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Supreme Court Concludes That Orders Denying Confirmation Of A Bankruptcy Plan Are Not Final For Purposes Of Appeal, Resolving Circuit Split

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

June 3, 2015 - As previously reported, on December 12, 2014, the Supreme Court granted certiorari on an appeal from the decision of the First Circuit Court of Appeals in *Bullard v. Hyde Park Savings Bank*, to resolve a circuit court split regarding whether an order denying confirmation of a bankruptcy plan is a final order appealable as of right under 28 U.S.C. § 158(d)(1). On May 4, 2015, the Supreme Court issued its opinion, concluding that a bankruptcy court's order denying confirmation of a chapter 13 debtor's proposed repayment plan is not a final order that the debtor can immediately appeal. Chief Justice Roberts wrote the opinion for a unanimous Court. The Court's decision in *Bullard* resolves a circuit split, affirming the approach of the majority of Circuit Courts; the First, Second, Sixth, Eighth, Ninth and Tenth Circuits had each previously ruled that an order denying confirmation of a reorganization plan is not final if the case has not been dismissed and the debtor remains free to propose another plan.[1] In contrast, the Third, Fourth and Fifth Circuits had held that such an order could be final, even if the underlying bankruptcy case had not been dismissed.[2]

Chief Justice Robert's opinion recognizes that the concept of finality in the bankruptcy context differs from ordinary civil litigation. *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686, 1691 (2015). "A bankruptcy case involves 'an aggregation of individual controversies,' many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor." *Id.* at 1692 (internal citation omitted). Accordingly, appeals as of right from orders of the bankruptcy court are authorized from "final judgments, orders and decrees . . . in cases *and proceedings*." *Id.* (emphasis added) *citing* 28 U.S.C. § 158(a). His opinion concludes that for the purposes of determining whether a court's order is final and immediately appealable, the relevant proceeding is the "entire process" of attempting to arrive at an approved plan that would allow the bankruptcy case to move forward, "culminating in confirmation or dismissal." *Id.* at 1693. As a result, only plan confirmation or case dismissal alters the status quo and fixes the

parties' rights and obligations. *Id.* at 1692. In contrast, denial of confirmation with leave to amend "changes little." *Id.* at 1693. The opinion likens this state of affairs to the finality of "a car buyer's declining to pay the sticker price," noting "[i]t ain't over till it's over." *Id.*

In support of its conclusion that the entire confirmation process, as opposed to the ruling on each specific proposed plan, should be viewed as the "proceeding" for purposes of assessing finality of an order, the Court noted that "confirmations of plans" are among the enumerated proceedings that form part of a bankruptcy court's "core" jurisdiction under 28 U.S.C. § 157(b)(2)(L). Although this provision of the United States Code does not govern appealability, the Court nonetheless determined that the absence of any reference to denials of confirmations among the enumerated core proceedings bolstered its conclusions.

In rejecting *Bullard*'s arguments that a denial order should be immediately appealable, the Court recognized that in many cases, the debtor's only remaining options – to seek or accept dismissal of the case and then appeal, or to proposed an amended plan and appeal its confirmation – may be unappealing. But the Court concluded that "our litigation system has long accepted that certain burdensome rulings will be 'only imperfectly reparable by the appellate process." 135 S.Ct. at 1689. The Court further noted that in cases where a question is of sufficient import to warrant immediate consideration on appeal, the mechanisms for interlocutory review are still available. While these discretionary review mechanisms "do not provide relief in every case, they serve as useful safety valves for promptly correcting serious errors." *Id.*

The Court's decision was rendered with respect to an order denying confirmation of a plan in a chapter 13 case. The decision is silent as to its applicability in chapter 11 cases, but the Court's reasoning does not suggest a different outcome in the chapter 11 context. While debtors in chapter 11 proceedings should therefore be aware that an order denying plan confirmation will likely not be considered final, this does not mean that the decision in *Bullard* will necessarily have a meaningful impact in plan negotiations. While *Bullard* may foreclose plan proponents from appealing as a matter of right, a debtor can still seek leave to appeal where appropriate. As such any potential shift of negotiating power away from a debtor suggested by *Bullard* may be limited in application.

Footnotes

[1] *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 752 F.3d 483 (1st Cir. 2014), *Mariano v. Bradford Savings Bank*, 691 F.2d 89 (2d Cir. 1982); *Lindsey v. Pinnacle Nat'l Bank (In re Lindsey)*, 726 F.3d 857, 859 (6th Cir. 2013); *In re Lewis*, 992 F.2d 767 (8th Cir. 1993); *In re Leivsay*, 118 F.3d 661 (9th Cir. 1997); *In re Simons*, 908 F.2d 643 (10th Cir. 1990).

[2] *In re Armstrong World Indus.*, 432 F.3d 507 (3d Cir. 2005); *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *In re Bartee*, 212 F.3d 277 5th Cir. 2000).

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