Supreme Court: decisions denying plan confirmation not appealable as of right

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Introduction

In *Bullard v Blue Hills Bank*(1) the Supreme Court considered whether a bankruptcy court order denying confirmation of a debtor's repayment plan, but leaving the debtor free to propose another plan, was a final order that could be appealed immediately as of right. On May 4 2015 the court rendered a unanimous decision, holding that the order was not final and immediately appealable. The decision closes off an avenue that would have allowed debtors to obtain, by right, immediate appellate review of a decision denying confirmation of their proposed plan, thereby delaying the conclusion of the bankruptcy case and hence payment of creditors' claims. Although *Bullard* was a Chapter 13 wage earner's case, the Supreme Court's decision will almost certainly have bearing in the Chapter 11 reorganisations of business entities.

Background

In December 2010 Louis Bullard petitioned for Chapter 13 relief in the US Bankruptcy Court for the District of Massachusetts. To proceed under Chapter 13, Bullard was required to propose a plan whereby he would use his future income over the next three to five years to pay back at least part of his outstanding debts. Chief among his debts was a claim of Blue Hills Bank, in the amount of roughly $346,000, which was secured by a mortgage on a multi-family house he owned. However, the house was worth substantially less than the amount Bullard owed the bank. Bullard proposed a Chapter 13 plan that would have bifurcated the bank's claim into a secured portion in the amount of the house's then-current value (estimated to be $245,000) and an unsecured portion for the remaining amount of the debt (about $101,000). The plan proposed that Bullard would continue making his monthly mortgage payments to pay down the secured portion, which would eventually be paid off long after the bankruptcy case concluded. As for the unsecured portion of roughly $101,000, the plan proposed that Bullard would repay only $5,000 of that amount over five years, with the remaining unpaid amount to be discharged.(2)

The bank objected to the plan. After a hearing, the bankruptcy court refused to confirm it on the basis that Chapter 13 did not permit Bullard to bifurcate the bank's claim as his plan proposed, unless the secured portion were paid in full within the five-year life of the plan. The bankruptcy court ordered Bullard to propose a new plan within 30 days. Bullard appealed to the US Bankruptcy Appellate Panel for the First Circuit,(3) which found that the bankruptcy court's order denying confirmation was not final and appealable because Bullard was "free to propose an alternative plan".(4) The panel nevertheless decided to exercise its discretion and hear the appeal in accordance with the provision of law allowing for appeals of interlocutory orders "with leave of the court".(5) On the merits, the panel agreed with the bankruptcy court and affirmed the order denying confirmation of Bullard's proposed plan.

Bullard then appealed the panel's decision to the US Court of Appeals for the First Circuit, but the appeal court ruled that it had no jurisdiction over the case. The court noted that because the bankruptcy appellate panel had not "certified the appeal" – that is, had not given permission to take a further appeal – the appeal court could have appellate jurisdiction only from a final order of the panel. Under First Circuit precedent, a bankruptcy appellate panel decision is final only when the underlying order of the bankruptcy court is final.(6) The appeal court thus addressed whether the order denying confirmation of Bullard's plan was final and appealable as of right. After noting a split among federal appellate courts across the country on the issue, the appeal court sided with the majority view that such orders are not final. Bullard petitioned the Supreme Court to review the case.(7)

Decision

Writing for a unanimous court, Chief Justice John G Roberts, Jr unequivocally affirmed the First Circuit's holding that the order denying confirmation is not final and appealable as a matter of right.

The court recognised that the doctrine of finality is more relaxed in bankruptcy since several separate proceedings can occur under the umbrella of a single bankruptcy case. Hence, as a general matter, orders disposing of discrete proceedings can be considered final, and therefore appealable by right, even though the bankruptcy case as a whole remains pending and unresolved. But the court rejected Bullard's argument that each time plan confirmation is denied, a final order is rendered. Rather, the court sided with the bank, agreeing that an "order denying confirmation is not final, so long as it leaves the debtor free to propose another plan".(8) The court reasoned that it is the actual confirmation of a plan or the dismissal of the bankruptcy case that "alters the status quo and fixes the rights and obligations of the parties", thereby creating finality.(9) By contrast, denial of confirmation with leave to amend "changes little", for as the court observed:(10)

> "*The automatic stay persists. The parties' rights and obligations remain unsettled. The trustee continues to collect funds from the debtor in anticipation of a different plan's eventual confirmation. The possibility of discharge lives on. 'Final' does not describe this state of affairs.*" (11)

The court buttressed its ruling by turning to Section 157(b) of the Judicial Code, which provides that "confirmations of plans" are core proceedings in bankruptcy.(12) The statute, said the court, did not refer to denials of confirmation, which suggested that Congress viewed the "larger confirmation process as the 'proceeding,' not the ruling on each specific plan".(13)

The court also expressed concern that allowing debtors to appeal denials of plan confirmation would engender significant delays, which the finality doctrine is meant to curb. The court noted that Bullard's case illustrated that "each climb up the appellate ladder and slide down the chute can take more than a year".(14) Bullard argued that concerns about delay were overblown because most debtors do not have the resources to pursue appeals over "small beer issues".(15) But the court took little comfort in Bullard's assurances, noting that:

> "*debtors may often view, in good faith or bad, the prospect of appeals as important leverage in dealing with creditors. An appeal extends the automatic stay that comes with bankruptcy, which can cost creditors money and allow a debtor to retain property he might lose if the Chapter 13 proceeding turns out not to be viable.*"(16)

The same concerns, the court observed, are heightened in Chapter 11 cases, where "Chapter 11 debtors, often business entities, are more likely to have the resources to appeal and may do so on narrow issues".(17) Yet even if Bullard were correct that appeals from confirmation denials would be rare, that did not adequately bolster the larger point that appeals of right should be recognised in each instance. "It is odd, after all, to argue in favor of allowing more appeals by emphasizing that almost nobody will take them," the court observed.(18)

The court brushed aside concerns of "asymmetry" – that is, while debtors would not have the right to appeal from orders denying confirmation, creditors could appeal from orders granting confirmation. (19) The court reasoned that "it is of course quite common for the finality of a decision to depend on which way the decision goes".(20) For example, an order granting summary judgment and fully disposing of the case is appealable immediately by right, but an order denying summary judgment is not. Moreover, the court noted that any asymmetry would not always benefit creditors over a debtor. Indeed, where a creditor is a proponent of a plan that is denied, that creditor would "have as keen an interest in a prompt appeal as the debtor".(21)

The court then addressed Bullard's "more practical objection": if orders denying confirmation are not final, they will become effectively unreviewable.(22) Bullard argued that a debtor's only recourse would be to have his case dismissed and then appeal, or to propose an amended plan and appeal its confirmation. The court was unmoved by that concern, saying that while such options may be "unappealing... our litigation system has long accepted that certain burdensome rulings will be only imperfectly reparable by the appellate process".(23) Moreover, the court noted that where immediate review of an order denying confirmation may be unusually important or necessary, "there are several mechanisms for interlocutory review to address such cases".(24) For example, such appeals may be taken with court permission. Bullard argued that this was an ineffective solution because courts grant leave to appeal so infrequently. However, the court noted that Bullard had obtained leave to appeal to the bankruptcy appellate panel, if not to the US Court of Appeals for the First Circuit as well.

Comment

The decision in *Bullard* substantially curbs the ability of debtors to put their bankruptcy cases on hold by pursuing potentially quixotic appeals to resurrect plans that were determined by lower courts to be unconfirmable. Delay – or even the threat thereof – has almost invariably been a source of leverage for debtors as they seek to utilise the protections of bankruptcy to resolve myriad disputes with their creditors.

To be sure, putting off the day when creditors are entitled to receive recoveries is endemic to bankruptcy and expressly contemplated by some of the Bankruptcy Code's provisions, such as the automatic stay.(25) The delay stemming from the stay and other code provisions is beneficial to creditors as a group because it gives bankruptcy trustees and debtors in possession the time and breathing room to marshal and maximise the value of the debtor's assets and to reorganise or liquidate the debtor in an orderly fashion. But the power to impose delays can also open the door to abuse, as the Supreme Court recognised in *Bullard* when it suggested that vesting a debtor with an automatic right of appeal each time confirmation is denied could "cost creditors money and allow a debtor to retain property he might lose if the Chapter 13 proceeding turns out not to be viable".(26)

Analogous scenarios can play out in Chapter 11, as creditors insist on a plan that would pay them in full but leave no equity value for shareholders, and corporate debtors in possession and their shareholders pursue appeals to vindicate plans that would preserve equity over the creditors' objections.

While the *Bullard* decision will reduce opportunities for abusive delays, it does not close off all avenues of appeal: debtors and other proponents of plans that have been denied confirmation will still have the possibility of pursuing an interlocutory appeal, provided that they obtain the permission of the court that will hear the appeal to do so.(27) However, such permission is within the discretion of the reviewing court and is not granted as a matter of course.(28)

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Endnotes

(1) 135 S Ct 1686 (2015).

(2) *Bullard*, 135 S Ct at 1690-91.

(3) A bankruptcy appellate panel is a panel composed of three bankruptcy judges authorised to hear and decide appeals from orders or judgments of the bankruptcy courts within a federal circuit. See 28 USC § 158(b). Only a handful of federal circuits have established bankruptcy appellate panels, most notably the First, Sixth, Eighth, Ninth and Tenth Circuits. In the circuits that have not established bankruptcy appellate panels, the federal district courts normally hear and determine appeals from the bankruptcy courts. *Id* § 158(a).

(4) *Bullard*, 135 S Ct at 1691 (quoting *In re Bullard*, 494 BR 92, 95 (BAP 1st Cir 2013)).

(5) *Id* (quoting 28 USC § 158(a)(3)).

(6) See, for example, *In re Watson*, 403 F 3d 1, 4 (1st Cir 2005); *In re Perry*, 391 F 3d 282, 284-85 (1st Cir 2004).

(7) *Bullard*, 135 S Ct at 1691.

(8) *Id* at 1692.

(9) *Id.*

(10) *Id* at 1693.

(11) *Id.*

(12) 28 USC § 157(b)(2)(L).

(13) *Bullard*, 135 S Ct at 1693.

(14) *Id.*

(15) *Id.*

(16) *Id.*

(17) *Id.*

(18) *Bullard*, 135 S Ct at 1693.

(19) *Id* at 1694-95.

(20) *Id* at 1694.

(21) *Id* at 1695.

(22) *Id.*

(23) *Id* (internal citations and quotation marks omitted).

(24) *Id.*

(25) See 11 USC § 362(a).

(26) *Bullard*, 135 S Ct at 1693.

(27) Aside from obtaining leave of court, a litigant may have other avenues for seeking appellate review. For example, under the collateral order doctrine, courts may review certain decisions on issues that are severable from the merits of a case and that would be effectively unreviewable after a case concludes. Although the Supreme Court in *Bullard* did not foreclose the possibility of an order denying confirmation being immediately appealable under the collateral order doctrine, lower courts confronting the issue have rejected arguments under the facts before them that such orders were appealable as collateral orders. See, for example, *In re Flor*, 79 F 3d 281, 284 (2d Cir 1996); *In re*

Simons, 908 F 2d 643, 645 (10th Cir 1990); *WCI Steel, Inc v Wilmington Trust Co*, 338 BR 1, 12 (ND Ohio 2005); *In re MCorp Financial, Inc*, 139 BR 820, 824 (SD Tex 1992).

(28) See, for example, *In re Kassover*, 343 F 3d 91, 94 (2d Cir 2003); *In re Tex Extrusion Corp*, 844 F 2d 1142, 1156 (5th Cir 1988).