

WILL A DEBTOR WITH THE RIGHT TO APPEAL AN ORDER DENYING CONFIRMATION BE LESS LIKELY TO NEGOTIATE WITH CREDITORS? JUSTICES EXAMINE IN *BULLARD*

On Wednesday, April 1, 2015, the Supreme Court heard oral argument in *Bullard v. Blue Hills Bank*, the second of two bankruptcy cases that the Court heard that day. In *Bullard*, the Court took up the question of whether an order denying confirmation of a chapter 13 plan with leave to file an amended plan is a final order appealable as of right. An analysis of the oral argument in the first case, *Harris v. Viegela*, appeared in this past Tuesday's edition of the ABI Bankruptcy Brief.

1. Case Background

Louis Bullard filed for relief under chapter 13, and proposed what is known as a "hybrid plan." The bankruptcy court denied confirmation, finding that the hybrid plan impermissibly combined §1322(b)(2) and §1322(b)(5) of the Code. The court gave the debtor 30 days to file an amended plan.

Instead, Mr. Bullard filed a notice of appeal to the Bankruptcy Appellate Panel of the First Circuit. The BAP granted leave to appeal after determining that the debtor had satisfied the criteria necessary to proceed with an interlocutory appeal, pursuant to 28 U.S.C. §158(a)(3). On the merits, however, the BAP affirmed the bankruptcy court's decision.

Mr. Bullard then filed a notice of appeal to the First Circuit and a week later moved the BAP to certify the appeal, pursuant to 28 U.S.C. §158(d)(2)(A). The BAP denied the motion for certification, noting that Bullard already had filed his notice of appeal to the First Circuit and, thus, certification was unnecessary. While recognizing that the appeal presented an "important and unsettled question of bankruptcy law," the First Circuit dismissed the appeal for lack of jurisdiction. The First Circuit concluded "an intermediate appellate court's affirmance of a bankruptcy court's denial of confirmation of a reorganization plan is not a final order appealable under §158(d)(1) so long as the debtor remains free to propose an amended plan."

2. Interlocutory Appeals and Finality

Early in the oral argument, Chief Justice Roberts asked James Feldman, who argued the case for Louis Bullard, the petitioner/debtor, why debtors, like Mr. Bullard, could not use "the multiple avenues that are provided for an interlocutory appeal." Mr. Feldman responded that interlocutory appeals serve a "fundamentally different purpose than appeal as of right." He explained that interlocutory appeals generally are "for the benefit of the system in systematically [sic] important cases [while] we rely on the parties for those issues that are important to them and they also help with the development of the law to have appeal as of right."

Chief Justice Roberts followed up by inquiring why the bankruptcy court's order denying confirmation was final, as it gave the debtor 30 days to file an amended plan. If the bankruptcy judge didn't think "it was done and over," asked the Chief

Justice, then why consider the judge's order a final one? Mr. Feldman explained that the difference lies in what constitutes the relevant proceeding.

CHIEF JUSTICE ROBERTS: So at least the judge didn't think it was done and over.

MR. FELDMAN: No, the judge thought for this plan, it was over. I think everybody agrees that the judge thought that this debtor can't get what the debtor wanted in this plan. He can't get this treatment - -

CHIEF JUSTICE ROBERTS: - - the way you look at it is whether the proceeding is the confirmation or denial of this plan, or if the proceeding is whether to confirm or deny a plan. Right?

MR. FELDMAN: Yes, yes. That - - that's right. And the - - the point is that - - that the denial of this plan kept the debtor from getting this particular relief that he wanted and that is finished and not going to be litigated - -

Thus, Mr. Feldman argued that the bankruptcy court's order was final, because it terminated the proceeding in which the debtor sought and the court rejected the relief provided for in debtor's hybrid plan. Mr. Feldman also claimed that the opportunity to file an amended plan did not solve the debtor's problem, because the bankruptcy court had closed the door on hybrid plans. As Justice Ginsburg later observed: "[Y]es, you can amend. But as I understood, your claim is - - the answer you've been given is never. You cannot have a hybrid."

Mr. Feldman argued that allowing an appeal of right "is important for the sake of sound functionality of the bankruptcy system for allowing bankruptcy - - appellate courts to develop and harmonize the law in bankruptcy, which is a need that many observers have noted." Justice Sotomayor interrupted Mr. Feldman to return to the Chief Justice's question about why the debtor could not simply use the interlocutory appeal route to raise these important issues. Justice Sotomayor listed the "multiple ways of getting an interlocutory appeal," and reiterated that the debtor has "four levels of protection in the event that a - - one court, like the one you applied to, says no to an interlocutory appeal." Mr. Feldman responded that notwithstanding these multiple avenues Mr. Bullard had not gotten a certification to appeal. He added that the certification process is "an additional level of overhead" and claimed that it is a "burden on the courts of appeals and on the various courts to deal with all the certifications."

3. A Parade of Horribles?

Douglas Hallward-Driemeier, who argued the case for respondent Blue Hills Bank, said that the debtor's rule of finality exposed the bankruptcy system to strategic gamesmanship by debtors.

MR. HALLWARD-DRIEMEIER: Well, I think there are incentives. Defensive, first, the - - the person who is trying to save their home and thinks that they'll be able to stay there longer if they're able to take multiple

appeals, each of which could take two years; offensively, by taking an appeal or at least threatening to take an appeal that would delay the process for years significantly increases the leverage that the debtor has over the creditors in terms of the negotiating.

Mr. Hallward-Driemeier also noted that while much of the oral argument focused on chapter 13, the debtor's proposed rule would apply to chapter 11 cases, as well. Mr. Hallward-Driemeier described the problems created by allowing an appeal of right on one plan while another plan is pending in the ongoing chapter 11 case.

MR. HALLWARD-DRIEMEIER: And when one thinks about this in the -
- how it would apply in the chapter 11 context, when you don't simply have one plan, at least after the period of exclusivity has expired, but rather multiple plans, the debtor has suggested and the creditors have proposed theirs, it raises very serious questions of what the bankruptcy court is to do. While one plan that's been denied confirmation is up on appeal, we have all these other plans that are pending in the bankruptcy court. Congress envisioned that that was going to be the period of negotiation. That there would be ultimately a consensus plan.

Earlier in oral argument, however, Mr. Feldman noted that the Third, Fourth, and Fifth Circuits had "all adopted rules that are similar to what we're proposing here." Justice Ginsburg asked Mr. Hallward-Driemeier about the "history in the circuits that have the rule," and he responded that "there is not much history to look at." His answer drew a skeptical rejoinder from Justice Kagan.

MR. HALLWARD-DRIEMEIER: ... The - - the Fifth Circuit was the first to suggest that there might be a right to appeal, but they actually held that that was only true where there was no leave to amend. So in our case, it would not have allowed an immediate right of appeal.

The - - the Third and Fourth Circuits have adopted the rule relatively recently, since 2005, after Congress amended the statute last. When Congress amended it, all of the courts of appeals that had clearly ruled had ruled in our way. So - -

JUSTICE KAGAN: Well, 2005 - -

MR. HALLWARD-DRIEMEIER: - - we don't have - -

JUSTICE KAGAN: -- that's, you know, 10 years. And these cases are coming up all of the time, and it seems as though you have a good natural experiment that goes on here. And - - and it hasn't really led to the kinds of bad consequences that we're all - -

MR. HALLWARD-DRIEMEIER: Well - -

JUSTICE KAGAN: - - surmising about.

Several Justices asked Mr. Hallward-Driemeier why, if debtor's rule would result in such dire consequences, major creditors were not lined up in support of respondent Blue Hills Bank's position. Justice Scalia inquired why both the Bank of America and

the United States sided with the debtor. Mr. Hallward-Driemeier responded that the Bank of America wanted to “force the court of appeals to decide this issue so that they have controlling circuit preference.” Justice Kagan also expressed surprise that creditors had not filed amicus briefs in support of the position Mr. Hallmark-Driemeier advanced to the Court.

JUSTICE KAGAN: - - one of the things that confuses me about this case, quite honestly, is why you don’t have more people on your side. In other words, where are the creditors, and where are the amicus briefs from the creditors who think that your position is important in order to prevent all of these appeals that you say are going to ruin the system?

MR. HALLWARD-DRIEMEIER: Well, without, I hope, being too flippant, when the Bank of America is on the other side, a lot of creditors give pause as to whether they want to be adverse to them on our side.

But the - - I’ve already, I think, explained that the Bank of America, in their amicus brief, have explained their reason for wanting to get - -

JUSTICE KAGAN: Well - -

MR. HALLWARD-DRIEMEIER: - - reviewed.

JUSTICE KAGAN: - - you explained a reason why a particular company, creditor, is on the other side. But, I mean, really, do you think everybody in the world is so intimidated by the Bank of America?

(Laughter).

4. A Compromise Position?

Justice Kagan expressed skepticism about the dire consequences predicted by Mr. Hallward-Driemeier. At the same time, however, she recognized that allowing debtors the right to appeal orders denying confirmation of their plans might undermine the goal of reaching negotiated outcomes in bankruptcy.

In a colloquy with Zachary Tripp, who argued the case for the Solicitor General as amicus curiae in support of petitioner/debtor, Justice Kagan wondered whether the interlocutory appeal route would work if the Court “were to say in an opinion, you know, interlocutory appeals are really good for this exact purpose.” Mr. Tripp rejected the idea, explaining, in part, that “it’s, frankly, completely backward . . . to read finality relatively narrow here, because Congress enacted 158(d) to expand the - - the path to appeal beyond that which 158(a) already had, because Congress in 2005 was concerned not that there were too many bankruptcy appeals, but there were too few - -.” Justice Kagan then explained the reason for offering an alternative approach.

JUSTICE KAGAN: The intuition that you’re running up against here, Mr. Tripp - -

MR. TRIPP: Right.

JUSTICE KAGAN: - - and the reason why people are searching to see if there are alternatives to your rule, is this idea that you’re short-circuit - - short-

circuiting what ought to be a kind of negotiated outcome. And, you know, what I - - what I hear you saying is just, no, you're not, because nobody will ever want to short-circuit a negotiated outcome. Is that - is that your answer?

MR. TRIPP: I think in the situations where a negotiated outcome is - is fairly available, the incentives to reach that are overwhelming. They're very, very, very strong. And I think that's one of the reasons we just haven't seen a flood of appeals and one of the reasons that - that both the United States and Bank of America is here for Petitioner and - - and nobody's come out to support Respondent.

Later in oral argument, Justice Breyer returned to Justice Kagan's suggestion, asking Mr. Hallward-Driemeier for his opinion.

JUSTICE BREYER: So one - - one thing. If you were - - maybe there's an argument against this - - but suppose for argument's sake I agreed with you on the basic point. It would then seem important to put in the opinion there is a problem here about there being insufficient appeals to generate law, but there is a mechanism, namely, the interlocutory mechanism, which perhaps has been used too sparingly. Now, what do you think of that?

MR. HALLWARD-DRIEMEIER: I - - I think that would be very wise on the Court's part.

JUSTICE BREYER: That was Justice Kagan's point initially.

Justice Scalia's skepticism about Justice Kagan's idea, however, injected a note of levity into the proceedings.

JUSTICE SCALIA: You know, sometimes they even ignore our holdings. Do you think they're not going to ignore this - -
(Laughter.)

JUSTICE SCALIA: - - this - - this piece of advice?

Is there support for a middle position in *Bullard*, apart from Justice Kagan and possibly Justice Breyer? It is unclear, as no other Justice explored the possibility during oral argument. Nonetheless, while several Justices were skeptical of the dire consequences cited by respondent Blue Hills Bank, they also recognized that a debtor with the right to appeal an order denying confirmation of his plan might have less incentive to negotiate an acceptable compromise with his creditors.