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Supreme Court To Resolve Circuit Split On Finality Of Orders Denying Confirmation Of A Bankruptcy Plan

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February 11, 2015 - On December 12, 2014, the Supreme Court agreed to hear an appeal of the ruling in *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 752 F.3d 483 (1st Cir. 2014) 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). The decision will impact Chapter 13 and Chapter 11 cases. In *Bullard v. Hyde Park Savings Bank*, the First Circuit held that such an order was not a final order so long as the bankruptcy case had not been dismissed and the debtor remained free to propose an amended plan.

The debtor, Louis Bullard, filed for Chapter 13 relief in the Bankruptcy Court for the District of Massachusetts. *In re Bullard*, Case No. 10-23503-WCH (Bankr. D. Mass). Among his assets, Mr. Bullard owned real property whose value was substantially lower than the amount he still owed on his mortgage with the respondent, Hype Park Savings Bank (the "Bank"). In January 2012, Mr. Bullard filed a Chapter 13 plan proposing that the secured portion of the Bank's claim be reduced to the value of the property and the Bank would be paid a dividend on the unsecured remainder of its claim. Hyde Park objected to the proposed plan, arguing that the plan could invoke either 11 U.S.C. § 1322(b)(2), which provides that a plan may modify the rights of holders of secured claims, or 11 U.S.C. § 1322(b)(5), which provides that a plan may permit the curing of any default and maintenance of payments while the case is pending, but the proposed plan could not invoke both provisions. The bankruptcy court agreed, sustaining the Bank's objection, denying confirmation of the plan and ordering Mr. Bullard to file an amended plan within thirty days or face dismissal.

Mr. Bullard appealed to the Bankruptcy Appellate Panel for the First Circuit (the "BAP"). Recognizing a split in authority on whether the Bankruptcy Court's order was a final order appealable as of right, Mr. Bullard also filed a motion for leave to appeal the Bankruptcy Court's order if it was determined to be interlocutory. The BAP granted the motion and affirmed the bankruptcy court's denial of confirmation. *Bullard v. Hyde Park Savings Bank*, 494 B.R. 92 (1st Cir. BAP 2013). Mr. Bullard then filed a notice of appeal to the First Circuit and a motion for certification of the appeal under 28 U.S.C. § 158(d)(2), which the BAP denied. The First Circuit issued an order to show cause why

his appeal should not be dismissed for lack of jurisdiction because the BAP's order affirming the denial of confirmation was not a final order as required by 28 U.S.C. § 158(d)(1) and directed the parties to fully brief the jurisdictional question and the merits.

The First Circuit held 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. The court rejected the debtor's argument that the practical implications of treating the order denying confirmation as interlocutory were to either force him to file a plan that is either unappealing or not feasible, or to wait until an order is entered dismissing his petition to seek his recourse on appeal. The court noted that while his "options may be unappealing," the debtor could have sought alternative avenues of appeal, such as certification and authorization to directly appeal the bankruptcy court's order to the Court of Appeals. *Bullard*, 752 F.3d 487. Ultimately the court concluded, "we do not think it problematic to adopt a rule that encourages, to the greatest extent possible, debtors and creditors to negotiate a mutually agreeable plan without requiring appellate intervention." *Id.*

In addressing the finality of an order denying confirmation of a reorganization plan, the Supreme Court will resolve a circuit split. In *Bullard*, the First Circuit joined the majority of Circuits, including the Second, Sixth, Eighth, Ninth and Tenth Circuits.[1]. In contrast, the Third, Fourth and Fifth Circuits have held that such an order can be final, even if the underlying bankruptcy case has not been dismissed.[2] Oral argument has not yet been scheduled.

Footnotes

[1] The Supreme Court may also resolve whether a more flexible standard for finality is appropriate in the bankruptcy context. Certain courts have adopted a more flexible standard for finality in the context of bankruptcy proceedings, to permit immediate appeal from issues that resolve disputes within the bankruptcy case as a whole, without requiring the litigants to discrete claims to wait until resolution of the case as a whole to seek their appellate recourse. Notably, the Tenth Circuit in *In re Simons*, 908 F.2d 643 (10th Cir. 1990) is the only Circuit Court that has issued an opinion on this issue that does not treat finality any differently in the bankruptcy context. See also *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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