

NATIONAL CONFERENCE OF BANKRUPTCY JUDGES TASK FORCE ON COST CONTAINMENT

I. INTRODUCTION AND SUMMARY OF POSITION REGARDING ANY ELIMINATION OF BANKRUPTCY APPELLATE PANELS

The National Conference of Bankruptcy Judges (hereinafter “NCBJ”) opposes the proposed elimination of Bankruptcy Appellate Panels (hereinafter “BAPs”) as a cost containment measure. The position of the NCBJ is that BAPs are a cost effective and extremely valuable method of deciding bankruptcy appeals and they should not be eliminated.

At the NCBJ mid-year meeting held on April 5, 2011, NCBJ President Randall L. Dunn appointed a task force to study and make recommendations with respect to a proposal made by the Administrative Office of the United States Courts to eliminate BAPs as a cost savings measure. The members of the task force are: Joan Feeney (Chair), Colleen Brown, Marian Harrison, Robert Nugent, Pamela Pepper, Barry Schermer, and Mary Walrath.¹ A subcommittee comprised of Joan Feeney and Barry Schermer investigated the history, operations, and statistics of the various BAPs and interviewed BAP judges. A report writing subcommittee comprised of Marian Harrison and Joan Feeney were primarily responsible for writing this report. The task force has concluded

¹ Certain members of the task force presently serve as members of BAPs. Joan Feeney is a member the First Circuit BAP. Barry Schermer is a member of the Eighth Circuit BAP. Robert Nugent is a member of the Tenth Circuit BAP.

that there are a number of valid reasons in support of maintaining BAPs, as discussed below.

II. BAPs ARE ESTABLISHED BY STATUTE AND THE CIRCUIT COUNCILS AND CANNOT BE ELIMINATED BY EITHER THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS OR THE JUDICIAL CONFERENCE OF THE UNITED STATES.

BAPs are established by federal statute. Pursuant to 28 U.S.C. § 158(b)(1), the judicial council of each circuit is *required* to establish a BAP absent the circuit council's finding that there are insufficient judicial resources available in the circuit for the establishment of a BAP or that a BAP would cause undue delay or increased costs to parties in bankruptcy appeals. A majority of district judges within a district must vote to permit BAP appeals in that district. 28 U.S.C. § 158(b)(6). In those circuits establishing BAPs, the overwhelming majority of district courts have elected to offer parties the option of consenting to determination of appeals in the BAP. Currently, five of the eleven circuits have BAPs: the First, Sixth, Eighth, Ninth, and Tenth Circuits.² Indeed, the Ninth Circuit BAP has been in existence for over 30 years. In each of the circuits which has a BAP, the BAPs have a long standing and well-settled presence.

² The BAP Clerks in the Sixth and Eighth Circuits are consolidated with their courts of appeals. The BAPs in the First, Ninth and Tenth Circuit have a free-standing Clerk and small staffs.

The decision of whether to establish a BAP within a circuit is made by the circuit council pursuant to 28 U.S.C. § 158. Only the circuit councils of the First, Sixth, Eighth, Ninth, and Tenth Circuits have the power and authority to eliminate their BAPs. Moreover, a decision to eliminate the BAPs would have to be supported by findings made by the circuit council of each particular circuit that the circuit lacks the judicial resources for the continuation of the BAP or that the BAP would unduly delay or increase costs to parties. The Administrative Office (“AO”) and the Judicial Conference of the United States could encourage circuit councils to reconsider their previous decisions to establish BAPs but neither entity can make the decision to eliminate BAPs.

III. BAPs PROVIDE AN IMPORTANT AND COST EFFECTIVE SERVICE TO THE UNITED STATES COURTS AND PARTIES IN BANKRUPTCY APPEALS.

A. BAPs have made, and continue to make, a significant contribution to the development of bankruptcy law.

The BAPs have developed a quality body of significant jurisprudence in bankruptcy law available for use by practitioners and other courts. See Jonathan Remy Nash and Rafael I. Pardo, *An Empirical Investigation Into Appellate Structure and the Perceived Quality of Appellate Review*, 61 Vand. L. Rev. 1745, 1746 (2008). Judges and members of the bar faced with legal issues in bankruptcy cases value the decisions of BAPs as a source of quality precedent and authority. Indeed, bankruptcy judges at the trial court level, and district judges at the appellate level, regard the decisions of BAPs as important

resources, particularly in their own circuits. See Judith A. McKenna and Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 American Bankruptcy Law Journal, 625, 627-28 (2002). The decisions of BAPs are cited more frequently by bankruptcy courts, other BAPs, circuit courts of appeals, and courts in other circuits than district court decisions in bankruptcy appeals. See Nash and Pardo, *supra*, at 1745, 1746, 1805.

It is the consensus of the bankruptcy judges interviewed from circuits that have BAPs, that a BAP decision is treated as highly persuasive precedent as the decisions of the BAPs are usually thorough and well-reasoned. The respect for BAP precedents, which most bankruptcy judges give to BAP decisions, results in more uniform standards of law in a circuit.

The BAPs provide the specialized expertise of bankruptcy judges in appeals from bankruptcy courts decisions and embody features of quality appellate review due to the three-judge panel model. Bankruptcy judges, due to their specialized experience, are well qualified to decide appeals involving issues of bankruptcy law and procedure. See Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 Am. Bankr. L. J. 109 (1997); see also Symposium, *Inside the Bankruptcy Judge's Mind*, 86 BU.L.Rev. 1227, 1230-31 (2006). Bankruptcy judges deal with the intricacies of bankruptcy law and procedure on a daily basis and are used to acting quickly in deciding complex cases in the fast-paced world of bankruptcy. Statistical evidence shows that BAPs are an excellent method of

determining errors in bankruptcy courts' decisions, and indeed where available, a BAP is the stronger of the two appellate options. See Nash and Pardo, *supra*, at 1753.

B. BAPs enjoy strong support throughout the judiciary and the legal community.

Bankruptcy practitioners support the availability of BAPs as an option for determining bankruptcy appeals. In the First Circuit, bankruptcy practitioners throughout the circuit were polled in 2004 on the question of whether the BAP should continue in that circuit. The overwhelming majority of attorneys surveyed answered the question in the affirmative. In a survey of Ninth Circuit bankruptcy practitioners, bankruptcy practitioners stated, by a two to one margin, that BAP opinions were “better products” than decisions of district courts in bankruptcy appeals. See Christopher F. Carlton, *Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century*, 14 *BYU J. Pub. L.* 37, 62 (1999). The elimination of the BAP as an option for appealing bankruptcy court decisions would represent a loss to practitioners who see the choice of appellate tribunals as beneficial to their clients.

National statistics are not conclusive on whether the BAPs have speedier disposition times than the district courts in deciding bankruptcy appeals. However, statistics maintained by the First Circuit and Tenth Circuit BAPs, when compared to the dockets of bankruptcy appeals in the district courts, reveal that these BAPs more expeditiously decide bankruptcy appeals than the district courts in those circuits. See Chart A. Although there are statistics on time intervals available from AO, these statistics

do not provide well-grounded comparisons because of the limited and inconsistent statistics maintained by district courts on bankruptcy appeals. Due to this gap of information, an equivalent comparison with AO's BAP and district court statistics is not possible. For example, although the BAPs keep statistics on when a case is taken under advisement and whether there is an oral argument or summary disposition, the district courts do not keep such statistics. Moreover, in general, district court judges treat bankruptcy appeals differently depending on the judge. In the district courts, there are many differences as to how bankruptcy appeals are docketed and processed and judges differ on whether oral arguments are necessary. Courts are not uniform as to when a case is considered under submission. These procedures affect disposition times from a statistical perspective. Regardless of whether there is a statistical difference between disposition times in the BAPs and the district courts, it can fairly be said that the bankruptcy bar believes that the BAPs more quickly decide bankruptcy appeals.

C. Service as a BAP judge enhances a bankruptcy judge's work as a trial judge.

Reviewing other bankruptcy judges' decisions provides a valuable and enriching educational experience for BAP judges. BAP service makes bankruptcy judges better trial judges. Judges who serve as BAP judges use the perspective of an appellate judge in performing their trial court duties and those interviewed stated that they have become more detailed in their findings and rulings as a result of BAP service.

BAP judges interviewed unanimously stated that reviewing decisions of bankruptcy courts from the appellate perspective has increased their awareness of the need for proper evidentiary rulings, a complete record, and thorough, structured, and precise findings of fact and rulings of law. Several judges also reported that BAP service guides them to consider the factors of appellate review, for example, jurisdiction and burden of proof. One judge stated that BAP service has made him particularly cautious and prudent in his cases, as well as humbled, knowing that his work will be reviewed by fellow bankruptcy judges who are skilled in bankruptcy law and procedure.

Writing BAP opinions contributes to a trial judge's skills and expertise in rendering opinions and in legal research. Moreover, the collaborative writing of opinions with other BAP judges on the three-judge panels exposes judges to other methods of researching and drafting opinions.

The opportunity to serve as a BAP judge is an enriching experience for judges. Collaboration with colleagues on BAP appeals is a major enhancement to the position of bankruptcy judge. It allows a more recently appointed bankruptcy judge to benefit from consultation with more senior bankruptcy judges and to benefit from their experience. In the course of reviewing other bankruptcy judges' orders and consulting with other BAP judges, bankruptcy judges who serve as BAP judges are exposed to knowledge, practices, philosophies, and styles that would otherwise take years to develop. One relatively new judge reported that the opportunity to serve as a BAP judge was a significant motivation for seeking appointment as a bankruptcy judge.

D. BAPs reduce the workloads of other federal courts.

The BAPs reduce the workload of the district courts and courts of appeals. It is axiomatic that BAPs decrease district court workloads as they process and decide cases that would otherwise be handled in the district courts. The current statutory opt-out procedure for automatic appeals to a BAP was designed to and does result in less work for district court judges, law clerks, and clerks' office personnel as the district court need not spend time on appeals taken to the BAP. Statistics from circuits with BAPs show that approximately 50 to 57 percent of bankruptcy appeals are taken to the BAPs.

In addition, BAPs reduce the workloads of the circuit courts of appeals. A lower percentage of appeals to the BAPs are appealed further to the circuit courts than are appealed further from the district courts. See Chart A. Moreover, statistical evidence shows that courts of appeals are more likely to uphold the decisions of BAPs than district courts, as courts of appeals affirm BAPs at a significantly greater rate than district courts. See Nash and Pardo, *supra*, at 1804; see also Chart A.

If the BAPs were abolished, the appellate work would remain and the district courts still would be required to determine the appeals of bankruptcy court decisions. The district court judges, their staff, and the district court clerk would have to absorb the work of the bankruptcy appeals. Elimination of the BAPs would shift the work first to the district courts. An increased bankruptcy appeal caseload could also result in an increase

in the practice of some district judges to refer bankruptcy appeals to magistrate judges.³ Similarly, in light of the discussion above, elimination of BAPs would undoubtedly increase the workload of the courts of appeals, through an increase in the number of appeals.

E. The costs of BAPs are justified and are reasonable in view of the work that is shifted from other courts and the valuable services provided.

The expenses associated with operation of the BAPs are reasonable in view of the services rendered. In 2010, 890 appeals were filed in the BAPs, a twenty one percent increase from 2009. The BAPs' clerks' offices operate at a low budget with minimal employees. BAP judges and their law clerks and staff provide assistance to bankruptcy judges who sit on the BAP and receive no additional remuneration for the additional work of the BAPs.

BAP judges and their staff receive only their normal salaries and their staff members contribute to the work of deciding bankruptcy appeals at little cost to the United States courts. Whereas BAP judges may be entitled to an extra law clerk depending on the number of BAP cases they handle, only in the Ninth Circuit, because of the large volume of BAP appeals, does each bankruptcy judge have an additional law clerk. Most bankruptcy judges use their chambers staff for BAP work at no cost to the judiciary. Indeed in the Eighth Circuit, there are no shared BAP law clerks and there is not a separate BAP Clerk. The First and the Tenth Circuit have two shared BAP law clerks. The Sixth Circuit has

³ However, there are circuits in which this practice is not permitted and it may not be permitted in any circuit under the new Bankruptcy Rules. In addition, this practice is considered to raise the cost (and hence dampen the desire to appeal) of an appeal because it adds another layer of intermediate appeal.

one shared BAP law clerk and does not have a separate BAP Clerk. Thus, any additional costs of BAPs are both a minimal expense and a bargain in light of the clear benefits to the bankruptcy system.

The only additional expense of BAPs is the travel expenses of judges to and from hearing locations and the cost of the clerks in the First, Ninth, and Tenth circuits.⁴ Both the clerks and travel expenses are minimal compared with the valued service for the parties to appeals.

The BAP clerks maintain efficient operations and keep statistics concerning bankruptcy appeals, which many district courts do not maintain. The BAP Clerk in the First Circuit, for example, provides monthly status reports to all bankruptcy judges in the circuit on the status of their appeals which are valuable to judges in monitoring their cases on the trial court level and to BAP judges as well. Moreover, all bankruptcy judges are sent copies of all BAP opinions electronically so they can immediately be apprised of the disposition of their appeals, and stay current on developments in the law. The BAP Clerks in the First, Ninth, and Tenth Circuits are attorneys and are able to and do perform the work of staff attorneys in addition to their traditional clerk duties. For example, the Clerks in the First and Ninth Circuits recently stepped in to cover staff attorney maternity leaves thereby avoiding the cost of hiring replacements or temporary law clerks.

⁴ These three BAPs have independent clerk's offices - all of the BAPs borrow courtrooms. Because most employees would remain, the rental cost for these circuits would be lowered but not eliminated if the BAPs were abolished.

To date, AO has not been able to provide exact figures for the cost of operating the BAPs. When the idea of eliminating BAPs to save money first surfaced, the AO inaccurately reported that the cost for salaries, benefits and non-salary allotments was \$2.3 million and travel costs were \$2.2 million. The reported travel costs are incorrect: the First, Ninth, and Tenth Circuits Clerks reported that they spent no more than one-tenth of the \$2.2 million estimate. Thereafter, the AO informally reported that the total cost of running the BAPs, including salaries, benefits, rents, and travel totaled \$3 million. Data is not available to verify if this amount is accurate or, again, inflated. For example, while the AO has records related to bankruptcy judge travel, it does not appear that the AO keeps records on BAP related bankruptcy judge travel. Accordingly, all of the AO's numbers are unverifiable. It also bears repeating that even if the BAPs were eliminated, only a relatively small percentage of BAP cost would be eliminated as the work to process bankruptcy appeals would remain.

IV. CONCLUSION

In summary, the NCBJ is of the opinion that the elimination of BAPs would not result in any significant cost savings, would increase the burden on district and circuit courts, delay adjudication of bankruptcy appeals and ultimately not be an effective cost containment measure. The BAPs are an integral and valuable component of the bankruptcy system in the United States Courts, and can only be eliminated by judicial council determination in each circuit that currently enjoys the benefits of a BAP.

Respectfully Submitted,

NCBJ Task Force on Cost Containment

August 15, 2011

NCBJ Report on elimination of BAPs.8.8.2010. wpd.

**COMPARISON OF APPEALS TO BANKRUPTCY APPELLATE PANELS AND TO
DISTRICT COURTS IN CIRCUITS WITH BANKRUPTCY APPELLATE PANELS**

Circuit	Year	BAP- Time Submission With Argument To Disposition	BAP - Time Submission W/Out Argument To Disposition	BAP - Time Submission To Disposition	% BAP Appealed To Circuit	% District Court Appealed To Circuit	% BAP Affirmed By Circuit	% District Court Affirmed By Circuit
First								
	2008	2.7	2.8		13%	24%	100%	84%
	2009	2.1	2.4		30%	33%	100%	78%
	2010	1.5	2.8		10.5%	43%	100%	90%
Sixth	2008-2010				16%	72%		
	2008	2.9	0.9		21%	76%		
	2009	1.3	1		15%	81%		
	2010	,7	0.9		13%	59%		
Eighth								
	2008	1.2	0.3	23 days	20%	52%	31%	48%
	2009	1.1	0.6	24 days	15%	13%	67%	37%
	2010	0.9	0.6	28 days	14%	25%	89%	67%
Ninth								
	2008	.8 months (105 of 117 appeals)	.6 months (12 of 117 appeals)		18%	36%	91%	72.2%
	2009	1.3 months (83 of 95 appeals)	1 month (12 of 95 appeals)		13%	28%	92%	75%
	2010	.9 months (95 of 104 appeals)	1.7 months (9 of 104 appeals)		10%	24%	84%	73%
Tenth	2008-2010				18.7%	28.5%	90.5%	63.6%
	2008	1.8	2.4	72.3 days				
	2009	2	2.5	68.7 days				
	2010	2.4	3.4	38.5 days				
National								
	2008	1.3	1.8		16%	31%		
	2009	1.5	1.2		15%	32%		
	2010	.9.9			12%	24%		

District courts do not keep statistics on the disposition times of bankruptcy appeals.