Clients&FriendsMemo

Supreme Court Holds That Orders Denying Plan Confirmation Are Not Final for Appellate Purposes

May 21, 2015

On May 4, 2015, a unanimous United States Supreme Court in Bullard v. Blue Hills, 135 S. Ct. 1686 (2015), resolved a long-standing circuit court split by holding that a bankruptcy court's order denying confirmation of a debtor's proposed bankruptcy plan is not a "final" order that can be immediately appealed as a matter of right. Although arising in the chapter 13 context, the Court's holding also likely applies in chapter 11 and amounts to a major win for creditors, who gain important leverage during plan negotiations with debtors now left with fewer options following denial of confirmation.

Background

In December 2010, Louis Bullard commenced a chapter 13 case in the U.S. Bankruptcy Court for the District of Massachusetts. Bullard's primary debt was an "underwater" mortgage on a multifamily dwelling. Bullard filed a bankruptcy plan that proposed a "hybrid" treatment for the mortgage: he would pay a secured claim equal to the house's current value in full over an extended period while paying only a fraction of the remaining unsecured portion of the mortgage over five years. The mortgagee-bank objected to the plan, arguing that chapter 13 does not permit Bullard's proposed treatment of the bank's claim. The bankruptcy court agreed and denied confirmation despite acknowledging other courts within the First Circuit that had approved such treatment.

Bullard appealed to the Bankruptcy Appellate Panel ("BAP") of the First Circuit. The BAP held that the bankruptcy court's order denying confirmation was not "final" and therefore, Bullard had no right to immediately appeal absent leave of the court. Nonetheless, the BAP exercised its discretion to hear an interlocutory appeal and ultimately affirmed the bankruptcy court's denial of confirmation.

Bullard then requested that the BAP certify the appeal for review by the First Circuit Court of Appeals, but the BAP refused for reasons that the Supreme Court later described as "not entirely clear." As a result, the First Circuit dismissed the appeal for lack of jurisdiction, adopting the majority view among circuit courts that a bankruptcy court's denial of plan confirmation is not final so long as the debtor remains free to propose another plan.

The Court's Opinion

After granting certiorari, the Supreme Court framed its analysis as an interpretation of the main jurisdictional statute governing bankruptcy appeals, 28 U.S.C. § 158. Specifically, section 158(a) permits immediate appeals as of right from "final judgments, orders, and decrees . . . in cases and proceedings." The fact that the statute refers to "proceedings" in addition to "cases" implies that orders other than those that terminate an entire bankruptcy case may be "final" for appellate purposes, and indeed courts have long recognized that orders in bankruptcy cases may be immediately appealed if they "finally dispose of discrete disputes within the larger case." Bullard, 135 S. Ct. at 1692 (citing Howard Delivery Service, Inc. v. Zurich American Ins. Co., 547 U. S. 651, 657, n. 3 (2006)).

The issue from the Court's perspective was how to define the immediately appealable "proceeding" in the context of considering bankruptcy plans. Bullard argued that each time a bankruptcy court reviews a proposed plan, it conducts a separate proceeding, and thus both orders granting and denying confirmation terminate the proceeding, rendering such orders final and appealable. The Bullard Court disagreed and held that the relevant "proceeding" is "the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward." Id. This "proceeding" terminates either with confirmation of a plan or dismissal of the bankruptcy case.

The Court's opinion is founded upon a general understanding that a "final" order "alters the status quo" and "fixes the rights and obligations of the parties." Confirmation accomplishes this by restructuring the parties' rights and obligations pursuant to a binding plan. Dismissal similarly alters the status quo by lifting the automatic stay and exposing the debtor to creditors' collection efforts. By contrast, an order denying confirmation with leave to amend "changes little;" the automatic stay persists, the parties' rights remain unsettled, and the possibility of discharge survives.

The Bullard Court advanced a number of policy rationales for its holding. In the Court's view, permitting immediate appeals of confirmation denials would lead to delays and inefficiencies as debtors pursue each failed plan up the appellate ladder – a concern even more likely to play out in chapter 11 cases involving corporations with resources to appeal any narrow issue. Conversely, "[t]he knowledge that he will have no guaranteed appeal from a denial should encourage the debtor to work with creditors and the trustee to develop a confirmable plan as promptly as possible." Id. at 1694.

The Court dismissed concerns that permitting appeals of orders granting confirmation but not orders denying confirmation was unfair. This apparent inconsistency is simply a reflection of the fact that confirmation alters the status quo while denial does not. The Court added that such asymmetry was actually quite common. For example, orders granting a motion for summary judgment are final but orders denying such a motion are not. Moreover, the resulting asymmetry will not always strictly benefit creditors. A creditor who supports a failed plan must wait for further

developments along with the debtor. Indeed, debtors and creditors are sometimes joint plan proponents.

The Court acknowledged that debtors are left with "unappealing" options following denial of confirmation: (1) accept dismissal of the entire bankruptcy case and then appeal, in which case the debtor will lose the benefit of the automatic stay, or (2) propose an alternative plan and then appeal its unwanted confirmation, which could lead to immediate and irreversible consequences (e.g., the sale or transfer of debtor assets) absent a stay pending appeal. However, the Court noted that the harshness of these alternatives is mitigated by the fact that "bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time," and that "many of their errors . . . will not be of a sort that justifies the costs entailed by a system of universal immediate appeals." Id. at 1695. Further, a debtor has multiple avenues for seeking interlocutory review of an order denying plan confirmation under 28 U.S.C. §§ 158(a)(3), 158(d)(2), and 1292(b).

Conclusion

The Bullard decision certainly strengthens the bargaining position of creditors. Without the right to immediately appeal orders denying plan confirmation, a few debtors may resort to the drastic measures for obtaining appellate review, such as accepting dismissal of the entire case or seeking confirmation of an unwanted plan. Most debtors, however, will likely re-engage creditors to arrive at a more acceptable plan, and, in that sense, Bullard may indeed foster more "consensual" resolutions of confirmation disputes, albeit primarily at the debtor's expense.

For a copy of the full opinion, click here.

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Please feel free to contact any of the following Cadwalader lawyers if you have any questions about this Clients & Friends Memo.

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