Flexible Finality in Bankruptcy: The Right to Appeal A Denial of Plan Confirmation

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Introduction

The United States Constitution confers upon Congress the authority to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”¹ However, uncertainty has arisen among the Bankruptcy courts as to whether the denial of confirmation of a chapter 13 plan gives the debtor an absolute right to appeal. Three circuits recognize the denial of plan confirmation to be grounds for a right of appeal under established finality principles.² However, six circuits refuse to allow an appeal as a right to a debtor in on grounds of a denial of plan confirmation.³

Chapter 13 of the Bankruptcy Code affords bankruptcy protection, including an automatic stay, to “individual[s] with regular income” whose debts fall within statutory limits.⁴ Chapter 13 debtors are permitted to keep their property, unlike Chapter 7, where debtors are required to liquidate their property.⁵ However, a Chapter 13 debtor must agree to a plan approved by the court, under which the debtor agrees to pay the creditors from his or her future

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¹ U.S. Const. art. I § 8, cl. 4.
² See cases cited infra note 30.
³ See Bullard v. Hyde Park Savings Bank, 752 F.3d 483 (1st Cir. 2014); In re Prudential Lines, Inc., 59 F.3d 327 (2d Cir. 1995); see also In re Flor, 79 F.3d 281 (2d Cir. 1995); see also Lindsey v. Pinnacle Nat’l Bank, 726 F.3d 857 (6th Cir. 2013); see also Pleasant Woods Assoc. Ltd. P’ship v. Simmons First Nat’l Bank, 2 F.3d 837 (8th Cir. 1993); see also Lievsay v. Western Fin. Sav. Bank, 118 F.3d 661 (9th Cir. 1997); Gordon v. Bank of America, 743 F.3d 720, 723 (10th Cir. 2014) (held denial of plan confirmation not final for purpose of appeal).
income. A bankruptcy trustee manages the filing and execution of the debtor’s plan under Chapter 13.

The debtor’s reorganization plan under Chapter 13 lists all the priority and secured claims existing against the estate, allocates a portion of the debtor’s income to the repayment of unsecured claims, which is generally on a pro rata basis, and finally proposes a schedule of payments to satisfy those claims. Subject to certain exceptions, once the debtor has made all payments in accordance to the plan, the debtor shall be granted a discharge of all debts, both secured and unsecured, as provided for under the plan. In accordance the Bankruptcy Code, the debtor may use the plan to cure defaults on claims, whether those defaults are secured or unsecured. Under a Chapter 13 plan, the debtor may have reasonable time to make payments to cure the default, while continuing to make regular payments as payments become due.

The bankruptcy court must then hold a Chapter 13 plan confirmation hearing, where the creditors and other parties may raise objections to the terms of the debtor’s plan. A plan that is confirmed binds the debtor to each creditor, regardless if such creditor objected to or consented to the Chapter 13 plan. Furthermore, at any time after confirmation of the Chapter 13 plan, but prior to the conclusion of the payments under the plan, the debtor, trustee, or unsecured creditor may request modification of the plan.

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6 See 11 U.S.C. §§ 1321, 1322(a)(1); see also §§ 704(a)(10), 726.
8 11 U.S.C. §1322
10 11 §§ 1328(a)(1); 1322(b)(5).
11 11 §1322(b)(5).
12 11 §§ 1324-25.
13 11§ 1327(a).
14 11 § 1329(a).
Louis Bullard, a Massachusetts resident, is a mortgagor whose real property value is significantly less than the amount he owes to his secured creditor.\textsuperscript{15} Hyde Park Savings Bank is the mortgagee who holds the mortgage on the property in which the promissory note is secured.\textsuperscript{16} Although the value of the property on which the mortgage is held is under dispute, both parties concur that the value of the property is substantially lower than the amount of Hyde Park’s secured claim.\textsuperscript{17} Bullard filed under Chapter 13 of the Bankruptcy Code in The United States Bankruptcy Court for the District of Massachusetts, Bullard later filed his third amended plan on January 17, 2012.\textsuperscript{18}

Bullard’s amended plan proposed to bifurcate Hyde Park’s claim into two separate claims: a secured claim for the amount Bullard claimed the property to be currently valued and a separate unsecured claim that would include the difference between the amount owed and the amount of the proposed secured claim.\textsuperscript{19} Under the proposed plan, Bullard would pay the secured portion of the claim according to the original terms of the promissory note under Section 1322(b)(5).\textsuperscript{20} The plan further proposed that Bullard would pay only a portion of the unsecured claim over a sixty-month payment plan.\textsuperscript{21} The remaining part of the unsecured mortgage debt, combined with other unsecured debts, was to be discharged at the end of the payment plan along with the other unsecured claims according to the plan.\textsuperscript{22}

Hyde Park objected to the proposed plan, arguing that the debtor cannot confirm a plan that utilized both the modification provision §1322(b)(2) and the cure-and-maintain provision.

\textsuperscript{15} See Bullard v. Hyde Park Savings Bank, 752 F.3d 483 (1st Cir. 2014).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} In re Bullard, 752 F.3d at 484.
§1322(b)(5); that the plan can only use one provision or the other.\textsuperscript{23} The bankruptcy court agreed with Hyde Park and denied the confirmation of the plan.\textsuperscript{24} Bullard appealed to the Bankruptcy Appellate Panel for the First Circuit (BAP).\textsuperscript{25} The BAP held that a denial of a Chapter 13 reorganization plan is not a “final” order appealable as of right.\textsuperscript{26}

This Article will examine the current state of the law interpreting what “finality” means in context of a bankruptcy proceeding and what effect that interpretation has on the appealability of certain order, such as the denial of plan confirmation under a Chapter 13 bankruptcy proceeding. Part I of this Article investigates the circuit split currently in place. This part of the Article highlights nine courts of appeals and their decisions concerning the appealability of a denial of a plan confirmation. It is apparent that the courts are split with three courts of appeal allowing a debtor to appeal a denial of plan confirmation as a matter of right, while six courts of appeal will deny a debtor the ability to appeal as a matter of right. Part II of this Article examines the “finality” requirement for appeal. Particularly, this part surveys the flexible and broad interpretation of “finality” the courts have held to bankruptcy proceedings and what “finality” means to the ability to appeal certain orders from the bankruptcy court as a matter of right. Finally, Part III of this Article proposes a uniform test that the Supreme Court should adopt in order to the end the disparity caused by the circuit split on this issue of “finality” for appeal. A uniform test would create an even playing field and uphold the ideals of the Constitution that the laws should be uniform throughout the land.

\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} In re Bullard, 752 F.3d at 484; see also 28 U.S.C. § 158(a)(1).
I. The Finality for Appeal Circuit Split

Although the Constitution calls for the Congress to establish *uniform* laws on the subject of bankruptcy, the courts do not uniformly address debtors’ attempts to appeal a bankruptcy court’s denial of plan confirmation. Three circuits will allow for an immediate appeal of a debtor when the bankruptcy court denies plan confirmation. However, six circuits will not allow a debtor to appeal as a matter of right after a bankruptcy court denies their plan confirmation. This uncertainty in the law creates disparity between debtors filing in different circuits. While some debtors have no recourse until after the entire bankruptcy has concluded to appeal, other debtors may have the ability to appeal a denial of plan confirmation immediately, and before moving forward with the rest of their bankruptcy proceedings.

A. Three Circuits Allow Appeal as Matter of Right

The Third, Fourth, and Fifth Circuits allow debtors to appeal a bankruptcy court’s denial of plan confirmation as a matter of right. The Third Circuit in *In re Armstrong World Indus.*, although a Chapter 11 bankruptcy case, held that a denial of plan confirmation is appealable as a matter of right. The district courts shall have jurisdiction to hear appeals from the bankruptcy courts “from final judgments, orders, and decrees.” In *In re Armstrong World Indus.* the court noted that in bankruptcy cases, “finality is construed more broadly than for other types of cases.” The court further noted that bankruptcy proceeding are “often protracted, and time and

27 See cases cited infra note 67.
28 See cases cited infra note 30.
29 See cases cited infra note 30.
30 See *In re Armstrong World Indus.*, 432 F.3d 507 (3d Cir. 2005); see also Morta Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013); see also Bartee v. Tara Colony Homeowners Ass’n, 212 F.3d 277 (5th Cir. 2000) (held denial of plan confirmation is a final order for purpose of appeal).
31 *In re Armstrong World Indus.*, 432 F.3d 507, 511 (3d Cir. 2005).
33 *In re Armstrong World Indus., Inc.*, 452 F.3d 507, 511 (3d Cir. 2005).
resources can be wasted if an appeal is delayed until after final disposition” and that the court’s policy has been to resolve issues quickly for the progress of the bankruptcy.\textsuperscript{34}

The Third Circuit, adopting a pragmatic approach, applied a four-factor test in order to determine whether the denial of plan confirmation was final and appealable, the factors are: “(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy.”\textsuperscript{35}

Using the Third Circuit’s four prong test, Bullard’s case should be allowed to appeal. First, the bankruptcy estate may be severely impacted; since Bullard would be required to submit an amended plan without the bifurcation included in the current proposed plan. Otherwise, if Bullard cannot submit a confirmable plan he faces dismissal and loss of the protection of the bankruptcy laws. Second, no further fact finding would be required on remand, the dispute over the validity of the bifurcation clause under the proposed plan is purely a matter of law. Third, a decision on the merits in this case would have a preclusive effect, since no other reorganization plan which includes a similar hybrid bifurcation clause could be confirmed under this decision of this court. Finally, time and resources would be wasted if an appeal were not allowed, because in such a case, time and resources would be wasted on the proposal of an amended undesired plan, or a dismissal of the case, that would lead toward eventual submission for appellate review. Under a uniform test of these four factors courts could quickly and efficiently resolve issues central to the progression of a bankruptcy case.

The Fourth Circuit in Morta Ranta, held that denial of plan confirmation under Chapter 13 was a “final order for the purpose of appeal even if the case had not yet been dismissed,

\textsuperscript{34} Id.  
\textsuperscript{35} Id.
recognizing that this conclusion is all but compelled by considerations of practicality.” 36 The court observed that courts have generally allowed trustees and creditors to appeal as a matter of right if the plan was confirmed over their objections. 37 Furthermore, the court noted that courts in the Fourth Circuit have a “long history of allowing appeals from debtors whose proposed plans are denied confirmation, without questioning the finality of the underlying order.” 38

The court also recognized that the issue of finality of an order denying confirmation of a plan has divided courts. 39 However, courts have on many occasions recognized that finality in bankruptcy has traditionally been applied in a “more pragmatic and less technical way than in other situations.” 40 Additionally, the court showed concern that without the ability to appeal, some debtors would not have any real options in formulating a confirmable plan. 41 Under a contrary rule, a debtor who seeks to appeal a denial of plan confirmation 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.” 42 A debtor forced to endure dismissal risks losing the protection of an automatic stay which shields the estate of the debtor. 43 Also, the debtor may be precluded from filing another petition for bankruptcy for the following six months. 44 A debtor forced to propose an unwanted plan would waste valuable time and resources. 45 The Fourth Circuit reasoned that “as a practical matter, it makes little sense to deny

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37 Id. at 245.
38 Morta Ranta, 721 F.3d at 245; see, e.g., In re Coleman, 426 F.3d 719, 722 (4th Cir. 2005) (appeal of bankruptcy court order affirmed by district court allowing withdrawal of debtor’s plan and allowing debtor 30 days to file amended plan); In re Solomon, 67 F.3d 1128, 1130-31 (4th Cir. 1995) (appeal of bankruptcy court order denying confirmation of plan affirmed by district court).
39 Morta Ranta, 721 F.3d at 246.
40 Id.
41 Id. at 248.
42 Morta Ranta, 721 F.3d at 248 (quoting In re Bartee, 212 F.3d 277, 283 (5th Cir. 2000)).
43 Id.
44 Morta Ranta, 721 F.3d at 248.
45 Id.
debtors immediate appellate review simply because the case not yet been dismissed and the
deptor could propose an amended plan.”

Finally, the Fifth Circuit also held that denial of plan confirmation was appealable under
Chapter 13 in *Bartee v. Tara Colony Homeowners Ass’n.* The Fifth Circuit court considered its
jurisdiction based solely on the “finality” of the judgment, therefore 28 U.S.C. § 158(d) is
applicable in the matter. Further, the court opined that “‘finality’ for the purposes of bankruptcy
appeals under § 158(d) is considered more liberally or flexibly than ‘finality’ under § 1291, we
address the appealability of the denial of confirmation order in this case solely under the less
stringent standard of § 158(d).” The Fifth Circuit long rejected a rigid rule that would require
that a bankruptcy case can only be appealed at the end of the bankruptcy proceeding as one
single judicial unit. Instead, the court has held that to appeal a bankruptcy order, the order must
“constitute either a final determination of the rights of the parties to secure the relief they seek or
a final disposition of a “discrete dispute” within the larger bankruptcy case for the order to be
considered final.”

The Fifth Circuit explained that a flexible rule is based on practicality and fairness. The
bankruptcy system would be substantially frustrated if appellate jurisdiction arises only when the
bankruptcy court enters an order that would end the entire bankruptcy case and leave only the
execution of the judgment left for the judge after such an order. This is especially true when
one single decision materially affects the entire bankruptcy case, such as denial of a plan

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46 Id.
47 See Bartee v. Tara Colony Homeowners Ass’n, 212 F.3d 277 (5th Cir. 2000).
48 Id. at 282, (quoting I.R.S. v. Orr, 180 F.3d 656, 659 (5th Cir. 1999) (“There is a lower threshold for meeting the
final judgments, order, and decrees appealability standard under 28 U.S.C. § 1291.”) (quotations omitted).
49 Id.
50 Id. (quotations omitted).
51 See id.
52 See In re Bartee, 212 F.3d at 282.
confirmation. The extent of the bankruptcy estate and the tenacity of the creditors’ effort to recover from that estate often depend heavily on separate and discrete orders during the bankruptcy proceedings. Furthermore, if such an order were reversed, the outcome would result in an enormous waste of time, money, and effort and would likely cause the parties to file a new petition and start the bankruptcy process all over again. As a result, the court concluded “[t]his potential waste of judicial and other resources has influenced this Court and other courts of appeals view finality in bankruptcy proceedings in a more practical and less technical way.”

Practicality stresses that the most logical reasoning is to consider a denial of a plan under Chapter 13 to be a final order. In many cases, an appeal is the only reasonable recourse, since the debtor is left with no other real options to formulate a new plan. According to the court, if an appeal is not available, often the debtor must “choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal.” The test for the Fifth Circuit is “whether or not the order was intended to serve as a final denial of the relief sought by the debtor.” Appellate jurisdiction would be found to be lacking if an order was not intended to be final, for example, if the court addressed an issue that left the debtor able to file an amended plan. However, an order denying plan confirmation that conclusively determined a substantive right at issue that ends the dispute is a “final” order and immediate appeal of such an order is appropriate.

53 See id.
54 See id.
55 See id. at 283.
56 Id. (quoting England v. F.D.I.C., 975 F.2d 1168, 1171 (5th Cir. 1992).
57 See In re Bartee, 212 F.3d at 283.
58 See id.
59 Id.
60 Id.
61 Id.
62 See In re Bartee, 212 F.3 at 283.
The Third, Fourth, and Fifth Circuits have each declined to adopt a rigid rule that would force a debtor to wait until the end of all of the bankruptcy proceedings before they would be allowed to appeal an order denying the confirmation of their plan. These circuits have determined that the needs of practicality, fairness, and efficiency require that debtors be allowed to appeal denial of plan confirmation in situations where the order is a final judgment on the matter before the court. These circuits have concluded that the statutory meaning of the word “final” be a flexible standard in context of bankruptcy proceedings. The Third Circuit sums up these concerns well in its Four-Prong test in In re Armstrong World Indus., where the court considered the impact on the bankruptcy estate, any need for further fact finding, any preclusive effect on a decision on the merits, and judicial economy in order to determine whether a debtor should be allowed to appeal a denial of plan confirmation.

B. Six Circuits Disallow Appeal as Matter of Right

The First, Second, Sixth, Eighth, Ninth, and Tenth Circuits do not allow debtors to appeal a bankruptcy court’s denial of plan confirmation as a matter of right. These six circuits, unlike the Third, Fourth, and Fifth Circuits, have held that an order denying plan confirmation is not a final order on which an appeal may be granted.63

The First Circuit held in a recent case, Bullard v. Hyde Park Savings Bank, that the denial of debtor’s Chapter 13 plan was not a final order “so long as the debtor remains free to propose an amended plan.”64 The court stated that the rejection of the plan does not “finally dispose of all

63 Compare In re Armstrong World Indus., 432 F.3d 507 (3d Cir. 2005); Morta Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013); Bartee v. Tara Colony Homeowners Ass’n, 212 F.3d 277 (5th Cir. 2000) (held denial of plan confirmation is a final order for purpose of appeal); with Bullard v. Hyde Park Savings Bank, 752 F.3d 483 (1st Cir. 2014); In re Prudential Lines, Inc., 59 F.3d 327 (2d Cir. 1995); In re Flor, 79 F.3d 281 (2d Cir. 1996); Lindsey v. Pinnacle Nat’l Bank, 726 F.3d 857 (6th Cir. 2013); Pleasant Woods Assocs. Ltd. P’ship v. Simmons First Nat’l Bank, 2 F.3d 837 (8th Cir. 1993); Lievsay v. Western Fin. Sav. Bank, 118 F.3d 661 (9th Cir. 1997); Gordon v. Bank of America, 743 F.3d 720, 723 (10th Cir. 2014) (held denial of plan confirmation not final for purpose of appeal).
64 Bullard v. Hyde Park Savings Bank, 752 F.3d 483, 486 (1st Cir. 2014).
the issues pertaining to a discrete dispute” within the case. The court noted that Bullard failed to seek alternative routes to an appeal that the legislature provided for by statute. For example, he could have pursued a permissive interlocutory appeal under the prevue of 28 U.S.C. § 158(d)(2). However, this avenue does not present the debtor with the ability, as a matter of right, to appeal a decision to deny confirmation of a plan and does not address whether a denial of plan confirmation is a final order. Instead, under § 158(d)(2) the debtor must apply to court on a specific ground laid out in the statute for a permissive appeal at the discretion of the court.

The court recognized issues of judicial inefficiency in the process. Bullard argued that by holding that the denial of plan confirmation was not a final order was a waste of judicial resources. Bullard cited to an Eighth Circuit case, Zahn v. Fink, to demonstrate the waste of judicial resources apparent in the current judicial process. In In re Zahn, the debtor’s original plan confirmation was denied by the bankruptcy court and an interlocutory permissive appeal to the BAP, was dismissed. The debtor then filed an alternative plan that she did not want, she then objected to this unwanted plan, which was consequently confirmed by the bankruptcy court. The BAP, on appeal, held that the original plan, which was denied confirmation, did not become final upon confirmation of the unwanted plan, therefore was not properly before the court. Further, the BAP stated that the debtor lacked standing to appeal her own plan’s confirmation, regardless if the plan was unwanted or not. The Eighth Circuit remanded the case

65 Id.
67 In re Bullard, 753 F.3d at 488.
68 Zahn v. Fink, 367 B.R. 654 (8th Cir. BAP 2007).
69 In re Bullard, 753 F.3d at 488.
70 In re Zahn, 367 B.R. at 655.
71 Id. at 655-56.
72 Id. at 656.
73 Id. at 657.
back to the BAP, after it disagreed with the BAP on both counts.\textsuperscript{74} The BAP, on remand, held that the bankruptcy court erred by denying the debtor’s original plan and ordered the confirmation of the unwanted plan to be vacated and the case was to be remanded to the bankruptcy court with instructions to confirm the debtor’s original plan.\textsuperscript{75}

The \textit{Bullard} court, in the First Circuit, recognized that the series of events in \textit{In re Zahn} was “undoubtedly inefficient.”\textsuperscript{76} However, the court observed alternative reasons for the unwieldy nature of the events in that case. For example, the \textit{Bullard} court noted that the debtor in \textit{In re Zahn}, could have sought an another interlocutory appeal to the BAP or district after rejection of her original plan.\textsuperscript{77} Furthermore, the BAP’s erroneous ruling concerning standing and the reviewability of the denial of the original plan after the confirmation of the unwanted plan caused further inefficiency.\textsuperscript{78} The conclusion of the First Circuit was that the facts in \textit{In re Zahn} were atypical and not representative of any inefficiency due to a rule of non-finality concerning orders denying plan confirmation.\textsuperscript{79} To the contrary, the court noted, any rule that purports to make the denial of plan confirmation routine would introduce yet more inefficiency to the courts, as the courts would be inundated with appeals.\textsuperscript{80}

The court labeled Bullard’s proposal a “presumption of finality,” that would “clog the appellate dockets with issues that could, and should be decided elsewhere.”\textsuperscript{81} The court cautioned that a rule allowing open access to appellate review would cause parties to run to the appellate courts for advice after every stage of bankruptcy proceedings.\textsuperscript{82} Additionally, if the

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\textsuperscript{74} Zahn v. Fink, 526 F.3d 1140, 1142-44 (8th Cir. 2008).
\textsuperscript{75} Zahn v. Fink, 391 B.R. 840, 847 (8th Cir. BAP 2008).
\textsuperscript{76} \textit{In re Bullard}, 753 F.3d 489.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See id.
\textsuperscript{81} Id.
\textsuperscript{82} \textit{In re Bullard}, 753 F.3d 489.
\end{flushleft}
courts were to adopt a less liberal rule “requiring case-by-case analysis, fact-intensive review, the parties and the courts would be bogged down with extended jurisdictional analysis before even approaching the merits.”\textsuperscript{83} The First Circuit decisively adopted the rule that a denial of a reorganization plan is not a “final” order under which a debtor has a right of appeal as a matter of right, so long as the debtor is able to propose an amended plan.\textsuperscript{84}

The Second Circuit court also agreed that the concept of “finality” is more flexible in bankruptcy proceedings than it is in ordinary civil litigation.\textsuperscript{85} However, the court goes on in \textit{In re Flor}, that “[i]mmediate appeal is allowed of orders in bankruptcy matter that ‘finally dispose of discrete disputes within the larger case.’”\textsuperscript{86} The court continues to describe that the resolution of a dispute does not refer to the decision of a separable issue; rather, it must be a resolution for the “entire claim on which relief may be granted.”\textsuperscript{87} Consequently, a district court’s order denying debtor’s plan confirmation is not “final” because it does not necessarily resolve all of the issues concerning a discrete claim.\textsuperscript{88} The court also agreed that because the debtors were still free to propose an alternate plan, the issues in the case were not disposed of finally.\textsuperscript{89} According to the court in the Second Circuit, a final order would be an order to dismiss the petition or to convert the petition to Chapter 7, neither of which occurred in \textit{In re Flor}.\textsuperscript{90}

The Sixth Circuit, in a more recent case, also concluded that the rejection of a plan confirmation is not a final order and therefore not appealable under § 158(d)(1).\textsuperscript{91} The court

\begin{footnotesize}
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\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{In re Prudential Lines, Inc.}, 59 F.3d 327, 331 (2d Cir. 1995).
\item \textsuperscript{86} \textit{In re Flor}, 79 F.3d 281, 283 (2d Cir. 1996) (quoting \textit{In re Sonnax Indus.}, 907 F.2d 1280, 1283 (2d Cir. 1990)).
\item \textsuperscript{87} \textit{In re Flor}, 79 F.3 at 283.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} Lindsey v. Pinnacle Nat’l Bank, 726 F.3d 857, 859 (6th Cir. 2013).
\end{itemize}
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reasoned that “[f]ar more than a few ministerial tasks remain to be done after such a decision.”92 The court noted that the debtor in this case may still propose another plan, creditors may or may not object to that plan, and further fact finding may or may not be needed.93 All of these tasks are more than ministerial in nature and require more than simply executing the judgment.94 At the time of this decision the Second Circuit joined four other circuits in this conclusion and noted that three circuits held the opposite conclusion.95

The circuits holding the minority view explained that a flexible approach to “finality” is prudent considering the complex nature of the typical bankruptcy case.96 However, the Second Circuit was not swayed by this argument.97 Instead, the court stated that even without a rule allowing appeal as a matter of right to denial of plan confirmation, there is “flexibility aplenty in this area.”98 The court points to several avenues in which a party pursue for an appeal, including 28 U.S.C. § 158(d)(2)(A), which allows an appeal on a novel legal question to “materially advance the progress of the case” and interlocutory appeals under § 158(a)(3).99 But, these appeals are permissive appeals which require “leave of the court,” neither of which grant the debtor any right to appeal as a matter of right. Additionally, the court observed that the Congress crafted § 158(d)(2), precisely to limit the non-appealable orders from the appealable interlocutory orders. The court suggests that Congress is concerned that debtors are using bankruptcy relief as a first resort rather than a last resort and this is one mechanism that would ensure that bankruptcy rules would not become too debtor friendly.100

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92 Id.
93 See id.
94 See id.
95 See id.
96 In re Lindsey, 726 F.3d at 859.
97 Id.
98 Id.
99 Id.
100 See id.
The Eighth Circuit has held on similar grounds to Sixth Circuit that an order denying plan confirmation is not a final order on which appeal can be made.101 In In re Pleasant Woods Associates Ltd. Partnership, the court held that a bankruptcy court order is not a final order if it “neither confirms a plan nor dismisses the underlying petition.”102 The court also looked to the remaining tasks of the court, such as considering amended proposed plans or decide how to dispose of property if a plan is not proposed that is confirmable.103 The court determined these tasks are more than ministerial or purely mechanical, therefore even under a liberal finality standard the bankruptcy court has not sufficiently resolved the issues to finality.104 The court notes that while debtors may prefer the ability to easily appeal confirmation denial orders, the decision of the court will shield the court from “time-consuming piecemeal appeals during the confirmation process without depriving parties of effective appellate review.”105

The Ninth Circuit dispensed of the issue in In re Lievsay.106 Even though both parties in this case contend that the court had jurisdiction to hear the debtor’s appeal, the court disagreed.107 The court first observed that it only has jurisdiction on final orders and interlocutory appeals under § 158(d).108 Further the court held that a “bankruptcy court’s decision denying confirmation of . . . [a reorganization] plan is interlocutory . . . [and] because the underlying order is interlocutory, section 158(d) does not confer jurisdiction on this court.”109

The Tenth Circuit held in In re Simons that denial of confirmation of proposed Chapter 13 reorganization plan, without dismissal of the underlying petition of the bankruptcy case, is not

102 Id.
103 See id.
104 See id.
105 Id.
106 See generally, Lievsay v. Western Fin. Sav. Bank, 118 F.3d 661 (9th Cir. 1997) (held denial of plan confirmation not a final order for purpose of appeal).
107 See id.
108 See id.
109 Id.
“final” and therefore not appealable.\(^\text{110}\) The court affirmed this holding in \textit{In re Gordon}.\(^\text{111}\) In \textit{In re Gordon}, the bankruptcy court confirmed a plan, but the district court remanded the case back to the district court for the debtor to amend their plan in order to conform to the model Chapter 13 reorganization plan.\(^\text{112}\) When a case is remanded to the bankruptcy court for “significant further proceedings,” generally that order is not final nor grounds for appeal.\(^\text{113}\) However, if the case is remanded for “purely ministerial functions,” or “to conduct additional proceedings involving little judicial discretion,” the order may be considered “final” and appealable.\(^\text{114}\)

The court concluded in this case that the district court remanded the case to the bankruptcy court for “significant further proceedings,” because the debtor would have to propose a new plan, give notice to creditors, allow for objections, and set a new confirmation hearing.\(^\text{115}\) Like \textit{In re Simons}, the court here held that the denial of the propose reorganization plan and the case being remanded to allow for a new plan to be proposed, is not “final” and not grounds for appeal.\(^\text{116}\) The court observed that, “so long as the bankruptcy proceeding itself has not been terminated, the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation, a prospect which negates any determination of finality.”\(^\text{117}\) Moreover, “the rejection of debtor’s proposed plan may yet be considered on appeal from a final judgment either confirming an alternative plan, or dismissing the underlying petition.”\(^\text{118}\) Both parties in \textit{In re Gordon} argued that \textit{In re Simons} was incorrectly

\(^{110}\) Simons v. F.D.I.C., 908 F.2d 643 (10th Cir. 1990) (per curiam).
\(^{111}\) Gordon v. Bank of America, 743 F.3d 720, 723 (10th Cir. 2014).
\(^{112}\) See id.
\(^{113}\) Id.
\(^{114}\) Id.
\(^{115}\) Id.
\(^{116}\) See id.
\(^{117}\) \textit{In re Gordon}, 743 F.3d at 724.
\(^{118}\) Id.
decided and that the court should overturn that decision and align the court with other circuits which have held that denial of plan confirmation is appealable.\textsuperscript{119}

The court declined to overrule \textit{In re Simmons}, and like other circuits indicated that other avenues were available to the debtors for appeal.\textsuperscript{120} One of those avenues mentioned is an interlocutory appeal under 28 U.S.C. §1292(b), but once again, this appeal would be permissive and “at the discretion of the court,” therefore not available as a matter of right to the debtor. Hence, the avenue at the discretion of the court is an uncertain one and may not lead to speedy recourse for the aggrieved debtor.

II. \textbf{The Liberal Finality of Bankruptcy}

The foundation for bankruptcy appeals is 28 U.S.C. § 158(a).\textsuperscript{121} Under this statute, a debtor may appeal a final order as a matter of right, but the debtor must seek leave of the court to for a permissive appeal of an interlocutory order.\textsuperscript{122} But neither the statute nor the Bankruptcy Code define the words “final” or “interlocutory.” As a result, the courts have split over the issue.\textsuperscript{123}

While the Supreme Court has remained largely silent on the issue, the appellate courts have provided, albeit far from perfect, some guidance. The First Circuit has introduced the “discrete-dispute” test, where the court must decide whether the order “conclusively determines a separable dispute over a claim or priority.”\textsuperscript{124} Other circuits have developed similar pragmatic tests, recognizing “that certain proceedings in a bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as

\textsuperscript{119} See id.
\textsuperscript{120} See id.
\textsuperscript{121} 28 U.S.C. § 158(a).
\textsuperscript{122} See 28 U.S.C. 158(a).
\textsuperscript{123} See supra Part I.
\textsuperscript{124} \textit{In re Saco Local Development Corp.}, 711F.2d 441, 445-46 (1st Cir. 1983).
to them should be appealable as a right.”125 Furthermore, the Third Circuit has applied its own four-prong test to determine the finality of the case.126 Under that test the court should consider: “(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy.”127

Bankruptcy courts have long recognized that finality in bankruptcy proceedings is a much broader concept than in typical civil or criminal litigation.128 Where a civil or criminal trial typically has one final resolution within a reasonable time, a bankruptcy case, on the other hand, often may not have a final determination, in the form of a discharge, until the end of a three to five year payment plan. In a typical civil case, a final judgment, which is appealable, is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”129 However, no court seems to think that an appeal from a bankruptcy court should have to wait until the debtor receives a discharge as a final order before that appeal can be made. Congress acknowledged this broad interpretation of “finality” when it enacted 28 U.S.C. § 158(d)(1).130 The statute, dealing with bankruptcy appeals, specifically states that “final judgments, orders, and decrees” are all appealable.131 Compared to 28 U.S.C. § 1291, which authorizes appeals for all other cases from the district courts—only states that “final decisions” are appealable.132 Congress clearly and intentionally crafted the bankruptcy statutes pertaining to finality and appeals to be more flexible and broad than in all the other types of cases which have a much more clearly defined ending.

125 In re Properties, Ltd., 894 F.2d 1136, 1138 (9th Cir. 1990).
126 See In re Armstrong World Indus., Inc., 452 F.3d 507, 511 (3d Cir. 2005).
127 Id.
128 See cases cited supra note 30.
131 Id.
The courts of appeal have consistently acknowledged that “[b]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation.”\textsuperscript{133} The Second Circuit stated that “the concept of ‘finality’ is more flexible in bankruptcy context than in ordinary civil litigation.”\textsuperscript{134} The Third Circuit noted, that “finality is construed more broadly than for other types of cases.”\textsuperscript{135} Moreover the Fourth Circuit asserts it has a “long history of allowing appeals from debtors whose proposed plans are denied confirmation, without questioning the finality of the underlying order.”\textsuperscript{136} But some courts consider bankruptcy orders final and appealable where “they finally dispose of discrete disputes within the larger case,” despite the fact that more left for the bankruptcy court to do.\textsuperscript{137} “Consequently, a long line of decisions from various circuits has established that “finality” in bankruptcy is a broader concept than in ordinary civil litigation.

III. A Uniform Solution: The Finality Test

The Supreme Court has largely been silent on the issue of finality in bankruptcy case orders and left the individual circuits each decide their own fate. The courts of appeals have repeatedly acknowledged the split among themselves on this conflict and addressed each other’s rationales in their opinions.\textsuperscript{138} The conflict applies to both Chapter 13 and Chapter 11 cases, and no court has differentiated between them in considering whether a denial of plan confirmation is

\textsuperscript{133} In re Chateaugay Corp., 880 F.2d 1509, 1511 (2d Cir. 1989); see also In re Oakley, 344 F.3d 709, 711 (7th Cir. 2003); see also In re Millers Cove Energy Co., Inc., 128 F.3d 449, 451 (6th Cir. 1997).
\textsuperscript{134} In re Flor, 79 F.3d 281, 283 (2d Cir. 1996).
\textsuperscript{135} In re Armstrong World Indus., Inc., 452 F.3d 507, 511 (3d Cir. 2005).
\textsuperscript{136} In re Morta Randa, 721 F.3d 241, 245 (4th Cir. 2013)
\textsuperscript{137} In re Saco Local Dev. Corp., 711 F.2d 441, 444 (1st Cir. 1993).
\textsuperscript{138} See Mort Ranta, 721 F.3d at 246; see also Bartee, 212 F.3d at 282; see also Lindsey, 726 F.3d at 859.
appealable.\textsuperscript{139} Additionally, Congress has specifically addressed appeals of bankruptcy orders in statute and chose to use the broad language: “final decisions, judgments, orders, and decrees,”\textsuperscript{140} as opposed to simply, “final decisions” which is the language found in statutes authorizing appeals on all other types of cases.\textsuperscript{141}

The remedy for this conflict is for the Supreme Court to state a clear rule for determining the finality of an order in a bankruptcy proceeding. Several circuits have implemented rules upon which the Supreme Court could consider in crafting a uniform rule to be used in all federal bankruptcy courts. One circuit has applied a “discrete-dispute” test, where the court must decide whether the order “conclusively determines a separable dispute over a claim or priority.”\textsuperscript{142} Another circuit has announced a four-prong test to determine the finality of the order and considers the following factors: “(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy.”\textsuperscript{143} The discrete-dispute test is paralleled by the third factor in the four-prong analysis, considering the preclusive effect of a decision on the merits; ultimately, the discrete-dispute test and the third factor make similar determinations.

An appropriate test should include the considerations from both the discrete-dispute test and the four-prong test employed by those circuits who have adopted these pragmatic tests. The Supreme Court should adopt a four part “Finality Test” for bankruptcy orders, including denials of plan confirmation, in order to determine if those orders should be appealable as a matter of right. Since, the discrete-dispute test and the third factor in the four prong test examine the essential the same issue, they should be formed into a single factor under the new test. The

\textsuperscript{139}See supra Part I.
\textsuperscript{140} 28 U.S.C. §158(d)(1).
\textsuperscript{141} 28 U.S.C. § 1291.
\textsuperscript{142} In re Saco Local Development Corp., 711 F.2d 441, 445-46 (1st Cir. 1983).
\textsuperscript{143} In re Armstrong World Indus., Inc., 452 F.3d 507, 511 (3d Cir. 2005).
proposed Finality Test would consider: (1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) whether the order conclusively determines a separable dispute over a claim or priority; and (4) the interests of judicial economy.

First the impact on the assets of the bankruptcy estate should be considered. If an order essentially forces the debtor to propose an unwanted plan that would lead to failure upon confirmation and appeal, or ultimately results in the dismissal of the petition, then the estate is negatively impacted and consideration should be given to an appeal as a matter of right. Second, the court should consider any further need to conduct fact-finding on remand. If further fact-finding is found to be needed, then the claim is not ripe for a final order, however, if no fact-finding is left to be concluded, then the claim is likely to suitable for a final order. Third, the court must examine whether the order has conclusively determined a separable dispute over a claim or priority. If, for example, an order denying plan confirmation precludes a particular provision of a plan, as a matter of law, then no plan may be proposed with a similar provision; in that case the court has determined conclusively a separable dispute over a claim. Finally, the interests of judicial economy should be considered. If a plan confirmation is denied and a debtor is not allowed an appeal as of a matter of right, then the debtor’s alternative is to propose a new amended, but unwanted plan, object to that plan, then appeal the unwanted plan after it has been confirmed. All the while the court must consider the amended, but unwanted plan, provide new notice to the creditors of the unwanted plan, consider objections to the unwanted plan, and set a hearing for the unwanted plan. Under such circumstances, waste of judicial resources is unwarranted if the debtor were simply allowed to appeal as a right to the denial of the original plan.
The proposed Finality Test operates squarely under 28 U.S.C. 158(d)(1), which confers upon courts of appeal the jurisdiction of appeals to “final decisions, orders, and decrees.”\(^{144}\) The test reflects Congress’s intention to apply a broad application to the rules regarding appeals of bankruptcy issues demonstrated in framing the statute more broadly, than that of the statute controlling appeals in all other types of cases.\(^{145}\) This Finality Test further considers the courts of appeals which have expressed a priority in dispensing of claims and issues in a pragmatic manner.

**Conclusion**

The issue of whether a debtor has a right to appeal the denial of a proposed reorganization plan is essential to both debtors and creditors. A rule that bars an appeal of a plan confirmation frustrates the Bankruptcy Code’s purpose of providing a fresh start to the honest but unfortunate debtor, by not allowing the courts of appeal to intervene in appropriate cases. The United States Supreme Court has held that a primary principle of bankruptcy is to “facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start.”\(^{146}\) A contrary rule, disallowing appeal as a right, will require debtors to pursue a revolving door style of trial-and-error of submitting petitions. A debtor may be forced to propose multiple plans that are unwanted, simply to have them confirmed, just so that debtor may appeal their own plan. This route is not only time-consuming, but expensive for the already cash-strapped debtors seeking a fresh start.

Without a rule allowing review of denials of plan confirmation, courts of appeal may not be able to resolve pure issues of law on which circuits are split. For example, the Tenth Circuit is

\(^{144}\) 28 U.S.C. § 158(d)(1).


split on whether a local object-or-forfeit rule is a valid provision in a reorganization plan. Even though separate divisions of the circuit have come to conflicting answers, an appeal brought to the circuit court for consideration was dismissed and the court of appeals was unable to settle the pure matter of law because the reorganization plan was denied because of the very object-or-forfeit rule in question. Under these circumstances, uncertainty will remain in the law concerning the object-or-forfeit rule so long as no debtor is allowed to bring her appeal to the circuit court. Currently, circuits that allow appeals can resolve these types of pure issues of law, to the benefit of not only the parties before those courts, but also the parties in subsequent cases.

In Bullard’s case, the BAP acknowledged that the “Massachusetts bankruptcy courts are split on the issue of hybrid plans.”147 Moreover, “[d]ecisions elsewhere are in disarray.”148 A uniform rule allowing for the appeal of orders from the bankruptcy court is vital to allow courts of appeal to determine central issues of bankruptcy law. Settled law will benefit creditors, debtors, and the bankruptcy courts. The Constitution demands uniformity in the Laws on the subject of Bankruptcy149 and only the Supreme Court can ensure that the Bankruptcy Code is uniformly applied by adopting a clear rule on the “finality” of the denial of plan confirmation orders, which can be applied to all federal bankruptcy courts.

147 In re Bullard, 494 B.R. 92, 96 (1st Cir. BAP 2013).
148 Id.
149 U.S. Const. art. I § 8, cl. 4.