

CLIENT MEMORANDUM

Supreme Court Nixes Debtor's Efforts to Automatically Appeal Denial of Confirmation

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AUTHORS

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On May 4, 2015, the Supreme Court of the United States issued a unanimous opinion¹ that affects parties' rights following the denial of plan confirmation. In *Bullard v. Blue Hills Bank*, the Supreme Court held that a chapter 13 debtor did not have an automatic right to appeal the bankruptcy court's refusal to confirm his proposed repayment plan because denial of confirmation is not a final order. The decision stands in contrast to an objecting party's ability to appeal a bankruptcy court's determination to confirm a plan, which is immediately appealable as a matter of right. While *Bullard* was decided in the chapter 13 context, some observers have expressed concern that the decision may reduce chapter 11 debtors' leverage in plan negotiations. However, because corporate debtors rarely sought appellate review of orders denying confirmation prior to *Bullard* (and still retain the right to move for interlocutory appeal), it is unlikely that the Supreme Court's decision will have a meaningful impact on the conduct of future chapter 11 corporate reorganizations.

In December 2010, Louis Bullard filed a petition for chapter 13 bankruptcy in the Federal Bankruptcy Court in Massachusetts (the "Bankruptcy Court"). Soon after, Mr. Bullard proposed a five-year repayment plan detailing the amounts he intended to pay on each creditor claim over the duration of the plan. Mr. Bullard's main debt was a \$346,000 home mortgage owed to Blue Hills Bank (the "Bank"). The repayment plan valued Mr. Bullard's house at significantly less than the balance of the mortgage.

¹ *Bullard v. Blue Hills Bank*, 2015 WL 1959040 (May 4, 2015).

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After amending the repayment plan for the third time, Mr. Bullard submitted it to the Bankruptcy Court for confirmation. In the third amended plan, Mr. Bullard proposed a hybrid treatment of the mortgage, whereby the Bank's secured debt would be split into a secured claim of \$245,000 (the proposed value of the house) and an unsecured claim for the remainder. The plan provided for Mr. Bullard to continue making mortgage payments toward the secured claim until it was repaid in full — a time period that would run far beyond the plan's five-year term. With respect to the unsecured claim, the plan allowed Mr. Bullard to pay only as much as his income would allow for the duration of the five-year plan, which was projected to be only about \$5,000 of the \$101,000.

Not surprisingly, the Bank objected, and after a hearing, the Bankruptcy Court declined to confirm the repayment plan.² The Bankruptcy Court held that Chapter 13 did not allow Mr. Bullard to split the Bank's claim unless he could pay the secured portion of the claim within the five-year lifetime of the repayment plan. The court then directed Mr. Bullard to submit a new repayment plan within 30 days.

Mr. Bullard appealed the court's decision to the First Circuit's Bankruptcy Appellate Panel ("BAP"). The BAP noted that under bankruptcy's appeals statute, a party has an automatic right to appeal only "final judgments, orders and decrees,"³ and held that an order denying plan confirmation was not final if the bankruptcy court allows the debtor to amend and resubmit the plan for further consideration.⁴ Nevertheless, the BAP used its discretion to hear the appeal under 28 U.S.C. § 158(a)(3), which allows interlocutory appeals with leave of the court. Still, the BAP affirmed the Bankruptcy Court's decision on the merits. Next, Mr. Bullard turned to the Court of Appeals for the First Circuit to hear his appeal, but the First Circuit dismissed the appeal⁵ for lack of jurisdiction because the BAP had not certified Mr. Bullard's appeal under 28 U.S.C. § 158(d)(2). The only other possible source of jurisdiction for the First Circuit was 28 U.S.C. § 158(d)(1), which allows the appeal of any final orders from the BAP. However, the First Circuit held that the BAP's order could not be considered final because the underlying Bankruptcy Court order denying confirmation was not final. Along with the First Circuit, the Second, Sixth, Eighth, Ninth, and Tenth Circuits have all held that an order denying confirmation is not final.⁶ However, the Third, Fourth, and Fifth Circuits disagree.⁷ Mr. Bullard appealed the First Circuit's ruling and the Supreme Court granted *certiorari*.

² *In re Bullard*, 475 B.R. 304 (Bankr. Mass. 2012).

³ 28 U.S.C. § 158(a)(1).

⁴ *In re Bullard*, 494 B.R. 92 (1st Cir. BAP 2013).

⁵ *In re Bullard*, 752 F.3d 483 (1st Cir. 2014).

⁶ See *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013); *In re Lievsay*, 118 F.3d 661, 662-63 (9th Cir. 1997); *In re Lewis*, 992 F.2d 767, 773-74 (8th Cir. 1993); *In re Simons*, 908 F.2d 643, 644-45 (10th Cir. 1990); *In re Maiorino*, 691 F.2d 89, 90-91 (2d Cir. 1982).

⁷ See *Mort Ranta v. Gorman*, 721 F.3d 241, 246 (4th Cir. 2013); *In re Armstrong World Indus.*, 432 F.3d 507, 511 (3d Cir. 2005); *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000).

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The Supreme Court affirmed the First Circuit’s holding by differentiating plan confirmation from orders denying confirmation. Following plan confirmation, legal rights are affected, the status quo in a bankruptcy case changes and the terms of a plan become binding on the debtor and the creditors. In contrast, when a bankruptcy court does not confirm a plan and gives the debtor leave to amend the plan the bankruptcy proceeding continues unchanged — the automatic stay persists and the parties’ rights and obligations remain as they were prior to the order denying confirmation.⁸ The Supreme Court explicitly considered the impact on chapter 11 cases, where debtor corporations (as opposed to individuals) may have the resources to appeal each iteration of a reorganization plan, potentially weighing down the bankruptcy process with additional delays and costs.⁹ In this regard, the Supreme Court noted that its ruling would encourage the debtor to work with all parties to create a confirmable plan expeditiously.¹⁰

Mr. Bullard’s argument that without an automatic right to appeal debtors would have no effective means to obtain judicial review of denied plan proposals did not persuade the Supreme Court. Mr. Bullard posited that a debtor whose plan is denied would be left with two options: seek dismissal or have an undesirable plan confirmed — because those were the only outcomes that would create an automatic right to appeal. The Supreme Court acknowledged that both options seem perverse, but noted its “confidence that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time.”¹¹ And, when critical questions of law arise in a bankruptcy case that require immediate appellate review, the debtor always has the right to seek interlocutory review.¹²

Following *Bullard*, some reaction has focused on the potential that the decision may constrain future debtors’ ability to negotiate the terms of their plan of reorganization by shifting leverage to creditors. Under this view, *Bullard* may stifle creativity and lead to timid proposals because debtors may not be willing to take the risk of their plan being rejected by bankruptcy courts without a right to automatic appellate review. However, it would be atypical for debtors to pursue appellate remedies following denial of confirmation in the vast majority of corporate reorganizations. Instead, denial of confirmation in chapter 11 cases typically leads to further plan negotiations in an attempt to obtain consensus or address the bankruptcy court’s concerns. Further, the Bankruptcy Code already incentivizes debtors to pursue consensus by imposing strict “cramdown” requirements necessary to confirm the plan over creditor dissent.¹³ Moreover, all debtors still have the right to move for interlocutory appeal. Thus, the practical difference between a well-funded debtor appealing

⁸ *Bullard v. Blue Hills Bank*, 2015 WL, at *6. For the same reasons, if confirmation is denied and the case is dismissed, the automatic stay would terminate and the parties’ rights would not remain unchanged. As a result, an order denying confirmation under these circumstances would be automatically appealable.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *8.

¹² See *Bullard v. Blue Hills Bank*, 2015 WL, at *8-9 (citing 28 U.S.C. §§ 158(a)(3) and 158(d)(2)).

¹³ 11 U.S.C. § 1129(b).

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denial of confirmation as of right or litigating a motion for leave to appeal as an intermediate step is not meaningful enough to have any appreciable impact on the debtor's plan negotiation strategy.

While its impact on chapter 11 plan negotiations may be negligible, the *Bullard* decision may be cited going forward for its limited view of the universe of final bankruptcy orders. The Supreme Court rejected the argument that "an order resolving *any* contested matter is final and immediately appealable" calling such an outcome "implausible" because the list of contested matters is "endless and covers all sorts of minor disagreements."¹⁴ Appellees are likely to point to this conclusion when their opponents try to appeal bankruptcy court orders resolving ancillary contested matters without first moving for leave to appeal.

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¹⁴ *Bullard v. Blue Hills Bank*, 2015 WL, at *7.