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Consumer Corner

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Supreme Court Finally Takes Up Chapter 13 Confirmation Finality

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Every chapter 13 debtor must file[2] and seek confirmation of a plan at the outset of the case.[3] A bankruptcy court's denial of confirmation[4] leaves most debtors with a choice between proposing an amended plan, which may or may not be acceptable to the debtor or confirmable, or suffering a dismissal or conversion of the bankruptcy case.[5] However, some chapter 13 debtors seek to appeal from orders denying plan confirmation.

The issue of a debtor's ability to appeal confirmation denial first made it to a court of appeals relatively quickly after the modern Bankruptcy Code's Oct. 1, 1979, effective date. In 1982, a divided Second Circuit panel in *Maiorino v. Branford Savings Bank* found an order denying confirmation of a chapter 13 plan to be interlocutory and thus, not appealable.[6] Multiple circuit courts of appeals followed *Maiorino*,[7] but a divided Fifth Circuit panel in the 2000 case of *In re Bartee* split from existing precedent to permit a debtor to proceed to an immediate appeal from an order denying plan confirmation.[8]

This split continues to date, with six circuits taking the *Maiorino* position and three circuits taking the view espoused in *Bartee*.[9] However, the U.S. Supreme Court's recent granting of *certiorari* in *Bullard v. Hyde Park Savings Bank* should conclude the debate about this issue during its current term.[10]

Statutory History and Background

Before the Bankruptcy Reform Act of 1978, a chapter 13 debtor only could seek confirmation of a "wage earner's plan" after obtaining written approval of the plan from a majority of his/her secured and unsecured creditors.[11] With the Bankruptcy Reform Act of 1978, Congress attempted to correct what it viewed as a serious defect in chapter 13 by permitting chapter 13 debtors to propose a "reasonable plan for debt repayment based on that individual's exact circumstances"[12] and gave parties-in-interest the right to object to plan confirmation.[13]

When a bankruptcy court denies confirmation of a chapter 13 plan, it typically either directs the debtor to file an amended plan by a certain date, or requires a conversion or dismissal of the case.[14] The issue of appellate jurisdiction arises in cases where the debtor decides to appeal the order denying confirmation instead of filing an unwanted or undesirable plan or risking dismissal of the case, as well as the loss of the automatic stay and other protections under the Bankruptcy Code.[15]

Standard for Appellate Jurisdiction over Bankruptcy Matters

Section 158 of title 28 governs appellate jurisdiction for appeals from bankruptcy courts. Debtors

1 The views expressed in this article do not reflect the views of Summers Compton Wells LLC or any of its clients.
2 *See* 11 U.S.C. § 1321.
3 *See* 11 U.S.C. § 1324(b).
4 *See generally* 11 U.S.C. § 1325 (setting out mandatory criteria for confirmation of chapter 13 plan).
5 *See* 11 U.S.C. § 1307(c) (enumerating grounds for conversion or dismissal of chapter 13 case, including denial of confirmation of plan under § 1325 of Bankruptcy Code).
6 *See Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 90 (2d Cir. 1982).
7 *See Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 752 F.3d 483, 485-86 (1st Cir. 2014), *cert. granted*, 83 U.S.L.W. 3100, 2014 WL 3817549 (U.S. Dec. 12, 2014) (No. 14-116); *In re Gordon*, 743 F.3d 720, 724 (10th Cir. 2014), *petition for cert. filed*, 82 U.S.L.W. 3709 (U.S. May 21, 2014) (No. 13-1416), *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013); *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993); *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997).
8 *See In re Bartee*, 212 F.3d 277, 283-84 (5th Cir. 2000).
9 *Id.*; *see also In re Armstrong World Indus. Inc.*, 432 F.3d 507, 511 (3d Cir. 2005); *Mort Ranta v. Gorman*, 721 F.3d 241, 248 (4th Cir. 2013).
10 The Supreme Court granted *certiorari* in *Bullard* on Dec. 12, 2014. At that time, the petition pending in *Gordon* also sought review of the identical issue. Although filed two months prior to the *Bullard* petition, the *Gordon* petition remained pending for further conference by the Supreme Court as of the submission of this article with any grant or denial of *certiorari* or other action, such as consolidation with *Bullard*.
11 The Bankruptcy Act, 11 U.S.C. § 1052 (repealed 1978); *see, e.g., In re Teegarden*, 330 F. Supp. 1113, 1114 (D. Ky. 1971).
12 S. Rep. No. 95-989, at 13 (1978).
13 *See* 11 U.S.C. § 1324(a).
14 *See, e.g.*, 11 U.S.C. §§ 1307(c) and 1323(a).
15 *See Mort Ranta*, 721 F.3d at 248.

may appeal final judgments, orders or decrees to a bankruptcy appellate panel (BAP) or district court as a matter of right,[16] but may only appeal interlocutory orders and decrees with a bankruptcy court's leave.[17] The courts of appeals then have jurisdiction over appeals from final decisions, orders, judgments and decrees by a BAP or district court,[18] but only have jurisdiction over interlocutory orders and decrees if a lower court certifies after motion or *sua sponte* that the order or decree at issue involves a question of law with no controlling authority, involves a matter of public importance or a question of law requiring resolution of conflicting decisions, or finds that immediate appeal materially should advance the case's progress.[19]

Courts of appeals generally apply a flexible standard in determining whether an order or decree is final in bankruptcy cases.[20] In applying this flexible standard, they deem an order or decree final if it finally disposes of a discrete dispute within a larger bankruptcy proceeding.[21] For example, case law finds an order denying a panel trustee's motion to dismiss a bankruptcy case as abusive under § 707(b) to be final and appealable because it finally and conclusively resolves a discrete issue within a chapter 7 case.[22] However, this finality standard does not necessarily suffice to permit chapter 13 debtors to proceed to immediate appeals when a bankruptcy court denies plan confirmation under existing precedent.

Majority View: No Jurisdiction over Debtors' Appeals from Confirmation Denials

The *Maiorino* decision comprised the first court of appeals decision on the issue and established the current majority view.[23] In that case, the Second Circuit found the bankruptcy court's order below denying confirmation of the debtor's chapter 13 plan interlocutory and not appealable.[24] Five other circuits, including the First Circuit in *Bullard*, now follow *Maiorino*'s rationale to bar immediate appeals from orders denying chapter 13 plan confirmations.[25]

Courts taking the majority view state that an order denying confirmation of a chapter 13 plan cannot be considered final if the debtor can propose an amended plan without his/her case being dismissed.[26] Those courts find that rejection of a plan fails completely to dispose of a discrete dispute within a chapter 13 case because any amended plan that a debtor proposes remains subject to creditors' objections and confirmation proceedings in front of the bankruptcy court.[27]

Courts in the majority also believe that allowing debtors immediate appeals from confirmation denials inevitably results in judicial inefficiency.[28] Indeed, as far back as *Maiorino*, the Second Circuit warned that courts should eschew construing jurisdictional statutes — especially those involving direct appeals to the courts of appeals — too liberally, "otherwise, at every stage of the bankruptcy proceedings the parties will run to the court of appeals for higher advice."[29] The courts holding the majority view often note that debtors have a safety valve in the event of extraordinary circumstances because they can seek certification for an appeal under 28 U.S.C. § 158(d)(2) if a substantive plan provision involves a question of law with no controlling authority.[30]

Minority View: Jurisdiction Exists over Debtors' Appeals from Confirmation Denials

The minority view began taking shape with the Fifth Circuit's decision in *Bartee*.[31] The Third and Fourth Circuits subsequently followed *Bartee* in holding that orders denying plan confirmation are final and appealable and allowing those appeals to proceed to decision.[32]

Courts holding the minority view take the position that allowing debtors to appeal confirmation denials is "all but compelled by considerations of practicality."[33] Those courts find that the unavailability of an immediate appeal from a confirmation denial forces a debtor to "choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal."[34] Courts espousing the minority view counter the majority view's efficiency argument with one of their own: They argue that forcing a debtor to propose and obtain confirmation of an unwanted plan in order to obtain an appellate review also results in the debtor wasting scarce resources.[35] Those courts also find the prospect of incurring dismissal equally unappealing, especially considering that the debtor could lose the protection of the automatic stay.[36] Forcing the debtor to appeal his/her own plan or dismissal also raises standing issues for the minority courts.[37]

Courts taking the minority view also urge that principles of fairness and equity to all parties-in-interest in a bankruptcy case dictate a debtor's right to an immediate appeal of a confirmation denial. Specifically, creditors have the ability to take immediate appeals as of right from chapter 13 plan confirmations over their objections.[38] Considering the Bankruptcy Code's stated goal of aiding consumer debtors, it creates an inconsistency and makes little sense to give creditors the unfair advantage of immediate access to appellate review.[39]

Finally, in response to the inefficiency argument propounded by courts sharing the majority view, the Fourth Circuit in *Mort Ranta* pointed out that a debtor facing denial of confirmation will not waste scarce resources on gratuitous appeals simply because the option to appeal exists.[40] The Fourth Circuit further asserted that the alter-

16 *See* 28 U.S.C. § 158. Section 158(b) allows a circuit's judicial council to establish a bankruptcy appellate panel comprised of bankruptcy judges from the district to hear appeals from a single bankruptcy judge's rulings.
17 28 U.S.C. § 158(a)(3).
18 28 U.S.C. § 158(d)(1).
19 28 U.S.C. § 158(d)(2).
20 *See Bullard*, 752 F.3d at 485-86; *Mort Ranta v. Gorman*, 721 F.3d 241, 246 (4th Cir. 2013). The Tenth Circuit is the exception to the rule as it has refused to apply a flexible or relaxed finality standard to bankruptcy cases. *See In re Gordon*, 743 F.3d 720, 723-24 (10th Cir. 2014).
21 *See Bullard*, 752 F.3d at 485-86; *see also Mort Ranta*, 721 F.3d at 246. Presumably, the Supreme Court's adjudication of *Bullard* will address the propriety of the flexible standard for finality.
22 *McDow v. Dudley*, 662 F.3d 284, 289 (4th Cir. 1983).
23 *Maiorino*, 691 F.2d at 90.
24 *Id.*
25 *See Bullard*, 752 F.3d at 489; *Gordon*, 743 F.3d at 724; *Lindsey*, 726 F.3d at 859; *Pleasant Woods Assocs.*, 2 F.3d at 838; *Lievsay*, 118 F.3d at 662.
26 *Bullard*, 752 F.3d at 486.
27 *Id.* at 486-87.
28 *Id.* at 489; *see also Maiorino*, 691 F.2d at 91.
29 *Maiorino*, 691 F.2d at 91.
30 *Bullard*, 752 F.3d at 487; *see also In re Lindsey*, 726 F.3d at 860.
31 *See In re Bartee*, 212 F.3d 281-84.
32 *See In re Armstrong World Indus.*, 432 F.3d at 511; *Mort Ranta*, 721 F.3d at 250.
33 *Mort Ranta*, 721 F.3d at 248 (citing *Bartee*, 212 F.3d at 283).
34 *Id.*
35 *Mort Ranta*, 721 F.3d at 248.
36 *Id.*
37 *Id.* at 248 n.10 (noting that appellant must be "aggrieved person" to have standing to appeal).
38 *Id.* at 249.
39 *Id.*
40 *Id.*

native of a debtor appealing confirmation of an amended, unwanted plan presents even fewer economies than an immediate appeal because that situation simply delays the inevitable in cases where the debtor finds the amended plan unacceptable.[41]

Bullard Brings the Issue to Supreme Court

In *Bullard*, a chapter 13 debtor submitted a plan proposing a "hybrid" payment scheme to bifurcate his residential lender's secured claim into a secured claim in an amount equal to the market value of the residence and an unsecured claim for the amount owed in excess of the market value.[42] The plan proposed that the debtor continue making payments under the applicable loan documents until he satisfied the secured component of the claim in full, and then treat the unsecured portion of the claim the same as the other unsecured claims by receiving a *pro rata* share of distributions over the life of the plan.[43] The bankruptcy court rejected the plan on the basis that the "hybrid" payment scheme violated § 1322(b) of the Bankruptcy Code.[44]

On initial appeal, the First Circuit BAP affirmed the ruling,[45] noting that the order denying confirmation lacked finality under 28 U.S.C. § 158(a)(1) and instead comprised only an interlocutory order subject to a review on appeal with leave of court.[46] The debtor filed a motion for leave to appeal with the BAP on the grounds that courts in the circuit were divided over the issue of whether "hybrid" plans are confirmable.[47] The BAP then granted the debtor's motion for leave and affirmed the order denying confirmation on the merits.[48] The debtor subsequently appealed to the First Circuit,[49] which dismissed the debtor's appeal due to the absence of jurisdiction for an appeal of an interlocutory order absent a certification from the BAP that the order involved a question of law not covered by any controlling decision from the court of appeals or the Supreme Court.[50]

Practicality and Fairness Compel Adoption of the Minority View

Many of the Supreme Court's recent bankruptcy decisions focus more heavily on statutory language and interpretation rather than policy.[51] However, the Court should give weight to the practicality and policy considerations associated with the issues before it in *Bullard*. Presumably, the Bankruptcy Code seeks to place debtors and creditors in comparable positions in comparable situations. As a result, all parties should have comparable access to prompt appellate review on plan-confirmation issues without having to go through the machinations to obtain it. Chapter 13 cases comprise more than 30 percent of all bankruptcy filings,[52] and any decision on *Bullard* may extend to confirmation denials in chapter 11 cases as well,[53] so the Supreme Court's final word on finality will finally have far-reaching effects. abi

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41 *Id.*
42 *Bullard*, 752 F.3d at 484.
43 Petition for *Writ of Certiorari*, *Bullard v. Hyde Park Savs. Bank*, at 4 (No. 14-116).
44 *Id.*
45 *In re Bullard*, 494 B.R. 92, 101 (B.A.P. 1st Cir. 2013), *appeal dismissed*, 752 F.3d 483 (1st Cir. 2014).
46 *Id.* at 95.
47 *Id.*
48 *Id.*
49 Petition for *Writ of Certiorari*, at 6.
50 *Id.*
51 *See, e.g., Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (holding that Bankruptcy Code's text and purpose supersede policy arguments), *Ransom v. FIA Card Serv. NA*, 562 U.S. 61, 131 S. Ct. 716, 723 (2011) (finding that interpretation of Bankruptcy Code starts "with the language of the statute itself") (internal quotations omitted); *Milavetz, Gallop & Milavetz PA v. U.S.*, 559 U.S. 229, 239 (2010) (stating that Supreme Court only will consider constructions of a statute that are "fairly possible").
52 Administrative Office of the U.S. Courts, Bankruptcy Statistics, *available at* www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0914_f2.pdf (last visited Dec. 24, 2014).
53 There were 6,504 chapter 11 cases, including more than 1,000 individual filings, during the year ending Sept. 30, 2014. *Id.*