1990

When is an Order Final--A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts

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Notes

When is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts

Imagine identical businesses in Newark, New Jersey and New York, New York. Each has identical creditors and identical financial woes. Each seeks the protection of the federal bankruptcy court, and they obtain identical final decisions. On appeal of those decisions to the federal district court of their respective jurisdictions, the appellate court reverses and remands both cases to bankruptcy court for identical further proceedings.

At that point, the similarity of these cases ends because the federal circuit courts in the two jurisdictions have different views of which judicial orders are final. The New Jersey appellant is entitled to immediate review of the district court's deci-

1. A primary purpose of bankruptcy is to grant an individual debtor a 'fresh start' economically by relieving the debtor of the burden of debt while permitting the debtor to retain some property. Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915).

2. 28 U.S.C. § 158(d) (Supp. V 1987) provides, inter alia, for appeals from final judgments in bankruptcy courts to be heard in the district courts of the United States. See infra note 56. The question of what constitutes a final order of a bankruptcy court for purposes of appeal to the district court under 28 U.S.C. § 158(d) has been litigated extensively and is not treated by this Note. See, e.g., In re Saco Local Dev. Corp., 711 F.2d 441, 448 (1st Cir.1983) (holding final a ruling that a claim is entitled to priority); Moxley v. Comer (In re Comer), 716 F.2d 168, 174 (3d Cir. 1983) (holding final a non-contingent order lifting the automatic stay); Mason v. Integrity Ins.-Co. (In re Mason), 709 F.2d 1313, 1315 (9th Cir. 1983) (finding orders rendered after a final hearing on relief from the final stay final).

3. The state of New York is in the Second Federal Judicial Circuit. The state of New Jersey is in the Third Federal Judicial Circuit.

4. Handling of these cases diverges because the Second and the Third Circuits split over how to interpret the finality requirement of their jurisdiction under 28 U.S.C. § 158(d)(Supp. V 1987). See infra notes 72-83 and accompanying text (describing the Marin approach to finality used in the Third Circuit) and infra notes 97-103 (describing the Biggsby approach to finality defined by the Seventh Circuit and adopted by the Second Circuit in LTV Corp. v. Farragher (In re Chateaugay Corp.), 839 F.2d 59 (2d Cir. 1988)).
cision,\textsuperscript{5} but the New York appellant must return to the bankruptcy court for further proceedings.\textsuperscript{6} Only after the bankruptcy court finishes those further proceedings can the New York appellant appeal. This delay in the appellate process may force the New York businessperson to undergo a paralyzing period of uncertainty concerning the finances of the business. This unfair result may occur even though Congress intends bankruptcy procedures to be uniform throughout the United States.\textsuperscript{7}

Bankruptcy matters usually begin in federal bankruptcy courts. Appeals from bankruptcy court generally are to a federal district court or, as in the Ninth Circuit, may be heard by a bankruptcy appellate panel.\textsuperscript{8} Appeals from either a federal district court or a bankruptcy appellate panel are to a circuit court. Appeals from the circuit courts may be reviewed by the Supreme Court.\textsuperscript{9}

Under 28 U.S.C. section 158(d), the federal circuit courts may review only final orders of a federal district court or appellate panel when the district court or appellate panel reviews

\begin{itemize}
  \item \textsuperscript{5} The Third Circuit considers a district court reversal and remand to bankruptcy court a 'final order' for purposes of appeal. Marin Motor Oil, Inc. v. Michaels, 689 F.2d 445, 449 (3d Cir. 1982).
  \item \textsuperscript{6} The Second Circuit considers a district court reversal with remand a non-final order for purposes of appeal. See LTV Corp., 839 F.2d at 62.
  \item \textsuperscript{7} Bankruptcy laws are federal laws. Article I, sec. 8 of the United States Constitution grants Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Although the grant of authority to make bankruptcy laws is not exclusive, two obstacles effectively eliminate state bankruptcy laws. First, the doctrine of preemption prevents any state from legislating in competition with the federal government when Congress shows an intent to occupy a particular field. D. COWAN, COWANS BANKRUPTCY LAW AND PRACTICE § 1.1, at 1-2 (1986). Second, the Constitution's prohibition against impairment of the obligation of contracts, U.S. CONST. art. 1, § 10, cl. 1, which applies only to the states, prevents the states from enacting effective bankruptcy laws. Id.
  \item \textsuperscript{8} See infra note 58.
  \item \textsuperscript{9} 28 U.S.C. § 1254 (1982) provides in pertinent part: Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
    \begin{itemize}
      \item (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree;
      \item \ldots
      \item (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.
    \end{itemize}
  \end{itemize}

\textit{Id.}
orders of a bankruptcy court. The circuits are split over how to interpret this finality requirement when a district court reverses and remands a case to a bankruptcy court for further proceedings. The lack of a uniform standard for determining finality in this situation undermines confidence in the bankruptcy system and may lead to inequitable results.

10. Congress enacted 28 U.S.C. § 158(d) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended primarily in scattered sections of Titles 11 & 26 U.S.C.), in an attempt to clear up many logical and constitutional problems with the existing bankruptcy code. Unfortunately, the attempt to clarify the old problems in the code engendered a new problem regarding the definition of finality in federal circuit court jurisdiction over bankruptcy appeals. The confusing way Congress repealed § 1293 (the grant to federal circuit courts of appellate jurisdiction in bankruptcy matters that preceded § 158) and enacted § 158 is described in 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3926, at 122-23 n.0.7 (Supp. 1990). Unfortunately, the Bankruptcy Amendments and Federal Judgeship Act of 1984 also was unclear. For example, the Act did not repeal explicitly the statute permitting direct appeals to the circuit courts in bankruptcy matters, 28 U.S.C. § 1293(b) (1990). See Thistlethwaite v. First Nat'l Bank of Lafayette (In re Exclusive Indus.), 751 F.2d 806, 807-08 n.1 (5th Cir. 1985) (attempting to reconcile seemingly inconsistent amendments to the Bankruptcy Reform Act of 1978).


[N]o uniform approach [to finality analysis] has been enunciated in these numerous cases rising to the appellate level.... Many of these decisions fail to recognize that the adoption of traditional appellate review in bankruptcy matters, modeled on the rules in regular civil litigation which limit review to final orders, was a development consistent with the broad jurisdiction granted to the bankruptcy court under the 1978 Code. However, when such legislation was restructured, the appellate review procedure was not altered appropriately.... Unfortunately, by the time a party whose appeal is dismissed suffers the irreparable harm which it seeks to redress in its appeal, it is too late for that party to ever be made whole or be placed into a status quo ante position.

The lack of a standard for determining finality undermines the entire bankruptcy process. At a time when courts of appeals are increasing their use of sanctions against a party who prosecutes a frivolous appeal, the attorney who litigates regularly in bankruptcy matters is often left without a clue as to what a circuit court of appeals and what a particular panel within that circuit court will do with an appeal.

Id. at 589-92 (footnotes omitted).
This Note argues that all federal circuit courts should adopt the pragmatic approach to interpreting finality used in other legal contexts. Such an approach would avoid the unequal treatment caused by the present circuit split. Part I describes the evolution of flexible finality analysis used by federal circuit courts when hearing appeals from district courts in non-bankruptcy matters. Part II examines the two dominant approaches circuit courts use in interpreting the section 158(d) finality requirement, and looks at a third, seldom-used approach. Part III analyzes the weaknesses in the two dominant approaches used by the federal circuit courts. Part IV explains how circuit courts could apply a more pragmatic balancing approach to interpreting finality. The Note concludes that circuit courts should abandon the two dominant approaches, and adopt a more pragmatic approach to interpreting the finality requirement of 28 U.S.C. section 158(d).

I. TRADITIONAL FINALITY ANALYSIS IN NON-BANKRUPTCY PROCEEDINGS

Jurisdiction is the first issue in all legal proceedings in federal courts. Without jurisdiction, a court is powerless to hear a case on the merits. Thus, before reaching the merits, federal courts must satisfy themselves that they have jurisdiction to hear a particular case.


Adopting a pragmatic balancing approach to determine finality for purposes of bankruptcy appeals would bring this area into line with finality analysis in several non-bankruptcy contexts. See infra note 163.


See Bender v. Williamsport Area School Dist., 475 U.S. 534, 549 (1986) (holding that a federal appellate court must satisfy itself not only of its own jurisdiction but also that of the lower court under review); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 740 (1976) (holding that if a circuit court lacks jurisdiction because the district court's decision is not final, the Supreme Court will refuse to review the circuit court's judgment); Allegheny Int'l Credit Corp. v. Bowman, 821 F.2d 245, 246 (5th Cir. 1987) (noting that every federal appellate court must determine that jurisdiction is proper, even when the issue is not raised by the parties on appeal).

The courts of appeals (other than the United States Court of Appeals
tion over all final decisions of the federal district courts.\textsuperscript{17} Several important policies support the finality requirement.\textsuperscript{18} Requiring finality underscores the trial judge's role as the initial person called on to decide the many issues of law and fact that arise at trial.\textsuperscript{19} It conserves judicial resources by eliminating piecemeal appeals.\textsuperscript{20} The finality rule allows the appellate court to determine issues on a full rather than a partial record.\textsuperscript{21} The rule helps avoid the loss of evidence that might re-

for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the United States, the United States District Court for the District of the Canal Zone, The District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

\textit{Id.}

17. The requirement that only final judgments are reviewable in federal courts has its roots in the very beginnings of the federal judicial system. Bachowski v. Usery, 545 F.2d 363, 367 (3d Cir. 1976). Section 22 of the Federal Judiciary Act of 1789 provided that only final judgments, whether at law or in equity, were reviewable. Federal Judiciary Act, ch. 20, § 22, 1 Stat. 73, 84 (1789). \textit{See} 15 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, § 3906, at 425-27 (1976 & Supp. 1990). Commentators have traced the limitation back to the English common law courts practice of entertaining appeals solely from final dispositions of completed controversies. \textit{See} id. (discussing early English cases). For further discussion concerning the historical development of the finality requirement, see Crick, \textit{The Final Judgment as a Basis for Appeal}, 41 YALE L.J. 539, 541-51 (1932).

18. Justice Frankfurter stressed the importance of the finality requirement for appellate jurisdiction in Cobbleidick v. United States, 309 U.S. 323 (1940):

\begin{quote}
Congress, from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . . To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause . . . .
\end{quote}

\textit{Id.} at 325-26.


20. \textit{Id.} The hostility toward piecemeal appeals is both logical and practical. Forbidding appeals from interlocutory judgments saves considerable time and resources for both litigants and courts. If litigation is allowed to proceed, a disputed ruling may lose its significance. A settlement may be reached or the party aggrieved by the ruling ultimately might win the suit. \textit{See}, e.g., Bachowski v. Usery, 545 F.2d 363, 368 (3d Cir. 1976).

result from a protracted trial.\textsuperscript{22} The final judgment rule also helps preserve the court's and counsel's familiarity with a case, which could be diminished due to repeated interruptions of the trial court process.\textsuperscript{23} Finally, the rule prevents a party with substantial resources from harassing an opponent with endless interlocutory appeals.\textsuperscript{24}

Many courts traditionally define a final order as one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.\textsuperscript{25} This definition makes little sense when an order leaves nothing for the litigants to do, yet technically there is no final judgment for the court to execute.\textsuperscript{26} For this reason, Congress and the courts developed

\begin{itemize}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} 15 C. Wright, A. Miller, E. Cooper, & E. Gressman, \textit{supra} note 17, § 3907, at 431. Statutes of limitation are designed, in part, to prevent incorrect adjudications, which may be more likely as the length of time increases between the occurrence of an event and the commencement of legal action. See, \textit{e.g.}, United States v. Kubrick, 444 U.S. 111, 117 (1979). Analogously, incorrect adjudications are more probable as the time lengthens between commencement of a legal action and its final adjudication.
\item \textsuperscript{24} 15 C. Wright, A. Miller, E. Cooper, & E. Gressman, \textit{supra} note 17, § 3907, at 432; \textit{see} Wright, \textit{The Doubtful Omniscience of Appellate Courts}, 41 MINN. L. REV. 751, 780-82 (1957) (arguing that an injured person of limited means may choose to settle for less than the amount awarded by the jury and approved by the trial court rather than wait a year or more until an appellate court affirms that the award was not excessive).
\item \textsuperscript{25} \textit{See}, \textit{e.g.}, Catlin v. United States, 324 U.S. 229, 233 (1945) (holding that a final decision generally is one that ends the litigation on the merits, leaving nothing for the court to do but execute the judgment); St. Louis, Iron Mountain & S. R.R. v. Southern Express Co., 108 U.S. 24, 28 (1883) (reasoning that a decree is final, for purposes of appeal, when it terminates the litigation on the merits and leaves nothing to be done but enforcement of the decree); \textit{cf} Collins v. Miller, 232 U.S. 354, 370 (1919) (holding that a judgment should be final not only as to all the parties but as to the entire subject matter and all causes of action involved).
\item Courts do not uniformly apply this finality requirement in non-bankruptcy cases. \textit{See} Redish, \textit{The Pragmatic Approach to Appealability in the Federal Courts}, 75 COLUM. L. REV. 89, 90 (1975) (arguing that strict adherence to the final judgment rule would be absurd and in some cases could result in severe hardship for the litigants).
\item \textsuperscript{26} \textit{See}, \textit{e.g.}, Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966). Eisen brought a class action suit against dealers on the New York stock exchange charging violations of the federal antitrust laws. \textit{Id.} at 119-20. The United States District Court for the Southern District of New York dismissed the class action suit but permitted Eisen to continue with his individual claim for $70.00. \textit{Id.} at 120. The Second Circuit held that Eisen could appeal this order even though the district court did not decide the entire case. The circuit court reasoned that Eisen's personal claim was so small that no lawyer would take his case absent a class action. Thus, if the appeal were dismissed, not only would Eisen's claim never be adjudicated, but no appellate court would have the chance to decide the propriety of a class action. \textit{Id.}
pragmatic exceptions to the finality requirement in non-bankruptcy appeals. Statutory exceptions to the finality requirement include 28 U.S.C. section 1292(b) and Rule 54(b) of the Federal Rules of Civil Procedure. Judicially created exceptions to the finality requirement first appeared in *Forgay v. Conrad*, *Cohen v. Beneficial Industrial Loan Corp.*, and *Gillespie v. United States Steel Corp.*

*Gillespie* is the most prominent Supreme Court case mandating a broader, more pragmatic approach to interpreting finality. In *Gillespie*, a parent brought a wrongful death action on behalf of herself and the decedent’s brothers and sisters after her son was killed while working on the defendant’s ship

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27. Section 1292(b) allows appeals from a civil action if a district court certifies that it “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”


29. FED. R. CIV. P. 54(b) allows an appeal to a federal circuit court when a federal district judge certifies orders that are final as to only certain parties or certain issues in complex litigation.

30. 47 U.S. (6 How.) 201 (1848). In *Forgay*, the circuit court, without issuing a final decree, ordered that certain lands and slaves be delivered to a creditor in bankruptcy. *Id.* at 203. The Supreme Court refused to give the finality requirement a strict, technical reading. *Id.* The Court heard the case on the merits, reasoning that if the appellants were forced to wait for a more final order of the circuit court, the land and slaves they claimed would be taken from their possession, sold, and the profits distributed before they had opportunity to appeal. The ”Forgay doctrine” allows immediate appeal when the substantive issues have been determined and delay of the appeal would render the appeal of little value to the appellant because he or she “may be ruined before he is permitted to avail himself of the right.” *Id.* at 205. See 9 J. MOORE, B. WARD, J. LUCAS, supra note 21, ¶ 110.11, at 86-105 (discussing the development of the *Forgay* doctrine).

31. 337 U.S. 541 (1949). The exception from *Cohen* also is termed the collateral order rule. See *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966). In *Cohen*, the Supreme Court heard an appeal from a Third Circuit order denying a corporation’s motion that would have required the plaintiff in a stockholder’s derivative suit to give security for reasonable legal expenses of the defendant. *Id.* at 543. The Court found it significant that the order was not a step toward the final disposition of the case on the merits and would not form part of the final judgment. To qualify for the *Cohen* exception to the final order rule, the ruling conclusively must determine a disputed question, must resolve an important issue that is completely severable from the action, and must be effectively unreviewable on appeal from the final judgment. *Id.* at 546.

32. 379 U.S. 148 (1964). The *Gillespie* exception allows review from a non-final order if the appeal presents a question that is fundamental to the further conduct of the case. Martin Bros. Toolmakers, Inc. v. Industrial Dev. Bd. of Huntsville (*In re Martin Bros. Toolmakers*, Inc.), 796 F.2d 1435, 1437 (11th Cir. 1986).

docked in Ohio. She claimed a right to recover under the Jones Act, for unseaworthiness under general maritime laws, and under Ohio's wrongful death statute. The Gillespie Court directed courts to interpret finality pragmatically and to decide close questions in favor of appealability, while permitting appeal of several interim orders. The Supreme Court held that the district court's granting of a motion to strike, thereby confining the complaint to the Jones Act and eliminating recovery by the siblings, was a final order for purposes of 28 U.S.C. section 1291.

The Gillespie Court emphasized that the question of finality under section 1291 is frequently so close a call that a decision either way may be supported by forceful arguments. Justice Black reasoned that it was impossible to derive a formula to resolve all marginal cases falling within the "twilight zone" of finality. Therefore, courts should give the general finality requirement of section 1291 "a practical rather than a technical construction." The court did not rely on any previous definition of finality, holding instead that the district court's order was final because the danger of denying justice to the plaintiffs was greater than the inconvenience of piecemeal litigation. The Court encouraged circuit courts to find finality whenever the dangers of denying justice by delay appear to outweigh the inconvenience of piecemeal litigation.

Some commentators predicted that Gillespie might alter profoundly the interpretation of the finality requirement of section 1291 and lead to much broader appellate jurisdiction for circuit courts. Some commentators advocated such a result.

33. Id. at 150.
34. Id.
35. Id. at 152-54.
36. Id. at 152.
37. Id.
38. Id.
40. Id. at 153.
41. Id. at 152 (citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).
43. C. Wright, A. Miller, Cooper & E. Gressman, supra note 17, § 3905, at 424-25. Wright, Miller, Cooper, and Gressman argue that when the parties and trial court have assumed that an appeal is proper, the primary justification for the final judgment rule is a desire to ensure that future parties
These predictions, however, did not come true. Instead, subsequent lower court decisions have either interpreted Gillespie restrictively\textsuperscript{44} or ignored it altogether and returned to earlier, more restrictive notions of finality.\textsuperscript{45}

II. FINALITY ANALYSIS IN BANKRUPTCY APPEALS

A. TRADITIONAL APPROACHES TO FINALITY IN BANKRUPTCY APPEALS

Federal statutes confer federal appellate court jurisdiction in the bankruptcy area\textsuperscript{46}. The original Bankruptcy Act of 1898, as amended in 1938,\textsuperscript{47} granted the district courts appellate jurisdiction over orders, decrees, or judgments, whether interlocutory or final, that were entered in proceedings before federal bankruptcy courts. The Act gave federal circuit courts jurisdiction only over final orders from the district court in controversies arising out of bankruptcy.\textsuperscript{48}

consider carefully questions of appellate jurisdiction. When there is no clear answer to that question, they argue that the Gillespie approach would allow a court to hear an appeal and then announce whether similar cases would be appealable in the future. \textit{Id.}

44. \textit{See}, e.g., New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 185 (1st Cir. 1972) (noting that Gillespie stands only for the proposition that an order may be considered final, although entered in proceedings still pending before a court, if immediate review of the order would settle issues fundamental to the further conduct of the case).

45. \textit{See} Bradley v. Milliken, 468 F.2d 902, 902-03 (6th Cir. 1972), \textit{rev'd on other grounds}, 418 U.S. 717 (1974) (holding that an order requiring the parties to submit proposed plans for desegregation of the Detroit schools within a stipulated period of time was not a final order for purposes of appeal).


47. Section 24 of the Bankruptcy Act, provided:

\textit{Jurisdiction of Appellate Courts} a. the Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may hereafter be held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy; to review, affirm, revise, or reverse, both in matters of law and in matters of fact; \textit{Provided, however}, that the jurisdiction on appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: \textit{Provided further}, that when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.


48. Chicago Bank of Commerce v. Carter, 61 F.2d 986, 989 (8th Cir. 1932) ("Controversies [are] those matters arising in the course of a bankruptcy proceeding which are not mere steps in the administration of the estate, but
The Bankruptcy Reform Act of 1978\(^49\) overhauled the entire appellate process for bankruptcy cases. The very broad grant of jurisdiction found in the Act was replaced with 28 U.S.C. section 1293(b), which narrowed the jurisdiction of federal courts of appeal to "a final judgment, order, or decree" in bankruptcy.\(^50\) The circuits split on whether to interpret the finality requirement for bankruptcy appeals in the same manner in which they interpret the finality requirement of non-bankruptcy appeals.\(^51\)

Because Congress drafted section 1293 under severe time constraints, the section suffered numerous flaws.\(^52\) Many

which give rise to distinct and separable issues between the trustee[s] and adverse claimants, concerning the right and title to the bankrupt's estate."


\(^{50}\) The revamped appeal procedures of the Bankruptcy Reform Act were not to become effective until April 1, 1984. During a four-and-one-half year transition period, however, most of the amendments to the judicial code, including those relating to appeals, were to apply to the existing bankruptcy courts. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

\(^{51}\) Several courts have held they are not bound by the traditional finality analysis developed under 28 U.S.C. § 1291, the statute granting federal circuit courts appellate jurisdiction in non-bankruptcy matters, when they interpret 28 U.S.C. § 1293, the statute granting federal circuit courts appellate jurisdiction in bankruptcy. Rather, these courts hold that they are free to apply a more flexible interpretation of finality. In Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98 (3d Cir. 1981), the court did not consider on appeal whether the district court's decision was final within the meaning of § 1291, because it construed the 1978 amendments as providing a "comprehensive . . . schema for jurisdiction of bankruptcy appeals." \(^{52}\) See Wisz v. Moister, 778 F.2d 762, 764 (11th Cir. 1985) ("In determining what is a final order in a bankruptcy appeal this court consistently has applied the final order jurisprudence developed under 28 U.S.C. § 1291"); International Horizons, Inc. v. Committee of Unsecured Creditors, 689 F.2d 996, 1000 n.6 (11th Cir. 1982) (noting that "in determining whether we are presented with a final and appealable order for the purposes [of § 1293], we shall look to the extensive final order jurisprudence that has developed in the context of appeals brought under 28 U.S.C. § 1291"); Stewart v. Kutner, 656 F.2d 1107, 1110-12 (5th Cir. 1981) (for purpose of bankruptcy appeals, the Fifth Circuit will look to finality analysis developed in the context of § 1291 non-bankruptcy appeals). In Sambo's Restaurants, Inc. v. Wheeler, Inc., 754 F.2d 811, 813 (9th Cir. 1985), the court warned against blind adherence to § 1291 finality jurisprudence, but acknowledged that the court generally is guided by the finality analysis under § 1291 even though § 1293 freed the court to develop new principles to fit the special needs of bankruptcy administration.

\(^{52}\) See Maiorino v. Branford Sav. Bank, 691 F.2d 89, 92 (2d Cir. 1982) ("[T]he working of the statute [§ 1293] is complicated, a situation doubtless engendered because the appeals provisions of the Act were hastily drawn during an eleventh hour compromise . . . that produced the present jumble as well as apparently inadvertent inconsistencies in the statute.").
judges criticized these flaws. In 1984, Congress responded to the criticism and replaced section 1293 with section 158.

Due to the similarity of their language, circuit courts routinely look to decisions interpreting section 1293(b) as a guide in construing the finality requirement of section 158(d). Presently, section 158 provides for initial appellate review of bankruptcy court decisions by the federal district court or by a bankruptcy appellate panel. Subsequent review of final judg-

53. See, e.g., Moxley v. Comer, 716 F.2d 168, 173 & n.9 (3d Cir. 1983) ("[R]esolution of the differing Senate and House bankruptcy bills by the floor managers resulted in some ambiguity in the appellate jurisdiction intended by Congress in its drafting of section 1293 .... An authoritative commentary describes the appeal provisions as 'nearly incomprehensible,' leaving appeals from the district courts 'in a sorry state of uncertainty.'") (quoting 16 C. Wright, A. Miller, F. Cooper, & E. Gressman, Federal Practice and Procedure § 3926, at 39 (Supp. 1982); Belo Broadcasting v. Rubin, 693 F.2d 73, 76 (9th Cir. 1982) ("Standard principles of statutory construction are not of substantial assistance since it is not possible to read § 1293(a) and (b) to be internally consistent with other provisions of the act while at the same time interpreting the language in a way to give each a meaning.").

54. 28 U.S.C. § 158(a) (1988) provides:

The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

Id.

55. See Pizza of Hawaii, Inc. v. Shakey's, Inc., 761 F.2d 1374, 1378 n.6 (9th Cir. 1985) (holding that decisions regarding finality under § 1293 are controlling under § 158). One leading commentator has argued that the same liberality in interpretation should obtain under section 158(d) as was used in interpreting section 1293. 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, supra note 10, § 3926, at 112 ("The special needs of complex, multiparty bankruptcy administration have long justified distinctive rules for timing appeals, and there is no justification for suddenly scrapping the long experience under earlier statutes .... The decisions under the 1978 legislation reflected these concerns, and supply some guidance for applying the 1984 legislation").

56. 28 U.S.C. § 158(b) (1988) provides:

(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

Id.
ments, orders, and decrees is available in the circuit court of ap-
peals for that jurisdiction.\textsuperscript{57}

Finality does not mean the same thing in bankruptcy cases
as it means in other federal cases. It would not be feasible to
postpone all appeals until the end of the bankruptcy case be-
cause most bankruptcy cases are too large and complex.\textsuperscript{58}
Within a single bankruptcy case there may be several claims
that would form separate lawsuits in any other context.\textsuperscript{59}
A bankruptcy court, however, can enter a truly final disposi-
tion of an estate only after defining each of the creditors’ claims and
filing the order closing the case.\textsuperscript{60} A large bankruptcy case can
continue for many years after a court determines an individual
creditor’s claim.\textsuperscript{61} Forcing that creditor to wait until the entire
proceeding ends could mean a wait of several years.\textsuperscript{62}

\textsuperscript{57} 28 U.S.C. § 158(d) (Supp. V 1987) provides:
The circuits shall have jurisdiction of appeals from all final deci-
sions, judgments, orders, and decrees entered under subsections (a) and (b)
of this section.
The circuits disagree about whether § 158(d) is the only basis for appellate
jurisdiction over bankruptcy matters. Some circuits hold that 28 U.S.C. § 1291,
the general grant of appellate jurisdiction to federal circuit courts, see supra
notes 16-17 and accompanying text, also grants appellate jurisdiction over
bankruptcy matters. See, e.g., Teton Exploration Drilling v. Bokum Resources
Corp., 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) (arguing that § 158(d) does not
preclude general appellate jurisdiction of appellate courts under § 1291). A
contrary line of cases holds that § 158 is the exclusive basis for appellate juris-
diction, therefore superseding § 1291. See, e.g., Teleport Oil Co. v. Security
Pac. Nat’l Bank, 759 F.2d 1376, 1378 (9th Cir. 1985).

\textsuperscript{58} See Martin Bros. Toolmakers, Inc. v. Industrial Dev. Bd. of Huntsville
(In re Martin Bros. Toolmakers, Inc.), 796 F.2d 1435, 1437 (11th Cir. 1986)
(stating that “[v]iewed realistically, a bankruptcy case is simply an aggregation
of controversies, many of which would constitute individual lawsuits had a
bankruptcy petition never been filed”).

\textsuperscript{59} See Mason v. Integrity Ins. Co. (In re Mason) 709 F.2d 1313, 1316 (9th
Cir. 1983) (stating that “the only truly final order in a bankruptcy proceeding
occurs when the order closing the case is filed”).

\textsuperscript{60} D. Cowans, Cowans Bankruptcy Law and Practice § 18.2, ¶ 11
(1987 ed.).

\textsuperscript{61} Id.
thus frequently interpret finality analysis more broadly in bankruptcy cases. The traditional rule is that a proceeding to establish a claim against a debtor's estate may be considered final when it is defined, even though the bankruptcy case continues.

When a bankruptcy court issues a final order that the federal district court reverses and remands for further proceedings, the circuits disagree about whether the section 158(d) finality requirement should be measured by the final order of the bankruptcy court or by the district court's reversal and remand. If the federal circuit court focuses on the final order of the bankruptcy court, the circuit court has a final order to review. If the federal circuit court ignores the final order of the bankruptcy court and focuses on the federal district court's reversal with remand for further proceedings, the circuit court may not have a final order to review. Searching section 158 legislative history for the solution to interpreting its grant of jurisdiction is futile. Representative Kastenmeier, the sponsor of the language, saw it only as continuing "traditional appellate review."

B. TWO CURRENT APPROACHES TO FINALITY ANALYSIS USED BY CIRCUIT COURTS

Before a bankruptcy case reaches a federal circuit court, the matter passes through a bankruptcy court and, on review, goes to a federal district court. A minority of jurisdictions

63. See, e.g., Moxley v. Comer (In re Comer), 716 F.2d 168, 171 (3d Cir. 1983) (concluding that considerations unique to bankruptcy permit the court to interpret finality more broadly than in a non-bankruptcy context); see also In re Goldblatt Bros., Inc., 758 F.2d 1248, 1251 (7th Cir. 1985) (noting that "the difference, if any, between finality under section 1291 [for non-bankruptcy matters] and finality under section 1293(b) [for bankruptcy matters] stems from the unique nature of bankruptcy cases. This uniqueness may, in certain cases, justify a more liberal reading of finality under section 1293(b)"); In re Saco Local Dev. Corp., 711 F.2d 441, 443 (1st Cir. 1983) (stating that finality decisions in bankruptcy are different from bankruptcy decisions in other contexts).

64. See, e.g., In re Fox, 762 F.2d 54, 55 (7th Cir. 1985) (stating that a decision is final for purposes of appeal if all that remains is purely mechanical or computational).

65. "[D]ifficult questions arise when the district court, hearing an appeal from a final order of the bankruptcy court, remands to that court for further action. There are both intra-circuit and inter-circuit disputes on this issue, leaving it hopelessly unresolved." 1 W. Collier, COLIER ON BANKRUPTCY ¶ 3.05[2] (L. King ed. 1987)(footnotes omitted).


67. See supra notes 57-59 and accompanying text.
hold that if a bankruptcy court’s decision is final, a district court’s reversal of that decision with remand for further proceedings also is final. This broad approach ignores the further proceedings ordered by the federal district court and focuses on the bankruptcy court’s final order when interpreting the finality requirement of 28 U.S.C. section 158(d). These courts reason that, because the bankruptcy court’s order is final, the federal district court’s order should be considered final for purposes of appeal to the circuit court.

Circuits using this approach frequently cite the Third Circuit’s opinion in *In re Matin Motor Oil, Inc. v. Michaels*.

The *Matin* court provided a number of reasons for its posi-

68. Namely, the Third, Eighth, and Ninth Circuits. See, e.g., Sambo’s Restaurants, Inc. v. Wheeler, 754 F.2d 811 (9th Cir. 1985); Bayer v. Nicola (*In re Bestmann*), 720 F.2d 484 (8th Cir. 1983); Matin Motor Oil, Inc. v. Michaels, 689 F.2d 445 (3d Cir. 1982).

69. See, e.g., *Matin*, 689 F.2d at 449 (holding that when a bankruptcy court issues a final order and the federal district court reverses and remands for further proceedings, the district court’s order also is a final order for purposes of appeal).

70. 689 F.2d 445 (3d Cir. 1982).

71. Id. at 449. *Matin* is often cited for its rigid holding, but the *Matin* court found it significant that a reversal of the district court’s judgment in the case would preclude any further litigation by the plaintiff. Id. at 448. This concern for the effect of its ruling makes the *Matin* holding appear much more flexible.

In *Moxley v. Comer (*In re Comer*), 716 F.2d 168 (3d Cir. 1983), the Third Circuit implied that its own precedent, *Matin*, which focused on the action of the bankruptcy court and allowed an appeal from a bankruptcy court decision that was reversed and remanded by the district court, was not intended to be the exclusive test. Id. at 172-73. Rather, the court found the *Matin* approach simply another argument for its position. Id. Indeed, the court suggested the best approach was a pragmatic approach that looks at the effect of the district court’s ruling. Id. at 172.

In *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985), the Third Circuit expanded its *Matin* analysis and argued that, in addition to determining whether there was anything more for the federal district court to do, the circuit court should consider “the practical effect of the . . . order at issue.” Id. at 1040. Most recently, in Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (*In re Meyertech Corp.*), 831 F.2d 410 (3d Cir. 1987), the Third Circuit reasoned that finality, for purposes of appeal in bankruptcy from district court to circuit court, should be determined by a desire to reach a practical termination of the case in issue. Id. at 414. Factors to weigh in that determination are the impact on the assets of the debtor’s estate, the necessity of further factfinding on remand to the bankruptcy court, the preclusive effect of the decision on the merits for further litigation, and a concern for judicial economy. Id.
tion.\textsuperscript{72} The court reasoned that, when a district court affirms or reverses a final order of a bankruptcy court, the district court judgment is final because nothing remains for the district court to do.\textsuperscript{73} In addition, the \textit{Marin} court found that the court of appeals and the district court play identical roles in bankruptcy appeals because both the district and the circuit court must examine the propriety of the bankruptcy court’s decision.\textsuperscript{74} The circuit court, therefore, can review the bankruptcy court’s finding as competently as the district court.\textsuperscript{75} The \textit{Marin} court also noted that one of the primary reasons courts sometimes narrowly construe the finality requirement is a desire to respect the unique roles of the trial court and the appellate court.\textsuperscript{76} This objective is inapposite, the \textit{Marin} court claimed, when the court of appeals is asked to review a district court acting as a lower appellate court.\textsuperscript{77}

The \textit{Marin} court also held that, because the relatively liberal appeals rules under the old Bankruptcy Act provisions\textsuperscript{78} were not unduly burdensome, courts need not be overly concerned that interpreting finality broadly in appeals under sec-
tion 1293(b) will cause undue problems. One object of the finality rule is to save time by avoiding unnecessary appeals and delays. The Marin court held that the delay factor is less compelling when the bankruptcy decision is final rather than interlocutory.

Two circuits continue to follow the Marin approach. In Sambo’s Restaurants, Inc. v. Wheeler, the Ninth Circuit embraced the reasoning of the Marin court. Sambo’s held that when a bankruptcy court’s order is final and results in a non-final district court order on review, the district court order is appealable if nothing remains for the district court to do. The Sambo’s court, however, went further than Marin, and stated its belief that this approach to determining finality will be the most efficient. The court found that, although bankruptcy courts still would be required to conduct full adversary proceedings on remand from some of the district court appeals, litigation would be completed if the circuit court reversed the district court decision.

The Eighth Circuit also adopted the Marin approach to in-

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79. Marin, 689 F.2d at 449. Section 1293 is the predecessor of § 158(a). Some courts routinely look to decisions interpreting § 1293(b) to guide them in interpreting § 158(d). See supra note 57 and accompanying text.
80. Marin, 689 F.2d at 449 (quoting 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3907 (1976)).
81. The Marin court recognized that its approach may result in two appeals of a case, one from the disputed remand order, and the other from whatever order the district court enters on appeal from the bankruptcy court’s final decision following remand. Id. at 448. The court argued that although two appeals might delay a trial more than one appeal, any damage to a speedy and coherent trial is caused primarily by the initial appeal. Id. at 449. Indeed, in some instances two appeals may be no more time consuming than a single appeal. In Marin, the adversary proceeding in the bankruptcy court apparently continued unaffected by the circuit court appeal. Id. at 449 n.2.
82. 754 F.2d 811 (9th Cir. 1985).
83. Id. at 814.
84. Id.
85. Id. The court noted:
Because we believe this approach is virtually always more efficient in reviewing a district court’s review of a final bankruptcy court judgment, we conclude it is not necessary to examine the relative costs of immediate versus delayed review of these types of district court orders on a case-by-case basis.
86. Id. In Crevier v. Welfare & Pension Fund for Local 701 (In re Crevier), 820 F.2d 1553 (9th Cir. 1987), the Ninth Circuit diluted its holding in Sambo’s. The Crevier court held that a non-final order of a district court reversing a final order of a bankruptcy court is appealable unless the intermediate court remands for factual development. Id. at 1555.
interpreting finality in *Bayer v. Nicola (In re Bestmann).*87 The underlying dispute in *Bestmann* was over the ownership of certain hogs.88 Appellant filed an adversary proceeding in the bankruptcy court claiming that proceeds from the sale of the hogs belonged to him and not the defendant bank, which had a security interest in the property of the debtor.89 The bankruptcy court found the debtor did own the hogs and awarded the proceeds to the bank.90 On appeal, the district court held that the appeal was interlocutory and dismissed the appeal for want of jurisdiction.91 The Eighth Circuit found the district court's dismissal of the case was a final order for purposes of appeal.92

A second and more flexible approach to determining finality focuses on what remains to be done by the bankruptcy court after remand from the district court. Courts following this approach refuse to hear bankruptcy appeals from a district court when the district court remands a case to the bankruptcy court for significant further proceedings.93

The Seventh Circuit's decision in *Suburban Bank v. Riggsby* exemplifies this approach.94 The *Riggsby* court directly

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88. *Id.* at 485.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 486. *Bestmann* is often cited for its rigid *Marin*-like approach. See *Homa Ltd. v. Stone (In re Matter of Commercial Contractors),* 771 F.2d 1373, 1375 (10th Cir. 1985) (citing *Bestmann* in support of a *Marin* approach to finality); 1 W. COLIER, *supra* note 67, § 3.03[6][b], at 3-192 & n.77 (citing *Bestmann* for the proposition that when the bankruptcy court issues a final order and the district court affirms or reverses, the district court's order also is final).

The *Bestmann* court, however, found it significant that denial of the appeal would preclude litigation on the issue of the district court's jurisdiction. *Bestmann,* 720 F.2d at 486. Such concern for the likely effect of the court's finality decision makes the *Bestmann* approach far less rigid than the holding for which it is frequently cited. This concern moves the court's approach closer to the pragmatic approach used in other contexts to determine finality. See supra notes 25-31 and accompanying text.

93. The First, Second, Fifth, Eighth, Tenth, and Eleventh Circuits. The Eighth Circuit has used this approach once. See *First Nat. Bank of Tekamah, Nebraska v. Hansen (In re Hansen),* 702 F.2d 728, 729 (8th Cir. 1983) (per curiam) (holding that "district court orders of remand are not final appealable orders"). *But see Bestmann,* 720 F.2d at 486 (adopting the *Marin* approach to interpreting finality, which holds that a district court's order in bankruptcy is final if it leaves nothing more for the district court to do).

94. 745 F.2d 1153 (7th Cir. 1984) (holding that "a decision of the district
challenged the efficiency argument made in *Sambo's*,
94 ruling that it is more efficient to wait until
remand to bankruptcy court is completed before the

circuit court hears an appeal.95 The *Riggsby*
court analogized remand from a district court to a
bankruptcy court to remand from a district court to an
administrative agency.97 The *Riggsby* court
maintained that an order by a district court remanding
an administrative appeal for further
proceedings before the agency is not considered a final

The court also analogized a remand to bankruptcy
court to the traditional interpretation of 28 U.S.C. section
1257 that holds that the Supreme Court's jurisdiction of

state court decisions does not include remands from a
higher to a lower state court.99 A number of
jurisdictions follow the *Riggsby* approach.100

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95. See supra notes 84-89 and accompanying text (discussing *Sambo's*).
96. *Riggsby*, 745 F.2d at 1155-56. The court wrote that:
Because most proceedings before bankruptcy judges are summary, remands
usually take little time to complete and it is therefore more efficient to
wait until the bankruptcy judge is finished with the case . . . before bringing
up the case to the court of appeals. If a district judge remanded a case for
further proceedings that would take a week to complete, and the remand
order was appealable and was upheld on appeal, a year or more might
elapse before the proceedings on remand were concluded. Yet if those
proceedings had been conducted without this interruption, then, depending
on their outcome, there might be no appeal at all, and in any event there would
be no chance of two appeals — one from the order of remand and the other
from whatever order the district judge entered on appeal from the

bankruptcy judge's final decision following remand.

96. *Id.* (citations omitted).
97. *Id.* at 1156.
98. "Provided that the order is effectively reviewable on appeal from the
agency's (here the bankruptcy court's) final decision." *Id.* at 1156 (citing
United Steelworkers v. Union R.R., 648 F.2d 905, 910-11 (3d Cir. 1981)).
99. See id. The *Riggsby* court was reluctant to press this analogy too
hard because of the "additional considerations" involved in this analysis. *Id.* Other
courts also have been reluctant to press the analogy. See, e.g., Universal
reluctance to analogize remands in bankruptcy to remands from a higher to a
lower state court due to "institutional considerations" and the greater
importance of the final judgment rule in the context of the review of state court
judgments).
100. *In re Gould & Eberhardt Gear & Mach. Corp.*, 852 F.2d 26 (1st Cir.
1988). In *Gould*, the First Circuit held that "when a district court remands a
C. A HYBRID OF THE CURRENT APPROACHES TO FINALITY

A seldom used approach to determining finality is a hybrid of the rigid *Mann* approach and the flexible *Riggsby* approach. This pragmatic approach focuses on the likely effect the district

matter to the bankruptcy court for significant further proceedings, there is no final order for the purposes of § 158(d) and therefore the court of appeals lacks jurisdiction." *Id.* at 29 (emphasis added). However, "[w]hen a remand leaves only ministerial proceedings, for example, computation of amounts according to established formulas, the remand may be considered final." *Id.*

The Second Circuit agreed with *Riggsby* in *LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59, 62 (2d Cir. 1988). The court held that it lacked jurisdiction over an appeal from a district court order vacating and remanding a bankruptcy court order because the district court's order was "replete with expressions of non-finality, contemplated significant further proceedings . . . and anticipated modification of injunctive relief upon the presentation of additional evidence to the bankruptcy court." *Id.* at 62.

The Fifth Circuit was faced with an appeal from a district court order remanding the case to the bankruptcy court for an accounting and further proceedings in *County Management, Inc. v. Kriegel*, 788 F.2d 311 (5th Cir. 1986). The court held that the remand for further factual proceedings was not a final order. *Id.* at 313. The court, in dicta, went even further than *Riggsby*. The court reasoned that, even if the district court had merely remanded for an accounting without requiring resolution of further factual and legal issues, its order would not have been final because the general approach to interpreting finality under § 1291 is that "an order determining the rights and liabilities of the parties and remanding for an accounting is interlocutory." *Id.* at 314. The Fifth Circuit subsequently modified this rigid position. *See ITT Diversified Credit Corp. v. Lift & Equip. Serv., Inc.*, 816 F.2d 1013, 1016 (5th Cir. 1987) (holding order final when nothing more than the bankruptcy court's review of the scheduled expenses was required.)

Similarly, the Eleventh Circuit held that it lacked jurisdiction to hear an appeal of a district court order remanding the case to the bankruptcy judge to conduct an adversary hearing in *TCL Investors v. Brookside Sav. & Loan Ass'n*, 775 F.2d 1516, 1519 (11th Cir. 1985).

The Tenth Circuit followed the flexible *Riggsby* approach in determining finality in *Hama Ltd. v. Stone (In re Commercial Contractors)*, 771 F.2d 1373, 1375 (10th Cir. 1985). The court found that the more traditional view of finality set out in *Riggsby* "furthers the policy underlying the finality doctrine by controlling piecemeal adjudication and eliminating the delays caused by the appeal of interlocutory decisions." *Id.*

The Ninth Circuit, contrary to the rigid position it would later take in *Sambo's*, see supra notes 85-87 and accompanying text, held it did not have jurisdiction over a bankruptcy appeal in view of the remand for factual determination by the bankruptcy judge. *Dental Capital Leasing v. Martinez*, 721 F.2d 282, 284-85 (9th Cir. 1983). The Ninth Circuit purported to reconcile *Sambo's* with *Martinez* in *King v. Stanton*, 766 F.2d 1283, 1287 n.7 (9th Cir. 1985):

One case, *In re Riggsby* suggests that the rule we adopted in *Sambo's* is inconsistent with our earlier holding in *Martinez* . . . . The Seventh Circuit concluded and apparently interpreted *Martinez* to mean, that a district court's order is not final if it remands the case to bankruptcy court 'for significant further proceedings'. Recently, in *In re Four Seas Center, Ltd.*, our court described the holding in *Martinez* similarly, stating in dicta that we lack appellate jurisdiction "[w]hen fur-
court's decision will have on the case. The Sixth Circuit used this approach in In re Gardner. In Gardner, the circuit court faced an appeal from a district court order reversing a bankruptcy court order concerning the existence of insurance coverage. The district court had remanded the case to the bankruptcy court to determine whether a release signed by the appellants was fraudulent. The circuit court examined the underlying support for both the Sambo's approach, which followed Marin, and the Riggsby approach. The Gardner court then applied the reasoning of each of these two approaches to the particular facts of the case before it.

If Martinez were read as the Seventh Circuit suggested in Riggsby or if our statement in Four Seas were taken literally, perhaps Martinez and Sambo's would be inconsistent with one another. An outright reversal and remand by the BAP ordinarily will fall within the Sambo's rule, even though it would entail 'further proceedings' that likely would affect the scope of the bankruptcy court's order. But we conclude that Martinez cannot be read as broadly as Riggsby or Four Seas might suggest. The key to our holding in Martinez was that the BAP remanded for further factual findings.

Arguably, this attenuated reasoning constitutes a substantial retreat from Sambo's.

101. See infra note 110.
103. Id. at 88. The bankruptcy court held as a matter of law that no insurance coverage existed for plaintiffs. Id. The district court reversed, holding, as a matter of law, that insurance coverage existed. Id. at 90.
104. Id.
105. Id. at 91. See supra notes 84-89 and accompanying text (discussing Sambo's).
106. Gardner, 810 F.2d at 92.
107. Id. at 92. In Gardner, the bankruptcy court held the defendant insurance company not liable to a trustee in bankruptcy for damages that resulted from a car accident because, as a matter of law, no insurance coverage existed. Id. The district court reversed the holding of the bankruptcy court and held that insurance coverage did exist. Id. at 90. The district court also remanded for a determination whether releases signed by two persons were fraudulent to another person and to the trustee in bankruptcy. Id. On remand, the bankruptcy court was to determine whether one party received fair value in exchange for a release to the defendant signed by him, and whether he executed the release knowing or believing he would be unable to pay his debts when they became due. Id.

The federal circuit court believed existence of insurance coverage was the central determinative issue. Id. at 92. If the circuit court agreed with the bankruptcy court that no insurance coverage existed the case would end and the bankruptcy court would not have to hold the further proceedings ordered by the federal district court. Id. The Gardner court believed that the issue of whether insurance coverage existed was straightforward. The facts were un-
Gardner exemplifies a result-oriented approach to finality analysis. The Sixth Circuit reasoned that the legal issue concerning the existence of insurance was the determinative issue underlying the dispute. If the circuit court agreed with the bankruptcy court that no coverage existed, the entire case would end and a remand would be unnecessary. The Sixth Circuit held that, under these circumstances, the Riggsby line of cases was not controlling and the reasoning of Sambo's was more persuasive. The court explicitly declined, however, to adopt the rule developed in Marin and extended in Sambo's.

Gardner might have profoundly altered the interpretation of the finality requirement for bankruptcy appeals had other courts followed the Gardner court's lead. Although other courts appear concerned with the likely result of their ruling, they typically do not adopt the Gardner approach. Unfortunately, as happened with the Gillespie approach, many subsequent decisions ignore it altogether, and return to earlier, more restrictive notions of finality.

disputed and no further factfinding would be necessary. Id. The court reasoned that the Sambo's approach, see supra notes 85-89 and accompanying text, was most appropriate to the case before it. Gardner, 810 F.2d at 92.

108. See supra note 110.
109. Gardner, 810 F.2d at 92.
110. Id.
111. Id.
112. The court did not fully adopt the Sambo's approach, presumably because it preferred a more pragmatic approach that allows the court to apply the Riggsby and Sambo's approaches merely as guidelines and then to examine the effect of the finality decision upon each case. See id. at 92 n.3.
113. For example, Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98 (3d Cir. 1981) (relied on in Marin), treated a judgment as final because nothing remained for the district court to do and because reversal of the judgment would preclude any further litigation on the relevant cause of action. Id. at 101 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83 (1975)). Again, this concern about the likely outcome of their decision makes the Universal Minerals analysis more pragmatic than rigid.
114. See Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting), 871 F.2d 1023, 1028-29 (11th Cir. 1989) (acknowledging that Gardner would lead to a contrary result, but following its precedent in Briglevich v. Rees, 847 F.2d 759 (11th Cir. 1988)). But see Thompson v. Kentucky Lumber Co., 860 F.2d 674, 676 (6th Cir. 1988) (applying Gardner without explanation); Allegheny Int'l Credit Corp. v. Bowman, 821 F.2d 245, 247 n.1 (5th Cir. 1987) (arguing that the Gardner analysis was mistaken); Briglevich, 847 F.2d at 761 (acknowledging that the Gardner approach would lead to a contrary result, but holding that the court was bound by precedent to the Riggsby approach).
115. See supra notes 44-45 and accompanying text.
116. See supra note 117.
III. THE LIMITATIONS OF THE MARIN AND RIGGSBY APPROACHES TO DETERMINING FINALITY

Both the Marin and Riggsby approaches used by circuit courts to determine what orders of a district court in bankruptcy matters are final are flawed. Commentators and courts alike recognize the shortcomings.\(^{117}\) A few courts are reluctant to adopt either approach because they realize that neither approach leads to a just result in all situations.\(^{118}\) No court or commentator, however, has elucidated a clearer standard for circuit courts to apply.\(^{119}\) Gardner,\(^{120}\) although only sketchy in

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117. See, e.g., Gardner, 810 F.2d at 90-91 (examining the conflict between the Sambo's and Riggsby approaches); 1 W. Collier, supra note 60, ¶ 3.03[6][b] (asserting that there are both inter and intra-circuit disputes on the issue of finality for bankruptcy appeals from district to circuit courts, leaving the issue hopelessly confused); Towber, supra note 11, at 589-90 (stating that many of the cases that address finality for bankruptcy appeals from district to circuit court fail to set guidelines for litigants to determine when their orders will become final).

118. See Gardner, 810 F.2d at 91-92 (refusing to adopt either the Sambo's approach, which developed from Marin, or the Riggsby approach).

119. See, e.g., Towber, supra note 11, at 611-13. Despite its title, this article does not elucidate a clearer definition of finality. Towber argues that to avoid some of the inequities of the finality decision, federal circuit courts, in determining whether a federal district court remand to bankruptcy is non-final, should fashion an equitable decree to preserve the appealing party's right to be made whole after subsequent review. Id. at 611-12. In the alternative, Towber argues that circuit courts should hear appeals from orders it deems to be non-final when the legal issue raised on appeal is an important question of law or procedure, the answer to which will affect management of the case. Id. at 613. The Towber approach can not address all the inequities inherent in the present circuit split.

Consider the plight of the New York businessperson in the introduction of this Note. After the federal district court remands his case to the bankruptcy court for further proceedings, he or she must return to the bankruptcy court for those further proceedings. During that time, the New York business' public image is tarnished by the ongoing bankruptcy litigation, while the New Jersey businessperson is entitled to immediate review in the federal circuit court of the federal district court's reversal and remand. The New Jersey businessperson may prevail in the federal circuit court and the bankruptcy case could be over. Under Towber's approach the New York businessperson would be entitled to review only if the legal issue raised on review is an important question of law or procedure. See id. at 612. Assuming it is not an important question of law or procedure, the Towber approach offered only one alternative: the federal circuit court can fashion an equitable decree to preserve the New York businessperson's right to be made whole after subsequent review. Id. at 611-12. The Towber approach does not adequately protect the New York businessperson because no equitable decree can compensate the New York businessperson for the worsened public image.

its analysis, might have served as a catalyst in developing a third, more pragmatic approach to finality analysis, but courts citing \textit{Gardner} ignore its analysis.

The limitations of the \textit{Marin} and \textit{Riggsby} approaches to finality must be analyzed to better understand how a new standard can be developed.

\textbf{A. PROBLEMS OF THE \textit{MARI}N APPROACH}

\textit{Marin} held that a federal district court order reversing and remanding a final order of a bankruptcy court also is a final order for purposes of an appeal.\textsuperscript{122} There are several problems inherent in the \textit{Marin} approach. The most apparent problem is its rigidity. \textit{Marin} raised several important rationales for considering district court remands to bankruptcy court final.\textsuperscript{123} Several other courts echo those rationales.\textsuperscript{124} Unfortunately, the \textit{Marin} court and its progeny failed to recognize the limits of their analysis.

The \textit{Marin} court found that a desire to respect the distinction between trial courts and appellate courts is a primary reason for interpreting finality narrowly.\textsuperscript{125} The court, however, dismissed this concern because in bankruptcy matters the circuit court reviews the decision of a lower appellate court.\textsuperscript{126} The \textit{Marin} court is only partly correct in asserting that concern for the distinction between trial courts and appellate courts is

\begin{itemize}
  \item \textsuperscript{121} \textit{See} United States v. Arnold, 878 F.2d 925, 926 n.2 (6th Cir. 1989) (citing \textit{Gardner} for the proposition that a federal district court's order is a final decision unless the district court remands for a factual determination on an issue central to the case (thus ignoring \textit{Gardner}'s balancing test)); Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. \textit{(In re Dixie Broadcasting, Inc.)}, 871 F.2d 1023, 1029 (11th Cir. 1989) (citing \textit{Gardner} for the proposition that a district court's remand of a bankruptcy case to a bankruptcy court for determination whether an insurance release was fraudulent was a final order (ignoring \textit{Gardner}'s ad hoc analysis)); Allegheny Int'l Credit Corp. v. Bowman, 821 F.2d 245, 248 n.3 (5th Cir. 1987) (asserting that in \textit{Gardner} the Sixth Circuit adopted the \textit{Marin} approach "with the exception that the district court order is not final where it remands the case for a factual determination on an issue central to the case").
  \item \textsuperscript{122} \textit{Marin Motor Oil, Inc. v. Michaels}, 689 F.2d 445, 449 (3d Cir. 1982).
  \item \textsuperscript{123} Id. at 448.
  \item \textsuperscript{124} \textit{See}, e.g., Sambo's Restaurant, Inc. v. Wheeler, Inc., 754 F.2d 811, 814-15 (9th Cir. 1985) (relying on \textit{Marin} analysis of finality to find the court had jurisdiction over a bankruptcy appeal from district court); Bayer v. Nicola \textit{(In re Bestmann)}, 720 F.2d 484, 486 (8th Cir. 1983) (using \textit{Marin} analysis of finality to find the court had jurisdiction over a bankruptcy appeal from district court).
  \item \textsuperscript{125} \textit{Marin}, 689 F.2d at 449.
  \item \textsuperscript{126} Id.
\end{itemize}
inappropriate in bankruptcy appeals from district court to circuit court.

There are three reasons to respect the distinction between trial courts and appellate courts: a desire not to interrupt proceedings in the trial court, a realization that most rulings that precede factfinding are not reversed, and an understanding that an appellate court can satisfactorily identify the controlling legal issues of a case only after factfinding is complete. Only the first of these reasons, a desire not to interrupt proceedings in the trial court, is inappropriate in bankruptcy appeals from district courts to circuit courts. This Note addresses situations in which a district court overturns and remands for further proceedings what is admittedly a final order of the bankruptcy court. It is impossible to interrupt the proceedings in bankruptcy court because proceedings on that order are finished. Thus, as the Matin court maintains, concern for the unique roles of the trial judge and appellate court may be more inappropriate in bankruptcy appeals from a district court to a circuit court than in appeals from a trial court to an appellate court.

Two of the rationales for respecting the unique role of the trial judge are valid when the district court remands to the bankruptcy court for further proceedings. The two valid rationales are that most rulings that precede factfinding are not reversed and that a court of appeals usually is able to satisfactorily identify the controlling legal questions only after factfinding is complete.

Most rulings that precede factfinding are not reversed. If a district court remands for more factfinding, the ruling precedes factfinding and thus is unlikely to be reversed. Often a court of appeals can only satisfactorily identify the controlling legal questions after factfinding is complete. The circuit court thus should wait until the additional factfinding ordered by the district court is complete before hearing the legal issues of a case.

In Matin, the court held that it need not worry about interpreting finality broadly because the relatively liberal appeals

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127. Id. (citing 15 C. Wright, A. Miller, E. Cooper, & E. Gressman, supra note 17, § 3907, at 434).
128. Id.
129. Id.
130. 15 C. Wright, A. Miller, E. Cooper, & E. Gressman, supra note 17, § 3907, at 433.
131. See id. at 432-33.
provisions of the old Bankruptcy Act were not unduly burdensome. However, because clogged court calendars are common today, courts should be concerned about interpreting finality broadly.

Finally, the delay argument from Marin is unpersuasive for two reasons. The court stated that delay caused by two appeals may be overlooked because the initial appeal from the bankruptcy court, not the appeal of the district court order, is the primary cause of the delay. This argument ignores the reality that a long delay is often more disruptive and expensive than a short one. On another level, this argument ignores the inefficient use of judicial resources when two courts hear different parts of one litigation concurrently rather than having one court hear the whole case.

The efficiency argument from Sambo’s, which followed the reasoning of Marin, is as simplistic as that made in Marin. The Sambo’s court argued that focusing narrowly on the action

TABLE 1
GROWTH IN CASELOADS AND JUDGESHIPS IN THE FEDERAL JUDICIARY 1960 - 1980

<table>
<thead>
<tr>
<th></th>
<th>% Increase in cases filed</th>
<th>% Increase in authorized judgeships</th>
<th>% Increase of cases filed over judgeships authorized</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>118%</td>
<td>0%</td>
<td>118%</td>
</tr>
<tr>
<td>Courts of Appeals</td>
<td>495</td>
<td>94</td>
<td>401</td>
</tr>
<tr>
<td>District Courts</td>
<td>122</td>
<td>111</td>
<td>11</td>
</tr>
</tbody>
</table>

Howard, Query: Are Heavy Caseloads Changing the Nature of Appellate Justice?, 66 JUDICATURE 57, 58 (1982).

134. See supra notes 82-83 and accompanying text.

135. Marin, 689 F.2d at 449.

136. For example, the time requirements for corporate reorganizations under the Bankruptcy Code expedite completion of reorganizations. See 11 U.S.C. §§ 1121 (1988); H.R. REP. NO. 595, 95th Cong., 2d Sess. 231, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6191. The Chapter 11 reorganization process alters contractual and property rights of creditors and other parties. To prevent the parties from being irreparably harmed, the bankruptcy court is authorized to conduct some proceedings on an accelerated basis. See, e.g., 11 U.S.C. §§ 362 (d), (e), 1113(d) (1988). Long delays obviously thwart this purpose.

137. See supra note 88.
of the bankruptcy court is more efficient because litigation is complete and the bankruptcy court has nothing more to do if the court of appeals reverses the district court decision to remand the case back to the bankruptcy court. This argument ignores the fact that appellate courts reverse few rulings that precede factfinding. Thus, in a majority of cases, the district court's decision to remand the case to the bankruptcy court will not be reversed. Matters in bankruptcy court ultimately will have to proceed as the district court originally ordered. The practical result of this approach is that appeal to the circuit court of the district court's remand to the bankruptcy court for further proceedings merely will have been delayed.

B. PROBLEMS OF THE RIGGSBY APPROACH

The more flexible approach used in Riggsby suffers many of the same flaws as the Marin approach. Under the Riggsby approach, a circuit court refuses an appeal from a district court only when the district court remands the case to the bankruptcy court for significant further proceedings. Although the flexible approach may bend, it does not bend in the right places. Courts applying the Riggsby approach focus on what the bankruptcy court has yet to resolve, when they should focus upon the interests of the parties affected by the finality decision.

The Riggsby court and other courts following it offer several policy considerations to support their position. Like Marin...
rin and its progeny, however, the Riggsby line of cases fails to recognize the limits of its analysis. The Riggsby court’s analogies to remand from a district court to an administrative agency\textsuperscript{144} and to remand from a higher to a lower state court\textsuperscript{145} are particularly problematic.

One of the two analogies the Riggsby court used to support its flexible approach involves remand to an administrative agency. This analogy is inappropriate to support so objective an approach to interpreting finality. Circuit courts decide the finality of remands by district courts to administrative agencies using a highly subjective case-by-case approach. An order by a district court remanding an administrative appeal for further proceedings before an agency usually is non-appealable only if the order will be reviewable on appeal from the agency’s final decision.\textsuperscript{146} If an order will be unreviewable after the agency’s final decision, the circuit courts apply a pragmatic approach to the finality requirement and hear the appeal from the district court.\textsuperscript{147} The Riggsby approach seemingly would not allow such an escape device. The analogy to a very flexible, subjective approach is inappropriate in support of the much less flexible, more objective Riggsby approach.

The analogy the Riggsby court draws between remand from a district court to a bankruptcy court and Supreme Court review of state court decisions is even weaker. The Riggsby court noted that Supreme Court review of state court decisions usually does not include remand from a higher to a lower state court.\textsuperscript{148} There are, however, several situations in which the Supreme Court exercises jurisdiction over a case without awaiting completion of additional proceedings on remand in the lower state court.\textsuperscript{149} One situation is when further proceedings

\textsuperscript{144} Suburban Bank v. Riggsby, 745 F.2d 1153, 1156 (7th Cir. 1984); see supra notes 100-01 and accompanying text.
\textsuperscript{145} Riggsby, 745 F.2d at 1156. See supra note 102 and accompanying text.
\textsuperscript{146} Riggsby, 745 F.2d at 1156. The Riggsby court found this exception was no problem in the case before it. \textit{Id.} at 1156. This exception to agency remands, however, could significantly alter the applicability of this analogy to many cases in which the order effectively will not be reviewable on appeal from the bankruptcy judge’s final decision.
\textsuperscript{149} See Cox, 420 U.S. at 477-85 (detailing the four categories of cases in which the court will treat a decision on a federal issue as a final judgment without awaiting the completion of the additional proceedings ordered for the lower state court).
on the state claim remain and the federal claim has been decided finally, but later review of the federal issue will be impossible regardless of the outcome of the case. Another situation is when a state court makes a final decision on a federal issue and a refusal immediately to review the state court decision could seriously erode a federal policy. In both of these instances, the Supreme Court uses a pragmatic interpretation of finality to avoid inequities that might result from the finality decision. The Riggsby approach has no similar "safety devices" and its reliance on this analogy of state court remands to lower courts is therefore misplaced.

The principal advantage of the Riggsby approach is that it allows the circuit court to exercise some pragmatism. Courts can avoid harmful delays when only ministerial tasks remain for the bankruptcy court to consider. Of course, any appellate system should exist to serve the interests of the parties involved. By narrowly focusing its inquiry on what remains to be done by the bankruptcy court, the Riggsby approach ignores

150. See California v. Stewart, 384 U.S. 436 (1966). In Stewart, the Supreme Court of California reversed appellant's conviction on federal constitutional grounds and remanded to the lower court for a new trial. Id. at 498. The United States Supreme Court affirmed, applying a pragmatic interpretation of finality because an acquittal of the defendant at trial would have precluded, under state law, an appeal by the state. Id. at 498 n.7.

151. See Cox Broadcasting, 420 U.S. at 482-83. In Cox Broadcasting, the appellant reporter broadcast a rape victim's name, which he had obtained from public records. The victim's father brought a damages action under a Georgia statute that made it a misdemeanor to broadcast a rape victim's name. At trial, the court held the reporter violated the Georgia statute. Id. at 474. The Georgia Supreme Court held the trial court erred in construing the statute to extend a cause of action for invasion of privacy, but found the complaint stated a cause of action for common law invasion of privacy. Id. The Georgia Supreme Court further held that the first and fourteenth amendments did not, as a matter of law, require judgment for appellants. Id. at 475. On motion for rehearing, the appellants charged that the victim's name could be published with impunity because it was a matter of public interest. The Georgia Supreme Court denied the motion and upheld the statute as a legitimate limitation on the first amendment's guarantee of free speech. Id.

The United States Supreme Court held that it had jurisdiction over the case, in part because if appellants prevailed at trial and made consideration of the federal constitutional question unnecessary it would "leave unanswered an important question of freedom of the press under the First Amendment... an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." Id. at 485-86 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247 n.6 (1974)).

152. See Riggsby, 745 F.2d at 1156.

the damage to the interests of the parties that can be caused by
the circuit court's finality decision.\textsuperscript{154} Although the flexible ap-
proach may better respect the distinct roles of the trial and ap-
pellate courts, the benefit may be lost if the parties' interests
are seriously harmed by the decision.\textsuperscript{155}

\textbf{IV. FOLLOWING THE LEAD OF GARDNER AND
GILLESPIE—ADOPTING A TRULY
PRAGMATIC APPROACH TO
INTERPRETING FINALITY
UNDER SECTION 158(d)}

The solution to the unfairness caused by unsound ap-
proaches to finality analysis currently used by the circuit courts
and the present circuit split is to adopt a pragmatic approach.
The circuit courts should adopt the ad hoc approach to deter-
mining finality used or advocated in many non-bankruptcy con-
texts.\textsuperscript{156} Circuit courts should follow the result-oriented
analytical approach hinted at by the Sixth Circuit in \textit{In re

\textsuperscript{154} Applying the Biggs by approach to the introductory hypothetical at the
beginning of this Note, the New York businessperson would be required to re-
turn to the bankruptcy court, complete the further proceedings ordered by the
federal district court, and incur additional legal fees before appeal could be
had in the federal circuit court, unless the appeal was for simple, administra-
tive tasks. During that time, the New York business' public image may be tar-
nished irreparably by the continuing bankruptcy proceedings. The Biggs by
approach does not consider the possible damage to the litigant's interests.
Under the approach advocated by this Note, the federal circuit court could
consider evidence of the likely effect on the litigants' public image of the delay
caused by denying immediate appeal. If the federal circuit court found this
danger outweighed the dangers of piecemeal review, the federal circuit court
could exercise jurisdiction.

\textsuperscript{155} Of course, this problem involves a value judgment about which inter-
est should prevail, respect for our legal structure or respect for the parties' in-
terests. Respect for our legal structure should not be automatic but should
spring from a belief that the structure typically leads to just results. In a situ-
atation in which the legal structure often leads to unfair outcomes, the reason
behind such respect fails. We should respect legal process when it leads, most
often, to just outcomes.

\textsuperscript{156} The approach advocated in this Note is similar to the flexible ap-
proaches to interpreting finality used in other contexts. \textit{See supra} notes 32-41
and accompanying text (discussing Gillespie v. United States Steel Corp., 379
U.S. 148 (1964), which advocates a broad, pragmatic approach to finality for all
appeals from federal district courts to federal circuit courts); \textit{supra} notes 105-
14 and accompanying text (discussing Breyfogle v. Grange Mut. Casualty Co.
(\textit{In re Gardner}), 610 F.2d 87 (6th Cir. 1987), which advocates ad hoc decision
making in interpreting the finality requirement for bankruptcy appeals from
federal district courts to federal circuit courts); \textit{see also supra} notes 152-53 and
accompanying text (examining the result-oriented approach to the finality re-
quirement for administrative appeals); \textit{supra} notes 156-58 and accompanying
A pragmatic approach to finality analysis would allow the courts to use the Riggsby and Marin approaches merely as guidelines and then to examine the effect of their finality decision on the litigants in each case. The circuit courts should weigh the potential harm to the litigants' interests against the inconvenience and costs of piecemeal review. This approach would allow circuit courts to be sensitive to the weaknesses in the Marin and Riggsby approaches. The Gardner court faintly sketched out the details of this approach. The fuller picture provided in this Note can help guide subsequent finality decisions.

Among the factors a court of appeals ought to consider in interpreting finality under a pragmatic approach are whether the decision will be reviewable after remand, the potential harm to the litigants' personal or financial situation from the delay caused by an appeal, and the likelihood that the order being appealed ultimately will be reversed.

Both the Marin court and the Gardner court were context (examining the flexible approach to the finality requirement for remands to lower state courts).

157. 810 F.2d 87, 90-92 (6th Cir. 1987). A pragmatic approach to finality analysis in bankruptcy appeals echoes Justice Black's language from Gillespie, that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice on the other.'" 379 U.S. 148, 152-53 (1964) (quoting Dickinson v. Petroleum Conversion Corp., 388 U.S. 507, 511 (1950)).

158. This is similar to the approach used in Gillespie. See supra notes 32-41.

159. In some large bankruptcy cases, the harm to the litigant's interest caused by delay from denying immediate appeal from a federal district court's reversal and remand of the bankruptcy court's order will be insubstantial because the larger bankruptcy case can continue for many years after the time when the disputed ruling is appealed to the federal circuit court.

160. See supra notes 125-44 and accompanying text (analyzing weaknesses of the Marin approach); supra notes 145-62 (examining weaknesses of the Riggsby approach).

161. See supra notes 105-15 and accompanying text.

162. Of course, creditors are harmed when the debtor's assets are depleted by legal fees resulting from protracted litigation.

163. These factors make up a test similar to the test commonly applied by a court in deciding whether to issue a temporary injunction. A court's discretion in deciding whether to grant a temporary injunction must be guided by considering four factors: the likelihood and type of harm to the plaintiff if a preliminary injunction is denied, the harm an injunction might inflict upon the defendant, the plaintiff's likelihood of success on the merits, and whether granting the injunction will disserve the public interest. See Signode Corp. v. Weld-Loc Systems, Inc., 700 F.2d 1108, 1111 (7th Cir. 1983).
cerned that reversal of the district court's judgment would preclude further litigation. Concern for whether the decision will be reviewable after remand animates the Supreme Court's flexible approach to review of state court remands to lower state courts. If a decision is appealable later, courts have less reason to consider it final. If the decision is not appealable later, the circuit court should consider it final and hear the appeal.

Even though denying jurisdiction may not lead to a long delay before a more final judgment is issued by the bankruptcy court, the delay may cause serious economic consequences for the party seeking immediate review at the circuit court level because of the uncertainty surrounding his or her financial soundness. Further, the accumulation of legal fees during a corporate reorganization can make long delays extremely expensive for both the debtor and the unsecured creditors. If potentially serious harm could result from the delay caused by a remand, the circuit court should exercise jurisdiction over an appeal.

Marin, 689 F.2d at 448; Gardner, 810 F.2d at 92.

See supra note 30.

For example, customers may not be willing to enter contracts with the New York businessperson in this Note's introductory hypothetical while the bankruptcy proceedings continue on remand to the bankruptcy court. The New Jersey businessperson may terminate bankruptcy litigation much sooner because in the Third Circuit she has a right to immediate appeal of the district court's reversal and remand of the bankruptcy court's final order. Customers who may have done business may decide that it is safer to cross the Hudson River and do business with the New Jersey businessperson because the New Jersey business is no longer involved in bankruptcy litigation and thus appears to be less risky. The New York businessperson will be penalized by this circuit split in finality analysis for bankruptcy appeals from federal district court to federal circuit court even though Congress intends bankruptcy procedure to be uniform throughout the United States. See supra note 7 (discussing Congress' power to make uniform bankruptcy laws).

The Bankruptcy Code grants special treatment to attorneys fees incurred by parties to the case and requires that those fees be paid prior to any distribution to the unsecured creditors. 11 U.S.C. §§ 507(a)(1), 1129(a)(9)(1988).

Under the approach advocated by this Note, if delay caused by the further proceedings ordered by the federal district court to occur in the bankruptcy court will seriously deplete the resources of the debtor's estate and deprive creditors of fair compensation, the circuit court should exercise jurisdiction. If the circuit court exercises jurisdiction and overturns the district court's reversal and remand the proceeding will be finished and the debtor's estate will be preserved.

Similar concern for the effects of delay in bankruptcy motivated the United States Bankruptcy Court for the Southern District of Florida to permit sale of a debtor's store and warehouse free and clear of security interests of any secured creditors. See Seidle v. Southeast First Nat'l Bank of Miami (In re
Circuit courts should consider the likelihood that the order being appealed ultimately will be reversed.\textsuperscript{169} Of course, it would be counterproductive to have an appellate court make a lengthy examination of the merits of an attempted appeal only to have it decide that the effort it had just expended was unnecessary. The circuit courts should develop a limited process, to be used in place of a full examination of the merits of a case, to determine whether an appeal presents an issue that likely was wrongly decided by the district court. Courts already have experience judging the likelihood that a litigant’s claim will prevail when a litigant attempts to obtain interlocutory review under 28 U.S.C. 1292(b)\textsuperscript{170} or when a litigant attempts to obtain a temporary injunction.\textsuperscript{171} If it is likely that the district court will be reversed, the circuit court has another compelling reason for exercising jurisdiction over an appeal.

The solution this Note proposes blurs the question of what district court decisions are appealable, and therefore encour-

\textsuperscript{169} The less likely the district court will be reversed, the less likely justice will be denied by delay and the greater the chance of causing harm to the litigants by piecemeal appeal. If there is little doubt that the district court reversal and remand was correct, then the dangers of wasted time, effort, and money resulting later from a possible reversal of the bankruptcy court’s decision are greatly reduced. Of course, as the danger of wasted effort in the trial court decreases, the danger of wasted time, effort, and money in the appellate court increases.

\textsuperscript{170} Section 1292(b) allows federal circuit courts to exercise discretion in deciding whether to hear interlocutory appeals. One of the rationales for permitting the exercise of discretion is that the appellate court can estimate the likelihood of error, and the burden upon its own docket. \textit{Hearings on Appeals From Interlocutory Orders & Confinement in Jail-Type Institutions Before the Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 2d Sess., 21 (1958) (statement of Hon. Judge Albert B. Morris, United States Court of Appeals for the Third Circuit, Philadelphia, Pa.).}

\textsuperscript{171} To grant a temporary injunction, a court must consider how likely a plaintiff is to succeed, because the answer affects the relative balance of harm that must be shown. Roland Machinery Co. v. Dresser Indus., 749 F.2d \textsuperscript{380}, \textsuperscript{387} (7th Cir. 1984) (Posner, J.)(arguing that “[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor [to issue a temporary injunction]; the less likely he is to win, the more need it weigh in his favor”).
ages questionable appeals.\textsuperscript{172} Obviously, given the already clogged circuit court calendars, questionable appeals should not be encouraged.\textsuperscript{173} Using a summary procedure could ameliorate the damage such blurring causes.

A pragmatic approach to the finality requirement in bankruptcy appeals would better serve the interests of the parties to the litigation because unnecessary delays will be curtailed and harm to the litigants' personal or financial situation will be minimized. This approach more wisely uses judicial resources. It reduces the unnecessary duplication of judicial effort that occurs whenever a district court decision that is likely to be overturned can not be reviewed immediately because it must await a "more final" disposition.

Moreover, the sponsor of section 158(d), which governs bankruptcy appeals from federal district courts to federal circuit courts, intended it to continue "traditional appellate review."\textsuperscript{174} The two dominant approaches circuit courts use to interpret section 158(d) are unlike any of the approaches used to interpret when an order is final in other legal contexts.\textsuperscript{176} A rule that allows a circuit court to consider the impact of its interpretation of finality on the litigants in a bankruptcy appeal is akin to the interpretation of finality used in administrative appeals,\textsuperscript{176} in appeals from state courts to the Supreme Court,\textsuperscript{177} and advocated for non-bankruptcy appeals from district court to circuit court in Gillespie.\textsuperscript{178}

**CONCLUSION**

Appeals from a bankruptcy court usually are to a federal district court, which reviews the decision of the bankruptcy court. Appeals from final decisions of the district court go to the circuit court. The circuits disagree on what constitutes a final decision for purposes of appeal from a district court to a cir-

\begin{footnotes}
\textsuperscript{172} Blurring this question could encourage dubious appeals by parties eager either for review or to delay the district court proceedings.
\textsuperscript{173} See supra note 137 (charting the growth in the number of appeals filed in federal circuit courts between 1960 and 1980).
\textsuperscript{174} See supra note 68 and accompanying text.
\textsuperscript{175} See supra notes 14-45 and accompanying text (describing finality analysis in non-bankruptcy contexts).
\textsuperscript{176} See supra notes 152-53 and accompanying text.
\textsuperscript{177} See supra notes 156-58 and accompanying text.
\textsuperscript{178} See supra notes 32-41 and accompanying text (advocating a broad, result-oriented approach to finality for non-bankruptcy appeals from federal district courts to federal circuit courts).
\end{footnotes}
cuit court in the bankruptcy context. Some circuits follow the Riggsby approach and refuse to hear bankruptcy appeals from a district court when the district court remands the case to the bankruptcy court for significant further proceedings. Other circuits follow the Marin approach and hold that a district court's order reversing a final order of the bankruptcy court also is a final order. Neither the Marin approach nor the Riggsby approach to finality adequately serves the interest of justice in every situation. The Gillespie and Gardner decisions sketch the outline of an alternative approach to finality analysis that is better able to achieve just results. Both of these cases, however, are largely ignored.

A circuit court faced with an appeal from a district court remand ordering the case to a bankruptcy court should determine the degree of harm to the litigant that would ensue if an order were found non-final and appellate review denied. If serious harm would result, circuit courts should exercise jurisdiction. This pragmatic and subjective approach to finality analysis in bankruptcy appeals under section 158(d) would resemble finality analysis currently used in non-bankruptcy appeals and would be superior to the present inconsistent approaches now used by the circuit courts.

Joseph Mitzel