order is typically entered very early in a pending appeal, and, although issues in the underlying appeal are considered in the context of a stay analysis,²³ an order of a stay pending appeal does not resolve the merits of the appeal.²⁴ It simply determines whether the stay is warranted at that juncture in the case.²⁵ The denial of a stay is simply an interlocutory order.²⁶ Therefore, as expressly found by the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, a denial of a stay by the district court or BAP is not an appealable final decision, judgment, order, or decree.²⁷

U.S.C. § 158(d) gives us jurisdiction specific to bankruptcy decisions of district courts and decisions of three-judge bankruptcy appellate panels (or BAPs).”); *see also In re The Celotex Corporation*, 700 F.3d 1262, 1265 (11th Cir. 2012) (internal quotations omitted) (quoting *In re F.D.R. Hickory House, Inc.*, 60 F.3d 724, 725 (11th Cir. 1995)) (stating that the court of appeals “. . . has jurisdiction over only final judgments and orders entered by a district court . . . sitting in review of a bankruptcy court, *see* § 158(d).”).

21. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1299 (7th Cir. 1997) (noting that the court appeals has jurisdiction “under § 158(d) only if both the bankruptcy and district court orders [are] final”).

22. *See In re The Celotex Corporation*, 700 F.3d at 1265 (citations omitted).

23. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (considering four factors in determining whether to issue a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (applying these four factors) (stating that of these factors, the first two factors — including the success on the merits — “are the most critical”).

24. *See id.* at 776 (stating that stays are granted pending appeal, not post-appeal).

25. *See id.*

26. *See In re Gugliuzza*, 852 F.3d 884, 890 n.5 (9th Cir. 2017).

27. *See Walker v. Fed. Nat’l Mortg. Ass’n*, No. 91-3883, 948 F.2d 1291, at *1291 (6th Cir. Nov. 22, 1991) (appearing in an unpublished opinion table); *In re Atencio*, 913 F.2d 814, 816 (10th Cir. 1990); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985); *In re Teleport Oil Co.*, 759 F.2d 1376, 1377 (9th Cir. 1985); “*see also Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (stating that the holding of these courts — the denial of a stay by a district court or bankruptcy appellate panel is not a final order under 28 U.S.C. § 158(d) — was not abrogated by the Supreme Court ruling); *see, e.g., In re Sinha*, No. 13-60100, 605 Fed. Appx. 664, at *664 (9th Cir. May 22, 2015) (noticing that the earlier Ninth Circuit case of *Teleport Oil* was abrogated on grounds other than the holding that a denial of a stay is not a final order and dismissing the appeal of the denial of stay by the bankruptcy appellant panel because said order was not a final order and the court of appeals did not have jurisdiction over the appeal).

It is well settled that denying a stay pending appeal in a bankruptcy proceeding by a district court or bankruptcy appellant panel is not a final order.²⁸ The Fifth, Sixth, Ninth, and Tenth Circuits have all expressly found that a district court denial of a stay pending appeal in a bankruptcy appeal is not a final order under 28 U.S.C. § 158(d)(1).²⁹ Importantly, the decisions of the Fifth, Sixth, Ninth, and Tenth Circuits were abrogated to the extent said decisions held that 28 U.S.C. § 158(d)(1) was the exclusive basis of appellate jurisdiction for courts of appeals in bankruptcy appeals. The Supreme Court found that 28 U.S.C. § 158(d), which grants courts of appeals jurisdiction over district court final orders when the district court sits as an appellate court in bankruptcy cases, did not limit interlocutory review of district court orders under 28 U.S.C. § 1292, provided the requirements of that statute are satisfied.³⁰ The Seventh Circuit has also expressly held that “stay denials at the bankruptcy and district court levels were not final order for purposes of § 158(a) or (d)”³¹

2. Final Decision under Pragmatic Analysis

When addressing this issue, the Third Circuit has found that a district court order denying a stay pending appeal is not technically a final judgment, which is consistent with other circuit courts. The Third Circuit considers “finality” under § 158(d)(1) on a pragmatic basis.³² Under this approach, whether a particular order denying a stay pending appeal is an appealable order under § 158(d)(1) turns on the facts of the underlying bankruptcy case on appeal, and not the denial of stay order itself. The Third Circuit applied this pragmatic analysis and in so doing dismissed appeals of district court denials of a stay for lack of jurisdiction in some, but not all, cases.³³

28. See, e.g., *In re Dalton*, 733 F.2d 710, 714 (10th Cir. 1984).

29. See *Walker*, 948 F.2d at *1291; *In re Atencio*, 913 F.2d at 816; *In re Barrier*, 776 F.2d at 1299; *In re Teleport Oil Co.*, 759 F.2d at 1377.

30. See *Conn. Nat'l Bank*, 503 U.S. at 253–54.

31. See also *In re Forty-Eight Insulations, Inc.*, 115 F.3d at 1299–1300 (considering whether jurisdiction exists over the interlocutory stay denial order under § 1292); *infra* notes 55–57 and accompanying text (analyzing the Seventh Circuit analysis of this issue).

32. See *In re Revel AC, Inc.*, 802 F.3d 558, 566–67 (3d Cir. 2015).

33. Compare *Black Horse Capital Master Fund Ltd. v. JP Morgan Chase Bank, N.A.*, No. 12-1263, at *4–5 (3d Cir. Feb. 10, 2012) (dismissing appeal of denial of stay order by district court for lack of jurisdiction in that it was not a final order under § 158(d) and the court went on and rejected the argument that the denial of a stay was an injunction and appealable under § 1292(a)(1)), with *In re Revel AC, Inc.*, 802 F.3d at 566–67 (exercising jurisdiction over an appeal of the district court denial of a stay in the context of a sale under 11 U.S.C. § 363(m) because once the sale closed there would be no recourse for the parties challenging the sale as the terms of the sale were not subject to any modification on appeal).

3. Collateral Order Doctrine Exception to Finality

Although the denial of a stay is not a final decision unless a court applies a pragmatic approach based on the facts of a specific case, there is an argument that it may be reviewable by a court of appeals under the collateral order doctrine, an exception to the final judgment rule employed by the courts of appeals in other procedural contexts.³⁴ This approach is similar to the pragmatic approach to finality applied by the Third Circuit.³⁵ Under the collateral order doctrine, the court of appeals exercises discretion to review a district court order, and arguably a BAP order,³⁶ that is not final.³⁷ The collateral order exception permits appeals of otherwise non-final orders which:

(1) finally determine claims collateral to and separable from the substance of other claims in the action; (2) cannot be reviewed along with the eventual final judgment because by then effective review will be precluded and rights conferred will be lost, and (3) are too important to be denied review because they present a serious and unsettled question of law.³⁸

The difficulty with applying the collateral order exception doctrine to a denial of stay order by the district court or a BAP is that a showing on all three factors, which is required,³⁹ is quite doubtful. A showing on one or two factors is possible, but all three seem to be a nearly insurmountable burden in the stay denial context. This is particularly true because the collateral order exception is a narrow exception limited to those cases that are “too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”⁴⁰

34. See, e.g., *In re King Memorial Hospital, Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985) (recognizing the exception to the final judgment rule).

35. See *supra* notes 25–26 and accompanying text.

36. 28 U.S.C. § 158(d) (2018). Courts of appeals have jurisdiction over final orders of a BAP under 28 U.S.C. § 158(d). Presumably the collateral order doctrine would apply and provide a jurisdictional basis for a court of appeals to have jurisdiction over a non-final judgment of the BAP if the requirements of the doctrine were satisfied. See *id.*

37. *McElmurry v. U.S. Bank Nat’l Ass’n*, 495 F.3d 1136, 1140 (9th Cir. 2007) (“Under the collateral order exception, an appellate court ‘may exercise its § 1291 jurisdiction to review a district court order that is not a final decision.’”).

38. *In re King Memorial Hospital, Inc.*, 767 F.2d at 1510; see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 (1978) (footnote omitted) (detailing the three factors required to satisfy the collateral order doctrine).

39. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) (noting that a party must show all three elements of the collateral source doctrine to establish jurisdiction).

40. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

First, a denial of stay order does not “finally determine claims collateral to and separable from the substance of other claims.”⁴¹ The only determination of the denial of stay order is that the burden of proof has not been met by the appellant or applicant to warrant the issuance of the stay.⁴² The underlying claims on the merits of the appeal are not resolved, although they are considered as part of the analysis of whether a stay is warranted.⁴³ Even though the underlying claims are considered, there is no final determination of the merits of the underlying claims.⁴⁴

Second, the denial of the stay does not preclude a review of the underlying claims as the underlying claims will be considered in the appeal on the merits. There is an argument that certain rights may be lost, particularly if the issue becomes moot by the time it reaches the appellate court. However, the mootness argument is really part of the four-factor stay test the district court or bankruptcy appellate panel considered in its denial of the stay, i.e. the irreparable harm factor if a stay is not issued. With a bankruptcy court and the district court or BAP already likely finding no irreparable harm — i.e. mootness in underlying appeal in denial of a stay — it is therefore unlikely in most cases that a court of appeals finding of that an effective review will be precluded and rights conferred lost.⁴⁵ In this context, the denial of stay would be unreviewable, but the underlying rights would not be unreviewable as the appeal is still pending.⁴⁶ It will be hard to show that the “right at stay” will be destroyed, particularly when two other courts will have engaged in a similar analysis in the context of an irreparable harm analysis.⁴⁷

Lastly, the legal analysis and framework to consider a stay in the federal

41. *In re King Memorial Hospital, Inc.*, 767 F.2d at 1510.

42. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (holding that the burden is on the appellant or applicant to show that the issuance of a stay is warranted because “[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.”).

43. *See id.* at 434 (stating that one important factor a court considers in a stay request is “whether the stay applicant has made a strong showing that he is likely to succeed on the merits,” which will involve an analysis of the underlying merits of the appeal, but not a final resolution of the merits).

44. *See id.* at 432 (“The whole idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits [of the underlying case].”).

45. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)) (holding that an order is effectively unreviewable when “the legal and practical value of [the right at stake will] be destroyed if . . . not vindicated before trial.”).

46. *See id.* at 800 (“[W]e have found denials of only three types of motions to be immediately appealable.”).

47. *See id.*

courts is well-settled.⁴⁸ The underlying legal issues in the appeal may present serious or unsettled questions of law, but those are not conclusively resolved or decided by a denial of stay order. The denial of the stay, provided the district court or bankruptcy appellate panel employed the four-factor analysis as required by the Supreme Court, will likely not raise any serious or unsettled questions of law.

4. *The Forgay-Conrad Doctrine Exception to Finality*

Another narrow exception permitting an appeal of a non-final order is the Forgay-Conrad Doctrine that arose in an 1848 Supreme Court case⁴⁹ involving an order in a bankruptcy case requiring the defendants to immediately turnover land and slaves.⁵⁰ The defendants appealed the order, which the plaintiffs sought to dismiss on the grounds that the order was not a final order.⁵¹ The Supreme Court disagreed and considered it final because with “the immediate transfer of property . . . the losing party will be subjected to undue hardship and irreparable injury if appellate review must wait until the final outcome of the litigation.”⁵² A party seeking to invoke this doctrine will need to show that the order at issue directs immediate delivery of property and the losing party is subject to irreparable injury without an immediate appeal.⁵³

The Forgay-Conrad Doctrine would arguably be applicable in the appeal of a denial of a stay by the district court or the BAP,⁵⁴ provided the underlying bankruptcy court order required the disposition of property that fits into the category of an irreparable injury.⁵⁵ Whether the Forgay-Conrad Doctrine will warrant review of a denial of stay by the district court or BAP

48. See also *Pedro*, *supra* note 16, at 892–96. But see *supra* note 23 (stating that although the four factors of the analysis are generally consistent, it has been recognized that the application of these factors by the federal courts is quite inconsistent).

49. *Grippando*, *supra* note 14, at 367–68 (noting the origin of the doctrine and its potential application to an appeal of a denial of stay to the court of appeals).

50. *Forgay v. Conrad*, 47 U.S. 201, 201–02 (1848); see also Hon. Joan N. Feeney, Mary P. Sharon & James M. Wilton, Address at the Northeast 23rd Annual Bankruptcy Conference: Appealing Propositions: (Most) Everything You Need to Know About Bankruptcy Appeals, (July 14, 2016) (transcript available on Westlaw at 071416 ABICLE 227) (analyzing the case and application of the Forgay-Conrad Doctrine in the bankruptcy generally).

51. Feeney et al., *supra* note 50 (citing *Forgay v. Conrad*, 47 U.S. 201, 203 (1848)).

52. See *id.* (citing *Forgay v. Conrad*, 47 U.S. 201, 203–04 (1848)).

53. See *Vylene Enters. v. Naugles, Inc.*, 968 F.2d 887, 895 (9th Cir. 1992).

54. See *Grippando*, *supra* note 14, at 367 (presuming a court of appeals would have jurisdiction over a non-final order of a BAP if the Forgay-Conrad rule requirements were met as with the collateral order doctrine).

55. See *id.*

will depend on how a particular circuit interprets the doctrine — narrowly or broadly.⁵⁶ The narrow or broad application, coupled with the underlying facts and impact of the underlying bankruptcy court order, determines whether the Forgay-Conrad Doctrine can be employed to invoke a court of appeals jurisdiction over the denial of a stay order by a district court or BAP.⁵⁷

B. Review as an Interlocutory Order

Beyond the argument to review the denial of a stay — an interlocutory order — under the common law exceptions to finality outlined above,⁵⁸ appellate review is possible under § 1292(a)(1).⁵⁹ The Supreme Court held that courts of appeals have appellate jurisdiction in bankruptcy appeals under both §§ 158(d) and 1292.⁶⁰ Therefore, even if jurisdiction over the denial of stay is not available as a final decision under § 158(d), it may be available under § 1292 to review a district court order. This basis of jurisdiction is not available to review denial of a stay order by a BAP as § 1292(a)(1) does not provide jurisdiction over interlocutory BAP orders.⁶¹

Although this basis for appellate jurisdiction from district court orders by the court of appeals is certainly available generally in bankruptcy appeals, it is uncertain in the context of a denial of stay. Under § 1292(a)(1) the court of appeals has jurisdiction over “[i]nterlocutory orders of the District Courts . . . granting, continuing, modifying, refusing or dissolving injunctions”⁶² For a court of appeals to have jurisdiction to consider the denial of a stay order, it must fit within the parameters of 28 U.S.C.

56. See Feeney, *supra* note 50 (describing how the circuit courts apply the doctrine in slightly different ways); *id.* (citing *HSBC Bank USA, N.A. v. Townsend*, 793 F.3d 771, 779 (7th Cir. 2015), cert. denied, 136 S. Ct. 897 (2016)) (applying the doctrine narrowly, requiring both delivery of property and irreparable harm); *id.* (citing *United States v. Kouri-Perez*, 187 F.3d 1, 11 (1st Cir. 1999)) (noting the First Circuit considers the Forgay-Conrad Doctrine “as articulating a ‘practical finality’ doctrine, which permits interlocutory appeals from ‘immediate payment’ orders which threaten a special risk of harm to the appellant.”).

57. *Id.*

58. See *supra* Section II.A.3 and accompanying text.

59. See *In re Forty-Eight Insulations Inc.*, 115 F.3d 1294, 1299–1300 (7th Cir. 1997) (analyzing the basis for jurisdiction and finding that if the requirements of 28 U.S.C. § 1292(a)(1) are met, appellate jurisdiction over denial of stay exits).

60. *Id.* at 1299–1300 (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

61. *In re Lievsay*, 118 F.3d 661, 663 (9th Cir. 1997) (noting that neither 28 U.S.C. §§ 1291 nor 1292 applies to appeals from a BAP to the court of appeals.).

62. 28 U.S.C. § 1292(a)(1) (2018).

§ 1292(a)(1).⁶³

The Seventh Circuit applied § 1292(a)(1) and reviewed the interlocutory order denying a stay to determine if it had *both* the effect of an injunction as well as the risk of “serious, perhaps irreparable, consequences.”⁶⁴ The Seventh Circuit found the requirements satisfied in the context of an underlying bankruptcy court order on appeal to the district court that would require a distribution that would deplete a trust.⁶⁵ The distribution, if not stayed, would present the risk of serious consequences to the appellant claimants, and thus, jurisdiction was found over the denial of stay by the district court under § 1292(a)(1).⁶⁶ Importantly, the Seventh Circuit in its analysis of satisfying § 1292(a)(1) did not focus on the effect of the order on appeal to the Seventh Circuit, which was the denial order.⁶⁷ Rather, the court focused on the effect of the underlying bankruptcy court order, which was still on appeal at district court and not even before the Seventh Circuit.⁶⁸

The Seventh Circuit approach is problematic and exemplifies how this basis for jurisdiction is suspect. If a court of appeals focuses solely on the actual order on appeal from district court — the deny of stay order — that order will likely not fit within § 1292(a)(1).⁶⁹ The denial of the stay order does not grant or deny an injunction — it merely lets the lower order remain in effect. The status quo of the procedural posture of the underlying case is not disturbed. For a court of appeals to find that § 1292(a)(1) applies to the denial of a stay, the court of appeals must look at the effect of the bankruptcy court that remains on appeal as the Seventh Circuit did.⁷⁰ It is critical to the analysis that the bankruptcy court order on appeal at the district court is not before the court of appeals.⁷¹ The court of appeals does not have jurisdiction

63. See *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction.”); see also *Forty-Eight Insulations*, 115 F.3d at 1299–300.

64. See *Forty-Eight Insulations*, 115 F.3d at 1299–300 (internal quotations omitted).

65. See *id.*

66. See *id.*

67. See *id.* at 1301.

68. See *id.* at 1298–99 (stating that the denial order from the district court that denied stay was not final).

69. See 28 U.S.C. § 1292(a)(1) (2018) (stating that an appeals court may have jurisdiction over interlocutory orders when a district court grants, continues, modifies, refuses, or dissolves injunctions).

70. See *In re Forty-Eight Insulations*, 115 F.3d at 1300 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 83–84 (1981) (stating that a court of appeals may review an interlocutory order under § 1292(a)(1) if the order has the effect of an injunction as well as “serious, perhaps irreparable, consequences”).

71. See *id.* at 1298–99 (noting that both the order from the bankruptcy court as well

over the bankruptcy court order on appeal; rather, the order on appeal is the denial stay court order, not the bankruptcy court order.⁷² Conceptually, it is hard to rationalize finding appellate jurisdiction over a stay denial order based on an order not before the court of appeals, which itself is on appeal to the district court.

Like the Seventh Circuit, the Third Circuit has engaged in a similar analysis under 28 U.S.C. § 1292(a)(1) to determine if a denial of stay order is appealable as an interlocutory order.⁷³ In the *Black Horse* case, the appellants sought a stay of confirmation proceedings, which the bankruptcy and district courts denied.⁷⁴ The stay was sought in the underlying appeal of an adverse judgement in an adversary proceeding that found that \$1.5 billion in preferred securities were owned by the debtor and not the appellants.⁷⁵ The appellants' arguments that the denial of stay was a final order under § 158(d) or that it fit with the collateral order exception were rejected.⁷⁶ And, central to the analysis at hand, the Third Circuit rejected the argument that the denial of stay was an injunction under § 1292(a) in that the denial order "was not designed to accord or protect anything in more than a temporary faction."⁷⁷ The exact basis for the Third Circuit's denial of jurisdiction under § 1292(a) is not explained, but it seems that the Third Circuit focused more on the denial order and less on the underlying bankruptcy court order.⁷⁸ If the focus is on the denial order to determine jurisdiction, a finding of no jurisdiction under § 1292(a) is expected.

The Second Circuit expressly considered this jurisdictional basis — § 1292(a) — in *Barretta v. Wells Fargo Bank, N.A.*⁷⁹ The underlying bankruptcy appeal was of a debtor-appellant appealing the lifting of the

as the order from the district court were not final and, as such, remain with the district court).

72. *Id.* at 1299.

73. *See Black Horse Capital Master Fund Ltd. v. JP Morgan Chase Bank, N.A.*, No. 12-1263, at *4-5 (3d Cir. Feb. 10, 2012) (finding no jurisdiction of denial of stay order by district court under § 158(d) and the court went on and considered, but rejected the argument that the denial of a stay was an injunction and appealable under § 1292(a)(1)); *see also In re Revel AC, Inc.*, 802 F.3d 558, 567 (3d Cir. 2015) (finding that the denial of a stay by the district court was a final order under § 158(d) employing a pragmatic approach, and, therefore did not reach the question of whether the court had jurisdiction to review a stay denial under § 1292(a)(1)); *id.* (indicating that jurisdiction may be found under § 1292(a)(1) "where the underlying appeal could become equitably moot").

74. *See Appeal-Proof*, *supra* note 14.

75. *See id.*

76. *See id.*

77. *Id.*

78. *See id.*

79. *Barretta v. Wells Fargo Bank, N.A.*, 693 Fed. Appx. 26, 27 (2d Cir. 2017).

automatic stay of the debtor-appellant's home.⁸⁰ The debtor-appellant sought a stay of that order lifting the automatic stay from the bankruptcy and district courts, which were both denied.⁸¹ The Second Circuit recognized that "it could be argued that [the court of appeals] ha[d] jurisdiction" over the denial of a stay motion by district court under § 1292(a)(1) in a bankruptcy appeal.⁸² However, the Second Circuit did not unequivocally find it had jurisdiction of the denial stay order under § 1292(a)(1); rather, the court noted the argument for jurisdiction and went on to find that "to the degree our jurisdiction is in doubt, we would reach the same outcome by exercising hypothetical jurisdiction."⁸³

The Second Circuit's failure to unequivocally find jurisdiction under § 1292(a)(1) provides two valuable thoughts for the analysis.⁸⁴ First, finding jurisdiction under § 1292(a)(1) clearly gave the court pause.⁸⁵ The basis for the pause is not expressly articulated.⁸⁶ Perhaps the court, without so writing, was aware of the conceptual problem with applying § 1292(a)(1) to denial of stay orders in the bankruptcy context, as noted above in analysing the Seventh and Third Circuits application of § 1292(a)(1).⁸⁷

Secondly, the Second Circuit provided an additional basis for possible appellate jurisdiction of a denial of a stay order by a district court in a bankruptcy appeal — hypothetical jurisdiction.⁸⁸ Under this judicially created doctrine, courts assume jurisdiction for the purpose of deciding the case on the merits even when there are jurisdictional objections.⁸⁹ The courts employing this doctrine apply it when "(1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied."⁹⁰ When the Second Circuit applied the doctrine to a denial of stay order, it found that both elements were satisfied: first, the merits were readily resolved as denial of stay by district court was correct and affirmed; second, the prevailing party on the merits

80. *Id.* at 27.

81. *See id.*

82. *Id.*

83. *Id.*

84. *See id.* (holding that the conclusion that the Second Circuit had jurisdiction over the case was not unequivocal).

85. *See id.*

86. *Id.* at 27–28.

87. *See supra* notes 55–69 and accompanying text.

88. *Barretta*, 693 Fed. Appx. at 27 (citing *Marquez-Almanzar v. I.N.S.*, 418 F.3d 210, 216 n.7 (2d Cir. 2005)) ("But, in any event, to the degree our jurisdiction is in doubt, we would reach the same outcome by exercising hypothetical jurisdiction.").

89. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998).

90. *Id.* at 93.

was the same as if appellate jurisdiction were denied because the same party objected to jurisdiction and to stay at the lower court.⁹¹

The Supreme Court has not endorsed hypothetical jurisdiction.⁹² A court entering an order “when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.”⁹³ Applying this doctrine to a denial of a stay order by district court, when there are specific statutory provisions that address the requisites of jurisdiction, is an ultra vires act by the court — the kind which the Supreme Court has been critical of.⁹⁴

C. Review under the All Writs Act

The All Writs Act provides that “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁹⁵ As such, the All Writs Act can serve as a basis for a court of appeals to consider issuing a writ of mandamus ordering the stay of a bankruptcy court order that is on appeal before a district court or BAP that has denied such a stay.⁹⁶ Effectively, the argument in this context is one of mootness.⁹⁷ The writ directing the district court or BAP to issue a stay is necessary to aid the courts of appeals in their respective jurisdictions over the underlying appeal if it reaches the court of appeals.⁹⁸ And, if a writ is not issued, then the court of appeals will not be able to provide relief to the appellant if the appellant is successful in the underlying appeal.⁹⁹

91. See, e.g., *Barretta*, 693 Fed. Appx. at 27–28 (stating that the doctrine will only apply when a party “has made a strong showing that he is likely to succeed on the merits” and the prevailing party would “prevail on the merits of her appeal”).

92. *Steel Co.*, 523 U.S. at 93–102 (critiquing the “doctrine of hypothetical jurisdiction”).

93. *Id.* at 101–02.

94. See *id.*; *Tenet v. Doe*, 554 U.S. 1, 12 (2005) (Stevens, J., concurring).

95. 28 U.S.C. § 1651 (2018).

96. See, e.g., *In re Barrier*, 776 F.2d 1298, 1299–1300 (5th Cir. 1985) (finding that a mandamus, a drastic remedy, was appropriate because the appellants had no other avenue for review of the bankruptcy and district court’s denial of a stay pending appeal, there was the potential for irreparable harm, and the lower courts abused their discretion in denying a stay).

97. See, e.g., *In re Syncora Guarantee Inc.*, 757 F.3d 511, 516 (6th Cir. 2014) (“The district court stayed Syncora’s appeal ‘[i]n light of the prospect that any decision of the bankruptcy court may be rendered moot by a subsequent decision of the Sixth Circuit Court of Appeals regarding appellant’s eligibility for Chapter 9 bankruptcy.’”).

98. See *id.* at 515 (quoting *Blay v. Young*, 509 F.2d 650, 651 (6th Cir. 1974) (noting that the All Writs Act provides authority for the court of appeals to “‘issue writs of mandamus in aid of its existing jurisdiction or in aid of its future appellate jurisdiction’”).

99. See *id.* at 517 (citing *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943) (“An orderly bankruptcy process depends on a concomitantly efficient appeals process,

Courts consider a host of non-binding factors and employ a flexible approach to the issuance of a writ of mandamus as it is a “safety valve . . . in the final-judgment rule.”¹⁰⁰ The factors include the following:

- (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal;
- (3) whether the district court’s order is clearly erroneous as a matter of law;
- (4) whether the district court’s order is an oft repeated error or manifests a persistent disregard of the federal rules; and
- (5) whether the district court’s order raises new and important problems or issues of first impression.¹⁰¹

In most bankruptcy appeals where the district court or BAP has denied a stay, it will be difficult to make a convincing showing of the factors.¹⁰²

The strongest factors to support a writ will likely be that there are no other means of relief and that damage or prejudice cannot be corrected on appeal — leading again to the mootness argument.¹⁰³ The trouble with this argument is when an appellant is petitioning for a writ, the appellant would already have had an opportunity to seek a stay from the bankruptcy and district court or BAP.¹⁰⁴ Therefore, the argument that the appellant had no other means of relief is weak.

Additionally, it is quite possible that both the bankruptcy court and the district court or BAP find no irreparable harm warranting the issuance of a stay. The irreparable harm analysis is quite similar to the mootness factor in the petition for a writ.¹⁰⁵ It is unlikely that both the lower courts committed errors on this point, and the ability to convince a panel of judges on the court of appeals that these factors warrant the issuance of a writ will be an uphill battle.

and the district court’s stay of Syncora’s appeal improperly thwarts both processes.”).

100. *In re Sch. Asbestos Litig.*, 977 F.2d 764, 773 (3d Cir. 1992) (quoting *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988)).

101. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (citation omitted).

102. *See, e.g., Appeal-Proof, supra* note 14 (“[L]itigants seeking to appeal a bankruptcy court order face an uphill process and may have difficulty bringing the ‘moving train’ to a stop.”).

103. *See supra* notes 1–2, 87 and accompanying text.

104. *See, e.g., Appeal-Proof, supra* note 14 (“Frequently, courts considering whether an appeal is equitably moot will look to see whether the appellant diligently sought to preserve its rights, for example, by seeking a stay pending appeal.”).

105. *See Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (stating that the probability of success argument is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay).

The remaining three factors will almost never be satisfied in the denial of a stay by a district court or BAP. The denial is a discretionary decision expressly provided for in the Bankruptcy Rules.¹⁰⁶ There is no “right” to a stay.¹⁰⁷ Showing that the lower court committed a clear error of law or disregard for the rules is a high hurdle. Furthermore, it would be unusual for a stay denial to raise new or important issues of first impression. Even though underlying legal issues will be addressed by the lower court in the denial of the stay,¹⁰⁸ any findings on those legal issues are merely interlocutory in nature and do not resolve the merits. To the extent the underlying appeal raises new or important issues of first impression, those have yet to be decided on the merits and are not decided in the denial of stay context.

Thus, even though the approach to analyzing a petition for a writ of mandamus is flexible and the power of the courts of appeals under the All Writs Act is broad, the issuance of a writ is a highly extraordinary equitable remedy¹⁰⁹ that likely is not warranted in most bankruptcy appeals in the context of a district court or BAP denial of a stay.¹¹⁰ Even so, at least one court of appeals has issued a writ of mandamus in this context.¹¹¹ Among the various jurisdictional arguments for review of the denial of a stay or for requesting a stay by a court of appeals, the All Writs Act is a relatively strong basis to get the request before the court of appeals, but not necessarily to have a writ granted.¹¹²

D. Review under the Rules of Procedure

1. Federal Rules of Appellate Procedure

Rule 8 of the Federal Rules of Appellate Procedure provides for “a stay of

106. Grippando, *supra* note 14, at 372.

107. *Id.*

108. *See supra* note 23 and accompanying text.

109. The Supreme Court has noted the extraordinary nature of a writ of mandamus. *See Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 107 (1967)) (stating that the writ of mandamus is “one of ‘the most potent weapons in the judicial arsenal.’”); *see also In re Syncora Guarantee Inc.*, 757 F.3d 511, 515 (6th Cir. 2014) (noting that mandamus is an extraordinary remedy that is infrequently used).

110. *See, e.g., Grippando, supra* note 14, at 371 (noting that invoking the court of appeals jurisdiction to consider issuing a writ is much easier than actually obtaining a writ in a bankruptcy appeal where the merits of the appeal have not been decided).

111. *In re Barrier*, 776 F.2d 1298, 1299–1300 (5th Cir. 1985).

112. Grippando, *supra* note 14, at 372–74 (discussing the distinction between obtaining a review by the court of appeals under the All Writs Act and the stringent requirements for the issuance of a writ in this context).

the judgment or order of a district court pending appeal . . . [,]” and such relief ordinarily must be brought in the district court before the court of appeals.¹¹³ Under Rule 8, a court of appeals could consider a stay of the district court or BAP denial of a stay — the order that is on appeal to the court of appeals.¹¹⁴ Rule 8 of the Federal Rules of Appellate Procedure is applicable to an interlocutory denial of stay order.¹¹⁵ In the context of an appeal of the denial of a stay by the district court or BAP, that appeal is not a “bankruptcy appeal”; it is an appeal of an interlocutory order that arises in the bankruptcy appeal process, but the actual appeal is an appeal of an interlocutory order of the district court or BAP.¹¹⁶ However, importantly, Rule 8 does not provide a procedure for a court of appeals to grant a stay of a bankruptcy court order that has been appealed to and is pending in the district court or the BAP.¹¹⁷ The only relief provided by Rule 8 is to stay the effect of the district court or BAP denial of a stay.¹¹⁸ Such relief, even if granted by a court of appeals, would have no impact on the underlying bankruptcy court order as it would still be in effect.¹¹⁹ Rule 8 does not provide a basis to seek a stay of an order — the bankruptcy court order — that is not on appeal to the court of appeals.¹²⁰

2. Bankruptcy Rule 8007

The District Court or BAP have already denied a stay order for the appellants seeking review of the denial; per Bankruptcy Rule 8007, the bankruptcy court has likely denied a stay order as well.¹²¹ Under Bankruptcy Rule 8007(b), when the bankruptcy court order on appeal is still pending in

113. FED. R. APP. P. 8(a)(1)–(2) (referencing to district court includes a BAP, if applicable); *see also* FED. R. APP. P. 6(b)(1)(C).

114. *See* FED. R. APP. P. 8.

115. *See id.*

116. *See id.*

117. *See* FED. R. APP. P. 8.

118. *See In re Barrier*, 776 F.2d at 1299 (rejecting consideration of a stay of a bankruptcy court order under Rule 8(a) of the Federal Rules of Appellate Procedure because “the rule only authorizes stays pending appeals to this court.” The bankruptcy court order was not on appeal to the court, only the district court interlocutory order denying the stay).

119. *See Deering Miliken Inc., v. F.T.C.*, 647 F.2d 1124, 1128–29 (D.C. Cir. 1978) (stating that unless a stay is granted by the court rendering the judgement or the court to which the appeal is taken, the judgement remains operative).

120. *See* FED. R. APP. P. 8.

121. *See* FED. R. BANKR. P. 8007(a)–(b) (explaining the reasoning and procedure behind filing a stay order in bankruptcy court); *see also supra* note 4 and accompanying text (detailing the procedural process typically involving an initial request for a stay from the bankruptcy court).

the district court or the BAP, a request to stay such order pending its appeal may be made only in the district court or BAP.¹²² Asking the court of appeals to review the denial of a stay at this posture is effectively asking the court of appeals to usurp the district court or BAP's authority and infringe upon the district court or BAP's jurisdiction over the bankruptcy court order.¹²³

Moreover, seeking a stay of the bankruptcy court order in this procedural posture is tantamount to a direct appeal of the underlying bankruptcy court order to the court of appeals. That procedural route — a direct appeal of a bankruptcy court order to the court of appeals — is available to bankruptcy appellants.¹²⁴ In that procedural position, an appellant could make a motion for a stay under Bankruptcy Rule 8007(b) that expressly provides that such a motion can be made in the court where the appeal is pending — the court of appeals.¹²⁵ If appellants do not choose to take a direct appeal, appellants should not circumvent the requirements of § 158(d)(1)–(2)¹²⁶ and Bankruptcy Rule 8006,¹²⁷ or run afoul of the procedure detailed in Bankruptcy Rule 8007(b),¹²⁸ to obtain review of the underlying bankruptcy court order in the context of a stay motion before the court of appeals.

3. Bankruptcy Rule 8025

After the district court or BAP issues an order in a bankruptcy appeal, Bankruptcy Rule 8025(b) provides that the district court or BAP may stay their order pending appeal to the court of appeals.¹²⁹ This is the same authority that the bankruptcy court — the lower court in the initial level of appeal to the district court or BAP — has under Bankruptcy Rule 8007(a).¹³⁰

122. See FED. R. BANKR. P. 8007(b)(1) (prescribing that the motion for stay “may be made in the court where the appeal is pending”).

123. See generally FED. R. BANKR. P. 8025 (providing the district court and BAP's authority).

124. See generally 28 U.S.C. § 158(d)(1)–(2) (2018); FED. R. BANKR. P. 8006(a) (stating when “[a] certification of judgment, order, or decree of a bankruptcy court for direct review in a court of appeals” is effective).

125. See FED. R. BANKR. P. 8007(b)(1) (“A motion for the relief specified in subdivision (a)(1) — or to vacate or modify a bankruptcy court's order granting such relief — may be made in the court where the appeal is pending.” (emphasis added)).

126. 28 U.S.C. § 158(d)(1)–(2).

127. FED. R. BANKR. P. 8006.

128. See FED. R. BANKR. P. 8007(b) (describing the procedure of reviewing a stay motion in the Bankruptcy Court).

129. FED. R. BANKR. P. 8025(b); see also *In re Anderson*, 560 B.R. 84, 88 (S.D.N.Y. 2016) (“Rule 8025 of the Federal Rules of Bankruptcy Procedure (‘Rule 8025’) permits district courts to stay their own orders pending appeal to the court of appeals.”).

130. See FED. R. BANKR. P. 8007(a) (providing the bankruptcy court's authority to stay their order).

Under Bankruptcy Rule 8025(d), if the district court or BAP denies a stay of its own order, the court of appeals can issue a stay pending appeal from the district court or BAP to the court of appeals.¹³¹ This is comparable to Bankruptcy Rule 8007(b), which provides authority for the district court or BAP to issue a stay if the bankruptcy court denies a stay.¹³²

Bankruptcy Rules 8007 and 8025 do not address the procedural posture presented here: the district court or BAP denial of a stay while the appeal is pending before the district court or BAP.¹³³ Both Bankruptcy Rules 8007 and 8025 provide an opportunity to seek a stay after denial of a stay by a lower court with the respective appellate court where the appeal is pending.¹³⁴ Thus, appellants throughout the bankruptcy appeal process — at each level of appeal — have two opportunities to seek a stay.¹³⁵ There is no rule-based authority for seeking a stay from the court appeals while the bankruptcy appeal is still pending in the district court or BAP.¹³⁶

E. Review through ‘Bootstrapping’

One approach to seek a stay from the court of appeals when the underlying appeal is still pending in the district court or BAP¹³⁷ is to file an appeal of the order denying the stay and then file in the court of appeals a motion for stay of the underlying bankruptcy court order. Effectively, the notice of appeal over the denial of stay order will get the appellant into the court of appeals.¹³⁸ And while the appeal of the denial of stay is pending in the court

131. See FED. R. BANKR. 8025(d) (clarifying that the Bankruptcy Rules do not in any way limit the authority of the court of appeals); see also FED. R. APP. P. 8(a) (providing for motions to stay in the court of appeals from a district court order).

132. See FED. R. BANKR. P. 8007(b) (“[I]f a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for that ruling.”).

133. See *infra* pp. 25–26 and notes 124–25.

134. FED. R. BANKR. P. 8007, 8025.

135. *Id.*

136. See *id.* (omitting any reference to the ability to seek a stay).

137. See 28 U.S.C. § 158(d) (2018) (establishing that the underlying jurisdictional basis to appeal a denial of stay from a BAP is limited and will require characterizing the denial of stay order as a final order under); 28 U.S.C. § 1292(a) (establishing that the court of appeals does not have jurisdiction over interlocutory appeals from the BAP, because § 1292(a) is limited to district court, therefore, the bootstrapping argument will be much more challenging from a denial of stay by a BAP).

138. See FED. R. APP. P. 3 (highlighting requirements of filing a notice of appeal in district court); FED. R. APP. P. 4 (detailing the time for filing a notice of appeal in district court); FED. R. APP. P. 6(b)(1) (noting that although Rule 6(b) of the Federal Rules of Appellate Procedure governs bankruptcy appeals, it would not govern the appeal of a denial of stay by a district court or BAP, unless the denial order was considered a final order, as Rule 6(b) expressly applies only to an appeal of a “final judgement, order, or

of appeals, the appellants can seek the very relief they want — a stay of the bankruptcy court order — through a motion in the court of appeals.¹³⁹ Rule 8 of the Federal Rules of Appellate Procedure, which provides for filing motions to stay, would not be applicable as the stay would be of an order other than the one on appeal.¹⁴⁰

This is effectively bootstrapping a motion to stay the bankruptcy court order in the court of appeals with the appeal of the district court or BAP denial of stay in the court of appeals. Without the appeal of the denial of stay order to the court of appeals, there is no way to have a motion to stay the bankruptcy court order considered by the court of appeals, absent some type of motion for a writ of mandamus under the All Writs Act.¹⁴¹ This is tying the motion for stay with the appeal on the denial of stay.

The difficulty with this approach is that the appellate jurisdiction of the court of appeals over the denial of stay order from the district court or BAP is suspect. In the context of an appeal from a district court order denying a stay to the court of appeals, the order denying the stay may not be a final order under § 158(d)¹⁴² or an appealable interlocutory order under § 1292(a)(1).¹⁴³ And in the context of an appeal from a BAP order denying a stay the court of appeals basis for jurisdiction, the order denying the stay may not be a final order under § 158(d),¹⁴⁴ and appeal as an interlocutory order is not available under § 1292(a)(1).¹⁴⁵ If the court of appeals does not have jurisdiction over the underlying appeal of the denial of stay, there would not be jurisdiction over the bootstrapped motion for stay.

In other procedural contexts, courts have rejected comparable bootstrapping for jurisdiction.¹⁴⁶ For example, if a court does not have jurisdiction over an underlying case that court cannot issue a subpoena,

decree of the district court or the bankruptcy appellate panel”).

139. See FED. R. APP. P. 27 (providing authority for filing motions); *supra* notes 85–87 and accompanying text (analyzing the application of Rule 8 of the Federal Rules of Appellate Procedure in this context).

140. See *supra* notes 85–87 and accompanying text (analyzing the application of Rule 8 of the Federal Rules of Appellate Procedure in this context).

141. See *supra* Section II.C and accompanying text (discussing the All Writs Act in the context of appeals of the denial to stay order).

142. See *supra* Section II.A.1 and accompanying text (analyzing whether the denial order is a final order).

143. See *supra* Section II.B and accompanying text (analyzing whether the denial order is an appealable interlocutory order).

144. See *supra* Section II.A.1 and accompanying text (analyzing whether the denial order is a final order).

145. See *supra* Section II.B and accompanying text.

146. See, e.g., *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294 (D.C. Cir. 2000).

absent the need to aid in determining jurisdiction or to issue a temporary restraining order.¹⁴⁷ The key issues discussed above regarding jurisdiction of the court of appeals over the appeal of the denial of stay are all at play, and authority to review of the motion for stay hinges on how the underlying jurisdictional basis is resolved.

Even though there are difficulties with the bootstrapping approach to seeking a stay from the court of appeals, it has worked to at least obtain consideration of the merits of a stay motion in the Eleventh Circuit.¹⁴⁸ The appellants' motions for stay of a bankruptcy court order, which imposed sanctions against the appellants, were denied by both the bankruptcy court and the district court.¹⁴⁹ While the underlying appeal on the merits of the bankruptcy court order was pending in the district court, the appellants appealed the district court denial of stay order and filed a motion for stay of the bankruptcy court order in the court of appeals.¹⁵⁰ The appellee objected to the motion for stay of the bankruptcy court order in the court appeals on the merits of the request¹⁵¹ and filed a motion to dismiss the appeal of the denial of stay order for lack of jurisdiction asserting that the order was not appealable under §§ 158(d) or 21292(a)(1) as a final order or an interlocutory order respectfully.¹⁵²

The Eleventh Circuit issued an order denying the motion for stay of the bankruptcy court order for the appellants' failure to meet their burden of proof.¹⁵³ The court provided no analysis as to the jurisdictional basis to consider the motion.¹⁵⁴ The underlying appeal of the district court denial of the stay was dismissed on procedural grounds for the appellants' failure to file a timely appendix.¹⁵⁵ The appellee's motion to dismiss for lack of jurisdiction was moot, and the merits of the motion were not addressed.¹⁵⁶

147. *See id.*

148. *See generally* Appellants' Motion to Stay Enforcement of Bankruptcy Court Order Pending Appeal, Law Sols. Of Chi., LLC v. Corbett, No. 18-12121-EE (11th Cir. June 20, 2018).

149. *See id.* at 14–16.

150. *Id.* at 1.

151. *See generally* Appellee's Response to Appellants' Motion to Stay Enforcement of Bankruptcy Court Order Pending Appeal, Law Sols. Of Chi., LLC v. Corbett, No. 18-12121-EE (11th Cir. June 25, 2018) (arguing against the motion for stay).

152. Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction at 1, Law Sols. Of Chi., L.L.C. v. Corbett, No. 18-12121-EE (11th Cir. May 25, 2018).

153. Order, Law Sols. Of Chi., LLC v. Corbett, No. 18-12121-EE (11th Cir. Aug. 3, 2018).

154. *See id.*

155. Entry of Dismissal, Law Sols. Of Chi., LLC v. Corbett, No. 18-12121-EE (11th Cir. Aug. 3, 2018).

156. Motion Moot, Law Sols. Of Chi., LLC v. Corbett, No. 18-12121-EE (11th Cir.

In this example from the Eleventh Circuit, we are left to guess what was the jurisdictional basis to consider the motion to stay the bankruptcy court order. In this procedural context, jurisdictional basis to consider the motion to stay was not §§ 158(d) or 1292(a)(1), as those jurisdictional arguments go to whether the Eleventh Circuit had jurisdiction over the appeal of denial of stay by the district court.¹⁵⁷ The basis could be the Eleventh Circuit's authority under the All Writs Act, but it was not articulated, so we are not certain. Regardless, this case shows how bootstrapping can at least get the issue before a court of appeals in some cases.¹⁵⁸ Additionally, it demonstrates that even if an appellant can get the issue before the court of appeals, obtaining a stay is a very high hurdle.¹⁵⁹

III. CRITIQUE OF INCONSISTENT APPROACHES TO REVIEW

The above analysis clearly shows one thing: whether the appellant's abilities to either have an appeal of a denial of stay by a district court or BAP considered by the court of appeals when the underlying appeal is still pending in the district court or BAP, or have a motion for stay of a bankruptcy court order considered by a court of appeals, will vary among the courts of appeals and will often be fact-driven. Most courts of appeals are in agreement that a denial of stay by a district court or BAP are not appealable final orders,¹⁶⁰ but some courts will consider finality on a pragmatic basis.¹⁶¹ Other courts of appeals will review the denial of a stay by a district court if it is an appealable interlocutory order.¹⁶² At least two circuits consider the appeal of a denial of a stay under the All Writs Act.¹⁶³ And, in one circuit, bootstrapping a motion to stay a bankruptcy court order along with an appeal of the denial order by the district court may get the court of appeals to review the merits of the stay request.¹⁶⁴

It is disconcerting how varied the courts' of appeals ability is to invoke their jurisdiction to consider the appeal of a denial of a stay (by a district court or BAP) in order to consider the merits of a motion to stay a bankruptcy

Aug. 3, 2018).

157. 28 U.S.C. § 158(d) (2018); § 1292(a)(1).

158. Appellants' Motion to Stay Enforcement of Bankruptcy Court Order Pending Appeal, Law Sols. Of Chi., LLC v. Corbett, No. 18-12121-EE (11th Cir. June 20, 2018).

159. See Grippando, *supra* note 14, at 374–75 (discussing the difficulty is satisfying the “test for entry of a stay, regardless of the source of judicial power to enter it”).

160. See *supra* note 24 and accompanying text.

161. See *supra* notes 25–26 and accompanying text.

162. See discussion *supra* Section II.B.

163. See discussion *supra* Section II.C.

164. See discussion *supra* Section II.E.

court order. It raises a concern about access to justice in this procedural setting.¹⁶⁵ There is an argument that an access to justice issue does not arise when an appellant has had a chance to obtain a stay from two courts — the bankruptcy court and the district court or BAP. However, if some appellants are able to obtain a review by the court of appeals of a motion for stay or an appeal of a denial of a stay, and other similarly situated appellants are not afforded that opportunity for review, fairness and access to justice are of concern.¹⁶⁶ Disparate approaches to review by the courts of appeals frustrate an appellant's access to justice. Procedural equality in the process of seeking a stay is essential to achieving access to justice. Viewing access to justice through only the procedural lens is inadequate. The procedural shortfall of denying access to justice raises a broader societal concern. Society as the whole values equal justice,¹⁶⁷ and fundamental to equal justice is, at a minimum, a procedural process that does not vary from court to court or case to case.

Access to justice does not mean that a court of appeals must rule in favor of the appellant on the merits of a motion for stay or an appeal from a denial of such a motion.¹⁶⁸ Rather, it simply requires a meaningful opportunity to be heard on the merits through a motion to stay the bankruptcy court order or to have the appeal of the denial of the stay by the district court or BAP considered on the merits.¹⁶⁹ What is needed is an ability for appellants to seek a stay and obtain a ruling on the merits.¹⁷⁰ The ability to seek the relief — a stay from the court of appeals — will provide access, and obtaining a ruling on the merits by the court of appeals will provide justice.¹⁷¹ The current landscape of the caselaw in this area shows that both “access” and “justice” are hit or miss.¹⁷²

IV. REFORM TO ELIMINATE DISPARATE APPROACHES TO REVIEW

The above critique shows how appellants in different jurisdictions may be

165. See generally Robert J. Landry, III & David W. Read, *Erosion of Access to Consumer Bankruptcy's "Fresh Start" Policy in the United States: Statutory Reforms Needed to Enhance Access to Justice and Promote Social Justice*, 7 WM. & MARY POL'Y REV. 51 (2015) (analyzing concepts of access to justice in the consumer bankruptcy context).

166. Grippando, *supra* note 14, at 359.

167. Landry & Read, *supra* note 156, at 55.

168. See *id.*

169. See *id.* (explaining that just because an individual can file for bankruptcy, does not necessarily afford them a meaningful opportunity to avail themselves to the court).

170. See *id.* at 71.

171. See *id.* at 54.

172. *Id.* at 55–56.

subject to disparate treatment in terms of ability to have a denial of stay reviewed by a court of appeals or to bring a motion for stay,¹⁷³ when the underlying appeal is still pending in the lower court. A procedural mechanism is needed to ensure that all appellants have the same opportunity to request a stay. The underlying analysis on the merits of issuing a stay is well-settled,¹⁷⁴ and there is a need for a mechanism that will provide a uniformity among all jurisdictions in a bankruptcy appeal.

The mechanism can be included in the Bankruptcy Rules. At first blush, it seems that an amendment to the Bankruptcy Rules would be inadequate and, in fact, go beyond the scope of what the rules can govern and confer jurisdiction on the court of appeals beyond what is provided by statute or the Constitution.¹⁷⁵ However, in this context, an amended Bankruptcy Rule adding a mechanism to seek a stay from the court of appeals would not confer jurisdiction; rather, it would simply provide the instrumentality to implement already existing jurisdiction.

Under 28 U.S.C. § 2075 the Supreme Court has the power to prescribe rules pertaining to the practice and procedure in cases under the Bankruptcy Code; however, “[s]uch rules shall not abridge, enlarge, or modify any substantive right.”¹⁷⁶ Bankruptcy rules, like other rules of procedure, have the authority of the federal statute, but the rules do not confer jurisdiction of federal courts.¹⁷⁷ In the stay context of bankruptcy appeals, for example, Bankruptcy Rule 8007(b)(1) does not confer jurisdiction on the district court.¹⁷⁸ Rather, the jurisdiction over the appeal is conferred by § 158.¹⁷⁹ Bankruptcy Rule 8007(b) provides the rules of procedure to implement that jurisdiction statutorily conferred on the district court in the bankruptcy appeal.¹⁸⁰ The ability to consider issuing a stay of the bankruptcy court order, which is an inherent power and statutory power under the All Writs Act of the district court, is integral to the district court appellate

173. See discussion *supra* Section II.

174. See *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (employing a four-factor test to determine if a stay is warranted, in which the underlying issues of the appeal, legal and otherwise, are part of the analysis); see also *Nken v. Holder*, 556 U.S. 418, 434 (2009) (employing these four factors).

175. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 375 (1994) (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.”).

176. 28 U.S.C. § 2075 (2018).

177. See 1 FED. PROC. § 1:332 (recognizing the rules of procedure as law derived from statute, but the rules do not expand or confer jurisdiction of federal courts).

178. See FED. R. BANKR. P. 8007(b)(1).

179. See 28 U.S.C. § 158(a) (2006) (detailing when the district court has jurisdiction over an appeal).

180. See FED. R. BANKR. P. 8007(b).

jurisdiction.¹⁸¹ Bankruptcy Rule 8007(b) simply provides the mechanism for the exercise of that power.

Just as Bankruptcy Rule 8007(b) does not confer jurisdiction, an amended rule with a procedural process to seek a stay from the court of appeals would not confer jurisdiction.¹⁸² Unlike the district court and BAP that has jurisdiction over the appeal,¹⁸³ the courts of appeals do not have jurisdiction over the appeal that is still pending in the lower appellate court. However, the courts of appeals have authority to consider the issuance of a stay under the All Writs Act. That jurisdictional authority has already been expressly exercised by some courts of appeal in this context.¹⁸⁴ Having a clear rule that details the procedure would permit all appellants to be treated the same and have the same ability to request a stay from the courts of appeals. It would also end the need for the courts of appeals to consider appeals of denials of a stay and the thorny jurisdictional issues that arise.¹⁸⁵ The courts of appeals could consider the merits of a stay of the bankruptcy court order up or down.

Bankruptcy Rule 8007 can be amended to provide that a motion for stay can be filed in the court of appeals when the bankruptcy appeal is pending in the district court or BAP. The ability to file such a motion would be limited to instances when such a motion has already been filed and ruled on by the district court or BAP. This would prevent appellants from going straight to the court of appeals to seek a stay. The current structure of Bankruptcy Rule 8007 has a similar limitation where the stay ordinarily should be sought in the bankruptcy court before the relief is sought in the district court or BAP.¹⁸⁶ The proposed amendment would instead require seeking the relief from the district court or BAP initially and that relief being denied prior to seeking relief from the court of appeals.¹⁸⁷

Bankruptcy Rule 8007 should be amended, as set forth below.

Rule 8007.

(a) Initial motion in the Bankruptcy Court

(1) In general. Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court

181. See 28 U.S.C. § 1659.

182. See FED. R. BANKR. P. 8007(b).

183. 28 U.S.C. § 158(a)–(b)(1).

184. See *supra* Section II.C and accompanying text.

185. See *supra* Sections II.A., II.B and accompanying text.

186. FED. R. BANKR. P. 8007 (b)(1).

187. See *contra* FED. R. BANKR. P. 8007 (b)(2)(A).

pending appeal;

(B) the approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

(2) Time to file. The motion may be made either before or after the notice of appeal is filed.

(b) Motion in the district court, the BAP, or the Court of Appeals on direct appeal

(1) Request for relief. A motion for the relief specified in subdivision (a)(1)--or to vacate or modify a bankruptcy court's order granting such relief--may be made in the court where the appeal is pending.

(2) Showing or statement required. The motion must:

(A) show that moving first in the bankruptcy court would be impracticable; or

(B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for the ruling.

(3) Additional content. The motion must also include:

(A) the reasons for granting the relief requested and the facts relied upon;

(B) affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) Serving notice. The movant must give reasonable notice of the motion to all parties.

(c) Motion in the Court of Appeals

(1) Request for relief. A motion for the relief specified in subdivision (a)(1)--or to vacate or modify a bankruptcy court's order granting such relief--may be made in the court of appeals when the appeal is pending in the district court or BAP.

(2) Showing or statement required. The motion must show that such a motion has been made in the district court or BAP and that the court has ruled and set out any reasons given for the ruling.

(3) Additional content. The motion must also include:

(A) the reasons for granting the relief requested and the facts relied upon;

(B) affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) Serving notice. The movant must give reasonable notice of the motion

to all parties.

(d) Filing a bond or other security

The district court, BAP, or court of appeals may condition relief on filing a bond or other appropriate security with the bankruptcy court.

(e) Bond for a trustee or the United States

The court may require a trustee to file a bond or other appropriate security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

(f) Continuation of proceedings in the bankruptcy court

Despite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may:

- (1) suspend or order the continuation of other proceedings in the case; or
- (2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest.

Amended Bankruptcy Rule 8007 has a new subsection (c). Subsection (c)(1) provides for a motion for relief from the court of appeals when the appeal is pending in the district court or BAP. Subsection (c)(2) requires that a motion show that a motion was made and ruled upon by the district court or BAP. The remaining subsections of (c) simply mirror those in current Bankruptcy Rule 8007(b).¹⁸⁸ Current Bankruptcy Rule 8007 subsections (c), (d), and (e) become subsections (d), (e), and (f), without any substantive changes.¹⁸⁹

V. CONCLUSIONS

Amending Bankruptcy Rule 8007 would help ensure that all bankruptcy appellants have the same opportunity to seek a stay from a court of appeals. It would remove the need to appeal a district court or BAP order denying a stay, thereby eliminating the jurisdictional problems and disparate outcomes among the courts of appeals through that process. Litigants would be on a more even playing field, and the outcomes would not be determined by jurisdictional issues unrelated to underlying merits of a stay request. Focusing on the merits of the stay request would give the parties equal access and enhance fairness in this aspect of bankruptcy appellate litigation.

In the meantime, before any type of amended Bankruptcy Rule is put in place, practitioners will need to pay particular attention to the possible

188. *See contra* FED. R. BANKR. P. 8007 (b)(2)(B).

189. *Contra* FED. R. BANKR. P. 8007 (c)–(e).

avenues for obtaining a stay in the applicable circuit to ensure that their clients' interests are advanced as much as possible. However, the most important thing for practitioners to do is to put on a strong and well-documented case for the issuance of a stay in the bankruptcy court initially. The burden is high, but practitioners need to spend the time, and clients the money, to make sure the record is convincing before the bankruptcy court to warrant the issuance of a stay. The affidavits and other evidence in support of a motion for stay need to be quite convincing and show the bankruptcy court why the extraordinary remedy of a stay is warranted. Furthermore, from a practical standpoint, the bankruptcy judge is likely in a better position, as the factfinder in the underlying case, as opposed to an appellate court, to appreciate whether a stay is warranted or not. Once the stay issue advances to the appellate court, obtaining a stay will likely be more difficult, assuming the jurisdictional hurdles can be overcome.