

Introduction to the Bankruptcy Appellate Panel

The statutory history of the bankruptcy appellate panel (“BAP”) begins with the Bankruptcy Reform Act of 1978 (“1978 Act”). The 1978 Act permitted the establishment of such panels on a circuit-by-circuit basis. Appeals from decisions of bankruptcy judges could be taken to the BAP and thereafter to the court of appeals. The 1978 Act also provided for the alternative of direct appeal to the court of appeals. Appeals from bankruptcy court rulings in circuits in which a panel had not been established would continue to be heard in the district court.

Under the authority granted by the 1978 Act, the First Circuit and Ninth Circuit each established a BAP. The First Circuit established its BAP in 1980. All districts in the circuit were included except Puerto Rico. The Ninth Circuit BAP was established in 1979. The panel heard its first oral argument on April 17, 1980. By November of 1982, the jurisdiction of the BAP covered all districts within the Ninth Circuit.

In 1982 the Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), struck down the 1978 Act’s broad vesting of judicial power in the bankruptcy courts. The Court, however, did not foreclose the possibility that cases and proceedings properly before bankruptcy judges at the trial level could also be reviewed by bankruptcy judges on first appeal, provided that review by an Article III appellate court remained a matter of right. This issue was addressed by the First Circuit and the Ninth Circuit in the cases of *Commonwealth v. Dartmouth House Nursing Home, Inc.*, 726 F.2d 26 (1st Cir. 1984), and *Briney v. Burley (In re Burley)*, 738 F.2d 981 (9th Cir. 1984).

When the Supreme Court rendered the *Marathon* decision and issued a stay order, the BAP in the First Circuit operated under an emergency rule that the district courts had adopted to continue operation of the bankruptcy system until Congress could provide the appropriate amendments to the 1978 Act. In *Dartmouth House*, the First Circuit held that the emergency rule pre-empted the use of bankruptcy appellate panels in the circuit. After Congress enacted the 1984 Bankruptcy Amendments, curing the *Marathon* defects, the First Circuit Judicial Council voted not to re-authorize BAPs.

The experience in the Ninth Circuit was different. In *Briney*, the court concluded that the continuing supervision of the BAP by the court of appeals, which retained all the essential attributes of judicial power, ensured that the BAP met the *Marathon* criteria for Article III judicial review. The BAP experiment in the Ninth Circuit received new life,

and continues to this day.

Before the Bankruptcy Reform Act of 1994 (“1994 Act”) was enacted, § 158 of Title 28 of the United States Code provided that a judicial council of a circuit could, if it wished, establish a BAP. The 1994 Act amended section 158 to *require* the judicial council of each circuit to create a BAP unless the council found that (1) there were insufficient judicial resources in the circuit to do so, or (2) the establishment of a BAP would result in undue delay or increased cost to parties in bankruptcy cases.

In 1996, five additional circuits decided to establish BAPs: the First (reauthorized), Second, Sixth, Eighth, and Tenth Circuits. The Seventh Circuit deferred making a decision. The remaining five circuits indicated that they did not intend to create a BAP. The Second Circuit BAP ceased operations on July 1, 2000.

Introduction to the Bankruptcy Appellate Panel of the Tenth Circuit

On February 6, 1996, the Judicial Council of the Tenth Circuit authorized the creation of the United States Bankruptcy Appellate Panel of the Tenth Circuit (BAP) for an initial three-year period beginning July 1, 1996, and ending June 30, 1999. On February 7, 1996, in accordance with the Judicial Council's resolution, the Chief Judge of the Tenth Circuit Court of Appeals appointed nine of the twenty-two bankruptcy Judges within the circuit to serve on the BAP. The terms of the nine Judges were staggered, with three Judges appointed to a three-year term, three Judges appointed to a two-year term, and three Judges appointed to a one-year term. Criteria for appointment to the panel included, but were not limited to a bankruptcy Judge's willingness to serve; the Judge's reputation for collegiality among peers and overall judicial temperament; and the accuracy, clarity, consistency, and timeliness of the Judge's written opinions.

On February 7, 1996, the Chief Judge of the Tenth Circuit appointed one of the nine panel Judges to serve as the Chief Judge of the panel. At that time, the Chief Judge of the BAP served a one-year renewable term, independent of that Judge's panel term appointment. The Chief Judge of the BAP has the responsibility for the administration of the panel. The Chief Judge's responsibilities include supervising the BAP Clerk's Office, chairing the BAP Local Rules of Practice Committee, assigning panels for appeals and motions (although the Chief Judge has no authority over the actual decision of a case by other Judges), appointing individual Judges or committees of Judges to assist in various administrative matters, presiding over administrative meetings of the BAP Judges, and ensuring that the rules of the BAP are observed and that the business of the BAP is handled effectively and expeditiously. The Chief Judge also attends meetings of the Tenth Circuit Judicial Council as an observer Judge.

On March 8, 1999, the Judicial Council of the Tenth Circuit unanimously voted to authorize the permanent establishment of the BAP in the Tenth Circuit. The appointment of the original nine Judges was extended with three Judges being reappointed to serve three-year terms, three Judges reappointed to serve four-year terms, and three Judges reappointed to serve five-year terms. Upon the completion of a term, each Judge is eligible for a renewable five-year term. The appointment of the Chief Judge was extended for a three-year renewable term.

The Chief Judge of the United States Court of Appeals for the Tenth Circuit appoints bankruptcy Judges to fill vacancies on the BAP after consulting with the Chief Judge of the BAP. From time to time, any active or recalled bankruptcy Judge not

otherwise appointed to the BAP may be called upon to serve on a pro tem basis.

The nine BAP Judges, sitting in three-judge panels, will hear appeals from the decisions of the Bankruptcy Courts in the districts of Wyoming, Utah, New Mexico, Kansas and Oklahoma. Bankruptcy appeals from the District of Colorado continue to be addressed by the district court.

A BAP Judge may not hear an appeal originating from his or her own district, and may elect not to hear an appeal from a district where the Judge has assisted. In addition to this restriction, panel Judges from Oklahoma may not be assigned to a case arising from any one of the three Oklahoma districts.

The BAP schedules appeals for oral argument after considering the length of time a case has been ready for argument, the number of appeals requesting oral argument from a district, and panel Judge assignment. To the extent practicable, the BAP schedules oral argument in the district from which the appeal arose. The BAP also allows argument by telephone or videoconference. Generally, if any party to an appeal before the BAP requests oral argument, the appeal will be placed on the first available calendar for that district.

The principal office of the clerk of the bankruptcy appellate panel is located in Denver, Colorado. Personnel for the BAP Clerk's Office consists of the clerk of the BAP, a staff attorney, and a deputy clerk. Staffing for the BAP Clerk's Office is based on projected caseload and is subject to the same reduced staffing level as other federal appellate court units. Responsibilities of the Clerk's Office include case management, records maintenance, opinion publication and circulation, operation of automated systems, statistical reporting, budgeting, personnel administration and public relations.

The clerk's office is dedicated to providing friendly and efficient quality service to the bench, the bar, and the public.