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BANKRUPTCY APPEALS AT ALL LEVELS

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Reno Fernandez joined the Complex Appellate Litigation Group as its first bankruptcy appellate specialist in 2022. Currently, Mr. Fernandez is working on a matter pending before the U.S. Supreme Court, namely *Buckley v. Bartenwerfer*, No. 21-908 (U.S. Dec. 17, 2021), set for oral argument on December 6, 2022. He is certified as a specialist in bankruptcy law by the State Bar of California Board of Specialization. He was a partner with Macdonald Fernandez LLP for ten of his fifteen years of practice in commercial bankruptcy litigation. He is a former chair of the Insolvency Law Committee of the State Bar of California's Business Law Section and the Commercial Law & Bankruptcy Section of the Bar Association of San Francisco, among other activities. Mr. Fernandez earned his J.D. from Golden Gate University School of Law and his undergraduate degree from the University of California, Berkeley.

I. Up to Three Levels of Review

a. Bankruptcy cases filed in the first instance in bankruptcy court. 28 U.S.C. § 157(a).

b. Bankruptcy court decisions reviewed by BAP unless a party elects into district court.

   1. For appellant, at time of appeal. 28 U.S.C. § 158(c)(1)(A).

   2. For appellee or other party, within 30 days after service of notice of appeal. 28 U.S.C. § 158(c)(1)(B).

c. With election, bankruptcy court decisions reviewed by district court. 28 U.S.C. § 158(a).

d. Where district court exercises original jurisdiction, e.g. withdrawal of reference, basis for appellate jurisdiction is the same as for ordinary civil appeals. *In re Gugliuzza*, 852 F.3d 884 (9th Cir. 2017). In this case, court of appeals applies same standards as in reviewing any district court decision. *In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 856 F.2d 78 (9th Cir. 1988).

e. BAP or district court may review an interlocutory order with leave. 28 U.S.C. § 158(a)(3).

f. BAP and district court decisions reviewed by court of appeals. 28 U.S.C. § 158(d)(1).

g. Or direct review by court of appeals with certification. 28 U.S.C. § 158(d)(2).

h. U.S. Supreme Court, discretionary.

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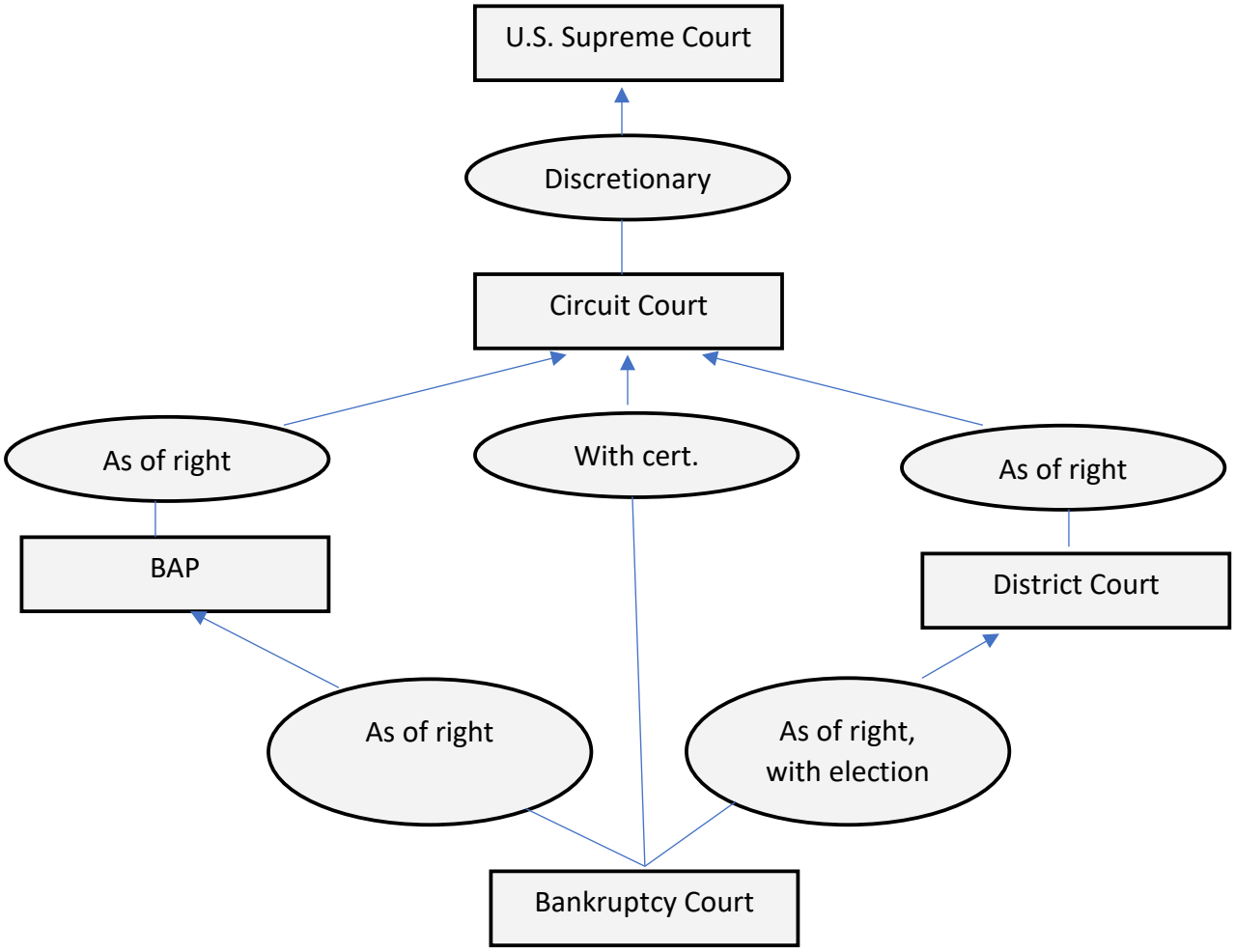

II. Statutes & Rules (see Appendix "A" for excerpts)

a. 28 U.S.C. §§ 157, 158, 1291, 1334 & 1447.

b. Fed. R. Bankr. P. 8001-8028.

c. Fed. R. App. P. 3(a)(4), 6, 25(a)(5) & 26.1(c).

d. Circuit Rules 3-1, 11-4.4, 21-2(a) & 30-1.4(f).

e. 9th Cir. BAP R. 8001-1 to 9010-2.

f. Civil L.R. 16-4.

g. B.L.R. 8003-1 to 8019-1.

III. Finality

a. More flexible standard than under 28 U.S.C. § 1291. **See Appendix "B"** for whimsical slides regarding finality.

b. Approach under 28 U.S.C. § 158 is "pragmatic." *In re Perl*, 811

F.3d 1120 (9th Cir. 2016).

c. A bankruptcy court decision is final when it definitively disposes of "a discrete procedural unit within the embracive bankruptcy case." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020).

d. Final decision is one that (1) "alters the status quo and fixes the ights and obligations of the parties" or "alters the legal relationships among the parties." *In re Gugliuzza*, 852 F.3d 884 (9th Cir. 2017); *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015).

    1. Decision is usually not final if further proceedings would affect the order. *Bank of New York Mellon v. Watt*, 867 F.3d 1155 (9th Cir. 2017).

    2. Impairment of property rights favors finality. *In re Lyons*, 995 F.2d 923 (9th Cir. 1993).

e. Pending request for attorney's fees or sanctions does not render a decision non-final. *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003).

f. Appeal from nonfinal order may be cured by subsequent events, e.g. entry of final judgment. *In re Rains*, 428 F.3d 893, 900-901 (9th Cir. 2005)

g. Circuit court may review only if ***both*** bankruptcy court order and order of BAP or district court are final. *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003); *In re SK Foods, L.P.,* 676 F.3d 798 (9th Cir. 2012).

h. Remand to bankruptcy court with instructions for "further fact-finding" not final and not appealable. *In re Landmark Fence Co., Inc.*, 801 F.3d 1099 (9th Cir. 2015).

    1. Four-factor test to determine whether remand is immediately appealable: (1) Need to avoid piecemeal litigation; (2) judicial efficiency; (3) systemic interest in preserving bankruptcy court's role as factfinder; and (4) whether delay would cause irreparable harm. *In re Marino*, 949 F.3d 483, 487 (9th Cir. 2020).

i. "[I]f a litigant is unsure about the nature of an order, the litigant should file both a notice to appeal and a motion for leave to appeal before the BAP or district court." *In re City of Desert Hot Springs*, 339 F.3d 782 (9th Cir. 2003).

j. If order is not final, consider seeking a writ of mandamus. Fed. R. App. P. 21; Circuit Rule 21-1 & 21-2.

Finality Chart

Approval of employment	Not Final	Order authorizing employment of counsel under 11 U.S.C. § 327 is interlocutory. *In re S.S. Retail Stores Corp.*, 162 F.3d 1230 (9th Cir. 1998).
Collective bargaining, interim relief	Not Final	Order granting interim relief under 11 U.S.C. § 1113(e) is interlocutory. *In re Landmark Hotel & Casino, Inc.*, 872 F.2d 857 (9th Cir. 1989).
Confirmation of plan	Final	Plan confirmation generally resolves the whole bankruptcy case. *In re Rodriguez*, 620 B.R. 94 (9th Cir. BAP 2020); *In re Fowler*, 903 F.2d 694 (9th Cir. 1990).
Conversion to chapter 7	Final	Order converting case to chapter 7 is appealable. *In re Rosson*, 545 F.3d 764 (9th Cir. 2008), *overruled on other grounds, In re Nichols*, 10 F.4th 956 (9th Cir. 2021).
Denial of motion to assume lease	Final	Final order "addressing" lease assumption is reviewable. *In re Arizona Appetito's Stores*, 893 F.2d 216 (9th Cir. 1990) (reviewing order denying relief).
Denial of motion to dismiss case	Not Final	Denial of motion to dismiss chapter 9 case for bad faith was not final. *In re City of Desert Hot Springs*, 339 F.3d 782 (9th Cir. 2003).
Denial of motion to extend exclusivity periods	Final	Would probably be interlocutory, but is final by statute. 28 U.S.C. § 158(c).
Denial of plan confirmation	Not Final	Unless denied with prejudice, a debtor is free to propose a different or amended plan. *In re Rodriguez*,

		620 B.R. 94 (9th Cir. BAP 2020).
Denial of stay pending appeal	Not Final	Order itself not appealable while appeal remains pending. *In re Teleport Oil*, 759 F.2d 1376 (9th Cir. 1985).
Dismissal of appeal for lack of finality	Final	Dismissal of an appeal for lack of finality by district court or BAP is immediately appealable. *In re Bonham*, 229 F.3d 750 (2000).
Dismissal of bankruptcy case	Final	*In re Ingram,* 460 B.R. 904, 906 (6th Cir. BAP 2011) (chapter 13); *In re Anderson*, 397 B.R. 363, 365 (6th Cir. BAP 2008) (chapter 7); *In re First Connecticut Consulting Group, Inc.*, 340 B.R. 210, 213 (D. V.T. 2006) (chapter 11).
Order denying disqualification of counsel	Not Final	Order denying motion to disqualify counsel is also not final. *In re SK Foods, L.P.*, 676 F.3d 798 (9th Cir. 2012).
Order denying removal of trustee for cause	Not Final	Trustee could be removed at a later time. *In re SK Foods, L.P.*, 676 F.3d 798 (9th Cir. 2012)
Order abstaining to hear case	Reviewable only by district court	Order dismissing a case under 11 U.S.C. § 305(a) nonreviewable by the court of appeals, by statute. 11 U.S.C. § 305(c). Same for certain abstention orders under 28 U.S.C. § 1334. 28 U.S.C. § 1334(d). But is reviewable by district court. *In re Goerg*, 930 F.2d 1563 (11th Cir. 1991).
Orders disposing of estate assets	Final	Orders disposing of estate assets generally final. *In re P.R.T.C., Inc.*, 177 F.3d 774 (9th Cir. 1999).

Order on objection to exemption	Final	An order "granting or denying" a claim of exemption is immediately appealable. *In re Gilman*, 887 F.3d 956, 961 (9th Cir. 2018).
Order remanding removed case	Not Reviewable	Order remanding case to state court cannot be reviewed by court of appeals or district court, by statute. 28 U.S.C. § 1447(d); *Rodriguez Estrada v. Aladdin W. Exp. Corp.*, 61 B.R. 675 (D. P.R. 1985).
Order removing trustee for cause	Final	Order removing trustee for cause is immediately appealable. *In re AFI Holding, Inc.*, 530 F.3d 832 (9th Cir. 2008).
Order withdrawing or declining to withdraw reference	Not Final	*In re Kissel Co.*, 105 F.3d 1324 (9th Cir. 1997) (order denying motion); *In re Kemble*, 776 F.2d 802 (9th Cir. 1985) (order granting motion).
Partial summary judgment	Final	Partial summary judgment final if it resolves issues distinct from remaining case. *In re Century Centre Partners Ltd.*, 969 F.2d 835 (9th Cir. 1993).
Relief or modification of automatic stay	Final	There is a "final, appealable order when the bankruptcy court unreservedly grants or denies relief" from the automatic stay. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020).
Stay or injunctive relief	Final	Order granting or denying stay or injunctive relief is usually final. *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1092 (9th Cir. 2007).
Substantive consolidation	Final	An order substantively consolidating estate with non-debtors is final. *In re Bonham*, 229

		F.3d 750 (9th Cir. 2000).

IV. Time to Appeal

a. Time to file notice of appeal from a bankruptcy court decision is 14 days after entry of order. Fed. R. Bankr. P. 8002.

    1. Deadline is jurisdictional and non-waivable. *In re Wilkins*, 587 B.R. 102 (9th Cir. BAP 2018).

b. Time for filing a notice of appeal from order of district court or BAP is same as for ordinary civil appeals, usually 30 days. Fed. R. App. P. 4(a) & 6; *In re Worcester*, 811 F.2d 1227 (9th Cir. 1987).

    1. Extended to 60 days of the U.S. is a party. *In re Loretto Winery Ltd.*, 898 F.2d 715 (9th Cir. 1990).

c. Time to file petition for rehearing en banc is generally 14 days after appellate court's judgment; may be shortened or lengthened by order or local rule. Fed. R. App. P. 40(a)(1).
    1. Extended to 45 days where United States or agency is a party. Fed. R. App. P. 40(a)(1).

d. Time to file petition for writ of certiorari is 90 days from entry of judgment. U.S. Sup. Ct. R. 13.1.

V. Motions Affecting Time to Appeal

a. Motion to amend or make additional findings of fact. Fed. R. Bankr. P. 7052 & 8002(b)(1)(A).

b. Motion to alter or amend judgment. Fed. R. Bankr. P. 9023 & 8002(b)(1)(B).

    1. Includes motions for reconsideration under Fed. R. Bankr. P. 3008. *In re Edelman*, 237 B.R. 146 (9th Cir. BAP 1999).

c. Motion for new trial (rehearing). Fed. R. Bankr. P. 9023 & 8002(b)(1)(C).

    1. Fourteen-day deadline also applies for motions filed in district court? *Roy v. Canadian Pac. Ry. Co. (In re Lac-Megantic Train Derailment Litig.)*, 999 F.3d 72 (1st Cir. 2021).

d. Motion for relief from order under Fed. R. Bankr. P. 9024 only if filed within 14 days after order. Fed. R. Bankr. P. 8002(b)(1)(D).

e. Petition for rehearing en banc extends time to file petition for writ

of certiorari. U.S. Sup. Ct. R. 13.1.

VI. Standing to Appeal

a. Constitutional standing "requires that a party demonstrate (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *In re Sisk*, 962 F.3d 1133 (9th Cir. 2020), *quoting Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

1. Different standards for Article III and non-Article III courts? *In re Cap. Contracting Co.*, 924 F.3d 890, 897 (6th Cir. 2019).

b. Prudential standing concerns "judicially self-impose limits on the exercise of federal jurisdiction…." *Bank of New York Mellon as Tr. for Certificateholders of CWALT, Inc. v. Enchantment at Sunset Bay Condo. Ass'n*, 2 F.4th 1229, 1238 (9th Cir. 2021) (in dissent), *quoting Bennett v. Spear*, 520 U.S. 154, 162 (1997).

2. "Prudential standing" is a misnomer. L*exmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (applying "zone of interests" test).

c. Standing to appeal requires that appellant is directly and adversely affected by the order, i.e. "that it diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *In re Thorpe Insulation Co.*, 677 F.3d 869 (9th Cir. 2012).

d. A debtor not in possession generally lacks standing. *Turner v. Cook*, 362 F.3d 1219 (9th Cir. 2004).

3. However, a debtor with a "pecuniary interest" may have standing. *In re Pena*, 974 F.3d 934 (9th Cir. 2020); *In re Point Center Fin'l, Inc.*, 957 F.3d 990 (9th Cir. 2020) (former principal of debtor had standing).

e. The lack of an appellee-opponent does not affect the appellant's standing. *In re Pena*, 974 F.3d 934 (9th Cir. 2020).

f. If requirements are met, third parties may have standing. *In re CFLC, Inc.*, 89 F.3d 673 (9th Cir. 1996) (asset purchaser had standing); *In re Fondiller*, 707 F.2d 441 (9th Cir. 1983) (debtor's wife lacked standing).

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VII. Three Kinds of Mootness

a. Constitutional mootness. Case is moot if impossible for appellate court to fashion effective relief; not moot if court can give any effective relief. *In re Thorpe Insulation Co.*, 677 F.3d 869 (9th Cir. 2012).

4. Appeal mooted by subsequent conversion to chapter 7 and discharge. *In re Cook*, 730 F.2d 1324 (9th Cir. 1984).

5. Determination of eligibility for chapter 13 mooted by subsequent dismissal of case. *In re Pattullo*, 271 F.3d 898 (9th Cir. 2001); *but see In re Universal Farming Indus.*, 873 F.2d 1334 (9th Cir. 1989) (not mooted by dismissal of chapter 11 case with significant issues outside bankruptcy).

b. Equitable mootness. Where status quo changes such that it becomes impractical or inequitable to "unscramble the eggs." *In re Castaic Partners II, LLC*, 823 F.3d 966 (9th Cir. 2016).

6. Equitable mootness depends on "1) whether appellant sought a stay; 2) whether the plan has been substantially consummated; 3) the effect on third parties' rights; and 4) the court's ability to fashion effective relief." *In re City of Stockton, Calif.*, 909 F.3d 1256 (9th Cir. 2018).

7. Prevented by obtaining stay pending appeal. Fed. R. Bankr. P. 8007.

c. Statutory mootness. Two sections of the Bankruptcy Code limit review, namely 11 U.S.C. §§ 363(m) and 364(e).

8. Unless the order is stayed, 11 U.S.C. § 363(m) limits an appellate court's ability to review an order approving a sale, use or lease of estate property, if the purchaser is in good faith, under 11 U.S.C. § 363(b). **See Appendix "C"** for excerpts from the petition for writ of certiorari in *MOAC Mall Holdings LLC v. Transform Holdco LLC, et al.,* No. 21-1270 (U.S. June 27, 2022).

9. Unless the order is stayed, 11 U.S.C. § 364(e) limits review of an order authorizing the estate to obtain credit or incur debt or granting priority or a lien, if the lender is in good faith, under 11 U.S.C. § 364.

VIII. Standards of Review

a. District court and BAP decisions are generally reviewed de novo because the court of appeals is in just as good a position to review the bankruptcy court's order. *In re Khan*, 846 F.3d 1058 (9th Cir. 2017).

b. The bankruptcy court's legal conclusions are reviewed de novo and factual determinations are reviewed for clear error. *In re EPD Investment Co., Inc.*, 821 F.3d 1146 (9th Cir. 2016).

c. Findings of fact are upheld unless they leave the "definite and firm conviction" that a mistake has been committed by the bankruptcy judge. *In re Khan*, 846 F.3d 1058 (9th Cir. 2017).

d. For mixed question of law and fact, standard depends on whether it is predominantly factual or legal. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S.Ct. 960 (2018).

Standards of Review Chart

Abandonment of estate property	Abuse of discretion	Decision to authorize or deny abandonment under 11 U.S.C. § 554(a) reviewed for abuse of discretion. *In re Johnston*, 49 F.3d 538 (9th Cir. 1995).
Amendment to proof of claim	Abuse of discretion	Allowance of amendment to timely-filed proof of claim reviewed for abuse of discretion. *In re Roberts Farms Inc.*, 980 F.2d 1248 (9th Cir. 1992).
Approval of compensation	Abuse of discretion	Approval of compensation under 11 U.S.C. § 330 will be "upheld unless the awarding court abused its discretion or erroneously applied the law." *Sw. Media, Inc. v. Rau*, 708 F.2d 419 (9th Cir. 1983); *but see In re Circle K Corp.*, 279 F.3d 669

		(9th Cir. 2002) (decision to apply 11 U.S.C. § 330 reviewed de novo).
Chapter 7 discharge	Gross abuse of discretion	Grant or denial of discharge under 11 U.S.C. § 727 reviewed for "gross abuse of discretion." In re Cox, 41 F.3d 1294 (9th Cir. 1994).
Character of debt	Clear error	Characterization of debt is essentially factual and is reviewed for clear error. *In re Cherrett*, 873 F.3d 1060 (9th Cir. 2017) (consumer or business debt); *Hewlett-Packard Co. v. Commissioner of Internal Revenue*, 875 F.3d 494 (9th Cir. 2017) (debt or equity).
Compromise of controversy	Abuse of discretion	Approval of compromise of estate claim is reviewed for abuse of discretion. *In re Open Med. Inst., Inc.*, 639 B.R. 169 (9th Cir. BAP 2022).
Contract interpretation	De novo	Contract interpretation is legal question reviewed de novo. *In re Emery*, 317 F.3d 1064 (9th Cir. 2003).
Conversion to chapter 7	Abuse of discretion	Conversion from chapter 13 to 7 reviewed for abuse of discretion. *In re Khan*, 846 F.3d 1058 (9th Cir. 2017).
Denial of motion to amend judgment	Abuse of discretion	*In re Phillips*, 434 B.R. 475, 482 (6th Cir. BAP 2010).
Dischargeability	Mixed	Dischargeability of particular debt is mixed issue of law and fact reviewed de novo. *In re Hamada*, 291 F.3d 645 (9th Cir. 2002). But pure issues of fact

		are reviewed for clear error. *In re Peklar*, 260 F.3d 1035 (9th Cir. 2001).
Dismissal of adversary proceeding	De novo	Dismissal of complaint for failure to state a claim under reviewed de novo. *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002).
Dismissal of bankruptcy case	Abuse of discretion	Dismissal of case as bad-faith filing reviewed for abuse of discretion. *In re Marsch*, 36 F.3d 825 (9th Cir. 1994).
Estoppel	Abuse of discretion	Applying equitable or judicial estoppel reviewed for abuse of discretion. *In re Allen*, 300 F.3d 1055 (9th Cir. 2002).
Motion for reconsideration	Abuse of discretion	Bankruptcy court's decision to grant rehearing or reconsideration reviewed for abuse of discretion. *In re Pacific Far East Lines*, 889 F.2d 242 (9th Cir. 1989).
Perfection of security interests	De novo	Perfection of security interest is question of state law reviewed de novo. *In re Park at Dash Point L.P.*, 985 F.2d 1008 (9th Cir. 1993).
Relief from automatic stay	Abuse of discretion	Decision to lift stay reviewed for abuse of discretion. *In re Martin*, 542 BR 199, 201 (6th Cir. BAP 2015).
Reopening bankruptcy case	Abuse of discretion	Decision whether to reopen case reviewed for abuse of discretion. *In re Castillo*, 297 F.3d 940 (9th Cir. 2002).
Summary judgment	De novo	Grant or denial of summary

		judgment is reviewed de novo; evidence is reviewed in light most favorable to nonmoving party. *In re Stern*, 345 F.3d 1036 (9th Cir. 2003).
Time for filing proof of claim	De novo	De novo review of whether a proof of claim is timely. *In re Osborne*, 76 F.3d 306 (9th Cir. 1996).
Violation of automatic stay	Mixed	Whether stay was violated is legal question reviewed de novo, but whether it was willful is factual question reviewed for clear error; sanctions amount reviewed for abuse of discretion. *Eskanos & Adler, P.C. v. Leetien*, supra, 309 F.3d 1210 (9th Cir. 2002).

IX. Challenging Precedent, Stare Decisis

a. A district court or three judge panel may reexamine and disagree with the holding of a prior Ninth Circuit panel when there is "an inconsistent decision by a court of last resort on a closely related, but not identical issue." *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

b. If BAP or court of appeals considers itself bound by prior holding, consider moving for reconsideration en banc.

Appendix "A": Statutes & Rules

The following are excerpts from certain statutes, federal rules and local rules governing bankruptcy appeals. These excerpts are from statutes and rules of interest and are not comprehensive.

28 U.S.C. § 158

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(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.

(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.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless--

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) 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.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel--

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

Fed. R. Bankr. P. 8002

(a) In general

(1) Fourteen-day period

Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) Filing before the entry of judgment

A notice of appeal filed after the bankruptcy court announces a decision or order--but before entry of the judgment, order, or decree--is treated as filed on the date of and after the entry.

(3) Multiple appeals

If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.

(4) Mistaken filing in another court

If a notice of appeal is mistakenly filed in a district court, BAP, or court of appeals, the clerk of that court must state on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so stated.

(5) Entry defined

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) F.R.Civ.P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

• the judgment, order, or decree is set out in a separate document; or

• 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F.R.Civ.P. does not affect the validity of an appeal from that judgment, order, or decree.

(b) Effect of a motion on the time to appeal

(1) In general

If a party files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

(2) Filing an appeal before the motion is decided

If a party files a notice of appeal after the court announces or enters a judgment, order, or decree--but before it disposes of any motion listed in subdivision (b)(1)--the notice becomes effective when the order disposing of the last such remaining motion is entered.

(3) Appealing the ruling on the motion

If a party intends to challenge an order disposing of any motion listed in subdivision (b)(1)--or the alteration or amendment of a judgment, order, or

decree upon the motion--the party must file a notice of appeal or an amended notice of appeal. The notice or amended notice must comply with Rule 8003 or 8004 and be filed within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

(4) No additional fee

No additional fee is required to file an amended notice of appeal.

(c) Appeal by an inmate confined in an institution

(1) In general

If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

(2) Multiple appeals

If an inmate files under this subdivision the first notice of appeal, the 14-day period provided in subdivision (a)(3) for another party to file a notice of appeal runs from the date when the bankruptcy clerk dockets the first notice.

(d) Extending the time to appeal

(1) When the time may be extended

Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion that is filed:

(A) within the time prescribed by this rule; or

(B) within 21 days after that time, if the party shows excusable neglect.

(2) When the time may not be extended

The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

(3) Time limits on an extension

No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later.

Fed. R. Bankr. P. 8003

(a) Filing the notice of appeal

(1) In general

An appeal from a judgment, order, or decree of a bankruptcy court to a district court or BAP under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(2) Effect of not taking other steps

An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal.

(3) Contents

The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment, order, or decree, or the part of it, being appealed; and

(C) be accompanied by the prescribed fee.

(4) Additional copies

If requested to do so, the appellant must furnish the bankruptcy clerk with enough copies of the notice to enable the clerk to comply with subdivision (c).

(b) Joint or consolidated appeals

(1) Joint notice of appeal

When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) Consolidating appeals

When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.

(c) Serving the notice of appeal

(1) Serving parties and transmitting to the United States trustee

The bankruptcy clerk must serve the notice of appeal on counsel of record for each party to the appeal, excluding the appellant, and transmit it to the United States trustee. If a party is proceeding pro se, the clerk must send the notice of appeal to the party's last known address. The clerk must note, on each copy, the date when the notice of appeal was filed.

(2) Effect of failing to serve or transmit notice

The bankruptcy clerk's failure to serve notice on a party or transmit notice to the United States trustee does not affect the validity of the appeal.

(3) Noting service on the docket

The clerk must note on the docket the names of the parties served and the date and method of the service.

(d) Transmitting the notice of appeal to the district court or BAP; docketing the appeal

(1) Transmitting the notice

The bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice to the district clerk.

(2) Docketing in the district court or BAP

Upon receiving the notice of appeal, the district or BAP clerk must docket the appeal under the title of the bankruptcy case and the title of any adversary proceeding, and must identify the appellant, adding the appellant's name if necessary.

Fed. R. Bankr. P. 8005

(a) Filing of a statement of election

To elect to have an appeal heard by the district court, a party must:

(1) file a statement of election that conforms substantially to the appropriate Official Form; and

(2) do so within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) Transmitting the documents related to the appeal

Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit to the district clerk all documents related to the appeal. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must transmit to the district clerk all documents related to the appeal and notify the bankruptcy clerk of the transmission.

(c) Determining the validity of an election

A party seeking a determination of the validity of an election must file a motion in the court where the appeal is then pending. The motion must be filed within 14 days after the statement of election is filed.

(d) Motion for leave without a notice of appeal--effect on the timing of an election

If an appellant moves for leave to appeal under Rule 8004 but fails to file a separate notice of appeal with the motion, the motion must be treated as a notice of appeal for purposes of determining the timeliness of a statement of election.

Fed. R. App. P. 6

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Forms 1A and 1B in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for Rehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree--but before disposition of the motion for rehearing--becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion--or the alteration or amendment of a judgment, order, or decree upon the motion--then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4--excluding Rules 4(a)(4) and 4(b)--measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The Record on Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009--and serve on the appellee--a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Making the Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and

promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy of the docket entries be made available in place of the redesignated record. But any party may request at any time during the pendency of the appeal that the redesignated record be made available.

(D) Filing the Record. When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes--to the extent appropriate--a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) The Record on Appeal. Bankruptcy Rule 8009 governs the record on appeal.

(B) Making the Record Available. Bankruptcy Rule 8010 governs completing the record and making it available.

(C) Stays Pending Appeal. Bankruptcy Rule 8007 applies to stays pending appeal.

(D) Duties of the Circuit Clerk. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) Filing a Representation Statement. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

9th Cir. BAP R. 8003-1

NOTICE OF APPEAL ORDER BEING APPEALED. The appellant shall attach to the notice of appeal filed in bankruptcy court a copy of the entered judgment, order or decree from which the appeal was taken. The clerk of the bankruptcy court shall forward these items to the BAP Clerk. If the notice of appeal is filed before entry of the order being appealed, it is appellant's duty to forward to the BAP Clerk a copy of the judgment or order immediately upon entry.

9th Cir. BAP R. 8005-1

TRANSFER OF APPEAL TO DISTRICT COURT. The Panel may transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the Panel deems appropriate.

9th Cir. BAP R. 8013(d)-1

EMERGENCY MOTIONS. (a) Contents. The motion and supporting declaration(s) must set forth the facts showing the existence and nature of the alleged immediate and irreparable harm.

(b) Appendix. The emergency motion must be accompanied by an appendix containing:

(1) A conformed copy of the notice of appeal, and

(2) A copy of the entered judgment, order or decree from which the appeal was taken;

(3) If the emergency motion concerns a stay pending appeal, the appendix must also contain:

(I) a conformed copy of the court's order denying or granting the stay and any explanation by the court of its ruling, or a declaration explaining why such a copy is unavailable; and

(ii) copies of all papers regarding the stay filed in bankruptcy court.

Explanatory Note:

When the emergency motion concerns a stay pending appeal, the parties are directed to *Nken v. Holder*, 556 U.S. 418, 434 (2009), for standards in granting a stay pending appeal.

9th Cir. BAP R. 8018-1

EXTENSIONS OF TIME. (a) Requirements. A motion for extension of time to file a brief shall be filed within the time limit for the filing of such brief and shall be accompanied by a proof of service.

The motion shall be supported by a declaration stating:

(1) When the brief was initially due;

(2) How many extensions of time, if any, have been granted;

(3) Reasons why this extension is necessary;

(4) The specific amount of time requested; and

(5) The position of the opponent(s) with respect to the motion or why the moving party has been unable to obtain a statement of such position(s).

(b) BAP Clerk Authority. The BAP Clerk is authorized to grant extensions of time under the direction and guidelines of the Panel.

(c) Consequences. A brief received after the due date will not be accepted for filing unless it is accompanied by a motion for an extension of time and the motion is granted. The Panel has no obligation to consider a late brief. Sanctions may be imposed, such as the waiver of oral argument, monetary sanctions or dismissal.

9th Cir. BAP R. 8026-1

SILENCE OF LOCAL RULES. In cases where Part VIII of the Federal Rules of Bankruptcy Procedure and these rules are silent as to a particular matter of practice, a Panel may apply the Rules of the United States Court of Appeals for the Ninth Circuit and the Federal Rules of Appellate Procedure.

Civil L.R. 16-4

Procedure in Bankruptcy Appeals

Appeals from the United States Bankruptcy Court to the United States District Court are governed by the Federal Rules of Bankruptcy Procedure and the Bankruptcy Local Rules of this district.

B.L.R. 8003-1

Procedure for Challenging Bankruptcy Court's Authority to Enter Final Order or Judgment.

(a) In any instance in which the Bankruptcy Court has entered a final order or judgment and a party contends that the matter is one in which the Bankruptcy Court lacked constitutional or statutory authority to enter a final order or judgment, such party must:

(1) proceed by filing a timely notice of appeal of the Bankruptcy Court's final order or judgment; and

(2) to avoid a waiver of any right to review by the District Court, elect that the appeal of the final order or judgment be heard by the District Court in the manner set forth in 28 U.S.C. § 158(c)(1) and Bankruptcy Rule 8005(a).

(b) The requirements for the contents of the appellate briefs in a case in which a party contends that the Bankruptcy Court lacked authority to enter a final order or judgment are set forth in B.L.R. 8014-1.

Commentary

Because the Bankruptcy Court decides whether it has authority to enter a final order or judgment, or whether it must submit proposed findings of fact and conclusions of law to the District Court, there will be instances in which the Bankruptcy Court will enter judgment in a case in which apar ty contends that the Bankruptcy Court had authority only to submit proposed

findings and conclusions. This rule is intended to clarify two points about how the parties should proceed in such a case. First, the party seeking review must proceed by filing a notice of appeal, because that is the proper process for obtaining review of an order or judgment, even where the party seeking review believes that the Bankruptcy Court did not have authority to enter the order or judgment. Second, to preserve any right to de novo review by an Article III court, a party must elect to have the appeal heard by the District Court, rather than by the Bankruptcy Appellate Panel. Pursuant to Bankruptcy Rule 8018.1, if the District Court agrees that the Bankruptcy Court should have issued proposed findings and conclusions, it can treat the decision of the Bankruptcy Court as proposed findings and conclusions subject to de novo review. *See also, Executive Benefits Ins. Agency, Inc. v. Arkinson (In re Bellingham Ins. Agency, Inc.)*, 134 S.Ct. 2165, 573 U.S. 189 L.Ed. 2d 83 (2014); District Court General Order 24 (February 22, 2016). The Bankruptcy Appellate Panel cannot itself provide de novo review under Article III. A party that does not avail itself of the opportunity to obtain de novo review by an Article III court may be found to have waived any right to such review.

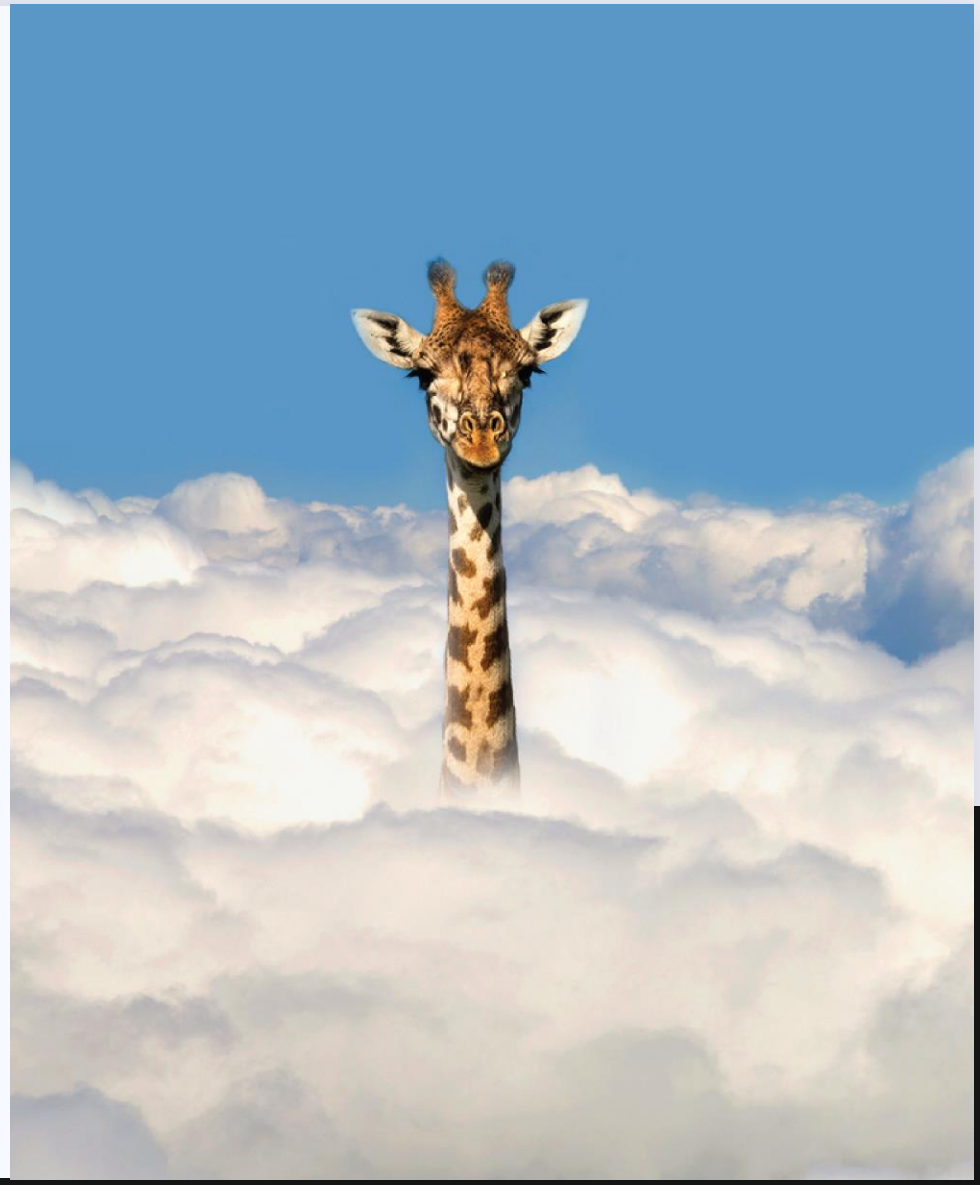
Appendix "B": Finality Guessing Game

The following are slides from a silly guessing game regarding finality in bankruptcy appeals.

THE
BANKRUPTCY APPEALS

FINALITY

GUESSING GAME



DO YOU HAVE WHAT IT TAKES TO WIN?!

Appeals from decisions in bankruptcy cases are... weird. I am working on an article about one of the weirdest parts: Finality. As you may know, an order or judgment must be final in order to be appealable; interim or "interlocutory" orders ordinarily are not appealable. In most litigation, this means the that the judgment is appealable, but orders entered beforehand are not. In bankruptcy, however, appeals may be taken from final "judgments, orders, and decrees," and interlocutory appeals may be heard with leave court. 28 U.S.C. § 158(a) & (b). It is important to understand how this applies in a bankruptcy case, where dozens of orders may be entered before the case is concluded. The applicable standard lacks detail: "[O]rders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015) (quotation marks and citations omitted). Accordingly, determining whether a bankruptcy court's order is final requires research an analysis in light of the particular circumstances. I am assembling a guide to finality under various bankruptcy scenarios. And so, I thought to myself, why not turn my research into a guessing game?

Come one, come all, nerd out with me and enjoy!



When a bankruptcy case is filed, it triggers an "automatic stay" under Bankruptcy Code (11 U.S.C.) § 362(a), which is a worldwide injunction barring virtually all actions and collection efforts against the debtor and the debtor's assets. Under certain circumstances, a bankruptcy court may lift or modify the automatic stay to allow a creditor to enforce its claim. But if relief from the stay is denied, the bankruptcy case continues as usual with no change.

Is an order denying a motion for relief from the automatic stay...



or



IT'S FINAL!

Recently, the U.S. Supreme Court held that there is a "final, appealable order when the bankruptcy court unreservedly grants or denies relief" from the automatic stay. ***Ritzen Group, Inc. v. Jackson Masonry, LLC*****, 140 S.Ct. 582 (2020) (Ginsburg, J.). Good job!**

NEXT!



Ordinarily, the debtor's goal in a case under chapter 11, 12 or 13 of the Bankruptcy Code is to obtain an order of the bankruptcy court confirming a plan of reorganization, which essentially replaces the debtor's pre-bankruptcy obligations. The process of confirming a contested plan often involves an evidentiary hearing or "mini trial."

Is an order denying confirmation of a chapter 11 plan of reorganization...



or



IT'S ***NOT*** FINAL, BUT...

Unless denied with prejudice, a debtor is free to propose a different or amended plan of reorganization. (By contrast, plan confirmation is final; in fact, it generally resolves the whole bankruptcy case.) However, in *In re Rodriguez*, 620 B.R. 94 (9th Cir. BAP 2020), the court entertained an appeal from an order sustaining an objection to a plan where the defect was "cured" by subsequent confirmation of an amended plan.

NEXT!



Speaking of chapter 11 plans, the chief consequence of a debtor taking too long to confirm a plan is that it may lose its exclusive right to propose and confirm a plan, which is has for only 120 and 180 days, respectively. 11 U.S.C. § 1121(c). These "exclusivity periods" may be extended by order of the bankruptcy court, but denial of a motion to extend and expiration of the deadlines does not terminate the bankruptcy case; it merely permits any party in interest – including the debtor – to propose competing plans of reorganization.

Final question: Is an order granting a motion to extend the exclusivity periods...



or



IT'S A TRICK QUESTION!

"Final" is correct but counterintuitive. This would seem to contradict the ordinary case-law driven test for finality. In this context, finality is determined by statute: 28 U.S.C. § 158(c), which expressly provides that an appeal may be taken from any order "increasing or reducing the time periods referred to in section 1121" of chapter 11 of the Bankruptcy Code.

THE END!



This is the end.

But we had fun, didn't we? I sure did. If you have questions or just want to nerd out some more, please feel free to message me.

THANK YOU FOR PLAYING!



Appendix "C": *MOAC Mall*

The successful petition for writ of certiorari in *MOAC Mall Holdings LLC v. Transform Holdco LLC, et al.,* No. 21-1270 (U.S. June 27, 2022), provides an excellent review of mootness under Bankruptcy Code § 363(m). Excerpts from the petition are attached. The following is an extremely-simplified summary:

Petitioner MOAC Mall Holdings LLC does business as the Mall of America in Bloomington, Minnesota. Respondent Transform Holdco LLC was formed by Eddie Lambert, the CEO of the holding company for Sears, Roebuck and Co.

MOAC leased space to Sears on favorable terms. Sears filed a chapter 11 bankruptcy petition on October 15, 2018, in the U.S. Bankruptcy Court for the Southern District of New York (Judge Robert Drain). Less than four months later, the court entered an order approving a sale of assets to Transform pursuant to Bankruptcy Code § 363(b). Transform also acquired the right to designate approximately 600 leases to be assumed by the debtor and assigned to Transform.

The sale closed. Afterward, Transform gave notice that it was designating the MOAC lease for assumption and assignment. MOAC objected, but the bankruptcy court entered an order approving assignment of the lease. MOAC appealed the order to the U.S. District Court for the Southern District of New York and moved for a stay pending appeal. In opposing the stay motion, Transform argued that a stay was not necessary because § 363(m) does not apply, and Transform represented that it would not argue otherwise on appeal. The bankruptcy court denied the motion.

The district court vacated the assignment order on the grounds that Transform did not satisfy the requirement of § 365(b)(3). Transform moved for rehearing and argued, for the first time, that § 363(m) applies, that it is jurisdictional and that is non-waivable. The district court was appalled by Transform's conduct but ruled that § 363(m) is jurisdictional and non-waivable. The district court dismissed the appeal, and MOAC timely appealed to the U.S. Court of Appeals for the Second Circuit. The Second Circuit affirmed.

MOAC argues that § 363(m) is not jurisdictional and is merely a limitation upon the remedies available following an unstayed sale. According to MOAC's petition for writ of certiorari, there is an extensive split among courts of appeal. The Second and Fifth Circuits hold that § 363(m) is jurisdictional; most circuit court, including the Ninth Circuit, hold that it is not. The U.S. Supreme Court granted the petition on June 27, 2022.

No. _____

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC AND SEARS HOLDINGS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Arbaugh* v. *Y & H Corp.*, this Court clarified that limitations on judicial relief should not be treated as jurisdictional absent a clear statement by Congress. At least six circuits have held that 11 U.S.C. 363(m) does not limit the appellate courts' jurisdiction to review unstayed bankruptcy court sale orders, but rather limits only the remedies available in such an appeal. By its plain terms, Section 363(m) presupposes a "reversal or modification on appeal" of a sale order, and specifies only that such reversal or modification "does not affect the validity of [the] sale" to a good faith purchaser, leaving the courts free to fashion other remedies without that effect.

In the present case, the Second Circuit held, to the contrary, that Section 363(m) deprived the appellate courts of jurisdiction over an appeal from a lease assignment order deemed "integral" to an already completed sale order, notwithstanding that: the sale order was not contingent on the assignment; the sale price was fixed without regard to whether the lease could be assigned; and respondent had expressly waived (in successfully opposing a stay) any argument that Section 363(m) would bar appellate review. A month later, the Fifth Circuit re-confirmed that it also treats Section 363(m) as jurisdiction-stripping.

The question presented is:

Whether Bankruptcy Code Section 363(m) limits the appellate courts' jurisdiction over any sale order or order deemed "integral" to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 17, 2021. App., *infra*, 1a. On January 24, 2022, the court of appeals entered a stay of its mandate to allow petitioner to file the present petition for a writ of certiorari. App., *infra*, 126a. This petition is filed within 90 days of the court of appeals' judgment.

The United States Bankruptcy Court for the Southern District of New York had jurisdiction to enter a final order under 28 U.S.C. 157(b)(2) and 1334. The United States District Court for the Southern District of New York had jurisdiction over the appeal of the bankruptcy court's order under 28 U.S.C. 158(a)(1). The United States Court of Appeals for the Second Circuit had jurisdiction to decide the appeal below under 28 U.S.C. 158(d). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 363 and 365 of Title 11 of the United States Code and Section 158 of Title 28 of the United States Code are reproduced in full in an appendix hereto. See App., *infra*, 128a-154a.

INTRODUCTION

This case grows out of one of the largest U.S. retail bankruptcies on record and involves an important and oft-recurring question of federal bankruptcy law that has divided the eight courts of appeals who have already ruled on the issue, including splitting the Second and Third Circuits (the two circuits in which the most large chapter 11 bankruptcies are filed). The question whether Section 363(m) of the Bankruptcy Code de-

prives the appellate courts of jurisdiction or instead merely limits the remedies available on appeal from a sale order has arisen in at least seventy appeals at the district and circuit court levels in the past five years. Here, the answer to that question was outcome determinative. The district court initially ruled in petitioner's favor on the merits of the appeal, and only upon respondent's motion for rehearing raising Section 363(m) for the first time—contrary to its repeated representations to the bankruptcy court that it would not argue on appeal that Section 363(m) applied—the district court dismissed the appeal for lack of jurisdiction. Petitioner's initially successful appeal turned into a loss solely because the Second Circuit (in conflict with all but one of the other courts of appeal to address the question) treats Section 363(m) as limiting the appellate courts' jurisdiction, and thus not subject to waiver or judicial estoppel.

As this Court recognizes, labeling a statutory limitation or prerequisite as "jurisdictional" is not merely semantic, but carries immense practical consequences. Jurisdictional issues are not subject to waiver or forfeiture, and can therefore be raised at any time. This can lead to gamesmanship by litigants playing a "wait-and-see" approach with respect to the merits of a proceeding, thus wasting judicial resources and unfairly prejudicing other parties. Worse yet, as happened here, parties can gain a procedural advantage by waiving an argument based on the statute, only to raise it later, when the litigation's outcome is unfavorable to them. Perhaps more importantly, outside of the waiver context, labeling Section 363(m) as jurisdictional prevents appellate courts from considering—as the plain language of Section 363(m) requires—whether there are

remedies available on appeal that do not affect the validity of the sale, which is the sole proscription that Congress included in the text of Section 363(m).

This Court has sought to reign in lower courts' loose characterization of limitations as "jurisdictional" by establishing a bright-line test requiring lower courts to find a statute jurisdictional *only if* Congress has "clearly state[d]" that it is jurisdictional. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006). Absent a clear Congressional statement, courts are instructed not to treat a statute as jurisdictional, but instead treat it as an element of the claim or a limitation on relief. *Ibid.*

The key statutory provision at issue in this case is Section 363(m) of the Bankruptcy Code, which applies to appeals from sale transactions in bankruptcy and provides as follows:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. 363(m). This section is intended to protect good faith purchasers of a bankrupt debtor's assets so that in the event an appellate court reverses or modifies an unstayed sale order on appeal, the sale itself (to the extent consummated) will remain valid.

In the case below, Sears obtained an order under Section 363(b) of the Bankruptcy Code authorizing a

sale of a substantial portion of Sears' assets to respondent Transform. The sale order provided that Transform had the right to designate up to approximately 600 leases for assignment to it, subject to all parties' rights to object to the assignment under the Bankruptcy Code. Importantly, nothing about the sale order was contingent on the successful assignment of any or all of the leases, and the purchase price in the sale would not change depending on whether the bankruptcy court approved the assignment of any (or all) of the leases. Months after the asset sale closed, Sears sought and obtained, over petitioner's objection, bankruptcy court approval to assign a shopping center lease within the Mall of America to Transform under Section 365 of the Bankruptcy Code. Petitioner appealed and sought a stay of that lease assignment order pending appeal, out of concern that Transform might argue on appeal that Section 363(m) precluded appellate review of the order. In opposing petitioner's stay request, Transform told the bankruptcy court that (i) Section 363(m) had no application to the order or appeal (because the lease assignment in question was not "an authorization under Subsection (b) or (c) of [Section 363] of a sale or lease of property") and (ii) Transform would not argue otherwise in district court.

Transform initially stayed true to its word—that is, until the district court ruled against it on the merits of petitioner's appeal and found that the bankruptcy court had erred in approving the lease assignment. Transform then pulled a remarkable about-face, arguing that 363(m) *did apply*, that it was a jurisdictional statute, not subject to waiver, and that it deprived the district court any ability to consider the appeal. Notwithstanding it was "appalled" by Transform's conduct, the dis-

trict court reluctantly agreed, based on Second Circuit precedent, that the court lacked jurisdiction. The court of appeals affirmed, similarly finding that it was bound by circuit precedent.

Applying this Court's *Arbaugh* analysis, Section 363(m) does not qualify as jurisdictional. Section 363(m) does not contain any indication, much less a "clear statement" by Congress, that it limits the appellate courts' jurisdiction. At least six other circuits have concluded that Section 363(m) limits only the available remedies, not the court's jurisdiction. Only the Fifth Circuit agrees with the Second that Section 363(m) is jurisdictional, a position the Fifth Circuit reaffirmed in a decision a month after the one here.

The ruling below is especially deserving of the Court's review. Respondent Transform repeatedly waived any argument that Section 363(m) precluded review, reversing course only *after* the district court ruled in petitioner's favor on the merits. The split among the courts of appeal divides two of the most important bankruptcy jurisdictions—the Second and the Third Circuits—and has been further entrenched since the decision in this case. Given the frequency with which the issue arises (but the difficulty that future litigants may face in obtaining this Court's review), this Court's intervention to resolve the conflict is sorely needed.

The writ of certiorari should be granted and the decision below should be reversed.

decided post-*Arbaugh* and "held in no ambiguous terms that Section 363(m) is a limit on our jurisdiction." *Id.* at 8a. The court further held that, as a jurisdictional limit, Section 363(m) was not subject to waiver or judicial estoppel. *Id.* at 10a.

Noting the circuit conflict regarding whether Section 363(m) is jurisdictional, petitioner moved to stay the mandate so as to maintain the status quo for purposes of seeking review in this Court. Although Transform opposed the stay, the circuit court granted the stay on January 24, 2022, until the petition for certiorari is ruled upon and, if granted, until a ruling on the merits. App., *infra*, 126a.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Holding Is Part Of A Deepening Circuit Conflict Regarding Whether Section 363(m) Is Jurisdictional

The Court should grant a writ of certiorari because the Second Circuit's ruling that Section 363(m) is jurisdictional in nature is part of a persistent circuit split that requires this Court's resolution. In the past eleven years, this critical question regarding an appellate court's power to hear an appeal has reached no fewer than eight circuit courts, often on multiple occasions. Although some circuits have switched sides in the conflict over that time, the split persists, and has been reaffirmed recently by both circuits in the minority camp—the Second and Fifth.

1. Each of the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have rejected the argument that Section 363(m) is a jurisdictional bar to an appellate court even hearing an appeal. These courts have ruled instead that Section 363(m) merely sets limits on the

relief that an appellant might obtain. See *Reynolds* v. *Servisfirst Bank (In re Stanford)*, 17 F.4th 116, 122 (11th Cir. 2021) (Section 363(m) may provide a defense for a purchaser in an appeal, but "is not jurisdictional"); *In re Energy Future Holdings Corp.*, 949 F.3d 806, 820 (3d Cir. 2020) ("[W]e have construed § 363(m) as a constraint not on our jurisdiction, but on our capacity to fashion relief."); *Trinity 83 Dev., LLC* v. *ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) (finding that while Section 363(m) may provide a defense, "[a] defense, even an ironclad defense, does not defeat jurisdiction"); *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 896-897 n.4 (9th Cir. 2017) (rejecting "argument that the case is moot" because, "[b]y its terms, section 363(m) preserves *the validity* of a sale," whereas appellants "have not asked us to undo the sale"); *In re Brown*, 851 F.3d 619, 622-623 (6th Cir.), cert. denied, 138 S. Ct. 328 (2017) (rejecting argument that the "court lacks jurisdiction to hear Brown's appeal," and adopting instead "the approach of the Third and Tenth Circuits requiring parties alleging statutory mootness under § 363(m) to prove that the reviewing court is unable to grant effective relief without affecting the validity of the sale"); *C.O.P. Coal Dev. Co.* v. *C.W. Mining Co. (In re C.W. Mining Co.)*, 641 F.3d 1235, 1239 (10th Cir. 2011) (denying motion to dismiss appeal, holding instead that, while "§ 363(m) forecloses any remedy to COP that would affect the validity of the trustee's sale," it "does not preclude a remedy that would not affect the validity of the sale").[2] Consistent

[2] The Eighth Circuit has not expressly ruled on the jurisdictional nature of Section 363(m), but set forth a test requiring courts to consider whether the relief sought on appeal would affect

with this Court's instruction, including in *Arbaugh*, these rulings focus on the text of Section 363(m) and the fact that it lacks any clear indication that Congress intended to erect a jurisdictional limit.

The Third Circuit's analysis in *In re Energy Future Holdings* illustrates the proper focus on whether the statute reflects a clear statement by Congress stripping the courts of jurisdiction. That court correctly noted that "the provision by its terms forbids only those appeals that 'affect the validity of a sale,' not all those that call into question any aspect of such a sale." 949 F.3d at 820-821. Thus, the Third Circuit held that it was able to entertain on appeal a due process challenge to certain claim procedures for asbestos claimants incorporated in the chapter 11 plan confirmation order. The term in question provided that persons that did not file claims by a court-ordered bar date, including persons exposed to asbestos but who had not yet developed symptoms of disease ("latent" or "unmanifested" claims) and thus would not have known they had a claim, could only assert claims after the bar date by meeting a "for cause" standard. Even though the confirmation order was "inextricably intertwined" with an earlier sale order, *id.* at 819, 822, the Third Circuit held that appellate review of whether the confirmation order "can provide fair process could not conceivably 'af-

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the sale's validity. See *Official Comm. of Unsecured Creditors* v. *Trism, Inc. (In re Trism, Inc.)*, 328 F.3d 1003, 1006 (2003). As discussed below, that approach conflicts with the Second Circuit, which bars any appeal from an unstayed sale order and does not consider whether there is relief available that would not affect the validity of the sale.

fect the validity of the sale'" and was thus not barred by Section 363(m). *Id.* at 822 (citation omitted).

The Seventh Circuit in *Trinity 83* likewise focused on the critical distinction between remedies available on appeal and jurisdictional defenses, and held that "[t]he text [of Section 363(m)] is straight-forward" in that regard. 917 F.3d at 602. As the court observed, "Section 363(m) does not say one word about the disposition of the proceeds of a sale," and thus does not preclude such relief, *id.* at 602-603. Citing the distinction this Court drew in *Bell* v. *Hood*, 327 U.S. 678 (1946), between a court's ability to grant relief and its jurisdiction to rule, the Seventh Circuit recognized that even where Section 363(m) applies, it would at most "entitle[] the defendant to prevail;" it would "not defeat jurisdiction." 917 F.3d at 602. Thus, the court criticized those cases, including prior panel decisions within the Seventh Circuit, that mistakenly characterized Section 363(m) as involving "mootness," because "mootness is a jurisdictional doctrine," whereas Section 363(m) is not. *Ibid.*

The Sixth Circuit's decision in *In re Brown* follows the same approach, and also illustrates the potentially outcome-determinative significance of recognizing the non-jurisdictional nature of Section 363(m). Focusing on "the plain language of § 363(m)," the court observed that the statute "prohibits reviewing courts from modifying or setting aside a sale of property purchased in good faith," but that it "does not prevent a reviewing court from" granting other relief, such as "redistributing the proceeds from such a sale." *In re Brown*, 851 F.3d at 623. Although using the language of "statutory mootness" to describe Section 363(m), the Sixth Circuit emphasized that this "extends beyond" mootness in the

Article III jurisdictional sense. *Id.* at 622. Because Section 363(m) is *not* jurisdictional, the Sixth Circuit "adopt[ed] the approach of the Third and Tenth Circuits [of] requiring parties alleging statutory mootness under § 363(m) to prove that the reviewing court is unable to grant effective relief without affecting the validity of the sale." *Id.* at 623. If the limitation were jurisdictional, by contrast, the court would need to raise the issue *sua sponte*, even if the appellee did not. See *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2021). In a separate part of the opinion, the court declined to address the appellee's "argument in favor of applying the prudential doctrine of equitable mootness," another non-jurisdictional mootness doctrine, because it was raised too late and thus forfeited. *In re Brown*, 851 F.3d at 623.

2. In contrast with the majority of circuits, the Second and Fifth Circuits have repeatedly held that Section 363(m) is a jurisdictional bar to appellate review, regardless of whether the relief sought on appeal would affect the validity of a sale, which is the only proscription stated in Section 363(m).[3] The Second Circuit

[3] The First and D.C. Circuits have not expressly ruled on whether Section 363(m) is jurisdictional, but have applied section 363(m) to moot appeals of unstayed sale orders that would adversely affect the sale's validity. See *Anheuser-Busch, Inc.* v. *Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845, 849 (1st Cir. 1990) (applying Section 363(m) to moot an appeal relating to "one of the most valuable elements of the sale" when "removing [the transferred asset] from the sale would have adversely affected the terms of the sale"); *Hicks* v. *Pearlstein (In re Magwood)*, 785 F.2d 1077, 1080 (D.C. Cir. 1986) (concluding that the court "has no authority to overturn the Trustee's January 11, 1985 sale of the property" because appellant "never sought to stay the sale, and

has confirmed that view twice in the past calendar year. See App., *infra*, 8a-10a; *In re Pursuit Holdings (NY), LLC*, 845 F. App'x 60, 62 (2021) (finding that Section 363(m) "bars appellate review of any sale authorized by 11 U.S.C. 363(b) or (c)").

In *Contrarian Funds LLC* v. *Aretex LLC (In re WestPoint Stevens, Inc.)*, which was decided post-*Arbaugh*, the Second Circuit reaffirmed its pre-*Arbaugh* cases that "equated section 363(m) to an imposed jurisdictional limit on our authority to review the Bankruptcy Court's sale order." 600 F.3d 231, 247 (citing *In re Gucci*, 105 F.3d 837, 838 (2d Cir. 1997)). Like *In re Gucci*, the *In re WestPoint Stevens* decision specifically considered and rejected the argument that the appellate court might "order some form of relief *other than invalidation of the sale*," reasoning that "under section 363(m), we lack jurisdiction to review the entire Sale Order—not just the actual sale transaction." *Id.* at 248 (quoting *In re Gucci*, 105 F.3d at 840 n.1).

Under the Second Circuit's approach, the appellate court must consider as a threshold inquiry whether the order appealed is "integral" to the sale order; if so, and the appealed order was not stayed, the appellate court has no further jurisdiction other than to determine whether the purchaser purchased in good faith. *In re WestPoint Stevens*, 600 F.3d at 254. That flips on its

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the sale of the property was clearly one to a good faith purchaser"). The Sixth Circuit has characterized these First Circuit and D.C. Circuit rulings as siding with the Second Circuit in "creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue." *Parker* v. *Goodman (In re Parker)*, 499 F.3d 616, 621 (2007).

head the inquiry in other courts, which view the "integral" inquiry not as a categorical bar to appellate review, but as part of analyzing what relief the courts could grant. See, *e.g.*, *In re ICL Holding Co.*, 802 F.3d 547, 554 (3d Cir. 2015) ("[S]o long as we can grant effective relief, § 363(m) doesn't bar appellate review.").

The Fifth Circuit shares the Second Circuit's view. See *In re Gilchrist*, 891 F.2d 559, 560 (5th Cir. 1990) ("We have interpreted [Section 363(m)] to moot an appeal in the absence of a stay."). Like the Second Circuit, the Fifth Circuit has very recently reiterated this established circuit precedent and the jurisdictional nature of Section 363(m). In *In re C Whale Corp.*, the Fifth Circuit held that it "lack[ed] jurisdiction over this appeal" of a sale order, even where the appeal concerned the question whether the bankruptcy court had jurisdiction to approve the sale in the first instance. *Morimoto* v. *C Whale Corp (In re C Whale Corp.)*, No. 21-20147, 2022 WL 135125, at *4 (Jan. 13, 2022) (holding that where "an appeal is dismissed pursuant to section 363(m)," the court cannot address "the merits of [appellant's] arguments that the bankruptcy court lacked jurisdiction to enter the Sale Order free and clear of his alleged patent rights") (citing *In re Gilchrist*, 891 F.2d at 561).

3. The courts of appeal have acknowledged this split among the circuits, and, while there has been some movement by individual circuits, the split persists. For example, in 2007, in *In re Parker*, the Sixth Circuit noted a conflict between those circuits, including the Second and Fifth, that "construe § 363(m) as creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue," and an "alternative two part approach," adopted by the Third Circuit, that re-

quires the court of appeals to further assess whether it could "grant effective relief without impacting the validity of the sale." 499 F.3d at 621. At that time, the Sixth Circuit viewed the First, Seventh, Eleventh, and D.C. Circuits as also adopting the Second Circuit's approach. *Ibid.*

Subsequently, in *In re Brown*, the Sixth Circuit adopted what it characterized as the "minority" view that Section 363(m) is *not* jurisdictional, specifically rejecting the Second and Fifth Circuits' view of Section 363(m) as "creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue." 851 F.3d at 621. By that time, the Sixth Circuit recognized the Tenth Circuit as siding with the Third Circuit's side of the split. See *ibid.*

Since the Sixth Circuit first cataloged the circuit split in *In re Parker*, the Seventh and Eleventh Circuits have also joined the Third Circuit in rejecting a jurisdictional view of Section 363(m). In 2019, in *Trinity 83*, the Seventh Circuit expressly reversed positions and adopted the now majority view. 917 F.3d at 603. The court declared that "*River West* is overruled [and] * * * [a]ny other decision in this circuit that treats § 363(m) as making a controversy moot, rather than giving the purchaser or lessee a defense to a request to upset the sale or lease, is disapproved." *Ibid.* Subsequently, in *In re Stanford*, the Eleventh Circuit expressly agreed with the Seventh that "[s]tatutory mootness under 363(m) * * * is not jurisdictional," 17 F.4th at 122, and thus proceeded to ask the second question, under the Third Circuit's approach, whether Section 363(m) "preclude[s] the kind of relief that [appellants] are seeking," *id.* at 125.

Notwithstanding the willingness of other courts of appeal to revisit the issue, the split identified by the Sixth Circuit persists. The Second Circuit in the decision below specifically acknowledged MOAC's argument, based on *Arbaugh*, that *In re WestPoint Stevens*' reference to jurisdiction should not be read in a strict sense "because viewing the statute as imposing a jurisdictional limitation conflates threshold requirements bearing on a statute's applicability, such as elements of a claim, with jurisdictional requirements." App., *infra*, 9a-10a. This is precisely the error that other courts, like the Seventh Circuit in *Trinity 83*, have recognized in the process of disavowing a truly "jurisdictional" treatment of Section 363(m). 917 F.3d at 603. In its briefs below, MOAC alerted the Second Circuit to these other circuits' interpretation of Section 363(m). See MOAC C.A. Br. 55 at 46-49. Nonetheless, the Second Circuit doubled down on *In re WestPoint Stevens*' holding that "§ 363(m) divests appellate courts of jurisdiction to grant relief," and, on that basis rejected "MOAC's argument that statutory mootness under § 363(m) is subject to waiver or judicial estoppel." App., *infra*, 9a-10a.

There is a clear, direct, and persistent circuit conflict on this fundamental issue of appellate jurisdiction. It is thus necessary and appropriate for this Court to resolve the conflict by deciding whether Section 363(m) is a jurisdictional statute, or whether Section 363(m) simply limits the available remedies on appeal and, as such, is subject to waiver and estoppel.

B. The Second Circuit Holding That Bankruptcy Code Section 363(m) Is Jurisdictional Conflicts With This Court's Precedent

The Second Circuit's rule is not only the minority position, it is also wrong. Treating Section 363(m) as jurisdictional contravenes this Court's precedent and violates the courts' "virtually unflagging obligation * * * to exercise the jurisdiction given them [by Congress]." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976).

As discussed above, in *Arbaugh*, this Court established a bright-line test for all lower courts to use in evaluating whether a particular statute is jurisdictional. In so doing, the Court cautioned lower courts against overuse of the term "jurisdictional" given the potential pitfalls to litigants and courts alike and the mandate for courts to exercise the jurisdiction vested in them by Congress. Accordingly, the Second Circuit's analysis should have started and ended with the language of the relevant statutes at issue. It did not.

There is little question that the district court and court of appeals had jurisdiction to review the Assignment Order under the broad terms of the generally applicable jurisdictional statute. Congress established the appellate jurisdiction of district courts by enacting 28 U.S.C. 158 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. In that statute, Congress granted district courts jurisdiction over all appeals "from final judgments, orders, and decrees * * * of bankruptcy judges entered in cases and proceedings" under the Bankruptcy Code. 28 U.S.C. 158(a).

There was no dispute below that the Assignment Order was a final order that the bankruptcy court had

jurisdiction to enter in Sears' bankruptcy case. There is also no dispute that 28 U.S.C. 158(a) contains no statutory exception to the district court's appellate jurisdiction for matters relating to lease assignments under Bankruptcy Code Section 365 or sales under Bankruptcy Code Section 363.

Under this Court's precedent in *Arbaugh*, the lower courts were thus required to identify in the plain text of Section 363(m) where Congress had "clearly stated" that it was establishing a jurisdictional limitation to district courts' appellate jurisdiction under 28 U.S.C. 158. Absent a clear Congressional statement to that effect, Section 363(m) cannot be considered jurisdictional.

The plain text of Section 363(m) confirms that it is not a jurisdictional statute. Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. 363(m).

Nothing in Section 363(m) indicates that Congress intended to attach jurisdictional consequences when a stay of a sale order is not obtained. Much less did it do so "clearly." Section 363(m) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines*,

Inc., 455 U.S. 385, 394 (1982). Instead, by referencing "[t]he reversal or modification on appeal" of a sale order, the language in Section 363(m) expressly recognizes the district courts' appellate jurisdiction over such orders and contemplates a district court exercising that jurisdiction to reverse or modify the order. The only textual limitation goes to the *effect* of that judgment—"reversal or modification on appeal of" a debtor's sale or lease of property under Section 363(b) or (c) "does not affect the validity of a sale or lease" if the purchaser bought or leased the property from the debtor in good faith. 11 U.S.C. 363(m).

If the statute is not jurisdictional, any rights and protections thereunder could be waived by Transform—which it did here by affirmatively repudiating any potential rights under Section 363(m) in order to induce a favorable bankruptcy court ruling. See *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.").

In addition, regardless of whether Section 363(m)'s protections were waived or subject to judicial estoppel, the district court would be free to award any relief not affecting the validity of the February 2019 asset sale. Here, it could have done so by simply reversing the Assignment Order. The lease assignment was not itself a sale or lease under Subsections (b) or (c) of Section 363, and the Second Circuit did not find otherwise. Indeed, the district court's initial merits ruling reversing the Assignment Order did not disturb any aspect of the Sale Order or the already-consummated Section 363 asset sale. Neither the Sale Order itself nor the sale

price was contingent on the assignment of any Designated Lease, and the Sale Order provided for a hearing before any particular lease could be assigned, which presupposed that the bankruptcy court could reject any particular assignment as improper. C.A. App. 68-69. The asset sale to Transform thus would remain valid even if the Assignment Order were reversed, just as it would have if the bankruptcy court had not approved assignment of the lease in the first instance.

The Second Circuit's jurisdictional approach to Section 363(m) prevented it from undertaking the analysis above, because its approach erroneously starts and stops with the question whether a subsequent order is "integral" to an earlier sale order. Here, the court of appeals found the Assignment Order to be "integral" to the sale order based on nothing more than the fact that the Sale Order said so. That effectively put the respondent and Sears, as drafters of the Sale Order, in a position of defining the appellate courts' jurisdiction. By its text, however, Section 363(m) makes the courts responsible to consider whether relief is available that would not affect the validity of the sale.

C. The Jurisdictional Nature Of Section 363(m) Is An Important Federal Question

The question presented is of "considerable practical importance" given the significant consequences to litigants and courts of deeming a requirement jurisdictional. *Henderson*, 562 U.S. at 434.

As this case and others in the circuit split discussed above demonstrate, the difference between a limitation on appellate remedies and a jurisdictional bar is anything but academic. For example, in *In re Energy Future Holdings*, the Third Circuit was able to consider

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

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