

January 1992

The Tenth Circuit Restricts Appellate Jurisdiction in Cases Originating in Bankruptcy Court. *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380 (10th Cir. 1990)

Timothy J. Dable

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Bankruptcy Law Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Timothy J. Dable, *The Tenth Circuit Restricts Appellate Jurisdiction in Cases Originating in Bankruptcy Court. Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380 (10th Cir. 1990), 70 WASH. U. L. Q. 221 (1992).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol70/iss1/7

This Case Comment is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

THE TENTH CIRCUIT RESTRICTS APPELLATE JURISDICTION IN CASES
ORIGINATING IN BANKRUPTCY COURT

Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 911 F.2d 380
(10th Cir. 1990)

In *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*,¹ the Tenth Circuit held that federal courts of appeal lack jurisdiction over interlocutory appeals² from a district court's decision in bankruptcy matters when the case originated in bankruptcy court.³

Kaiser, a Chapter 11 debtor, commenced an adversary proceeding in the bankruptcy court against two investor groups, challenging as fraudulent two transfers of cash and property to the defendants, which had owned and managed Kaiser before bankruptcy.⁴ After the bankruptcy court rejected the defendants' request for a jury,⁵ the defendants took an interlocutory appeal to the district court.⁶ The district court affirmed the bankruptcy court's decision, but certified the case for interlocutory ap-

1. 911 F.2d 380 (10th Cir. 1990).

2. An interlocutory appeal is "[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits." BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

3. 911 F.2d at 386.

4. *Id.* at 383.

5. *Id.* The defendants' request for a jury trial is unusual. Until recently, it was well settled that the constitutional right to a jury trial did not apply to bankruptcy proceedings. *See Katchen v. Landy*, 382 U.S. 323, 336-37 (1966) (Seventh Amendment right to trial by jury does not extend to bankruptcy cases, which are proceedings in equity).

The Seventh Amendment of the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. The Seventh Amendment guarantees a right to jury trial of legal, but not equitable rights. *See Note, The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1179-81 (1961). Since bankruptcy proceedings are equitable, traditionally there has been no right to trial by jury. In *Barton v. Barbour*, 104 U.S. 126 (1881), the Supreme Court held there to be no right to jury trial of questions that would be legal if not brought in bankruptcy court. *Id.* at 133-34. *See also Katchen v. Landy*, 382 U.S. 323 (1966) (bankruptcy court, as court of equity, has power to decide all issues in a case, whether legal or equitable, without help of a jury).

In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), however, the Supreme Court carved out an exception to this general rule. The Court held that the Seventh Amendment guarantees a right to trial by jury for creditors when a trustee in bankruptcy sues to recover fraudulent transfers when the creditors otherwise have not submitted a claim against the bankruptcy estate. *Id.* at 36. Similarly, in *Langenkamp v. Culp*, 111 S. Ct. 330 (1990), the Supreme Court stated in dictum that creditors who have not submitted claims against a bankruptcy estate have a right to a jury trial when the trustee in bankruptcy sues them to recover preferential transfers. *Id.* at 331.

6. 911 F.2d at 384.

peal to the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292(b).⁷ The Tenth Circuit dismissed the appeal for lack of jurisdiction, holding that 28 U.S.C. § 158(d),⁸ which limits the jurisdiction of appeals courts to final orders in bankruptcy matters, conflicts with and therefore ousts the more general provisions of section 1292(b).⁹

The appellate jurisdiction of the federal courts of appeals traditionally has extended only to final decisions.¹⁰ A number of exceptions to this

7. *Id.* at 384.

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (1988).

8. 28 U.S.C. § 158 governs bankruptcy appeals. It provides in relevant part:

(a) 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 . . . under section 157 of this title. . . .

(b)(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. . . .

. . . .

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. §§ 158 (a), (b)(1), (d) (1988).

9. 911 F.2d at 386-87. However, the court granted a petition for a writ of mandamus. *Id.* at 392. A writ of mandamus is an order from a court of superior jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a specific act requested by a complainant or to restore to the complainant rights or privileges that he has been denied. BLACK'S LAW DICTIONARY 961 (6th ed. 1990). The writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)).

10. This concept of finality dates back to early English common law, in which writs of error required a complete record of the trial below. *See generally* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932). The United States Congress adopted this requirement in the Judiciary Act of 1789, which provided that only final decisions were appealable. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84. Currently, 28 U.S.C. § 1291 grants courts of appeals "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291 (1988). *See* CHARLES A. WRIGHT, FEDERAL COURTS § 101 (4th ed. 1983).

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945) (citing *St. Louis, I.M. & S.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28 (1883)). The imprecision of this standard has led to differing interpretations of what constitutes finality. *See Note, Appealability in*

rule permit interlocutory appeals.¹¹ In 1958, Congress enacted the most far-reaching of these exceptions, section 1292(b),¹² which allows interlocutory appeals if the district court first certifies them and if the court of appeals then accepts them.¹³

A district court's jurisdiction is both original¹⁴ and appellate in bankruptcy cases.¹⁵ The procedure for appealing district court orders in bankruptcy cases, however, is far from clear.¹⁶ In 1984, Congress enacted section 158(d) as part of the Bankruptcy Amendments and Federal Judgeship Act.¹⁷ This statute grants "[t]he courts of appeals . . . jurisdiction of appeals from all final decisions, judgments, orders, and decrees" a district court issues on reviewing a bankruptcy court's orders.¹⁸ The circuits are currently split over whether section 1292(b)'s discretionary appellate jurisdiction applies to interlocutory appeals from a district court's

the Federal Courts, 75 HARV. L. REV. 351, 353-54 (1961). The Supreme Court has observed that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

The final order doctrine seeks to avoid piecemeal litigation, reduce delay, and serve judicial economy. Carlos J. Cuevas, *Judicial Code Section 158: The Final Order Doctrine*, 18 SW. U. L. REV. 1, 7-8 (1988). Moreover, the finality requirement increases the likelihood of a correct holding and prevents erosion of respect for the trial court's authority. See Note, *supra* at 351-52.

11. See, e.g., 28 U.S.C. § 1292(a)(1) (1988) (courts of appeals have jurisdiction over interlocutory appeals concerning injunctions); 28 U.S.C. § 1292(a)(2) (1988) (courts of appeals have jurisdiction over interlocutory appeals concerning receiverships); 28 U.S.C. § 1292(a)(3) (1988) (courts of appeals have jurisdiction over interlocutory appeals concerning admiralty cases).

12. Act of Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

13. See *supra* note 7 for the text of § 1292.

14. 28 U.S.C. § 1334(b) (1988).

15. 28 U.S.C. § 158(a) (1988). See *supra* note 8. The district court hears appeals from determinations of the bankruptcy court, which has original jurisdiction under 28 U.S.C. § 151. Bankruptcy courts have jurisdiction over "core" proceedings in which their orders are final unless appealed. In "non-core" proceedings, the determination of the bankruptcy court is merely a recommendation, and the district court has original jurisdiction. See ASA S. HERZOG ET AL., 1 HERZOG'S BANKRUPTCY FORMS AND PRACTICE § 102[3] (8th ed. 1990). See also 28 U.S.C. §§ 157-158 (1988).

16. See generally 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3926 (Supp. 1991).

17. Pub. L. No. 98-353, 98 Stat. 333 (1984). This statute succeeds 28 U.S.C. § 1293(b) (1982). The courts have treated the two sections very similarly since the statutes contain nearly identical language. See, e.g., *Teleport Oil Co. v. Security Pac. Nat'l Bank (In re Teleport Oil Co.)*, 759 F.2d 1376, 1377 n.1 (9th Cir. 1985) (appropriate to apply § 1293(b) caselaw to case involving § 158(d) because of similarity); *Suburban Bank v. Riggsby (In re Riggsby)*, 745 F.2d 1153, 1154-55 (7th Cir. 1984) (when comparing the different sections, "[t]he relevant provisions appear to be identical except for immaterial wording changes"). See also *Germain v. Connecticut Nat'l Bank*, 926 F.2d 191, 194-96 (2d Cir. 1991) (court examined legislative history of § 1293(b) to determine meaning of § 158(d)), *cert. granted*, 112 S. Ct. 294 (1991).

18. 28 U.S.C. § 158(d) (1988).

appellate review of a bankruptcy court order. The split arose after the enactment of section 158(d), which does not mention interlocutory appeals.¹⁹

In *Teleport Oil Co. v. Security Pacific National Bank (In re Teleport Oil Co.)*,²⁰ the Ninth Circuit found that the express language of section 158 demonstrates Congress' intent that section 158 be the exclusive basis for bankruptcy appeals.²¹ The court reasoned that the application of section 1291 to final bankruptcy orders would render section 158 superfluous.²² The court concluded that, since section 158 must be interpreted to have a purpose, section 1291 no longer grants appellate jurisdiction in bankruptcy cases.²³ The court then held, without much elaboration, that section 1292 is unavailable in such cases.²⁴ The Ninth Circuit further noted that denying bankruptcy appellants interlocutory review would not cause undue hardship because of the "availability of mandamus jurisdiction"²⁵ and "the less stringent definition of finality applied under [section] 158."²⁶

Although no other court of appeals has ever held section 158 to be the sole basis for appellate jurisdiction,²⁷ some circuits have reached agree-

19. 28 U.S.C. § 158(d) mentions only "final decisions, judgments, orders, and decrees." See *supra* note 8.

20. 759 F.2d 1376 (9th Cir. 1985).

21. *Id.* at 1378.

22. *Id.*

23. *Id.*

24. *Id.* See also Cuevas, *supra* note 10, at 28-31 (citing *Teleport* with approval).

25. See *supra* note 9.

26. 759 F.2d at 1378. The Ninth Circuit has adopted a loose interpretation of the finality requirement in bankruptcy matters, reasoning that the underlying justifications for the finality doctrine are not as strong in the bankruptcy context because an interlocutory appeal will often "advance, and not impede, the bankruptcy proceedings." *Sambo's Restaurants v. Wheeler*, 754 F.2d 811, 814 (9th Cir. 1985) (quoting *Sulmeyer v. Karbach Enters. (In re Exennium, Inc.)*, 715 F.2d 1401, 1403 (9th Cir. 1983)). Other circuits have not followed this approach, choosing instead to adopt a more traditional approach. See, e.g., *Suburban Bank v. Riggsby (In re Riggsby)*, 745 F.2d 1153 (7th Cir. 1984) (traditional standards of finality determine whether a bankruptcy order is final). See *supra* note 9.

27. See *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 752 (4th Cir. 1990). Since *Teleport Oil*, the Ninth Circuit has retreated from its position that § 158 is the exclusive basis for jurisdiction. The court now recognizes that the statute does not preclude interlocutory appeals from a district court order in cases originating in district court. See *Benny v. England (In re Benny)*, 791 F.2d 712, 717-18 (9th Cir. 1986). The Fifth Circuit, in *National Bank of Commerce v. Barrier (In re Barrier)*, 776 F.2d 1298 (5th Cir. 1985), appeared initially to adopt the *Teleport* stance when it held that section 158 "clearly supersedes" § 1291 and "inferentially supersedes" section 1292. *Id.* at 1299. However, the Fifth Circuit has revised its position and held that § 158 does not preclude interlocutory appeals from a district court when the district court was reviewing a bank-

ment that section 158(d) precludes the courts of appeal from reviewing district court orders in bankruptcy cases when the district court acted in its appellate capacity pursuant to section 158(a). In *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*,²⁸ the Fourth Circuit held that, under section 158(d), interlocutory appeals of district court orders were available when the district court had reviewed a bankruptcy court order, but not when the lower court had acted as a trial court.²⁹ The court noted that this interpretation produces “symmetry” in the bankruptcy appeals procedure by allowing interlocutory appeals only to the next highest court without a final decision.³⁰ The court reasoned that reading section 158 as the exclusive source of circuit court jurisdiction would divest the courts of appeal of jurisdiction over cases originating in the district court.³¹ Section 158(d) grants the courts of appeal jurisdiction only over final orders under sections 158(a) and 158(b), which do not address cases in which the district court exercises original jurisdiction.³² Thus, the court reasoned, that if section 158(d) were the exclusive basis for the courts of appeal’s jurisdiction, the courts of appeal would not have jurisdiction over any cases originating in the district courts.³³ The court concluded that, because this was not Congress’ intent when it enacted section 158,³⁴ when the case originates in the district courts, sections 1291 and 1292(b) govern the jurisdiction of the courts of appeal.³⁵ The court, however, agreed with the *Teleport* court³⁶ and held section 158(d) to be an exclusive grant of jurisdiction in cases originating in bankruptcy court.³⁷

ruptcy court order. *River Prod. Co. v. Webb (In re Topco, Inc.)*, 894 F.2d 727 (5th Cir. 1990). *Webb* distinguished *Teleport* by noting that it faced an appeal, under § 158, of a final judgment and did not address an appeal from a district court hearing bankruptcy cases not covered by §§ 158(a) and (b). *Id.* at 736-37. See *supra* note 8.

28. 912 F.2d 749 (4th Cir. 1990).

29. *Id.* at 752-54.

30. *Id.* at 753. See also *Germain v. Connecticut Nat’l Bank*, 926 F.2d 191, 197 (2d Cir.) (noting a “rough, if not complete symmetry” in the bankruptcy appellate scheme), *cert. granted*, 112 S. Ct. 294 (1991).

31. 912 F.2d at 753.

32. *Id.* 28 U.S.C. § 158(a) (1988) addresses district courts’ appellate jurisdiction to review bankruptcy court orders. 28 U.S.C. § 158(b) (1988) refers to bankruptcy appellate panels set up to review bankruptcy court decisions. See *supra* note 8.

33. 912 F.2d at 753.

34. *Id.* Courts generally will not conclude that Congress intended to eliminate appellate jurisdiction without express statutory language. *Benny v. England (In re Benny)*, 791 F.2d 712, 717 n.4 (9th Cir. 1986) (citing *Lindahl v. OPM*, 470 U.S. 768, 778-80 & n.13 (1985)).

35. 912 F.2d at 753.

36. See *supra* notes 20-22 and accompanying text.

37. 912 F.2d at 753-54. The court noted that the Fifth, Third, and Ninth Circuits already had

The Seventh Circuit reached a contrary conclusion in *FDIC v. Moens (In re Moens)*,³⁸ holding that the finality requirement of section 158 did not abolish the courts of appeal's section 1292(b) discretionary appellate jurisdiction.³⁹ The court noted that neither the statute nor its legislative history contain any language limiting the courts of appeal's jurisdiction.⁴⁰ The court reasoned that if Congress had wished to foreclose review, it would have done so expressly.⁴¹

The Sixth Circuit reached a similar conclusion in *Kelley v. Nodine (In re Salem Mortgage Co.)*,⁴² holding section 1291 to be an independent basis for appellate jurisdiction in a case that originated in bankruptcy court.⁴³ The court also noted that grants of jurisdiction are not usually exclusive,⁴⁴ and thus supported an inference that section 158(d) is not the exclusive source of appellate court jurisdiction in bankruptcy matters.⁴⁵

In *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*,⁴⁶ the Court of Appeals for the Tenth Circuit held that section 1292(b) is not a basis of jurisdiction for interlocutory appeals from district court decisions reviewing bankruptcy court determinations.⁴⁷ The *Kaiser Steel* court reasoned that section 158 is the exclusive basis of jurisdiction for such appeals.⁴⁸ The court distinguished cases a district court decides in its

adopted this position. *Id.* at 753 (citing *River Prod. Co. v. Webb (In re Topco)*, 894 F.2d 727, 735 n.12 (5th Cir. 1990)); *In re Brown*, 803 F.2d 120, 122 (3d. Cir. 1986); *Benny v. England (In re Benny)*, 791 F.2d 712, 716-18 (9th Cir. 1986)). The court also called on Congress to resolve the split between the courts. *Id.* In *Germain v. Connecticut Nat'l Bank*, 926 F.2d 191, 194-96 (2d Cir.), *cert. granted*, 112 S. Ct. 294 (1991), the Second Circuit reached the same conclusion as the Fourth Circuit by examining the legislative history of the predecessor to § 158(d). The Supreme Court's recent grant of certiorari in the *Germain* case may resolve the issue. The Supreme Court will be presented with an opportunity finally to decide the availability of interlocutory appeal based on § 1292(b). See Carole Bass, *Cert for CNB*, CONN. L. TRIB., Oct. 28, 1991, Backcourt, at 13.

38. 800 F.2d 173 (7th Cir. 1986).

39. *Id.* at 177.

40. *Id.* The legislative history of § 158 offers little guidance in interpreting the meaning of § 158(d). The sponsor of the bill described it as continuing "traditional appellate review." 130 CONG. REC. E1108 (daily ed. March 20, 1984) (statement of Rep. Kastemeyer).

41. 800 F.2d at 177.

42. 783 F.2d 626 (6th Cir. 1986).

43. *Id.* at 632. If § 1291 is available, then § 158(d) is not exclusive. If § 158(d) is not exclusive, then § 1292(b) is also available as a basis for jurisdiction. See *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 752 (4th Cir. 1990).

44. As an example, the court cited 28 U.S.C. § 1331 (1982), in which the grant of federal question jurisdiction is not exclusive. 783 F.2d at 632 n.15.

45. *Id.*

46. 911 F.2d 380 (10th Cir. 1990).

47. *Id.* at 386.

48. *Id.*

original bankruptcy jurisdiction from those that reach the district court on appeal under section 158(a).⁴⁹

The court stated that Congress must have intended section 158(d) to be the exclusive jurisdictional basis for review of district court orders when the case originated in bankruptcy court.⁵⁰ The court reasoned that an interpretation that section 1291 applied to orders entered under section 158(a) would make section 158(d) superfluous.⁵¹ Since 158(d) clearly must have a purpose, section 1291 cannot apply to such orders.⁵² Thus, by analogy, section 1292(b) cannot apply.⁵³

According to the court, its holding was consistent with congressional intent to avoid piecemeal litigation.⁵⁴ Furthermore, the court reasoned that making section 158(d) the sole basis for the courts of appeal's jurisdiction in bankruptcy matters that originate in bankruptcy court would not overly burden a party's right to appeal.⁵⁵ Interlocutory appeals to the district court are available through section 158(a),⁵⁶ providing the parties with a right of appeal to the next highest court.⁵⁷ The court further pointed out that in the unlikely event that both the district court and the bankruptcy court clearly abuse their discretion, in circumstances amounting to a "judicial usurpation of power,"⁵⁸ the court of appeals can invoke its mandamus jurisdiction.⁵⁹ The court thus concluded that sec-

49. *Id.* at 386 n.4. In *Teton Exploration Drilling v. Bokum Resources Corp.*, 818 F.2d 1521 (10th Cir. 1987), the Tenth Circuit suggested in dicta that § 158(d) does not limit the courts of appeals' jurisdiction under § 1291 or, by implication, under § 1292. *Id.* at 1524 n.2. Rather than overruling *Teton*, the *Kaiser* court merely distinguished the two cases, indicating that § 158 is not an exclusive basis for jurisdiction when the case originates in district court. 911 F.2d at 386 n.4. This holding is consistent with the *In re Benny* line of cases. See *supra* note 27.

50. 911 F.2d at 386.

51. *Id.*

52. *Id.*

53. *Id.* This argument is similar to the Ninth Circuit's argument in *In re Teleport*. See *supra* notes 20-24 and accompanying text. However, the Tenth Circuit limited the argument to those cases in which the district court acts in its appellate capacity. 911 F.2d at 386.

54. 911 F.2d at 386. In support of its rationale, the court cited an earlier Tenth Circuit case, *Homa, Ltd. v. Stone (In re Commercial Contractors, Inc.)*, 771 F.2d 1373 (10th Cir. 1985), which explained that avoiding piecemeal litigation is an underlying policy of the finality doctrine. *Id.* at 1375. See *supra* note 10.

55. 911 F.2d at 386.

56. *Id.*

57. Thus the court's holding merely limits any further interlocutory appeals. See *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 753 (4th Cir. 1990) ("symmetry" results from allowing interlocutory appeals only to next highest court). See *supra* note 30 and accompanying text.

58. 911 F.2d at 386 (citing *Allied Chem. Corp. v. Daifon, Inc.*, 449 U.S. 33, 34-35 (1980)).

59. *Id.* See *supra* note 9. The Tenth Circuit's citation of *Allied Chemical* to demonstrate the

tion 1292(b) did not give the courts of appeal jurisdiction to hear an appeal from the district court's interlocutory review of a bankruptcy court order.⁶⁰

The Tenth Circuit's holding that section 158(d) precludes review pursuant to 1292(b) in cases originating in bankruptcy court is ill-advised. First, the court's rationale that if section 1291 applied to orders entered under 158(a), section 158(d) would be superfluous⁶¹ ignores the possibility that Congress intended section 158(d) to be an application of the general appellate scheme to bankruptcy matters. Thus section 158(d) would not be superfluous because it clarifies the appellate scheme in bankruptcy matters by applying general appellate jurisdictional rules.⁶²

Second, the Tenth Circuit's reasoning that its decision would not overly limit a party's right to appeal is misplaced.⁶³ Mandamus jurisdiction is available only in extraordinary circumstances.⁶⁴ The Tenth Circuit's finding that mandamus jurisdiction was available in *Kaiser* is not a sign that it would so find in other cases, since the desired relief in *Kaiser* was a right to a jury trial. Petitions for a writ of mandamus have a far higher chance of success when the issue is a party's right to a jury trial.⁶⁵ Moreover, the Supreme Court has declared that courts are not to use writs of mandamus as substitutes for appeals.⁶⁶

Third, bankruptcy judges are Article I judges who do not possess the tenure and salary protections of Article III of the Constitution.⁶⁷ As a

availability of mandamus jurisdiction is interesting because there the Supreme Court reversed the Tenth Circuit's issuance of a mandamus writ. 449 U.S. at 37.

60. 911 F.2d at 386.

61. *Id.* at 378. See *supra* text accompanying notes 51-53.

62. The limited legislative history of § 158 supports this view. The sponsor of the bill described it as continuing "traditional appellate review." 130 CONG. REC. E1108 (daily ed. March 20, 1984) (statement of Rep. Kastenmeier). See *supra* note 40. Many provisions in the Bankruptcy Code merely apply existing law to the bankruptcy context. See, e.g., FED. R. BANKR. P. 7054(d) (addressing costs and substantially restating FED. R. CRV. P. 54(d)).

63. 911 F.2d at 386. See *supra* text accompanying note 55.

64. *Will v. United States*, 389 U.S. 90, 95 (1967). Courts issuing writs of mandamus usually do so to accomplish a larger goal of public policy rather than to resolve the issues of the case at hand. Charles R. Janes, Note, *Mandamus as a Means of Federal Interlocutory Review*, 38 OHIO ST. L.J. 301, 310-15 (1977).

65. See WRIGHT, *supra* note 10, § 102, at 712.

66. *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Appellate jurisdiction is available under § 1292(b) when there is "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b) (1988). A writ of mandamus is appropriate only "where there is a clear legal right in the petitioner." *Cohen v. Ford*, 339 A.2d 175, 177 (Pa. Commw. Ct. 1975) (citations omitted).

67. See *supra* note 15. Many judges and commentators do not consider Article I courts to be

result, the right to appeal bankruptcy court orders to a district court is not an adequate substitute for the right to circuit court review of district court orders.

Finally, while the court's holding arguably promotes the policy of avoiding piecemeal litigation,⁶⁸ the Tenth Circuit over-emphasizes this factor. Section 158(d) is a grant of jurisdiction; a construction of the statute as limiting appellate jurisdiction goes against the intent of the statute. If Congress had wished to limit appellate jurisdiction under section 1292(b), it could have expressly done so.⁶⁹ Thus, although the court's holding in *Kaiser Steel* was unfortunate, uncertainty will remain until Congress definitely clarifies its intentions.⁷⁰

Timothy J. Dable

on an equal footing with Article III courts. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Thus the right to appeal to district court from bankruptcy court is not analogous to the right to appeal to a court of appeals from district court.

68. *See supra* text accompanying note 54.

69. *See* *FDIC v. Moens (In re Moens)*, 800 F.2d 173, 177 (7th Cir. 1986); *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 632 (6th Cir. 1986).

70. *See* *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 754 (4th Cir. 1990) (calling on Congress to enact a clarifying amendment to resolve the split among the circuits).

