

# Notice

CC-2006-012

April 21, 2006

**Subject:** Direct Appeals of Bankruptcy Orders to United States Courts of Appeal  
**Cancel Date:** Upon incorporation into the CCDM

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## I. Purpose

This notice provides procedures for making a recommendation to the Department of Justice that a bankruptcy court's judgment, order, or decree be directly appealed to a United States court of appeals. This notice also provides procedures for responding to another party's request for direct appeal. The procedures provided in this notice supplement the existing procedures for handling bankruptcy court appeals to a district court or bankruptcy appellate panel. The existing procedures are set forth in CCDM 36.2.1.1.5.5.

## II. Background

Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8 (2005), 119 Stat. 23, 202-204, enacted 28 U.S.C. § 158(d)(2). Section 158(d)(2) authorizes the direct appeal of a bankruptcy court's judgment, order, or decree to a court of appeals without prior review by the district court or bankruptcy appellate panel (BAP) if certain requirements are met. Prior to the enactment of the BAPCPA, direct appeals were not authorized. Direct appeals are authorized under the BAPCPA in cases commenced under the Bankruptcy Code on or after October 17, 2005.

An appeal from a bankruptcy court's judgment, order, or decree may be made directly to the appropriate court of appeals if certification is made that a basis for direct appeal exists and the court of appeals authorizes the direct appeal. Three grounds for a direct appeal are specified:

- (1) The case involves a question of law as to which there is no controlling decision of the court of appeals or the Supreme Court;
- (2) The case involves a question of law requiring resolution of conflicting decisions; or
- (3) An immediate appeal may materially advance the progress of the case or proceeding in which the appeal is taken.

The required certification may be made by the bankruptcy court, district court, or BAP acting on its own motion or on the request of a party. Alternatively, the certification may be made by all the appellants and appellees acting jointly without involvement by the court. The bankruptcy court, district court, or BAP will make the certification if the court determines that a ground for direct appeal exists or it receives a request for certification from a majority of the appellants and a majority of the appellees. 28 U.S.C. § 158(d)(2)(B).

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A direct appeal does not stay any proceeding of the bankruptcy court, the district court, or the BAP in which the appeal is taken unless the respective bankruptcy court, district court, or BAP, or the court of appeals in which the appeal is pending issues a stay of the proceeding pending the appeal. 28 U.S.C. § 158(d)(2)(D).

A request for certification must be made not later than 60 days after the entry of the judgment, order, or decree by the bankruptcy court. 28 U.S.C. § 158(d)(2)(E). A petition to the court of appeals requesting permission to appeal based on a certification must be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the BAP. A copy of the certification must be attached to the petition. BAPCPA § 1233(b)(4).

### III. Interim Rules

The Advisory Committee on Bankruptcy Rules has prepared Interim Rules designed to implement the substantive and procedural changes mandated by the BAPCPA. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has also approved the Interim Rules and recommends the adoption of the Interim Rules to provide uniform procedures for implementing the BAPCPA until National Rules are adopted by the Supreme Court. Local court's website and decisions (e.g., In re Adoption of Interim Procedural Rules, 332 B.R. 199 (9<sup>th</sup> Cir. B.A.P. 2005)) should be checked to determine whether the Interim Rules have been adopted.

Bankruptcy Rules 8001 and 8003 were amended under the Interim Rules to implement the direct appeal provisions. New subdivision (f) was added to Rule 8001 to provide procedures for obtaining a certification and to require the filing of a timely appeal. Rule 8003 was amended to address leave to appeal. Certain provisions of Interim Rules 8001(f) and 8003(d) are summarized specifically, below. Different courts have adopted slightly different versions of the Interim Rules. The Interim Rules (or amendments thereto) may be adopted that modify the procedural rules for direct appeals set forth in BAPCPA § 1233(b), including the rule in § 1233(b)(4)(A) providing for a 10-day period in which a petition must be filed with the clerk of the circuit court after certification for direct appeal by the bankruptcy court, district court, or BAP. The procedural rules in § 1233(b) are unlike the amendments to section 158 of title 28 set forth in BAPCPA § 1233(a) in that the procedural rules are temporary and may be modified by the adoption of Interim Rules, amendments to Interim Rules, or National Rules issued by the Supreme Court. See BAPCPA § 1233(b)(1).

Interim Rule 8001(f)(2) provides that only a bankruptcy court may make a certification while the matter is pending in the bankruptcy court, and only the district court or BAP involved may make a certification while the matter is pending in the district court or BAP. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the granting of leave to appeal under 28 U.S.C. § 158(a)(3). A matter is pending in a district court or BAP after the appeal under 28 U.S.C. § 158(a)(1) or (2) is docketed, or leave to appeal under 28 U.S.C. § 158(a)(3) is granted. A certification by all the appellants and appellees acting jointly may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending.

Interim Rule 8001(f)(1) requires the filing of a timely notice of appeal in order for a certification to be treated as a certification entered on the docket within the meaning of BAPCPA § 1233(b)(4)(A). Consequently, as with appeals from the bankruptcy court to the district court or the BAP, the filing of a notice of appeal within 10 days of the entry of the judgment, order or

decree is also required when pursuing a direct appeal. Interim Rule 8001(f)(1) and Rule 8002(a).

A request for certification must be filed within the 60-day period specified in section 158(d)(2)(E) with the clerk of the court in which the matter is pending. Interim Rule 8001(f)(3)(A). Notice of the filing of a request for certification must be served in the manner required for serving a notice of appeal under Rule 8004. Interim Rule 8001(f)(3)(B). A request for certification must include the following: (i) the facts necessary to understand the question presented; (ii) the question itself; (iii) the relief sought; (iv) the reasons why the appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in section 158(d)(2)(A) exists; and (v) an attached copy of the judgment, order, or decree complained of and any related opinion or memorandum. Interim Rule 8001(f)(3)(C).

A party may file a response to a request for certification or a cross-request within 10 days after the notice of request is served, or another time fixed by the court. The request, cross-request, and any response are not governed by Rule 9014 and will be submitted without oral argument unless the court otherwise directs. Interim Rules 8001(f)(3)(D) and (E).

Except as provided in 28 U.S.C. § 158(a)(2), interlocutory orders and decrees may only be appealed by leave of court. 28 U.S.C. § 158(a)(3). If leave to appeal an interlocutory order or decree has not earlier been granted, the authorization of a direct appeal by a court of appeals under 28 U.S.C. § 158(d)(2) shall be deemed to satisfy the requirement for leave to appeal. Interim Rule 8003(d).

#### **IV. Procedures**

1. Recommendations for direct appeal should only be made in rare and unusual circumstances and only with the approval of the Division Counsel (SB/SE) and the Associate Chief Counsel (Procedure & Administration). Ordinarily, the interests of the Government will be adequately protected by an appeal to the district court or the BAP and, if necessary, a subsequent appeal to the court of appeals.

2. In the rare and unusual circumstances in which a direct appeal to the court of appeals should be pursued, a notice of appeal must be filed to protect the interests of the Government. The notice of appeal must be filed with the clerk within 10 days of the date of the entry of the adverse judgment, order or decree. See Fed. R. Bankr. P. 8002(a). The filing of a notice of appeal within 10 days of the entry of the adverse judgment, order or decree is necessary because the court of appeals has the discretion not to authorize a direct appeal, and thus an appeal to the district court or the BAP is the only certain means of obtaining judicial review of a bankruptcy court's adverse judgment, order, or decree. In jurisdictions that have adopted the Interim Rules, a notice of appeal must be filed within the 10-day period as a prerequisite to direct appeal certification. Interim Rule 8001(f)(1). A party pursuing direct appeal must file a notice of appeal even when the bankruptcy court has already made the certification. See In re Virissimo, 332 B.R. 208, 209 n.1 (Bankr. D. Nev. 2005).

The procedures outlined in CCDM 36.2.1.1.5.5 should be followed to ensure that a notice of appeal is timely filed when pursuing a direct appeal recommendation. Both a referral for direct appeal following the procedures in this notice and a referral for appeal to the district court or the BAP following the procedures outlined in CCDM 36.2.1.1.5.5 should be made.

3. A request for certification for direct appeal must be made not later than 60 days after the

entry of the judgment, order, or decree. 28 U.S.C. § 158(d)(2)(E). Meeting the 60-day deadline will require prompt action by Area Counsel, Division Counsel (SB/SE), and the Associate Chief Counsel (Procedure & Administration). For the Government to meet the 60-day deadline, the following actions must be performed within the times specified below, unless another time is agreed upon among the Government offices referred to below:

A. Within two business days of the bankruptcy court's entry of the adverse judgment, order, or decree, the Area Counsel attorney (or the attorney's manager) must telephone Branch 2 of the Collection, Bankruptcy & Summonses Division (CBS) at (202) 622-3620 to discuss the case and explain why the Government should seek a direct appeal to the court of appeals, rather than an appeal to the district court or the BAP.

B. Following the discussion with Branch 2 of CBS, if the Area Counsel attorney and the attorney's manager wish to pursue direct appeal, the Area Counsel attorney must draft a memorandum recommending direct appeal and notify the appropriate Civil Trial Section Chief that Area Counsel will recommend direct appeal. The memorandum must discuss why a direct appeal should be pursued and recommend whether a motion should be filed to stay proceedings pending in the bankruptcy court, district court, or BAP. The memorandum must be approved by the Area Counsel and Division Counsel (SB/SE). The memorandum must be received by Branch 2 of CBS not later than 10 calendar days after entry of the adverse judgment, order, or decree.

C. Consistent with CCDM 36.1.1.7.2, the Associate Chief Counsel (Procedure & Administration) will consider SB/SE Division Counsel's recommendation for a direct appeal, in addition to other recommendations, in determining whether to pursue a direct appeal.

D. If it is agreed that a recommendation for direct appeal should be made, the CBS attorney assigned the case will draft a recommendation for direct appeal for the approval of the Associate Chief Counsel (Procedure & Administration). Upon approval by the Associate Chief Counsel, the direct appeal recommendation must be received by the Appellate Section of the Tax Division, Department of Justice, not later than 30 days after entry of the adverse judgment, order or decree (a copy of the recommendation should be provided to the Civil Trial Section Chief).

E. The Solicitor General must approve a recommendation to request certification for direct appeal.

4. If a party other than the Government requests certification for direct appeal, immediate action is necessary. Interim Rule 8001(f)(3)(D) provides that a party has only 10 days to file a response or cross-request to a request for certification, unless another time is fixed by the court. For the Government to meet the 10-day deadline, the following actions must be promptly performed as follows:

A. The Area Counsel attorney (or the attorney's manager) must immediately telephone the following parties to notify them of the pending request for certification: Branch 2 of CBS, Division Counsel (SB/SE), the Civil Trial Section Chief, and the appropriate Assistant U.S. Attorney (if applicable). These parties must be immediately notified regardless of whether the bankruptcy court's judgment, order, or decree is entirely favorable to the Government or is adverse in whole or in part.

