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Objectionable by Necessity: Achieving Appellate Review of Plan Confirmation Denial

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Practice in the bankruptcy arena for long enough and you will inevitably run across the following, vexing, situation: debtor files a plan; party in interest objects to a plan provision; Bankruptcy Court sustains the objection and denies confirmation; debtor refuses to go forward with a plan that conforms to the Bankruptcy Court's ruling, fervently believing that the Bankruptcy Court "got it wrong," and wants to seek appellate review on the issue. What should a debtor do in this situation? This fact pattern has gotten even more difficult after the Supreme Court's recent decision in *Bullard v. Blue Hills Bank*, which makes clear that an order denying confirmation is interlocutory and is therefore not appealable. Earlier this year, in *In re: O&S Trucking*, the Eight Circuit weighed in with their thoughts on the proper (albeit convoluted) procedures a debtor should follow to achieve meaningful appellate review in this situation. *In re: O&S Trucking*, 811 F.3d 1020 (8th Cir. 2016). Below, we discuss the interesting result in the *O&S Trucking* case, some potential pitfalls of that procedure, and implications that case, as well as *Bullard v. Blue Hills Bank*, may have for Fourth Circuit bankruptcy practitioners.

A. Factual and Procedural Background

O&S Trucking, which owned and operated a fleet of commercial trucks, filed its Chapter 11 petition in May of 2012. Many of O&S's trucks were financed or leased from Daimler, which filed a motion seeking adequate protection of its security interest. Daimler and O&S negotiated a consent order by which O&S agreed to make adequate protection payments to Daimler based on the parties' calculation of the values of each truck that served as Daimler's collateral. After O&S filed a motion for determination of secured status, the bankruptcy court concluded that Daimler's claim was partially secured, and partly unsecured. The amount of the secured claim was calculated based on the present value of Daimler's vehicle collateral, along with O&S's net post-petition income from use of the Daimler trucks. O&S moved for reconsideration of the secured-status order, arguing that the bankruptcy court erred in its calculation of Daimler's secured claim amount.

The bankruptcy court denied reconsideration and O&S appealed the order to the Bankruptcy Appellate Panel for the Eighth Circuit. While the appeal was pending before the BAP, O&S proposed a plan of reorganization to the bankruptcy court that incorporated the court's secured-status order. The plan specified that the amount set forth in the secured-status order was "subject to adjustment" based on "the final outcome of the pending appeal of the Daimler Decision by Debtor and any subsequent appeal." The bankruptcy court confirmed the debtor's plan. O&S immediately appealed the confirmation order, reiterating its argument that the bankruptcy court's calculation of Daimler's secured claim was improper. The BAP concluded that it lacked jurisdiction to consider the appeal, and O&S subsequently appealed to the Eighth Circuit.†

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† The BAP denied the debtor's appeal of the bankruptcy court's secured-status order and its appeal of the confirmation order in a single opinion. *In re O&S Trucking*, 529 B.R. 711 (B.A.P. 8th Cir. 2015). The BAP reasoned that the debtor's appeal of the secured-status order was moot, as it returned all of Daimler's collateral during the pendency of the appeal. It further determined that the debtor was not an "aggrieved person" with standing to appeal the confirmation of its bankruptcy plan, an argument

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B. The Eighth Circuit's Holding

The Eighth Circuit ultimately affirmed the decision of the BAP and held that O&S lacked standing as an "aggrieved person" to appeal the bankruptcy court's decision. *Id.* at 1025. In reaching this conclusion, the court applied the "person aggrieved" standard originally derived from the Bankruptcy Act of 1898. *Id*. at 1023. This standard requires that the appellant "demonstrate that 'the challenged order directly and adversely affect[ed] his pecuniary interest.'" *Id*. (*quoting Spenlinhauer v. O'Donnell*, 261 F.3d 113, 118 (1st Cir. 2001)). Debtors and plan proponents generally lack standing to appeal confirmation of a plan, but the court noted that it "recognizes an exception 'when there has been some error prejudicial to [the debtor], or he has not received all he is entitled to.'" *Id*. (*quoting Houchin Sales Co. v. Angert*, 11 F.2d 115, 118-19 (8th Cir. 1926)). "When a debtor invokes this exception at the conclusion of bankruptcy proceedings in order to appeal from a favorable plan-confirmation judgment, the exception runs into tension with the strong policy favoring finality." Id. (*citing Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995)).

Confronted with this tension between fairness and finality, the court noted that it had already established a procedure by which debtors might seek review of a confirmed plan in its decision in *Zahn v. Fink (In re Zahn)*, 526 F.3d 1140 (8th Cir. 2008). In *Zahn*, a Chapter 13 debtor appealed an interlocutory order of the bankruptcy court. The BAP dismissed the appeal for lack of jurisdiction, arguing that the ruling was not a final, appealable order. *Id*. at 1141. In order to obtain an appealable final order, the debtor proposed a plan incorporating the contested interlocutory order and promptly objected to her own plan, explicitly noting her opposition to the disputed plan provision. *Id*. at 1141-42. The bankruptcy court confirmed the debtor's plan, and the debtor appealed. *Id*. at 1144. The Eighth Circuit held that, by proposing and objecting to her own plan, the debtor had created person-aggrieved status and properly preserved the issue for appeal. *Id*.

The *O&S Trucking* court noted that, rather than explicitly objecting to the proposed plan of reorganization, O&S included a provision stating that the amount of Daimler's secured claim—the disputed portion of the plan—was subject to adjustment based on the outcome of O&S's appeal of the bankruptcy court's secured-status order. *In re O&S Trucking*, 811 F.3d 1020, 1024 (8th Cir. 2016). The court determined that this provision was too imprecise to comply with the requirements set forth in *Zahn* and concluded that O&S lacked standing to appeal the bankruptcy court's confirmation of the plan.

C. Implications for Fourth Circuit Practitioners

While the *O&S Trucking* decision establishes a clear procedure for Eighth Circuit debtors intent on preserving a right to appeal, it raises unresolved questions for Fourth Circuit practitioners seeking relief from adverse interlocutory orders, particularly in light of the Supreme Court's recent decision in *Bullard v. Blue Hills Bank* establishing that an order denying confirmation of a Chapter 13 plan is an interlocutory order from which there is no automatic right of appeal. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015).[‡] Must a debtor seeking relief from an order denying confirmation go through the process of proposing an unacceptable plan, objecting to the plan, and then appealing its confirmation in order to preserve its objections for appeal? Post-*Bullard*, there is virtually no discussion among Fourth Circuit courts regarding a debtor's options when faced with an adverse interlocutory order, but a 2013 Fourth Circuit decision, since abrogated by *Bullard*, may provide some guidance amidst the uncertainty.

In *Ranta v. Gorman*, the Fourth Circuit considered whether an order denying

discussed at greater length in the Eighth Circuit's opinion affirming the BAP's decision.

[‡] While the Supreme Court declined to say whether the Bullard decision would apply to Chapter 11 cases, it noted that both the appellant and appellee assumed that it would. The principles relied on by the court are equally applicable in the Chapter 13 and Chapter 11 contexts.

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confirmation of a Chapter 13 plan was final and, therefore, appealable by right, or interlocutory and not subject to automatic appeal. 721 F.3d 241 (4th Cir. 2013). Ultimately, the court determined that such an order was final and appealable. While the decision was abrogated by *Bullard* only two years later, the majority's reasoning provides some insight into the Fourth Circuit's perspective on proper procedures for preserving the right to appeal. In its decision, the *Ranta* court expresses practical concerns about a debtor's options in the face of an interlocutory order denying confirmation, opining that such a finding would "leave some debtors without any options in formulating their plan … Assuming an interlocutory appeal is unavailable, the debtor who prefers the proposed plan and seeks to appeal the denial would be forced to choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal"—exactly the scenario prescribed by the Eighth Circuit in *O&S Trucking*. *Id*. at 248. The disadvantages to taking a dismissal are obvious—loss of the automatic stay and—for individuals and family farmers—a possible six month delay before refiling. *See* 11 U.S.C. §§ 362, 109(g). The Fourth Circuit also highlights the potential problems with proposing—and then appealing—an undesirable plan, noting that "the procedural oddity of allowing a debtor to appeal the confirmation of his or her own proposed plan raises questions regarding standing." *Id*. at 248, n. 10. Citing the "person aggrieved" standard, the court notes that, while the Eighth Circuit has held that a party forced to propose an amended plan has standing to appeal, the Fourth Circuit has yet to consider that question. *Id*. One issue not addressed by either the Eight Circuit or the Fourth Circuit is whether a debtor might be judicially estopped from objecting to a provision in a plan the debtor herself proposed. Perhaps the best way to prevent a judicial estoppel argument is for the debtor to be clear in the plan that she is including the offending plan provision only as a way to preserve her ability to appeal the Court's decision approving that provision, and be clear that the debtor intends to object to this provision prior to the confirmation hearing.

Interestingly, the dissent remained unconvinced by the majority's concerns regarding standing, calling them "unwarranted." *Id*. at 263, n. 11. According to its reasoning, "[w]hen appealing one's own plan, no matter how odd a procedure it might seem, a party can nonetheless be a 'person aggrieved,' even if a second, third, or eighth amended plan is finally confirmed… This is so because each previous denial of confirmation … merges with the plan's confirmation." *Id*. The dissent cited authority from the Ninth and Tenth Circuits suggesting that debtors who appeal their own plans—even absent an explicit objection by the debtor—are "persons aggrieved" such that they have standing to appeal. *See In re Giesbrecht*, 429 B.R. 682, 688 (B.A.P. 9th Cir. 2010); *In re Pearson*, 390 B.R. 706, 710 (B.A.P. 10th Cir. 2008) (vacated as moot).

While the dissent offers an intriguing alternative to the strict protocol required by the court in *O&S Trucking*, given the lack of Fourth Circuit authority post-*Bullard* and the majority opinion in *Ranta*, debtors seeking relief from interlocutory orders on appeal would be wise to follow the procedure originally set forth by the Eighth Circuit in *Zahn*. In *Ranta*, the Fourth Circuit seemed to embrace the inevitability of a convoluted procedure like that required in *O&S Trucking* should it determine that orders denying plan confirmation were interlocutory and not subject to automatic appeal. Now that the *Bullard* decision has removed any doubt regarding the appealability of such orders, debtors exercising an abundance of caution should be mindful of preserving their standing as future appellants.

The information in this article is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual situation.

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