

## WHY BANKRUPTCY APPELLATE PANELS MAKE FINANCIAL SENSE IN TOUGH BUDGETARY TIMES

### I. Introduction

The National Conference of Bankruptcy Judges Cost Containment Task Force (“Task Force”) has prepared this report to address renewed concerns about Bankruptcy Appellate Panel costs in the current difficult budget environment. The members of the Task Force are Judges Robert Nugent (Chair), Randall L. Dunn, Nancy Alquist, Colleen Brown, Joan Feeney, Stephani Humrickhouse, Cecelia Morris, Michael Romero and Mary Walrath.

The specific issue that we discuss is, in this era of tight budget constraints, only driven in part by the baleful effects of the “sequester,” does it make sense to curtail substantially the travel costs of Bankruptcy Appellate Panels (“BAPs”) and associated staff? While the BAPs are highly cognizant of the need to be prudent and economical in managing their travel costs, we submit that it is not even penny wise, and most certainly is pound foolish to mandate a substantial decrease in or elimination of BAP travel costs. There are a number of reasons we advance in support of this conclusion in the following discussion. This report augments (and supplements with data from 2011-2012) the report that the Task Force prepared and submitted on August 15, 2011 in response to a suggestion that the BAPs be eliminated entirely as a cost saving measure.

II. BAPs are created under statutory authority and specifically have been established by various Circuit Court Councils.

As we noted in our prior report, BAPs are established under federal statute. Pursuant to 28 U.S.C. § 158(b)(1)<sup>1</sup>, the judicial council of each Circuit is required to establish a BAP absent the council's finding that 1) there are not sufficient judicial resources available for the formation of a BAP, or 2) a BAP would cause undue delay or increased costs to parties in bankruptcy appeals. As to the latter point, we submit that in the Circuits with BAPs, interested parties have experienced both decreased delays and decreased costs in moving their bankruptcy appeals to resolution.

A majority of district judges within a district must vote to permit BAP appeals within their district. 28 U.S.C. § 158(b)(6). In the Circuits where BAPs have been established, the vast majority of district courts have elected to allow BAPs to handle bankruptcy appeals. At present, five of the eleven Circuits have BAPs. Only the Circuit councils of the First, Sixth, Eighth, Ninth and Tenth Circuits have the authority to eliminate their BAPs, and any such decision would have to be supported by a determination either 1) that the Circuit lacks the judicial

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<sup>1</sup> 28 U.S.C. § 158(b)(1) provides as follows:

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that - (A) there are insufficient judicial resources available in the circuit; or (B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

resources to allow for continued operation of its BAP, or 2) that continued operation of its BAP would unduly delay, or increase costs to, interested parties. 28 U.S.C. § 158(b)(2).<sup>2</sup>

III. The clearly demonstrated benefits of BAPs are both quantitative and qualitative.

In the fiscal year ended September 30, 2011, 1,085 bankruptcy appeals were filed with BAPs. In fiscal 2012, 1,051 new bankruptcy appeals were filed with BAPs. Net of elective transfers thereafter to the District Courts, a total of approximately 2000 bankruptcy appeals for 2011 and 2012 were dealt with as intermediate appeals by the five BAPs. That means that our hard-working District Courts in BAP Circuits did not have to add approximately 2000 additional bankruptcy appeal cases to their case loads. In the Ninth Circuit, where most BAP appeals are filed, the BAP handled approximately 58% of all bankruptcy appeals, while the District Courts dealt with approximately 42% of bankruptcy appeals in both 2011 and 2012.

Bankruptcy judges who sit on BAPs handle BAP appeals as an add-on to their normal trial court work. They receive no additional compensation or adjustment to their work load for BAP work. Their high quality service is provided at no additional cost to the federal

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<sup>2</sup> 28 U.S.C. § 158(b)(2) provides as follows:

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1). (B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists. (C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists. (D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

government. As quoted from noted Portland, Oregon retailer Tom Peterson, “Free is a very good price!”

The BAP judges benefit from the assistance of a total of twelve law clerks for all five BAPs. In the Ninth Circuit, because of the high volume of appeals heard by the BAP, the six BAP judges have one additional law clerk each. Based on the Ninth Circuit BAP case load as of June 30, 2012, under the staffing formula authorized by the Judicial Conference at its September 2001 meeting, the Ninth Circuit BAP was entitled to six additional law clerks. None were requested.

The benefits of BAP work do not extend just to lightening the load of the District Courts. There are material benefits to the Circuit Courts as well. Attached as Exhibit A is a chart showing BAP dispositions and District Court dispositions in bankruptcy appeals and appeals to the Circuits from those dispositions in Circuits with BAPs for fiscal 2011 and 2012. In fiscal 2012, appeals to the Circuits from BAP dispositions ranged from 9% to 15% (9%, 15%, 14%, 11% and 12%). In contrast, in fiscal 2012, appeals to the Circuits from District Court dispositions of bankruptcy appeals ranged from 25% to 38% (27%, 29%, 26%, 25% and 38%). Attached as Exhibit B is a chart showing District Court dispositions in bankruptcy appeals and appeals to the Circuits from those dispositions in Circuits without BAPS for fiscal 2011 and 2012. In fiscal 2011, appeals from District Court dispositions of bankruptcy appeals to the Circuits in Circuits without BAPs ranged from 16% to 34%. For fiscal 2012, the range was from 19% to 41%.

In fiscal 2012, the Ninth Circuit BAP issued dispositions in 724 appeals. 78 of those dispositions, 10.7%, were appealed further to the Ninth Circuit, where the affirmance rate was

82%. District Courts in the Ninth Circuit issued dispositions in 440 bankruptcy appeals in fiscal 2012, and 111 of those dispositions, 25.2%, were appealed to the Circuit, where the rate of affirmance was 79%. In the Tenth Circuit, in fiscal 2012, the BAP issued dispositions in 110 appeals. 13 of those appeals, 11.8%, were appealed further to the Circuit. In contrast, the Tenth Circuit District Courts issued dispositions in 47 bankruptcy appeals, and 18 of those dispositions, 38.3%, were appealed to the Circuit. In the Second Circuit, which does not have a BAP, in fiscal 2012, District Courts issued dispositions in 226 bankruptcy appeals, and 92 of those dispositions, 40.7%, were appealed further to the Circuit.

As stated by Ninth Circuit Chief Judge, Alex Kozinski:

Based on our experience, which spans more than three decades, the BAP is highly productive and well versed in the law. It has become an integral part of our judicial system. The Ninth Circuit was the first to establish a BAP back in 1979. More than 30 of our most experienced bankruptcy judges have served on the panel, which has terminated over 15,000 cases and issued some 6,250 merits decisions. The vast majority of BAP decisions are accepted as final by litigants. When a second-level appeal is sought, the Ninth Circuit Court of Appeals typically affirms BAP decisions 80 to 90 percent of the time. Indeed, Court of Appeals panels often laud the BAP for its sound legal reasoning and sometimes adopt BAP opinions as their own. Within the legal community, the BAP has become the venue of choice for bankruptcy practitioners, regularly claiming a sizeable majority of new bankruptcy appeals. Last fiscal year, litigants filed 712 new appeals with the BAP compared to 425 with district courts. Shifting these cases to the BAP helps lessen the burden on our overburdened district judges who have their hands full with criminal and other civil matters on their dockets. We can say with confidence that the BAP has made a tremendous contribution to the administration of justice here in the Ninth Circuit.

A substantial number of appeals handled by the BAPs are prosecuted by pro se parties.

In fiscal 2012, 506 such appeals were filed at the BAPs. Many of the records submitted in those appeals are “birds’ nests,” either so sparse as to require recourse to the bankruptcy court docket or so voluminous as to require substantial review and sorting time to make sense of them. While

review of such records is never easy, it is substantially easier and more efficient for BAPs, where the judges are thoroughly familiar with procedures and proceedings in bankruptcy court, to sort the wheat from the chaff in such records than it is for the District Courts. Dumping the relatively high volume of pro se bankruptcy appeals on the District Courts would increase their work loads to a far greater extent than is reflected in the raw numbers. This is an area where the BAPs provide a substantial qualitative benefit for the federal judiciary beyond the quantitative benefit of handling a large volume of bankruptcy appeals in the Circuits where BAPs operate.

In addition, over the last 35 years, the BAPs have developed an extensive, well-reasoned body of case law. While difficult to measure, we submit that because the BAPs have addressed and resolved so many different, significant bankruptcy-related issues, a substantial number of potential bankruptcy appeals have been avoided. In other words, because there is an impressive volume of decisions from the BAPs that are cited and relied upon by bankruptcy courts, we would argue that on frequent occasions, appeals, even to the District Courts, are not pursued because the parties are convinced that BAP decisions will effectively control resolution of their issues.

As stated by Tenth Circuit Chief Judge Mary Beck Briscoe,

I have been uniformly impressed with the quality of the BAP opinions generated in our circuit. It seems only obvious that the expertise a panel of seasoned bankruptcy judges can bring to a case far exceeds that of a district judge, who usually has little, if any, experience in this specialized area of law. The BAP has earned such credibility in our circuit that appeals from BAP rulings are declining (24.7% of all BAP dispositions appealed to circuit in 2009-2010, while only 9.7% were appealed in 2010-2011). So we are seeing two benefits: these cases are removed from the district courts' dockets and, for the most part, are also removed from ours. And when we do see appeals from the BAP, they are usually affirmed. From 1996-2011, 81% of the appeals to us from the BAP were affirmed.

IV. BAP travel costs are small and reflect sensitivity to the need to minimize costs.

The BAPs hear oral arguments at various locations in the Circuits where they operate. Since BAPs are elective tribunals, with parties having the option to “opt out” and have their appeals heard by the District Court, the BAP judges have felt it important to give a “face” and presence to their proceedings in districts from which significant portions of their case loads arise. The BAPs balance their objective to provide prompt resolutions to the appeals before them with the costs associated with travel. Accordingly, when necessary or appropriate, the BAPs use video technology, to the extent it is available, to facilitate timely arguments in locations where the case loads do not justify sending full panels of judges. A major limitation on the use of video hearings for BAP proceedings, however, is the lack of any BAP budget for video conference equipment, facilities and personnel. The BAPs have not asked for funding for their own video conferencing capabilities in the past and certainly do not intend to initiate such a funding request in the present budget environment. The BAPs greatly appreciate the friendly cooperation that has been extended to them by the local bankruptcy courts and their staffs in paving the way for appearances by BAP panels in their districts, including providing video conferencing assistance. However, as a bottom line matter, for video conference services, like Blanche Dubois in “A Streetcar Named Desire,” the BAPs have “always depended on the kindness of strangers.”

There is a further significant logistical concern with respect to mandating BAP oral arguments by video conference. While it can be possible to allow attorneys to appear remotely at oral arguments by video with the gracious assistance of local bankruptcy courts, it would be very challenging, to say the least, to attempt to tie in three BAP judges from three separate districts as well as counsel, possibly from a fourth (or even fifth) remote location(s) for oral

arguments by multi-point videos. In addition, in such circumstances, the BAP judges' conferences, pre- and post- oral argument, also would need to be set up through multi-point video conferencing. Such arrangements may not be impossible, but they undoubtedly would be logistically challenging, and again, the BAPs have no budget to implement such arrangements.

The costs for BAP travel totaled \$179,236.05 for 2011 and \$156,726.27 for 2012, broken down by Circuit, as follows:

<u>BAP Travel Costs</u>	<u>2011</u>	<u>2012</u>
First Circuit	\$9,154.00	\$11,870.00 <sup>3</sup>
Sixth Circuit	\$33,824.13	\$30,718.02
Eighth Circuit	\$30,446.80	\$7,050.03
Ninth Circuit	\$96,329.12	\$95,380.22
Tenth Circuit	\$9,482.00	\$11,708.00
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TOTALS	\$179,236.05	\$156,726.27

The BAPs are following the guidelines for judicial staff travel underlined in Judge Thomas F. Hogan's March 11, 2013 memorandum re Emergency Lodgings – Plus Reimbursement Policy During Sequestration.

Our ultimate conclusion is that current BAP travel arrangements are cost conscious and reasonably allow the BAPS to function effectively to perform services that benefit the Circuit and District Courts to a degree far in excess of their hard costs. While we recognize that all costs

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<sup>3</sup> First Circuit BAP travel costs increased slightly in 2012 because two judges retired, necessitating temporary increased used of judges from Puerto Rico.

are significant and must be scrutinized carefully in the current budget environment, when we consider that in fiscal 2012, the federal judiciary spent approximately \$3.2 million for office supplies for the bankruptcy system, including paper clips, staples and file folders, BAP travel costs look like a real bargain.

Respectfully submitted,

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**EXHIBIT A**

Circuit	Fiscal Year	Bankruptcy Appeals Terminated by BAP	BAP Appeals to Circuit	Percentage BAP Decisions Appealed to Circuit		Bankruptcy Appeals Terminated by District Courts	District Court Bankruptcy Appeals to Circuit	Percentage District Court Bankruptcy Decisions Appealed to Circuit	
				BAP Appeals to Circuit	Percentage BAP Decisions Appealed to Circuit			District Court Bankruptcy Appeals to Circuit	Percentage District Court Bankruptcy Decisions Appealed to Circuit
1	2011	88	9	10%	76	19	25%		
	2012	93	8	9%	70	19	27%		
6	2011	81	17	21%	175	39	22%		
	2012	71	11	15%	138	40	29%		
8	2011	99	15	15%	36	11	31%		
	2012	87	12	14%	46	12	26%		
9	2011	567	78	14%	401	100	25%		
	2012	724	78	11%	440	111	25%		
10	2011	113	10	9%	86	10	12%		
	2012	110	13	12%	47	18	38%		

Circuits with BAPs

**EXHIBIT B**

Circuit Circuits Without BAPs	Fiscal Year	Bankruptcy Appeals Terminated by BAP	BAP Appeals to Circuit	Percentage BAP Decisions Appealed to Circuit	Bankruptcy Appeals Terminated by District Courts	District Court Bankruptcy Appeals to Circuit	District Court Bankruptcy Decisions Appealed to Circuit	Percentage District Court Bankruptcy Decisions Appealed to Circuit
2	2011				254	86	86	34%
	2012				226	92	92	41%
3	2011				265	44	44	16%
	2012				296	57	57	19%
4	2011				177	39	39	22%
	2012				180	63	63	35%
5	2011				296	63	63	23%
	2012				288	91	91	32%
7	2011				180	42	42	23%
	2012				123	31	31	25%
11	2011				264	60	60	23%
	2012				318	72	72	23%
DC	2011				25	7	7	28%
	2012				19	6	6	32%