BURR ALERT

January **2015**

Denial of Plan Confirmation and Finality - Supreme Court's Resolution of Circuit Split May Apply to Chapter 11

INTRODUCTION

The Supreme Court has agreed to hear *Bullard v. Hyde Park Savings Bank (In re Bullard)*, U.S., No. 14-116 (*cert. granted* 12/12/14). The Court's decision in this case will resolve a circuit split with regard to whether an order denying confirmation of a bankruptcy plan is a final order appealable pursuant to 28 U.S.C. § 158(d)(1). The decision has the potential to impact Chapter 13 and Chapter 11 cases.

The statute covering appeals from a district court's or Bankruptcy Appellate Panel's review of a bankruptcy decision, 28 U.S.C. § 158(d)(1), vests jurisdiction in U.S. Courts of Appeals "from all *final* decisions, judgments, orders, and decrees" entered under 28 U.S.C. § 158(a) and (b). Case law and the Bankruptcy Code provide exceptions to the requirement of finality, including orders reviewable under the collateral order doctrine, interlocutory orders regarding injunctions under 28 U.S.C. § 1292(a)(1), and orders involving a controlling issue of law as to which an immediate appeal may materially advance the ultimate termination of the litigation under 28 U.S.C. § 1292(b). Otherwise, orders must be "final" to be reviewable.

Finality is a more uncertain concept in the context of bankruptcy appeals, however, than it is in other civil federal appellate contexts. Due to the unique characteristics of bankruptcy proceedings, courts of appeals have adopted the "flexibility doctrine" to assess finality in bankruptcy.[1] This broader definition of finality accommodates the inherent complexity of bankruptcy administration, but it has also led to uncertainty among the courts of appeals and resulted in non-uniform application of bankruptcy laws.

CIRCUIT SPLIT

A circuit split on this issue has developed over the last three decades. The majority of circuits hold that an order denying confirmation of a Chapter 13 plan, or a Chapter 11 plan, is not a final order appealable pursuant to 28 U.S.C. § 158(d)(1). The First,[2] Second,[3] Sixth,[4] Eighth,[5] Ninth,[6] and Tenth

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[1] Frank W. Volk, Closing a Deep Divide: Appealing a Denial of Plan Confirmation, Am. Bankr. Inst. J., November 2013, at 34, 34.

[2] *In re Bullard*, 752 F.3d 483 (1st Cir. 2014) (Chapter 13 plan).

[3] *Mariano v. Bradrford Savings Bank*, 691 F.2d 89 (2d Cir. 1982) (Chapter 13 plan).

[4] *In re Lindsey*, 726 F.3d 857 (6th Cir. 2013) (Chapter 11 plan).

[5] *In re Lewis,* 992 F.2d 767, 773–74 (8th Cir. 1993) (Chapter 13 plan).

[6] *In re Lievsay,* 118 F.3d 661, 662–63 (9th Cir. 1997) (Chapter 11 plan).

Circuits[7] agree that the denial of plan confirmation is not final and appealable because significant further proceedings in the bankruptcy court remain after denial of a plan.[8] After denial of plan confirmation, the bankruptcy court's proceedings are not merely ministerial in character: The debtor is free to propose a new plan, to which creditors can object. Alternatively, the bankruptcy court must determine how to dispose of the case if no confirmable plan is proposed. Essentially, the majority rule is that as long as the debtor is free to propose an amended plan, an order denying confirmation is non-final and therefore not appealable. The circuits comprising the majority contend that allowing debtors to appeal the denials of plan confirmation would clog appellate dockets with issues that should be decided elsewhere.[9] Finally, as the Respondent in *Bullard* contends, the Bankruptcy Code provides a mechanism for reviewing the denial of plan confirmations involving unsettled or conflicting issues of the law.[10]

The minority of circuits, including the Third,[11] Fourth,[12] and Fifth Circuits,[13] holds that an order denying plan confirmation may be considered a final appealable order. The Fourth Circuit took the position that the majority rule is logically inconsistent in that it treats denial of plan confirmation as non-final while simultaneously treating confirmation as final and appealable: if denial of plan confirmation is non-final because the debtor may propose an amended plan before the case is dismissed, then according to the Fourth Circuit, confirmation orders must also be non-final because the debtor whose plan is confirmed may also propose an amended plan.[14] The circuits in the minority also reason that the majority rule, which deprives debtors of the option to appeal denial of plan confirmation, effectively leaves some debtors with just two equally unattractive options.[15] The first is to file an unwanted or involuntary plan and then appeal that plan, which raises potential standing issues, according to the Fourth Circuit. The other option is for the debtor to dismiss his case and then appeal the dismissal. This option risks losing the automatic stay and could preclude the debtor from filing another petition for six months. The circuits in the minority also note that the majority rule would lead to a waste of time, money, and labor.[16] The Petitioner's argument in the case before the Court points out that this potential waste is not only detrimental to cash-strapped debtors, but also to the creditors who have an interest in preserving resources of the bankruptcy estate.

IMPLICATIONS OF THE SUPREME COURT'S DECISION

The outcome of the Supreme Court's decision will undoubtedly impact the practice of Chapter 13 bankruptcy cases. Less clear is whether and to what extent the outcome in *Bullard* will impact the practice of Chapter 11 cases. As the petitioner notes in his brief, no court has distinguished between Chapter 13 and Chapter 11 cases on the issue of whether denial of a proposed plan is a

[7] *In re Simons,* 908 F.2d 643, 644–45 (10th Cir. 1990) (Chapter 13 plan).

[8] 726 F.3d 857 at 859.

[9] 752 F.3d at 489.

[10] 28 U.S.C. § 158(d)(2).

[11] *In re Armstrong World Indus.*, 432 F.3d 507 (3d Cir. 2005) (Chapter 11 plan).

[12] *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013) (Chapter 13 plan).

[13] *In re Bartee*, 212 F.3d 277 (5th Cir. 2000) (Chapter 13 plan).

[14] 721 F.3d, 247-48.

[15] *Id.* (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)).

[16] 212 F.3d at 283 (quoting *England v. FDIC*, 975 F.2d 1168,1171 (5th Cir. 1992)).

final order. Settled Chapter 13 issues in other areas of bankruptcy law are similarly applicable to Chapter 11 cases. The impact of the Court's decision in *Till v. SCS Credit Corp.* is particularly instructive.[17] In *Till*, the Supreme Court settled the issue of discount rates under the "cramdown" provision of the Bankruptcy Code in the context of Chapter 13, and lower courts have subsequently applied *Till* in the Chapter 11 context.

Although *Bullard* presents the issue of whether denial of confirmation is a final order appealable in the context of denial of a Chapter 13 plan, the Court's decision will probably impact the administration of Chapter 11 cases as well. In the absence of a contrary directive, lower courts will be free to apply the Court's ruling in *Bullard* to Chapter 11 cases.

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[17] 541 U.S. 465 (2004).