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Bankruptcy—Appeals

No Right for Debtor to Appeal Plan Denial; 'Lopsided' System 'Tolerable' to High Court

A unanimous U.S. Supreme Court closed a deep circuit split May 4 by holding that a debtor can't appeal a bankruptcy court order denying confirmation of a proposed repayment plan (*Bullard v. Blue Hills Bank*, 2015 BL 128677, U.S., No. 14-116, 5/4/15).

Such an order is not a ''final'' order so long as it leaves the debtor free to propose another plan, Chief Justice John G. Roberts Jr.'s opinion said.

Additionally, the review of each proposed plan is not a separate, appealable ''proceeding'' under 28 U.S.C. § 158(a), the court said.

The relevant ''proceeding'' is the entire process of ''attempting to arrive at an approved plan that would allow the bankruptcy to move forward,'' it said.

Only ''plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties,'' the court said.

The ruling will prevent debtors from being able to delay proceedings with unnecessary appeals, but it does not foreclose all appellate review, Douglas Hallward-Driemeier of Ropes & Gray LLP, Washington, counsel for Blue Hills Bank, told Bloomberg BNA May 4.

However, the ruling is ''not a perfect solution,'' Eric Brunstad Jr. of Dechert LLP, Hartford, Conn., who filed an amicus curiae brief supporting the bank, told Bloomberg BNA May 4.

Counsel for the debtor, James A. Feldman of the University of Pennsylvania Law School, Philadelphia, declined to comment in a May 4 e-mail to Bloomberg BNA.

'Lopsided System.' Without an appeal-as-of-right, ''disappointed debtors must typically seek to confirm a different plan they do not like, or suffer dismissal of their cases'' to obtain a final order from which they can appeal denial ''of the original plan,'' Brunstad said.

''This creates a lopsided system,'' especially since plan confirmations are immediately appealable by creditors, Brunstad said.

However, the court ''interestingly'' reasoned that ''bankruptcy courts typically get things right,'' and that ''the kinds of mistakes that bankruptcy courts make tend to be relatively small in nature,'' to justify the limited appellate review, he said.

Wrongly concluding ''that a debtor should pay unsecured creditors $400 a month rather than $300'' isn't the type of error that ''justifies the costs entailed by a system of universal immediate appeals,'' the court said.

''We do not doubt that in many cases these options may be, as the court below put it, 'unappealing,' '' the Supreme Court said.

''But our litigation system has long accepted that certain burdensome rulings will be 'only imperfectly reparable' by the appellate process,'' it said.

''That prospect is made tolerable in part by our confidence'' that bankruptcy courts ''rule correctly most of the time,'' the court said.

Other 'Safety Valves' Available. ''The court stressed that, where there is good reason for immediate appeal, the bankruptcy statute creates many avenues for discretionary appellate review of interlocutory orders,'' Hallward-Driemeier said.

After the denial of a plan, a district court or bankruptcy appellate panel can grant leave to hear an immediate appeal under 28 U.S.C. § 158(a)(3), the court said.

Next, a debtor who appeals to the district court and loses ''can seek certification to the court of appeals under the general interlocutory appeals statute,'' 28 U.S.C. § 1292(b), the court said.

Finally, a bankruptcy court, district court, BAP or the parties acting jointly can also certify a bankruptcy court's order to the court of appeals under 28 U.S.C. § 158(d)(2), the court said.

Discretionary review mechanisms don't provide relief in every case, but ''they serve as useful safety valves'' for ''promptly correcting serious errors'' and ''addressing important legal questions,'' the court said.

Debtor Had a Chance. The court said the debtor's case here ''could well fit the bill'' of an issue ''important enough that it should be addressed immediately'' via discretionary review.

The case ''presented a pure question of law that had divided bankruptcy courts'' in the U.S. Court of Appeals for the First Circuit and ''would make a substantial financial difference to the parties,'' the Supreme Court said.

Here, the debtor had proposed a ''hybrid'' plan of secured and unsecured debt to deal with his ''underwater mortgage,'' where the value of his house had fallen

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''substantially'' below the amount he owed to the bank, the court said.

He proposed splitting the mortgage debt into a secured claim in the amount of the house's then-current value, and an unsecured claim for the remainder, but the bankruptcy court declined to confirm the plan, the high court said.

The BAP did grant leave to appeal under Section 158(a)(3), but denied the debtor's request for certification to the appeals court under Section 158(d)(2) for ''reasons that are not entirely clear,'' the high court said.

Still, the fact that the debtor here was ''not able to obtain further merits review'' does ''not undermine our expectation that lower courts will certify and accept interlocutory appeals from plan denials in appropriate cases,'' the court said.

Congress' Textual 'Clue.' The court said its conclusion that each plan review is not an appealable ''proceeding'' is bolstered by a ''textual clue'' from Congress.

''Among the list of 'core proceedings' statutorily entrusted to bankruptcy judges'' in 28 U.S.C. § 157(b)(2)(L) ''are 'confirmations of plans,' '' the court said.

''The presence of the phrase 'confirmations of plans,' combined with the absence of any reference to denials, suggests that Congress viewed the larger confirmation process as the 'proceeding,' not the ruling on each specific plan,'' it said.

Encouraging Negotiation. A ruling allowing appeals as a matter of right from plan denials ''would have shifted significantly the negotiating leverage over plan confirmation in favor of debtors,'' Hallward-Driemeier said.

Now, instead, the debtor's ''knowledge that he will have no guaranteed appeal from a denial should encourage the debtor to work with creditors and the trustee to develop a confirmable plan as promptly as possible,'' the court said.

Expediency ''is always an important consideration in bankruptcy,'' it said.

Appellate Chutes and Ladders. As the case here shows, ''each climb up the appellate ladder and slide down the chute can take more than a year,'' the court said.

''Avoiding such delays and inefficiencies is precisely the reason for a rule of finality,'' it said.

The court rejected the debtor's argument that ''frequent piecemeal appeals'' should not be a concern, because debtors ''do not typically have the money or incentives to take appeals over small beer issues.''

''It is odd, after all, to argue in favor of allowing more appeals by emphasizing that almost nobody will take them,'' it said.

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Full text at http://www.bloomberglaw.com/public/document/Bullard_v_Blue_Hills_Bank_No_14116_US_May_04_2015_Court_Opinion and 83 U.S.L.W. 4288.

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