BANKRUPTCY LAW SECTION
SINCE 1983

BANKRUPTCY BRIEFS

NEWSLETTER OF THE BANKRUPTCY SECTION OF THE FEDERAL BAR ASSOCIATION

Marc Taubenfeld, Editor *May 2015*

LETTER FROM THE CHAIR

Greetings! Once more the editor of *Bankruptcy Briefs*, Executive Committee member Marc Taubenfeld, and all of the contributing authors have done an excellent job and we hope you enjoy this latest edition of the Bankruptcy Section's newsletter. This newsletter features a discussion of the United States Supreme Court's recent decision in *Bullard v. Blue Hills Bank* that a bankruptcy court's denial of the confirmation of a bankruptcy plan is not a final order and is, accordingly, not subject to an immediate appeal. In addition, and hot off the presses, the newsletter includes an analysis of the recent decision from the Supreme Court in *Wellness v. Shariff*. You will also learn about some of the issues surrounding structured dismissals, a controversial option (that many argue is not permitted by the Bankruptcy Code) for ending chapter 11 bankruptcy cases thereby limiting the ongoing expense of such cases that otherwise would be borne by the estate and its creditors. In addition, we have included a summary of the proposed changes to the Federal Rules of Bankruptcy Procedure. Finally, we will be adding a new section to the newsletter, "Chapter Spotlight," in which we focus on a specific chapter and, in particular, the ways in which the Bankruptcy Section can work with chapters to benefit our members through increased programming, additional promotion, provision of speakers, and/or assistance with materials. I invite all of you to reach out to me, any of the Bankruptcy Section's officers, and/or any member of the Executive Committee to discuss ways in which the Bankruptcy Section can better serve the needs of you, our members, including through collaborative efforts with local chapters. Please join me in thanking Marc and all of the contributing authors for their fine work and devotion to the Bankruptcy Section and its members.

Bankruptcy Briefs is one of the many tangible benefits of your membership in the Federal Bar Association's Bankruptcy Section. In addition, the Bankruptcy Section's Circuit writers (a list of our current writers is available at http://www.fedbar.org/Sections/Bankruptcy-Law-Section/Weekly-Circuit-Updates.aspx) have recently published the latest edition of the Bankruptcy Section's Circuit updates. You can find those summaries by clicking on the latest month on the left hand side of the page (or under the applicable Circuit) at the same link. We think you will find something of interest and of benefit to your practice within these summaries. I thank all of the writers of these summaries, and Executive Committee member

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LETTER FROM THE CHAIR

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(and current Bankruptcy Section secretary) Chris Sullivan, for their time and effort in getting the summaries out to the membership again in a timely manner.

In addition, the Bankruptcy Section is proud to be sponsoring (and offering a number of Section speakers for) the upcoming Fundamentals of Bankruptcy Litigation CLE to be held on June 24, 2015, at the United States Bankruptcy Court for the Southern District of New York. Speakers/panelists currently include: Judge Alan Trust, (our Section's chair of the CLE Committee), Judge Martin Glenn, Judge Laura Taylor Swain, Thomas R. Slome, Jason I. Blanchard, Richard J, Corbi, Leah M. Eisenberg, Sharon L. Levine, Robert A. Weber (immediate past chair of the Bankruptcy Section), Philip D. Anker, and G. Eric Brunstad. It is truly a star-studded cast. Details about the event, including how to register, are available at http://www.fedbar.org/Sections/Bankruptcy-Law-Section/Calendar/Bankruptcy-Section-and-SDNY-Chapter-Fundamentals-of-Bankruptcy-Litigation.aspx. As you will note, pending approval from the relevant CLE agencies, the event offers up to 4.5 hours of CLE credit along with an opportunity to network with friends and colleagues at a cocktail hour to be held immediately after the formal instruction ends. This promises to be a great event for practitioners of all levels of experience, including any summer clerks who may have an interest in pursuing a career as a bankruptcy lawyer. We are pleased to make this event available to FBA members at a reduced cost (one more way in which your Bankruptcy Section is striving to serve the needs of its members) and hope that it will become an annual event at locations throughout the country. We are also very excited to be sponsoring and planning this event with our friends and colleagues in the Federal Litigation Section and the Southern and Eastern District of New York Chapters of the Federal Bar Association.

As I indicated in my prior letter and will repeat herein, the Bankruptcy Section is looking for more input and help from you, our members. To facilitate such active participation, the Executive Committee has authorized the formation of the following committees: communications, chaired by Robert Weber (Robert.Weber@skadden.com); membership, chaired by Michael Hammer (mhammer@dickinson-wright.com); publications, co-chaired by Chris Sullivan (csullivan@diamondmccarthy.com) and Marc Taubenfeld (mtaubenfeld@mcslw.com); and CLE planning, co-chaired by Judge Alan Trust (alan_trust@nyeb.uscourts.gov) and chair-elect, Lisa Lambert (Lisa.L.Lambert@usdoj.gov). Among other things, you can now follow the Bankruptcy Section on Twitter (@FBABankruptcy). We intend to explore more options for communicating more effectively with the members of the Bankruptcy Section and welcome any and all suggestions in this regard.

We need the active engagement of our members to continue to have an effective and responsive Bankruptcy Section and to build on the strong foundation laid by the efforts of those members, officers, and Executive Committee members who have come before us. Therefore, I urge you to offer whatever time and effort you can to the Bankruptcy Section. If you have any interest in serving on any of the committees above, please reach out to the chair identified above, or contact me. In particular, Mr. Weber is in the process of forming the communications committee and enhancing the Bankruptcy Section's ability to increase the flow of information to its membership. We are excited to delve into the world of Linked In and Twitter, even if we may not be quite ready for SnapChat and ask for your help to make these efforts a success.

The FBA and your Bankruptcy Section provide a unique opportunity not only to hone your skills and acquire knowledge (through FBA and Bankruptcy Section sponsored CLE and through publications like this newsletter, the *Federal Lawyer*, and the Circuit Writer project), but also to get to know your fellow bankruptcy lawyers and the judges in front of whom you appear. Please let us know what we can do to help you get the most from your Bankruptcy Section membership.

In closing, I thank you again for the opportunity to serve the Bankruptcy Section and thank the other officers and the members of the Executive Committee for their hard work and dedication. As always, we welcome your comments and suggestions and hope you enjoy this edition of *Bankruptcy Briefs*.

Regards,

Mark L. Desgrosseilliers
Chair, Bankruptcy Section
(mdesgrosseilliers@wcsr.com)

DIFFERENT VIEWPOINTS:

Bullard v. Blue Hills Bank

SCOTUS Finds Second-Guessing Bankruptcy Courts on Plan Denials "Unappealing"

By: Bryan Rochelle,
Judicial Extern to the Hon. Stacey Jernigan and Hon. Harlin Hale
U.S. Bankruptcy Court for the N.D. Texas (Dallas Div.)

On May 4, 2015, the United States Supreme Court issued its opinion in *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015). The Court, faced with deciding whether a bankruptcy court's order denying confirmation of a debtor's proposed Chapter 13 bankruptcy plan is a final order that the debtor may immediately appeal pursuant to 28 U.S.C. § 158(a)(2) and (d)(1), held that a denial is not a final order for purposes of an immediate appeal.

THE BANKRUPTCY COURT

The debtor, Louis Bullard, owned real property in Massachusetts. Blue Hills Bank (formerly Hyde Park Savings Bank; the "bank"), held a mortgage on the property. In December 2010, Bullard filed for Chapter 13 bankruptcy in the United States District Court for the District of Massachusetts. While there was a wide disparity in both parties' valuation of the property, they agreed that the property was "underwater"—that is, worth substantially less than the claim filed by the bank.

The case involved the debtor's third amended plan, filed in January 2012, under which Bullard proposed a "hybrid"

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SCOTUS Rules That Order Denying Plan Confirmation Is Not Immediately Appealable

By: Ericka F. Johnson
Womble Carlyle Sandridge & Rice, LLP

On May 4, 2015, the Supreme Court for the United States unanimously held that an order denying confirmation of a plan is not a "final" order subject to immediate appeal as a matter of right.[1] Although the *Bullard* decision involved a plan proposed under chapter 13 to title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), the holding is equally applicable to bankruptcy cases filed under chapter 11 of the Bankruptcy Code. The Supreme Court's decision divests plan proponents of the ability to immediately appeal denial of plan confirmation giving additional leverage to creditors in the plan process, as plan proponents are more likely to settle contested plan issues rather than risk denial of the plan.

CASE BACKGROUND

Louis Bullard filed a petition under chapter 13 of the Bankruptcy Code.[2] Bankruptcy Code chapter 13 generally allows individuals with regular income to develop a plan to repay all or a portion of their debts while retaining their property. Unless the bankruptcy court grants an extension, the debtor must file a plan for repayment within 14 days of when the bankruptcy

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DIFFERENT VIEWPOINTS: ***Bullard v. Blue Hills Bank***

SCOTUS Finds Second-Guessing Bankruptcy Courts on Plan Denials "Unappealing"

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payment scheme that would have bifurcated the bank's claims. The secured claim would be valued at the then-current value of the property under 11 U.S.C. § 506(a) and paid out at the same rate as the original note. The number of payments would be reduced to reflect the new value of the principal. Meanwhile, the unsecured claim, representing the "underwater" part of the mortgage, would be paid pro rata along with other unsecured debts in the plan. This portion of the debt would be discharged thereafter.

The bank subsequently objected to the plan treatment. The bankruptcy court sustained the creditor's objection, and denied confirmation of the plan in July 2012. Noting the lack of jurisdictional uniformity regarding the permissibility of hybrid plans, the bankruptcy court took the position that such plans were inconsistent with certain provisions in the Bankruptcy Code.

APPEAL TO THE BANKRUPTCY APPELLATE PANEL

Following the denial of plan confirmation, Bullard appealed to the First Circuit Bankruptcy Appellate Panel (BAP). The BAP found that the bankruptcy court's denial of confirmation was not a final order that could be appealed under 28 U.S.C. § 158(a)(1), which provides that a party may appeal "final judgments, orders, and decrees" of a bankruptcy court to the district court or BAP. Specifically, the BAP reasoned that the order lacked finality because the petitioner could still have proposed an alternate plan.

Notwithstanding this determination, the BAP heard the appeal under § 158(a)(3), which permits appeals "with leave of the court, from other interlocutory orders and decrees." Taking note of the "[s]ubstantial ground for difference of opinion" on the validity of hybrid plans, which presented a "difficult and pivotal question of law" that many courts decided differently within the First Circuit, the BAP ultimately agreed with the Bankruptcy Court that Bullard's proposed plan was impermissible.

APPEAL TO THE FIRST CIRCUIT COURT OF APPEALS

Bullard subsequently appealed to the First Circuit, which dismissed the case for lack of subject matter jurisdiction. The appellate court reasoned that, in order for it to assert its jurisdictional authority, a final order must have been issued not only from the BAP, but the bankruptcy court as well. Neither requirement was met here. The First Circuit, like the BAP before it, observed that Bullard could still propose a new plan.

AT THE SUPREME COURT

Following the First Circuit ruling, Bullard filed a petition for certiorari in the United States Supreme Court. Noting the conflict in the circuit courts as to whether denials of plan confirmation may be immediately appealed—the Second, Sixth, Eighth, Ninth, and Tenth Circuits agreed with the First Circuit decision on the matter, while the Third, Fourth, and Fifth Circuits permitted such appeals—the petitioner, bolstered by an amicus brief filed by the Solicitor General, urged the Supreme Court to adopt the minority view.

The Supreme Court unanimously affirmed the First Circuit in an opinion authored by Chief Justice John Roberts. Chief Justice Roberts quoted *Howard Delivery Services, Inc. v. Zurich American Insurance Co.* 547 U.S. 651, 657, n. 3, stating, "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they *finally* dispose of discrete disputes within the larger case."[1] (Emphasis added). The task before the Court, he said, was to define the scope of such discrete disputes, or "proceedings." The Court disagreed with Bullard's contention that the bankruptcy court conducts a *separate* proceeding each time it reviews a bankruptcy plan proposal, and, further, that an order denying it would conclude the proceeding—thus making it final and appealable. Instead, the Court accepted the bank's view that the "proceeding" in question involved the *full* process of considering plans, concluding only upon the confirmation of a plan or upon the dismissal of the case. In fact, the Chief Justice wrote, only confirmation of a plan or dismissal could be viewed as "final" because such actions changed the rights and obligations of the parties. This situation was wholly different than that which the parties faced following the denial of a confirmation:

> Denial of confirmation with leave to amend, by contrast, changes little. The automatic stay persists. The parties' rights and obligations remain unsettled. The trustee continues to collect funds from the debtor in anticipation of a different plan's eventual confirmation. The possibility of discharge lives on. 'Final' does not describe this state of affairs.[2]

Further, the Court pointed to the "textual clue" in § 157(b)(2)(L), which lists "confirmations of plans" as a "core" proceeding. The phrase "confirmation of plans," coupled with the lack of any reference to plan denials, hinted that Congress viewed the confirmation process as a whole as the "proceeding." Finally, the Court simply could not apply the idea of finality to all contested matters in a case. For example, applying this concept to a disputed request for an extension of time would be improper, the Chief Justice said.

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DIFFERENT VIEWPOINTS: ***Bullard v. Blue Hills Bank***

SCOTUS Rules That Order Denying Plan Confirmation Is Not Immediately Appealable

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petition is filed.[3] In Bullard's case, his primary debt was the $346,000 he owed to Blue Hills Bank (the "Bank"), which held a mortgage on a multifamily house Bullard owed. Bullard's proposed repayment plan was to split the debt to the Bank into a secured claim totaling the house's current value (estimated at $245,000) and an unsecured claim for the remainder ($101,000).[4] Under the proposed plan, Bullard would continue making regular mortgage payments towards the secured portion of the claim, and the unsecured portion would be treated the same as his other unsecured debt (estimated recovery to the Bank on the unsecured portion of its claim was approximately $5,000).[5]

The Bank objected to the proposed plan.[6] After a hearing, the Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") denied confirmation, holding that the Bankruptcy Code did not permit Bullard to split the Bank's claim as proposed unless Bullard paid the entirety of the secured portion of the claim within the plan period.[7] In making its ruling, the Bankruptcy Court recognized that there was a split of authority on this issue in the First Circuit.[8] The Bankruptcy Court ordered Bullard to propose a new plan within 30 days.[9]

Bullard appealed to the Bankruptcy Appellate Panel of the First Circuit (the "BAP").[10] The BAP found that denial of the confirmation order was not a final order because Bullard was "free to propose an alternate plan."[11] Nonetheless, the BAP exercised its discretion under 28 U.S.C. § 158(a)(3) to hear the appeal "with leave of the court." The BAP affirmed the Bankruptcy Court's decision,[12] and Bullard appealed to the Court of Appeals for the First Circuit (the "Court of Appeals").[13] The Court of Appeals dismissed the appeal for lack of jurisdiction, adopting the majority view that an order denying confirmation is not final, provided that the debtor remains free to propose another plan.[14] Bullard again appealed, and the United States Supreme Court granted certiorari.[15]

THE SUPREME COURT'S DECISION

In a unanimous decision, the United States Supreme Court settled a circuit split and held that a bankruptcy court's denial of confirmation of a plan is not a "final" order, and, therefore, that such denial does not trigger an automatic right of appeal.[16] Chief Justice John Roberts, who authored the opinion, recognized that bankruptcy is different than most other civil litigation.[17] A bankruptcy case is comprised of "an aggregation of individual controversies" that, absent the bankruptcy, could exist as stand-alone lawsuits.[18] Accordingly, 28 U.S.C. § 158(a) permits appeals of bankruptcy court orders if such orders "'finally dispose of discrete disputes within the larger case.'"[19] The issue in this case is whether the pending dispute is confirmability of each proposed plan, as argued by Bullard, or the plan process as a whole, as argued by the Bank. The Court agreed with the Bank, finding that the "relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward."[20]

In reaching this conclusion, the Court determined that denial of plan confirmation, when there is the right to propose a new plan, does nothing to establish or fix the rights and obligations of the parties.[21] Confirmation has a preclusive effect and is binding on the debtor and the creditor.[22] If confirmation is denied and the bankruptcy case is dismissed, there is likewise a significant effect as dismissal eliminates the possibility of a discharge, lifts the automatic stay, and may limit the availability of such stay in a subsequent case.[23] Denial of confirmation with the opportunity to amend the plan, on the other hand, while it does eliminate the specific distributions contemplated under the denied plan, does little ultimately to change the rights of the

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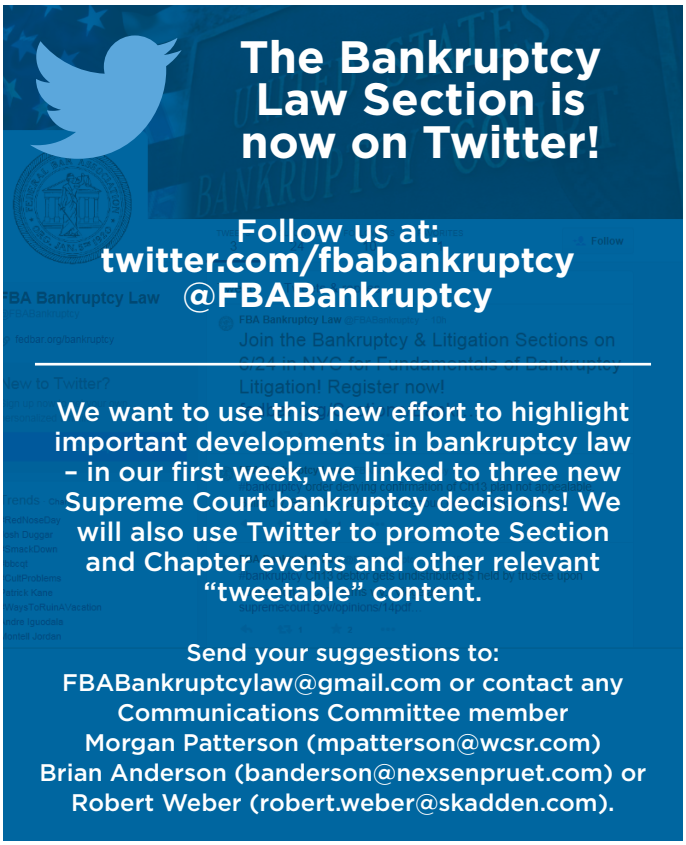

DIFFERENT VIEWPOINTS: ***Bullard v. Blue Hills Bank***

SCOTUS Finds Second-Guessing Bankruptcy Courts on Plan Denials "Unappealing"

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Chief Justice Roberts's opinion also addressed the more "practical" issues raised by the petitioner. In response to the petitioner's argument that concerns about problems arising out of an increased frequency of appeals was unfounded, the Chief Justice asserted that such fears were *not* misplaced. "[E]ach climb up the appellate ladder and slide down the chute can take more than a year," after all. Consequently, "[a]voiding such delays and inefficiencies is precisely the reason for a rule of finality."[3] Moreover, debtors could use an ever-present potential for appeal as leverage. Looking at procedural patterns more broadly, he further defended the Court's position by pointing out that it is common for a decision's finality to turn on whether it is answered in the affirmative or the negative. For instance, while orders granting summary judgment are considered final, orders denying them are not.

Chief Justice Roberts next addressed one of the petitioner's principal concerns about adopting the majority view on the appealability of plan confirmation denials—namely, that such a ruling would not only "insulate a host of potential legal errors from review and harm debtors," but that it would also saddle them with two unappealing alternatives to review.[4] The first alternative, the so-called "appeal-your-own-plan" procedure, called for the debtor to propose a new plan—presumably, one less favorable to the debtor—and then to appeal its confirmation.[5] The second alternative would be for the debtor to move for voluntary dismissal of his case, and then appeal from the grant of the debtor's motion. Either option, the petitioner contended, would unnecessarily lengthen the appeals process to the detriment of the debtor, who is already short on funds. The Chief Justice conceded that these were "good points." Debtors, he acknowledged, would surely find such options "unappealing."[6] Nevertheless, he asserted that in the litigation system, certain incorrect rulings were, as suggested in *Digital Equipment Corp.*, "only imperfectly reparable" by the appellate process.[7] The Chief Justice continued, stating that, "[t]his prospect is made tolerable in part by our confidence that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time."[8]

Concluding his opinion, the Court opined that a debtor's rights to review would still be adequately protected following the Court's ruling. A denied plan might still be appealed immediately, as Bullard's case was by the BAP, through an interlocutory appeal under circumstances set forth in 28 U.S.C. §§ 158(a)(3), 158(d)(2), and 1292. Although certification of an interlocutory appeal was subsequently denied by the First Circuit, this action did "not undermine [the Court's] expectations that lower courts will certify and accept interlocutory appeals from plan denials in appropriate cases."[9]

IMPACT

Following the Supreme Court opinion, the denial of confirmation of a Chapter 13 plan is not a final one for purposes of appeal. Beyond the holding itself, though, the *Bullard* opinion will likely impact the development of bankruptcy law in two significant respects. For one, it's a win for creditors. As one commentator, Charles J. Tabb, the Mildred Van Voorhis Jones Chair in Law at the University of Illinois College of Law, put it: debtors will find themselves in a "heads I win, tails you lose" situation in cases where approval of the debtor's plan comes down to the court's interpretation of a contested area of the law, as in *Bullard*. While the creditor can still appeal immediately should it find the approval of a debtor's confirmation plan objectionable, the debtor cannot do the same when his plan is denied. This, Professor Tabb has noted, gives creditors significant negotiating leverage in plan confirmation proceedings.[10]

Not only will creditors celebrate the decision within the context of Chapter 13 proceedings, but may assume that it should be read to apply to Chapter 11 cases as well. While the opinion does not expressly indicate its application to Chapter 11, the Court left the door open for such an interpretation. Chief Justice Roberts hinted at the decision's broad reach in the opinion. In rebutting the petitioner's argument that there was little harm in allowing immediate appeals from debtors following denials of plan confirmations, he commented that "such concerns are heightened *if the same rule applies in Chapter 11* . . . [because] debtors, often business entities, [will be] more likely to have the resources to appeal and may do so on narrow issues."[11] (Emphasis added). ■

Footnotes

[1] *Bullard v. Blue Hills*, 135 S. Ct. 1686, 1692 (2015) (Quoting *Howard Delivery Services, Inc. v. Zurich American Insurance Co.* 547 U.S. 651, 657, n. 3 (2006)).
[2] *Id.* at 1693.
[3] *Id.*
[4] Petition for Certiorari, Case No. 14-116, 18 (U.S., July 30, 2014).
[5] *Id.*
[6] 135 S. Ct. at 1695.
[7] *Id.* (citing *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994)).
[8] *Id.*
[9] *Id.* at 1696.
[10] Charles J. Tabb, *"It Ain't Over Till It's Over": Supreme Court Holds That Denial of Confirmation of a Plan is Not an Appealable Final Order* (http://s3.amazonaws.com/abi-org/Newsroom/Headlines/Tabb_Bullard_analysis.pdf).
[11] 135 S. Ct. at 1693.

DIFFERENT VIEWPOINTS: ***Bullard v. Blue Hills Bank***

SCOTUS Rules That Order Denying Plan Confirmation Is Not Immediately Appealable

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debtor or creditors.[24]

The Court also relied on a textual analysis to support its conclusion that the relevant proceeding is the entire plan confirmation process. Section 157 of title 28 of the United States Code provides that among the list of "core proceedings" entrusted to bankruptcy judges are "confirmations of plans."[25] "The presence of the phrase 'confirmation 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."[26]

The Court also expressed concern that if Bullard's interpretation were accepted, then each time a proposed plan was denied, he would be able to appeal, file a revised plan, and if that plan were denied, again file an appeal.[27] Each appeal could take more than one year, creating inefficiencies and delays in the process that the requirement of finality for appealability was designed to limit.[28] The Court dismissed Bullard's argument that debtors seldom have sufficient funds to pursue serial appeals, observing instead that debtors may use the prospect of appeals as leverage against their creditors.[29] The appeal process extends the automatic stay, which can cost creditors money if the chapter 13 proceeding proves not to be viable.[30] The court noted that these same concerns apply in the chapter 11 context.[31]

A plan proponent is not without recourse if its proposed plan is denied. If the issue is important enough to require appellate review, there are several mechanisms for seeking permissive interlocutory review to address such instances. The plan proponent can seek certification to the appellate court under the general interlocutory appeals statute, 28 U.S.C. § 1292(b), or through the interlocutory mechanism in 28 U.S.C. 158(d)(2).[32]

POTENTIAL IMPACTS OF THE BULLARD DECISION

The *Bullard* decision divests plan proponents of the ability to immediately appeal denial of plan confirmation and gives additional leverage to creditors in the plan process, since plan proponents are more likely to settle contested plan issues rather than risk denial of the plan. However, the decision is more likely to impact chapter 13 cases than larger chapter 11 cases because the reality of most chapter 11 bankruptcy case plan processes is that they are flexible; where debtors or other plan proponents are motivated to limit litigation costs and expenses and can seldom afford the time required to wade through the appellate process. Accordingly, at least in the chapter 11 context, plan proponents are already in the habit of modifying the plan to accommodate legitimate creditor objections in order to proceed promptly with confirmation. The *Bullard* decision encourages negotiations and furthers the overarching bankruptcy policies of promoting settlement and expediency. Thus, while the Bullard decision does provide some additional leverage to creditors, is unlikely to change significantly a chapter 11 plan proponent's approach to confirmation. If a significant legal question is at issue, the plan proponent is still likely to move forward without accommodating objections. If the plan is not approved, then the plan proponent will then determine whether to modify the unapproved portion of the plan at the confirmation hearing in order to obtain plan approval. If the matter warrants the expense and delay, a plan proponent may choose to use the "safety valves" of permissive interlocutory appeal to promptly correct any perceived serious errors or important legal questions. ■

Footnotes

[1] *Bullard v. Blue Hills Bank*, 575 U.S. ___ (2015), 135 S.Ct. 1686, 1690 (2015).
[2] *Id.*
[3] Fed. R. Bankr. P. 3015.
[4] *Bullard*, 135 S.Ct. at 1690.
[5] *Id.* at 1691.
[6] *Id.*
[7] *Id.* (citing *In re Bullard*, 475 B.R. 304, 314 (Bankr. D. Mass. 2012)).
[8] *Id.* (citing *In re Bullard*, 475 B.R. at 309).
[9] *Id.* (citing *In re Bullard*, 475 B.R. at 314.
[10] *Id.*
[11] *Id.* (citing *In re Bullard*, 494 B.R. 92, 95 (B.A.P. 1st Cir. 2013)).
[12] *Id.* (citing *In re Bullard*, 494 B.R. at 96-101).
[13] *Id.*
[14] *Id.* (citing *In re Bullard*, 752 F.3d 483, 486-490 (2014)).
[15] 574 U.S. __ (2014), 135 S.Ct. 781 (2014).
[16] *Bullard*, 135 S.Ct. at 1690.
[17] *Id.* at 1692.
[18] *Id.* (citing 1 Collier on Bankruptcy ¶ 5.08[1][b], p. 5-42 (16th ed. 2014).
[19] *Id.* (internal citations omitted).
[20] *Id.* In reaching this conclusion, the Court also dismissed the Solicitor General's argument that an objection to the plan initiates a contested matter and denial of the plan resolves the matter such that the order denying the plan should be a final order. The Court observed that the list of contested matters in bankruptcy is "endless" and covers even minor disputes, and that the concept of finality cannot extend to disputes as minor as a motion to extend time. Case (internal citations omitted). *See Id.* at 1694.
[21] *Bullard*, 135 S.Ct. at 1692.
[22] *Id.*
[23] *Id.* at 1692-93.
[24] *Id.* at 1693.
[25] *Id.* (citing 28 U.S.C. § 157(b)(2)(L)).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1695-96.

BANKRUPTCY LAW SECTION

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FEDERAL BAR ASSOCIATION / FBA BANKRUPTCY SECTION

UPCOMING EVENTS

June 24, 2015

Bankruptcy Litigation Skills Seminar
U.S. Bankruptcy Court, Southern District of New York,
One Bowling Green, New York, New York

- Hon. Laura Taylor Swain, U.S. District Judge, Southern District of New York
- Hon. Martin Glenn, U.S. Bankruptcy Judge, Southern District of New York
- Hon. Alan S. Trust, U.S. Bankruptcy Judge, Eastern District of New York

September 10-12, 2015

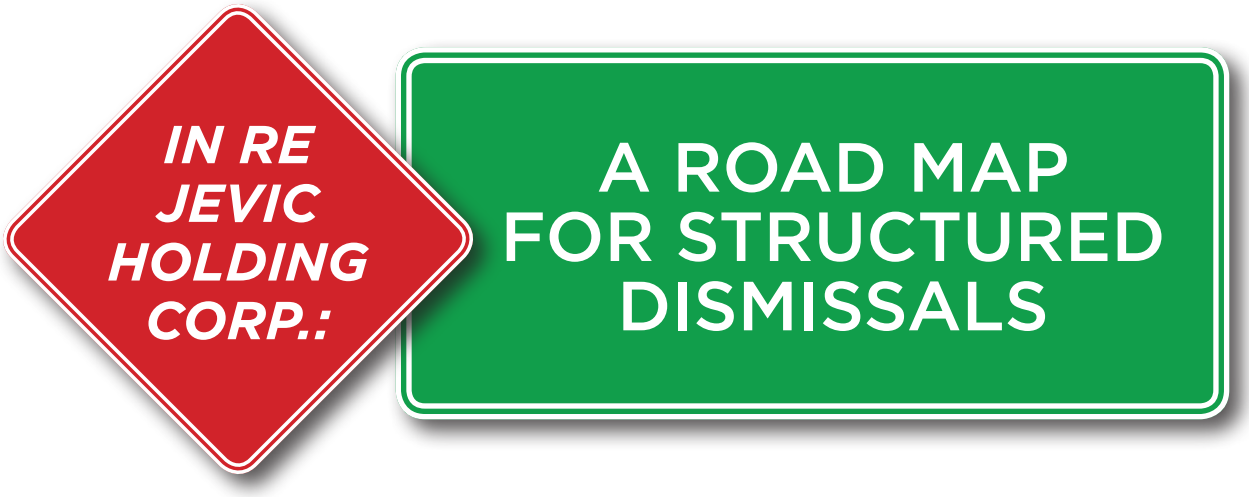
FBA Annual Meeting and Convention in Salt Lake City, Utah

September 11, 2015

Time TBA
Bankruptcy Section Annual Meeting to Elect New Officers, at the
FBA Annual Meeting

November 20, 2015

Bankruptcy Ethics Symposium in Los Angeles, California



By: Dain De Souza
Skadden, Arps, Slate, Meagher & Flom LLP

INTRODUCTION

In the past decade, Chapter 11 practice has witnessed the rise of a new phenomenon – structured dismissals. Broadly speaking, the term structured dismissal[1] is an umbrella term for a dismissal order that includes additional bells and whistles, such as releases, protocols for claims administration, or provisions permitting the gifting of assets to junior stakeholders. Like a Chapter 11 plan, a structured dismissal often identifies how proceeds are to be distributed, while retaining jurisdiction in the bankruptcy court for claims administration and other specified matters.

The United States Court of Appeals for the Third Circuit (the "*Court*" or "*Court of Appeals*") recently confirmed that a structured dismissal may be permissible under certain circumstances, even if distributions made in connection with such dismissal do not adhere to Bankruptcy Code section 507's priority scheme. *See In re Jevic Holding Corp.*, Case No. 14-1465, -- F.3d --, 2015 WL 2403443 (3d Cir. May 21, 2015).

CASE SUMMARY

A. FACTS AND POSTURE

In 2006, a private equity fund ("*Sun*") purchased all of the equity of a New Jersey-based trucking company ("*Jevic*") in a leveraged buyout financed by a group of lenders led by CIT Group ("*CIT*"). In May 2008, Jevic terminated employees, began winding down its operations, and filed a voluntary Chapter 11 petition.

Jevic's Chapter 11 filing spawned two important lawsuits. First, a group of Jevic's terminated truck drivers (the "*Drivers*") filed a class action against Jevic and Sun alleging violations of federal and state Worker Adjustment and Retraining Notification ("*WARN*") Acts, seeking more than $12 million (including more than $8 million in priority wage claims). Second, the Official Committee of Unsecured Creditors (the "*Committee*") brought an action against CIT and Sun, alleging, among other things, fraudulent and preferential conveyances (the "*Committee Action*").

By March 2012, Jevic's remaining assets had dwindled to just the Committee Action and the $1.7 million in cash collateral that was subject to Sun's lien. All parties agreed that conversion to Chapter 7 would result in Sun's receipt of the cash collateral and a high likelihood of no recovery for other constituents. The Committee, CIT, Sun and the Drivers convened to negotiate a settlement of the Committee Action. The negotiations resulted in a settlement agreement among the Committee, Jevic, CIT, and Sun, but not the Drivers. The settlement was framed as a dismissal of Jevic's bankruptcy case, with the following key terms:

- payment by CIT of $2 million to the estates to pay Jevic's and the Committee's legal fees and other administrative expenses;
- application of the $1.7 million in cash collateral to satisfy certain priority tax claims, with the remainder distributed pro rata among general unsecured creditors; and
- mutual releases among the parties.

The Drivers and the United States Trustee objected to the proposed settlement and dismissal, but the Bankruptcy Court overruled their objections and approved the settlement and structured dismissal. The Bankruptcy Court acknowledged the absence of Bankruptcy Code provisions authorizing the proposed distribution and dismissal, but noted that similar relief had been granted by other courts. *Id.* at *3.[2] The Bankruptcy Court found that the evidence established that there was "no

prospect" of a confirmable Chapter 11 plan, that the secured creditors "would not do this deal in a Chapter 7[,]" that a Chapter 7 conversion would therefore fail because a trustee would have no cash or other resources to fund prosecution of the Committee Action, and that absent the settlement, there was "no realistic prospect" of meaningful distributions except for secured creditors. *In re Jevic Holding Corp.*, 2015 WL 2403443, at *3. Based on these findings, the Bankruptcy Court held that the "dire circumstances" justified approval of the settlement and structured dismissal. Id. at *3. The Drivers appealed to the District Court, which affirmed, and then sought review by the Court of Appeals. *Id.* at *4.

B. MAJORITY DECISION[3]

The Court of Appeals seemed to view the case as presenting two discrete questions: (1) whether structured dismissals are permissible as a matter of law (*id.* at *4-6); and (2) whether a settlement arising as part of a structured dismissal may ever skip a class of objecting creditors in favor of more junior creditors (*id.* at *6-11).

1. STRUCTURED DISMISSALS

The Drivers argued that a structured dismissal is not permitted by the Bankruptcy Code, contending that the "only three exits" from Chapter 11 are plan confirmation, conversion to Chapter 7, and "plain dismissal with no strings attached." *Id.* at *5. The Court rejected this argument, holding instead that "absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order [a structured dismissal]." *In re Jevic Holding Corp.*, 2015 WL 2403443, at *6. The Court suggested that different facts might warrant a different result in a future case, such as if there is the prospect of a plan process or worthwhile conversion – noting that the Drivers did not seriously dispute the Bankruptcy Court's factual findings regarding the absence of prospects for a confirmable plan and the likelihood that conversion to Chapter 7 would be ineffective. *Id.* at *6. As a result, the permissibility of a structured dismissal in light of such circumstances remains an open question.

2. PRIORITY AND CLASS SKIPPING

The Jevic Court also addressed the question of "whether [pre-plan] settlements in th[e] context [of structured dismissals] may ever skip a class of objecting creditors in favor of more junior creditors." *Id.* at *6.[4] The Court concluded that this discrete question presented a "close call." *In re Jevic Holding Corp.*, 2015 WL 2403443, at *9. The Court began its analysis by holding that "bankruptcy courts may approve settlements that deviate from the priority scheme" of Bankruptcy Code section 507 if "specific and credible grounds…justify [the] deviation." *Id.* at *9 (quoting *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007)).[5] The Court then turned to whether such specific and credible grounds were present. Based upon the Bankruptcy Court's factual findings, including that the settlement and structured dismissal presented "the least bad alternative since there was 'no prospect' of a plan being confirmed and conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in 'short order[,]'" the Court affirmed. *Id.* at *9.

CONCLUSION

For Chapter 11 professionals, *Jevic* confirms that in the Third Circuit, a structured dismissal may be a viable alternative to conversion or outright dismissal of a failing Chapter 11 case. The opinion also provides a roadmap for the factual findings necessary to safeguard structured dismissals. ■

Footnotes

[1] Although not always the case, structured dismissals often occur in tandem with sales of substantially all of a debtor's assets.

[2] Joint Appendix at 31 (Bankruptcy Court Bench Opinion): "There is no express[ ] provision in the [Bankruptcy C]ode for distribution and dismissal contemplated by the settlement motion. However, I do observe that while the practice is certainly neither favored nor commonplace[,] the record does reflect that this[ ] sort[ ] of relief has been granted by this and other court[s] in appropriate occasions in the past."

[3] The *Jevic* appeal was before Hon. Thomas M. Hardiman, Hon. Anthony J. Scirica and Hon. Maryanne Trump Barry. From the opinion authored by Judge Hardiman, Judge Scirica concurred and dissented in part. *See generally In re Jevic Holding Corp.*, 2015 WL 2403443, at *11-14. Judge Scirica's dissent focused on whether the exclusion of the Drivers from the settlement was necessary on the facts of the case, and did not directly address the propriety of structured dismissals. *See id.*

[4] In their brief, the Drivers argued "even if structured dismissals are permissible, they cannot be approved if they distribute estate assets in derogation of the priority scheme of § 507 of the [Bankruptcy] Code." *Id.* at *6.

[5] In agreeing with the Second Circuit's decision in *Iridium Operating LLC*, *supra*, the Court of Appeals rejected a more stringent approach adopted by the Fifth Circuit in *In Matter of AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984), which held that the "fair and equitable" standard applies to settlements, and "fair and equitable" means compliance with the priority system. *Id.* at 298.

UPCOMING FEATURE:

Chapter Spotlight

Many FBA Chapters around the country include bankruptcy judges and practitioners. Some have formal bankruptcy-focused subcommittees, and put on bankruptcy-related CLE events and programs. **We want to hear more about you!** In future editions of ***Bankruptcy Briefs,*** look for our new ***Chapter Spotlight*** feature. If you would like us to feature your Chapter in an upcoming ***Chapter Spotlight***, please send us a one-page article. Articles should highlight the bankruptcy-centric aspects of your Chapter's membership and activities.

Please submit articles and questions to editor Marc Taubenfeld at mtaubenfeld@mcslaw.com.

THE PROPOSED AMENDMENTS TO THE FEDERAL BANKRUPTCY RULES

By: Morgan L. Patterson
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Almost a year ago the Judicial Conferences Advisory Committee on Appellate, Bankruptcy, Civil, and Criminal Rules sought preliminary public comment on proposed changes to their respective rules and forms. The comment period for the proposed amendments (some of which were previously proposed, received comment and are being republished after revisions) ran for months and closed on February 17, 2015. Upon the closing of public comment period, including the conclusion of public hearings, the Advisory Committees will determine whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure. The Advisory Committee for the Bankruptcy Rules received 138 comments. See Regulations.gov, http://www.regulations.gov/#!docketDetail;D=USC-RULES-BK-2014-0001 (last visited May 20, 2015). The Bankruptcy Advisory Committee also held public hearing on January 23, 2015 in Washington, D.C. and received testimony from eight (8) witnesses on the proposed federal bankruptcy rule changes. See Transcript of Proceedings, http://www.uscourts.gov/file/document/bankruptcy-rules-public-hearing (last visited May 20, 2015).

Below is a brief summary of the proposed amendments to the bankruptcy rules:

Official Form 113 (Chapter 13 Form Plan): Perhaps the most controversial potential change to the rules is the introduction of an official form plan for chapter 13 cases. The initial publication of the form plan generated 150 public comments, as well as witness testimony during a public hearing in January 2014. Despite some commenters' opposition to establishment of a form plan at all in the chapter 13 context, the Advisory Committee revised and republished the form plan with this round of amendments and seeks adoption of the form. The national official form seeks to standardize the essential information being presented to parties in interest.

Rule 2002: The proposed amendment for rule 2002 is limited to the chapter 13 context. The change would require 21 days' notice of the time to objection to confirmation of a chapter 13 plan and 28 days' notice of the date of the confirmation hearing.

Rule 3002: The proposed changes to rule 3002 are related to the filing of proofs of claim. First, the proposed changes will require a secured creditor to file a proof of claim in order to have an allowed claim under rule 3002(a). However, the revised language states clearly that "[a] lien that secured a claim against the debtor is not void due only to the failure of any entity to file a proof of claim." Second, section (c) of rule 3002 will be revised to shorten the automatic bar date in voluntary chapter 7, chapter 12 and chapter 13 cases. The automatic bar date in cases under those chapters was 90 days and under the proposed changes it will be shortened to 60 days. The automatic bar dates of 90 days from the order for relief will remain the same in the case of an involuntary chapter 7. Finally, the revisions would give holders of mortgage claims an additional 60 days to file the supplemental documents required by rule 3001(c)(1) and (d).

Rule 3002.1: Rule 3002.1 pertains to chapter 13 cases and requires mortgage creditors to provide the debtor and trustee with certain information during the case including changes to payment amounts and fees, expenses or charges incurred during the pendency of the case. This rule became effective in 2011 and since that time a split has occurred in the case law with respect to when this rule applies. To clarify the intent of the rule and end a split in case law, the Advisory Committee determined that the mortgage creditor's obligations to keep the debtor informed as to the status of the mortgage should be required whenever continuing payments on the mortgage are provided for in the plan. Further, the Advisory Committee has clarified the obligation remains whether the debtor makes the mortgage payments through a plan or directly to the mortgage creditor. Finally, the amendment would also clarify that the mortgage creditor's obligation would cease if the automatic stay was lifted to allow for foreclosure.

Rule 3007: The proposed revision to rule 3007 relates to the service of claim objections. The objection to any claim would be required now to be served via first-class mail on the person designated on the proof of claim to receive notices, unless the claim is the United States (including any of its officers or

agencies) or the an insured depository institution. In those instances, the United States must be served as is required under rule 7004(b)(4) or (5) and the insured depository institution in manner required by rule 7004(h).

Rule 3012: The proposed changes to rule 3012 relate to determination of the value of secured and priority claims. Rule 3012 previously allowed for a party to request that the court determine the value of a secured claim after notice to the holder of the claim and any other entity the court should direct. The revisions would allow a party in interest to seek a similar determination from the Court for a priority claim. Further, the revisions clarify the proper procedures for make such a request for a determination from the Court.

Rule 3015: The proposed changes to rule 3015 relate to the proposed form chapter 13 plan and pertain to chapter 12 and chapter 13 cases generally. The changes include: (i) requiring that any objections to a plan be filed 7 days prior to the plan confirmation hearing, (ii) making clear that the valuation of a secured claim in a confirmed plan is binding on the holder of the claim, and (iii) outlining the service required for plan modifications after confirmation.

Rule 4003: The proposed changes to rule 4003(d) would permit a lien avoidance proceeding under Bankruptcy Code § 522(f) to be commenced through a chapter 12 or 13 plan or by motion. The current rule allows for commencement of the proceeding only by motion.

Rule 5009: The proposed changes to rule 5009 received several comments and concerns during the first publication. Accordingly, the Advisory Committee amended the rule for this publication. The proposed amendment pertains to chapter 12 and 13 cases and allows a debtor to seek entry of an order declaring that a secured claim has been satisfied and the lien has been released under the terms of a confirmed plan.

Rule 7001: The proposed changes to rule 7001 clarify that an adversary proceeding is not required for a proceeding under rules 3012 and 4003(d).

Rule 9006(f): Rule 9006(f) in its current form allows a three (3) day extension of time periods when service is effected electronically. As electronic service is now widely used, the proposed amendment to the rule would eliminate this three (3) day extension.

Rule 9009: The initial publication of the amendment to rule 9009 altered the rule to require strict adherence to the official forms. This amendment generated numerous comments, specifically with respect to the new form chapter 13 plan and that the revisions to rule 9009 would make it impossible to alter the form. Accordingly, the Advisory Committee incorporated more flexibility in this proposed amendment to rule 9009. This amendment states that minor changes can be made to official forms as long as those changes do not affect the wording or order of the information provided.

Chapter 15 Related Revisions (Rules 1010, 1011, 1012, 2002): With the growing popularity of chapter 15 cases, the Advisory Committee published for comment revisions to rules 1010, 1011, 1012, and 2002 pertaining to chapter 15 cases. The proposed changes would act to (i) remove the chapter 15-related provisions from Rule 1010 and 1011; (ii) create a new rule 1012 to govern responses to a chapter 15 petition; and (iii) augment rule 2002 to clarify the procedures for providing notice in cross-border proceedings. These changes were prompted by the Advisory Committee's recognition that some portions of these rules were ill suited to the chapter 15 context.

Official Form 401 (Chapter 15 Petition Form): In connection with the revisions to the rules related to chapter 15 cases, the Advisory Committee proposes to adopt an official form of a chapter 15 petition. This adoption is part of the overall attempts to modernize the official forms discussed *infra*.

Official Form 410A (Mortgage Proof of Claim): The Advisory Committee proposes a number of changes to the current form proof of claim to be filed by the holder of a mortgage in a debtor's primary residence in a chapter 13 case. Specifically, the new form proof of claim would require the filing of a detailed payment history starting at the first date of default. This change will allow the debtor to see the basis for the claim as well as the amount of the arrearage asserted.

Modernization of Official Forms: The Advisory Committee has committed to an overall modernization of the official forms used in bankruptcy cases and submits a number of modernized forms for comment in this publication. The Advisory Committee noted that this is the nearly final installment of the forms modernization project; however, there remain a few forms still to be updated. This installment of the modernization project generally includes case opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases (in addition to the proposed changes to the forms previously discussed). The Advisory Committee suggests that, if no republication is required, the forms go into effect December 1, 2015.

Whether the comments and testimony received will elicit revisions and republication of the proposed rules has yet to be determined. A more detailed description, as well as the text of each proposed rule change, can be located on the United States Courts' website at: http://www.uscourts.gov/file/preliminary-draft-proposed-amendments-federal-rules-appellate-bankruptcy-civil-and-criminal. ■

Supreme Court Upholds Bankruptcy Court Jurisdiction Over Non-Core Matters By Consent

By: Jordan M. "Monty" Lewis,
Law Clerk to the Hon. Harlin D. Hale

In its opinion handed down on Tuesday, May 26, 2015 in *Wellness Intl Network, Ltd. v. Sharif*, the United States Supreme Court considered: 1) whether Article III, § 1 of the United States Constitution permits bankruptcy judges to adjudicate *Stern* claims with the parties' knowing and voluntary consent; and 2) whether such consent to adjudication by a bankruptcy court must be express or may be implied, and thus waived by a litigant's actions. In a 6-3 opinion written by Justice Sotomayor and concurred with by Justice Alito, the Court held that 1) parties may waive their right to an Article III judge by knowingly and voluntarily consenting to adjudication by a bankruptcy judge; and 2) such waiver may be implied by actions, so long as consent is knowing and voluntary.

The proceeding involved debtor Richard Sharif (the "Debtor") and Wellness International Network, Ltd. ("Wellness"). In the Debtor's Chapter 7 bankruptcy, filed in the Northern District of Illinois in February of 2009, Wellness filed an adversary complaint against the Debtor, objecting to his discharge on several grounds, including that the Debtor was concealing property by claiming it was owned by a trust. Wellness asserted that the trust was actually the Debtor's alter• ego, and thus its assets should be part of the Debtor's bankruptcy estate. The Debtor admitted in his answer that the adversary proceeding was "core" under 28 U.S.C. § 157(b). The Debtor then engaged in discovery evasion. Wellness sought to compel discovery or for sanctions. The bankruptcy court granted the motion to compel, and warned of default judgment if the Debtor did not respond appropriately to discovery. After failing to produce documents related to the Trust, the Court denied the Debtor's discharge and declared the assets of the trust to be property of the Debtor's estate.

On appeal to the District Court, the Debtor argued that the bankruptcy court's order should be treated only as a report and recommendation, and sought leave to file a supplemental brief. The district court denied leave and affirmed the bankruptcy court's judgment. The Debtor then appealed to the Seventh Circuit, who relied upon *Stern v. Marshall*, 131 S.Ct. 2594 (2011) to find that the bankruptcy court lacked constitutional authority to enter final judgment on the alter-ego claims.

The Supreme Court's opinion reverses the Seventh Circuit, holding that litigants may validly consent to adjudication by bankruptcy courts. The opinion draws heavily from language in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), when the Court upheld statutory and constitutional challenges to a regulation issued by the Commodity Futures Trading Commission (CFTC) allowing it to hear state-law

counterclaims. The CFTC was only authorized by Congress to hear complaints against commodities brokers, but the Supreme Court decided at the time that a litigant could waive his personal right to an Article III court, subject to exceptions implicating the structural principle of the constitutional system of checks and balances.

Considering *Schor* and the subsequent line of cases dealing with consent, the Supreme Court in this case summarized the underlying principle to be that entitlement to an Article III adjudicator is a "personal right" and "subject to waiver so long as Article III courts maintain supervisory authority over the process. The majority concluded that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts, since bankruptcy judges are appointed and subject to removal by Article III judges. Likewise, district courts may withdraw the reference to a bankruptcy court *sua sponte* or at the request of a party. So long as bankruptcy judges are subject to such control, the Court found, their work poses no threat to the separation of powers. The Court dismissed concerns that *Stern* barred consensual adjudications, pointing out that the opinion in *Stern* stated that it was to be read narrowly.

Turning to express consent, the Court then pointed out that neither the Constitution nor the statute in 28 U.S.C. § 157 requires it. Instead, the Court relied upon the standard set forth in *Roell v. Withrow*, 538 U.S. 580 (2003), which allows magistrate judges to conduct and enter orders in civil proceedings upon the knowing and voluntary consent of parties, implied or express. In order to determine whether an implied waiver of the right to an Article III court has been made, courts must inquire whether a litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator. The Court remanded the case to the Seventh Circuit to decide whether the Debtor had evinced the requisite "knowing and voluntary" consent, and also whether the Debtor had forfeited a *Stern* objection by failing to present the argument in the lower courts.

Justice Alito, in his concurrence, joined the opinion of the Court insofar as it held that a bankruptcy judge's resolution of a *Stern* claim with the consent of the parties does not violate Article III of the Constitution. However, Justice Alito expressed his preference that the Court left unresolved the issue of whether such consent must be express or implied, and instead found that the Debtor had forfeited his *Stern* objections by failing to present them in the courts below as required by procedure. Critical to Justice Alito's concern regarding the Court's holding on implied consent was the language of Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, which requires "express consent" of the parties before final orders and judgments can be entered on a bankruptcy judge's order.

In their dissents, Justices Roberts, Scalia, and Thomas rejected the majority's decision on consent as a violation of Article III implicating the structural separation of powers. Instead, they expressed their preference that the case had been resolved more narrowly on the grounds that the claim at issue stemmed from the bankruptcy case itself, and thus within the bankruptcy court's jurisdiction. Justices Roberts and Scalia go on to point out that, even though consent is efficient, convenient, and useful, such functionalism does not save it from being unconstitutional. Justice Thomas, in his own dissent, agreed with resolving the case narrowly, but differed as to why consent is unconstitutional. ■

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