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Lawyers React To High Court's Limiting Of Debt Plan Appeals

Law360, New York (May 04, 2015, 7:46 PM ET) -- The U.S. Supreme Court on Monday ruled that corporations and individuals do not have an absolute right to immediately appeal the rejection of a bankruptcy plan. Here, attorneys tell Law360 why the decision is significant.

Douglas Bartner, Shearman & Sterling LLP

"At the risk of oversimplifying, you might think of a plan as a settlement proposal made by one constituent to other parties in the case. If that settlement does not satisfy the legal standards for confirmation — because it cannot be crammed down on an objecting class or otherwise — then the settlement negotiations must continue. In that sense, there is nothing 'final' about being told by a court to change the plan because it is unconfirmable. In fact, the decision, which is clearly applicable in a Chapter 11 case, should serve to reduce the leverage the plan proponent might believe it otherwise has to push for confirmation of a plan that is not confirmable. In turn, the plan proponent will more likely be induced to seek a consensual plan, furthering the bankruptcy policies of settlement and expediency."

G. Eric Brunstad Jr., Dechert LLP

"The court today determined that a bankruptcy court's denial of confirmation of a bankruptcy plan is not immediately appealable as of right. The decision is significant because, in general, a bankruptcy court's confirmation of a plan is immediately appealable as of right. As a result, creditors disappointed by confirmation of a plan they do not like may take an immediate appeal, but debtors disappointed by the denial of confirmation of a plan generally may not. Instead, disappointed debtors must typically seek to confirm a different plan they do not like, or suffer dismissal of their cases, in order to appeal the denial of confirmation of the original plan. This creates a lopsided system. In reaching its conclusion, the court noted interestingly that bankruptcy courts typically get things right, and that the kinds of mistakes that bankruptcy courts make tend to be relatively small in nature. The court also observed that disappointed debtors are not entirely without recourse: They may seek appellate review on a permissive basis in a number of instances, rather than as-of-right. Although not a perfect solution, the court concluded that limited appellate recourse for disappointed debtors is adequate. The decision resolves an important legal question in the bankruptcy area that has long divided the lower courts."

Thomas M. Byrne, Sutherland Asbill & Brennan LLP

"The court faced a difficult task in striking a balance between avoiding piecemeal appeals and disadvantaging consumer debtors. Today's decision weakens the debtor's hand but, as the court pointed out, there are mitigating practicalities that still leave the debtor with some options for appellate review. The ultimate outcome, however, probably means fewer successful Chapter 13 cases. To me, the most

interesting thing about the court's opinion was its evident frustration with the solicitor general's brief, which the court appeared to regard as entirely unhelpful to finding a solution to the problem at hand."

Oren Buchanan Haker, Stoel Rives LLP

"The bankruptcy process works best when parties are encouraged to negotiate to resolve their differences, rather than immediately resorting to formal litigation, which only increases fees and costs to the detriment of unsecured creditors. Today's decision from the Supreme Court affirms two principles: First, that resorting to the appeals process should not be the first option for a debtor whose plan is not confirmed; and second, that the confirmation process should remain firmly within the bankruptcy judge's purview and should not play out across the appellate courts. Speed and efficiency are key to a successful restructuring, and today's decision affirms their importance."

Euripides Dalmanieras, Foley Hoag LLP

"The decision is significant. Federal courts have long recognized that the 'finality' of orders in bankruptcy proceedings is a more flexible concept than the 'finality' of orders entered in other civil cases. Thus, an order entered in a bankruptcy case may be deemed final and immediately appealable even if there remain other disputes in the bankruptcy proceeding that need to be resolved. In the Bullard decision, the Supreme Court drew a bright line by making clear that in all events an order in a Chapter 13 case must change the status quo in a material fashion to be final and, therefore, immediately appealable."

Tracy Green, Wendel Rosen Black & Dean LLP

"The Supreme Court decision takes away debtors' absolute right to appeal the denial of a confirmed plan, forcing debtors to negotiate with creditors rather than allowing an appellate review. While negotiations may be good under some circumstances, there can be uneven playing fields, and without the benefit of an appellate review debtors may have to give up something important to confirm a plan. This places a lot of power in the hands of select creditors, who may be trying to force a debtor to liquidate rather than reorganize, which can be a huge detriment to the debtor, other creditors, and employees and venders who hope the debtor continues in business. Even Bank of America supported the debtor's right, and saw the importance of allowing the legal issues to be resolved and the harm that can come to creditors without judicial review. It is disappointing that the Supreme Court does not think that legal issues that impact debtors' abilities to confirm a plan are entitled to judicial review."

Rachel A. Greenleaf, Hirschler Fleischer

"Bullard v. Blue Hills Bank forces a debtor seeking to appeal a denial of confirmation to choose [between] a rock and a hard place. Either the debtor must seek a discretionary appeal, unattractive due to a perceived hesitancy to grant such discretionary appeals, or allow the case to be dismissed for failure to file an amended plan, which would be an appealable final order. For the latter, without a stay pending appeal, the debtor will lose the protection of the automatic stay and, if the appeal is unsuccessful, be faced with various issues arising from a previously dismissed bankruptcy case."

Michael Kimberly, Mayer Brown LLP

"As a result of the court's decision, Chapter 11 and Chapter 13 debtors will now have far less flexibility to challenge intermediate rejections of their reorganization plans. Because the development of a plan is such an undertaking, that means the risk of using creative solutions to deal with difficult problems will be far greater. Without the right to an immediate appeal, the debtor and its creditors will have to scrap their efforts and either return to the drawing board or dismiss the case altogether and forfeit the

benefits of the automatic stay, every time a bankruptcy judge rejects a plan. This means creative solutions will be used less often, and the law will develop far more slowly, which helps no one."

Ralph R. Mabey, Kirton McConkie PC

"Bullard does little to tame our 'unruly' bankruptcy law (the court's word in RadLAX). Bankruptcy decisions by the district courts and the bankruptcy appellate panels are not considered precedential; it takes circuit decisions to tame the 'unruly' law. But under Bullard, plan denials are generally not 'final,' and cannot be appealed by right. The court's optimistic answer to this roadblock is its 'expectation that lower courts will certify and accept interlocutory appeals from plan denials in appropriate cases.' The First Circuit did not do so in Bullard. One hopes the court's expectation will be endorsed in the future."

David Pikus, Bressler Amery & Ross PC

"I expect that this opinion will ultimately have a relatively narrow impact on the outcome of future bankruptcy cases. It does not deprive individual or corporate debtors of the right to appeal denial of confirmation of their proposed plans. It only affects the timing. It is analogous to summary judgment in the federal system: A grant of summary judgment is immediately appealable as of right but denial of summary judgment is not."

John K. Rezac, Taylor English Duma LLP

"The Supreme Court, in the Bullard decision, prudently holds that debtors in bankruptcy may not appeal, as a matter of right, orders denying bankruptcy plan confirmation. The court correctly observed the likely, significant delays should such appeals be allowed, and acknowledged a debtor's right to seek interlocutory appeal or certification otherwise. Where a debtor is permitted to file an amended or new plan following denial of confirmation, however, denial of confirmation should not be deemed 'final' for purposes of appellate jurisdiction. The court's decision simply embraces the long-held desire for efficiency in bankruptcy cases."

Shaya Rochester, Curtis Mallet-Prevost Colt & Mosle LLP

"The Supreme Court struck an appropriate balance here, holding that an order denying plan confirmation is not a final, immediately appealable order, unless the case is dismissed as a result. As the court said, 'It ain't over till it's over,' as plan proponents can frequently amend the plan to address the reasons for denial of confirmation. This approach is almost always more efficient than a costly appellate process. Of course, appeals may be appropriate in certain circumstances, in which cases interlocutory appeals can still be requested. In any event, another circuit split has been resolved for bankruptcy practitioners."

Andrew Sherman, Sills Cummis & Gross PC

"The Supreme Court's decision in Bullard v. Hyde Park is a blow to debtors in the reorganization process and another leverage point for creditors. In denying the right of a debtor to seek review of an order rejecting a plan, a debtor's options in a reorganization case are limited and the ability to present untested legal theories are restricted. The duration of a reorganization case can be artificially extended increasing costs and potentially impairing the ability to effectuate a successful reorganization. The benefits of the reorganization process and the speed at which cases need to be administered and resolved will be hampered by the inability to seek review of orders denying confirmation. Creditors will use the inability to seek judicial review of an order denying confirmation as another tool to leverage their own positions and gain an advantage in the reorganization process."

Glenn Siegel, Morgan Lewis & Bockius LLP

“This decision makes clear that, so long as the case is not dismissed at the same time, the failure to confirm a bankruptcy plan does not ordinarily allow a debtor to suspend its negotiations with its objecting creditors by seeking an appeal. As a consequence, this should encourage debtors to resolve their differences with greater speed than attempting to wait for the outcome of a successful appeal.”

Catherine L. Steege, Jenner & Block LLP

“The court's decision follows traditional finality rules and in that sense is not surprising. While the court recognizes that in some cases its holding may prevent appellate review of unsettled legal issues, its ruling confirms that participants in bankruptcy cases like all other litigants must rely on the established exceptions to finality to appeal.”

Daniel H. Tabak, Cohen & Gresser LLP

“The court’s decision is a straightforward application of the final order rule to the plan confirmation process. It is perhaps more significant because, having chipped away at the power of bankruptcy court judges to deal with noncore proceedings in Stern v. Marshall, the court is now reaffirming the powerful role of bankruptcy court judges in core proceedings like plan confirmation.”

Charles Tabb, Foley & Lardner LLP

“The takeaway is that Bullard is a huge victory for creditors. Especially in cases where the plan being proposed turns on the application and interpretation of a disputed area of law, the appellate reality for creditors who oppose the debtor’s plan is a 'Heads I win, tails you lose' scenario. If the creditor loses the confirmation battle, it can appeal immediately. But if the debtor loses, then it’s essentially game, set and match for the creditor, because the debtor cannot appeal — except with leave of court. That gives considerable leverage to creditors.”

James Tancredi, Day Pitney LLP

“In 2014, there were 310,061 Chapter 13 filings in the U.S. bankruptcy courts. The Bullard decision ostensibly recognizes both the practical limitations of the court’s resources and that the balance of justice sometimes requires that the system of appellate justice address certain burdensome rulings with 'only imperfectly reparable process.' Notably, the Supreme Court relied upon its observation that such process was tolerable as the bankruptcy courts rule correctly most of the time and that the interlocutory appeal process provides the appropriate safety valve for serious errors. The decision is a reminder of the restraint of the Supreme Court on bankruptcy matters and a stark recognition that Chapter 13 process was designed with a premium on consensus, efficiency and lack of undue delays.”

Tom Waldrep, Womble Carlyle Sandridge & Rice PLLC

“Although a debtor cannot appeal the denial of her Chapter 13 plan of reorganization, she can still amend the plan prior to and even on the date of confirmation, and if confirmation of her plan is denied, she almost always is given the opportunity to file a new plan. The bankruptcy court in Bullard allowed the debtor just such an opportunity. Thus, the Supreme Court found that until the case is dismissed, a debtor still has the opportunity to file a new plan. Only the confirmation of a plan or the dismissal of the case is appealable as of right. This same reasoning should apply in Chapter 11 cases.”