MICHIGAN DEFENSE
QUARTERLY

Volume 37, No. 3 - 2021

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Appellate Practice Report

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When is a Bankruptcy Order "Final" for Appellate Purposes?

A party's appellate rights often depend on whether the order at issue is a final order. In most contexts, there's an appeal of right from a final order but not from a non-final (or interlocutory) order. These appeals often have different deadlines, too. So confusing a final order with an interlocutory order (or vice versa) may have adverse consequences for a client. It's important to get this one right.

In typical litigation, determining whether an order is final means deciding whether a court has resolved all claims against all parties. But a bankruptcy case involves many parties and many discrete issues—reorganization or liquidation, automatic-stay issues, refinancing, litigation of pre-existing claims, and "an aggregation of individual controversies," as one leading authority puts it.[1] In this context, deciding whether an order is final isn't as easy as making a list of outstanding claims and checking them off. (And because everything is more complicated in bankruptcy law, Congress created a category of non-final orders that are appealable as if they *were* final orders—namely, orders that increase or deduce the debtor's exclusive period for filing a Chapter 11 plan. See 28 USC § 158(a)(2)).

The current test for finality in the bankruptcy context comes from the United States Supreme Court's opinion in *Bullard v Blue Hills Back* (2015),[2] which the Court applied again in *Ritzen Group, Inc v Jackson Masonry, LLC* (2020).[3] Both cases begin with 28 USC §158, a statute in which Congress authorized district courts to hear appeals from "final judgments, orders, and decrees" "in cases *and proceedings* referred to bankruptcy judges under section 157" of title 28.[4] This statute's reference to cases *and proceedings* indicated to the Supreme Court that Congress intended to allow direct appeals from discrete "proceedings" within a bankruptcy case. So how can one tell whether an order resolves a discrete "proceeding" within a bankruptcy case?

In *Bullard*, the question was whether an order denying confirmation of a proposed Chapter 13 plan was final for appellate purposes. To answer that question, the Court considered whether plan confirmation was a distinct "proceeding" within the bankruptcy.[5] It had little difficulty concluding that it was: "The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward."[6] The Court concluded that an order *approving* a plan would end that "proceeding." But an order denying confirmation—with leave to file a new proposed plan—does not end the proceeding.[7] "The parties' rights and obligations remain unsettled," the Court wrote. "The possibility of discharge lives on. 'Final' does not describe this state of affairs."[8]

The Court found further textual support in 28 USC §157, which lists proceedings within a bankruptcy court's "core" jurisdiction. Among these core proceedings, Congress listed the "confirmation of plans."[9] For the Supreme Court, that listing indicates that plan confirmation is a discrete proceeding and that the bankruptcy court in *Bullard* had not yet resolved it finally. Although the debtor and the Solicitor General offered a parade of horribles that could arise from failing to treat denial of confirmation as a final order, the Supreme Court wasn't convinced. If an order denying confirmation deserved an immediate appeal, the Court said, the aggrieved party can file an application for leave.

The Supreme Court returned to this test in *Ritzen*. The test, *Ritzen* explained, is whether an order "definitively dispose[s] of discrete disputes within the overarching bankruptcy case."[10] The particular question in *Ritzen* was whether an order denying

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relief from the automatic stay was final. The creditor at issue tried to seek relief through the claim-allowance process after losing a lift-stay motion. Then, well after the time for filing a separate appeal on the lift-stay motion, the creditor filed a claim of appeal challenging the lift-stay ruling and the bankruptcy court's resolution of his claim.[11] If the order denying the creditor's lift-stay motion was final, then the creditor's appeal of that order was too late.

The Court held that the "proceeding" under 28 USC § 158 was "the stay-relief adjudication."[12] The Court found support in 28 USC § 158's list of core proceedings, which includes "motions to terminate, annul, or modify the automatic stay[.]"[13] Moreover, a motion seeking relief from the automatic stay "initiates a discrete procedural sequence, including notice and a hearing, and the creditor's qualification for relief turns on the statutory standard, *i.e.*, 'cause' or the presence of specified conditions."[14] Although the Supreme Court reaffirmed *Bullard*'s statement that a "proceeding" should not include "disputes over minor details about how a bankruptcy case will unfold," it didn't view stay relief as a minor matter.

The test applied in *Bullard* and *Ritzen* works well enough when a matter is defined as "core" under 28 USC § 158. But it can be tricky for matters that Congress didn't include in its list of core proceedings. The safest approach, as always, is to assume that the earliest deadline applies.

Submitting Supplemental Authority

As there can often be a delay of several months between the time that briefs are filed and oral argument is held, there are times when a party may want to supplement the authorities in its brief with a decision that came out after briefing was completed. The Michigan Supreme Court, Court of Appeals, and Sixth Circuit all have specific procedures for doing just that.

Michigan Supreme Court and Court of Appeals

Submitting supplemental authority in the Michigan Supreme Court and Court of Appeals is governed by MCR 7.212(F).[15] The rule explains that without leave of court, a party may submit a "one-page communication" titled "supplemental authority," subject to certain conditions. First, it must be for the purpose of "call[ing] the court's attention to new authority released after the party filed its brief."[16] Second, a supplemental authority "may not raise new issues."[17] Third, it "may only discuss how the new authority applies to the case, and may not repeat arguments or authorities contained in the party's brief."[18] Finally, a supplemental authority "may not cite unpublished opinions."[19]

> As further explained in the Court of Appeals' Internal Operating Procedures (IOPs):
>
> Such a filing may only cite and discuss new published authority released subsequent to the date the party filed its last brief or supplemental authority. New issues may not be raised in a supplemental authority. The body of the supplemental authority cannot exceed one page. The caption may be on a preceding page and the signature block alone may be on a subsequent page. But the *text* of the supplemental authority cannot exceed one page.[20]

Should a party seek to exceed the one-page limit or cite newly-discovered authority that was released *before* the party filed its brief, then a motion is required:

> Unless accompanied by a motion, a supplemental authority will be returned if it (1) fails to comply with the requirement that it not exceed one page, (2) cites other than new published authority.[21]

Finally, the IOPs provide one last word of caution. A supplemental authority must include *all* new authorities that the party wishes to raise. In other words, multiple supplemental authorities are not permitted unless "a party files a supplemental authority after the filing of the brief, and then another *new* case is released after filing of the first supplemental authority."[22] In that case, "the subsequent supplemental authority will be accepted."[23]

Note that neither MCR 7.212(F) nor the IOP specifically provide for a *response* to a supplemental authority filing. Doing so, however, is simply a matter of the opposing party filing its own "supplemental authority" addressing the new case.

Sixth Circuit

Supplemental authority filings in the Sixth Circuit are governed by FR Civ P 28(j). The rule provides that a party may "promptly advise the circuit court clerk by letter" of any "pertinent and significant authorities [that] come to a party's attention after the party's brief has been filed—or after oral argument but before decision." Although the rule does not expressly restrict a party to citing decisions issued after the party's brief has been filed, it would be wise to use caution in citing decisions that were simply overlooked. The letter must "state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally." Thus, it should go without saying that a Rule 28(j) letter may not be used to raise new issues. Finally, the "body of the letter must not exceed 350 words." A party wishing to respond to a Rule 28(j) letter must do so "promptly" in a letter that it is "similarly limited."

Endnotes

1 1 Collier on Bankruptcy ¶5.08[1][b], p. 5-42 (16th ed. 2014), quoted in *Bullard v Blue Hills Bank,* 575 US 496 (2015).
2 *Bullard v Blue Hills Bank,* 575 US 496 (2015).
3 *Ritzen Group, Inc v Jackson Masonry, LLC* 140 S Ct 582 (2020).
4 28 USC 58(a) (emphasis added).
5 *Bullard,* 575 US at 1692.
6 *Id.* at 1692.
7 *Id.* at 1693.
8 *Id.*
9 *Id.* at 1693, quoting 28 USC 157(b)(2)(L).
10 *Ritzen,* 140 S Ct at 586.
11 *Id.* at 588.
12 *Id.* at 589.
13 *Id.* at 590, quoting 28 USC 157(B)(2)(G).
14 *Ritzen,* 140 S Ct at 589.
15 MCR 7.312(I), which governs supplemental authority in the Supreme Court, provides that a party may file "a supplemental authority in conformity with MCR 7.212(F)."
16 MCR 7.212(F).
17 MCR 7.212(F)(1).
18 MCR 7.212(F)(2).
19 MCR 7.212(F)(3).
20 IOP 7.212(F)-1 (emphasis in original).
21 *Id.*
22 *Id.* (emphasis in original).
23 *Id.*