

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF OREGON**

**ELIZABETH L. PERRIS**  
BANKRUPTCY JUDGE

1001 S.W. FIFTH AVENUE, # 700  
PORTLAND, OREGON 97204  
(503) 326 - 4173

RAEMA MANNING, JUDICIAL ASSISTANT  
DIANE K. BRIDGE, LAW CLERK  
TONIA J. McCOMBS, LAW CLERK

VIA FACSIMILE

May 10, 2004

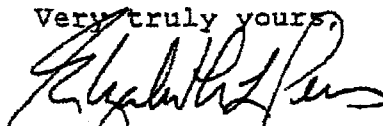
The Honorable Senator Jeff Sessions  
United States Senate  
335 Russell Senate Office Building  
Washington, D.C. 20510-0104

Re: S. 2278

Dear Senator Sessions:

On behalf of the judges of the Bankruptcy Appellate Panel of the Ninth Circuit, enclosed please find a statement opposing division of the circuit. We appreciate the fact that the Subcommittee left the record open to allow for submission of additional comments.

Very truly yours,



ELIZABETH L. PERRIS  
Bankruptcy Judge

ELP:rjm

Enclosure

cc: Chief Judge Mary M. Schroeder (via facsimile)  
Gregory B. Walters (via facsimile)

**Statement Opposing Division of the Ninth Circuit**

**Submitted by the Judges of the Bankruptcy Appellate  
Panel of the Ninth Circuit Court of Appeals**

The judges of the Bankruptcy Appellate Panel for the Ninth Circuit respectfully oppose division of the Ninth Circuit Court of Appeals. Such division would result in the loss of a circuit that is a unique, innovative judicial entity that is able to foster efficient use of judicial resources while maximizing coherence in the interpretation of the law in the Ninth Circuit.

The focus of our comments is on the impact that dividing the circuit would have on the administration of bankruptcy cases and appeals.<sup>1</sup> Bankruptcy touches more American lives than any other federal law, except the Federal Tax Code. Of the 1,611,268 bankruptcies filed nationally in the 12 months ending March 31, 2004, 284,093 cases were filed in the bankruptcy courts of the Ninth Circuit.

When the Bankruptcy Code was enacted in 1978, it contained authority for the circuit courts to create bankruptcy appellate panels (BAP) as an alternative forum to the district courts for reviewing bankruptcy decisions. The Ninth Circuit created a BAP for the circuit almost immediately. The Ninth Circuit is the

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<sup>1</sup> Others have ably explained the impact that dividing the circuit will have on the court's appellate work and other aspects of judicial administration. We limit our comments to the impact on bankruptcy case administration, which is our area of expertise.

only circuit that has continuously had a BAP since 1979. As discussed in more detail below, the Ninth Circuit BAP is an example of how the Ninth Circuit is innovative and leverages its resources to provide better public service.

#### Effective Use Of Judicial Resources

Seven bankruptcy judges are authorized for appointment to the BAP. Beginning January 2003, the number actually appointed dropped to six to reflect reduced case loads and to preserve resources. BAP judges serve in an appellate role in addition to their trial court responsibilities. The work of the BAP is augmented by trial judges who sit pro tem. All are volunteers who receive no additional compensation for BAP duty. Regularly appointed BAP judges do receive the assistance of an additional law clerk.

Because BAP judges cannot hear cases from their own districts, the judges travel throughout the circuit to hear appeals. The fact that the Ninth Circuit is large, with varying economic conditions in different parts of the circuit at any given time, has meant that there have always been an adequate number of capable bankruptcy judges willing to volunteer to assume the additional 25% - 30% workload that comes with being a BAP judge.

Since its inception, more than 14,060 appeals have been resolved by the BAP, of which 4,500 appeals have been decided on the merits.

### Advantages Of Size Offered By A Large Circuit

In bankruptcy, the same legal issues will often arise in thousands of cases. Only a handful of the parties involved will go to the time and expense of appealing an adverse ruling. A prompt, persuasively reasoned determination of those issues by a circuit-wide court provides predictability of probable legal outcome across the circuit. Decisions by the BAP give guidance to trial courts and save unnecessary litigation costs.

The current structure of the Ninth Circuit offers advantages over smaller circuits. As the number of cases increases, the chance that a particular issue will be brought to an appellate court more quickly also increases. Issues can be decided once, not two or three times, as would be the result if the circuit were to be divided and each new circuit had to address the same issues. Although BAP decisions are not considered binding precedent, our understanding is that the bar considers them highly effective tools for assuring predictability of outcomes, if not for anticipating circuit court adoption of legal principles developed by the BAP.

### Having A BAP Conserves District Court Resources

The BAP is authorized to hear appeals from all 13 districts of the Ninth Circuit. (Guam and the Northern Mariana Islands are excluded, as they do not have bankruptcy judges separate from the district judges.) Appeals are heard by three-judge panels with the consent of the parties. Historically the BAP has handled

approximately 60% of the appeals, while the various district courts have handled approximately 40% of the appeals.

The BAP handles appeals that otherwise would have resulted in additional case loads for the district courts. For example, over the past ten years, the BAP has resolved an average of 680 appeals annually. The shift of work from district courts to the BAP enables the Article III district judges to spend more time on criminal and other cases that only they can adjudicate.

If the circuit were to be divided, it is unknown whether the case load of each of the new circuits would warrant the establishment of a BAP and, even if it did, whether the smaller BAPs could justify the administrative expense and necessary staffing inherent in any court.<sup>2</sup>

#### Having A BAP Conserves Circuit Resources

Bankruptcy decisions are subject to a two-tiered system of appellate review. The first stop is the BAP or the district court, where about 75% of the number of appeals initially filed are fully resolved. The remaining 25% seek second-level review at the court of appeals. Appeals that go through the BAP are less likely to seek second-level review, 20% from the BAP compared with 30% from the district courts, in part due to the

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<sup>2</sup> We do note that, under 28 U.S.C. § 158(b)(4), it is possible that a BAP could serve the bankruptcy courts of more than one circuit, but there has never been a joint BAP. The complexity of establishing a cross-circuit institution may create practical impediments to doing so.

expertise of the bankruptcy bench in understanding bankruptcy issues, and in part due to the persuasive value of the BAP decisions. These efficiencies would likely be lost if the circuit were to be divided.

Conclusion

In closing, the judges of the Bankruptcy Appellate Panel for the Ninth Circuit strongly oppose division of our circuit, because we believe that opportunities to make efficient use of the substantial resources of our large circuit will be lost by fragmentation, as will the consistency in the law that comes from having a large circuit rather than two or more smaller circuits.

We greatly appreciate the opportunity to submit a statement regarding division of the circuit

Submitted on May 5, 2004

Elizabeth L. Perris, Chief Judge

Philip H. Brandt

Christopher M. Klein

Dennis Montali

James M. Marlar

Erithe Smith