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Bankruptcy- Is It over Even Though No One Is Singing: Determining Finality in Bankruptcy Appeals- Bullard v. Hyde Park Sav. Bank (in Re Bullard), 752 F.3D 483 (1st Cir. 2014)

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BANKRUPTCY—IS IT OVER EVEN THOUGH NO ONE IS SINGING: DETERMINING FINALITY IN BANKRUPTCY APPEALS—*BULLARD V. HYDE PARK SAV. BANK* (*IN RE BULLARD*), 752 F.3D 483 (1ST CIR. 2014).

A bankruptcy court's ruling cannot be appealed until a final order has been issued.[1] When a bankruptcy judge denies the confirmation of a reorganization plan, but allows the debtor to propose a modified plan, it becomes difficult to determine the order's finality.[2] In *Bullard III*,[3] the First Circuit considered whether an order denying confirmation of a

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[1] *See* 28 U.S.C. § 158(d) (2012) (granting circuit courts' jurisdiction over appeals from all final decisions, judgments, orders and decrees); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 251-52 (1992) (clarifying jurisdiction under § 158 in addition to, not in lieu of, normal appellate jurisdiction); Lievsay v. W. Fin. Sav. Bank (*In re* Lievsay), 118 F.3d 661, 662 (9th Cir. 1997) ("If the underlying bankruptcy court decision is interlocutory, the [Bankruptcy Appellate Panel] order affirming or reversing it is also interlocutory."); Flor v. BOT Fin. Corp. (*In re* Flor), 79 F.3d 281, 283 (2d Cir. 1996) (determining district court's order not final unless underlying bankruptcy court's order final). Because of a bankruptcy proceeding's complexity, courts constructed the flexible finality standard. *See* Perry v. First Citizens Fed. Credit Union (*In re* Perry), 391 F.3d 282, 284-85 (1st Cir. 2004) (holding "final" meant all issues pertaining to discrete dispute resolved); Fugazy Express, Inc. v. Fugazy Limosine Ltd. (*In re* Fugazy Express, Inc.), 982 F.2d 769, 776 (2d Cir. 1992) (drawing distinction between discrete dispute and entire bankruptcy proceeding); *In re* G.S.F. Corp., 938 F.2d 1467, 1473 (1st Cir. 1991) ("[B]ecause bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other 'finality' is given a flexible interpretation in bankruptcy."), *abrogated on other grounds by* Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); *see also* Bowers v. Conn. Nat'l Bank, 847 F.2d 1019, 1022 (2d Cir. 1988) (recognizing finality of bankruptcy court's decision affected by district court's disposition of appeal). Prior to assessing an appeal's merits, a court must determine the proper interpretation of finality. *See In re* St. Charles Pres. Investors, Ltd., 916 F.2d 727, 729 (D.C. Cir. 1990) (applying strict interpretation of final to avoid piecemeal review and conserve judicial resources). *But see In re G.S.F. Corp.*, 938 F.2d at 1473 (interpreting finality flexibly in bankruptcy context).

[2] *See* Bullard v. Hyde Park Sav. Bank (*In re* Bullard) (*Bullard III*), 752 F.3d 483, 486 (1st Cir. 2014) ("The finality of an order denying confirmation of a reorganization plan is the subject of a circuit split."), *cert. granted* 135 S. Ct. 781 (2014); Gordon v. Bank of Am., N.A. (*In re* Gordon), 743 F.3d 720, 722 (10th Cir. 2014) (holding denial of confirmation of proposed plan not final order when debtor may amend plan); Lindsey v. Pinnacle Nat'l Bank (*In re* Lindsey), 726 F.3d 857, 861 (6th Cir. 2013) (same); Zahn v. Fink (*In re* Zahn), 526 F.3d 1140, 1142-43 (8th Cir. 2008) (same); *In re* Lievsay, 118 F.3d at 662-63 (same); *In re* Lopez, 116 F.3d 1191, 1194 (7th Cir. 1997) (same); Maiorino v. Branford Sav. Bank, 691 F.2d 89, 89-90 (2d Cir. 1982) (same). *But see* Mort Ranta v. Gorman, 721 F.3d 241, 246 (4th Cir. 2013) (holding denial of confirmation of proposed plan final order even though debtor may amend plan); *In re* Armstrong World Indus., Inc., 432 F.3d 507, 511 (3d Cir. 2005) (same); Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 283-84 (5th Cir. 2000) (same).

[3] 752 F.3d 483 (1st Cir. 2014), *cert. granted* 135 S. Ct. 781 (2014).

reorganization plan was final if the debtor could propose a modified plan.[4] The First Circuit held that if an intermediate appellate court affirms a bankruptcy court's refusal to confirm a reorganization plan—and the debtor can propose an amended plan—then, the order is not final and therefore not immediately appealable.[5]

In *Bullard III*, the case's facts were inconsequential because the court focused on a jurisdictional question.[6] Instead, the First Circuit meticulously examined *Bullard*'s procedural posture.[7] Although the First

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[4] *See Bullard III,* 752 F.3d at 486 (acknowledging court presented with rarely addressed issue of law). Previously, in *Watson*, the First Circuit suggested that an order denying confirmation of a reorganization plan may not be a final order, if the bankruptcy case was not dismissed, and the debtor remained free to propose a modified plan. *See* Watson v. Boyajian (*In re* Watson), 403 F.3d 1, 4 (1st Cir. 2005) (insinuating court's position). The *Watson* court did not decide whether the bankruptcy court's order was final because the parties agreed that the order was not final. *See id.* (displaying court's reluctance to address jurisdictional question).

[5] *See Bullard III*, 752 F.3d at 485 (reasoning denial of confirmation of proposed plan not final order).

[6] *See id.* ("We start and, as it turns out, end with the jurisdictional question."). The First Circuit has avoided questions of statutory jurisdiction to reach a case's merits, but this was not possible in *Bullard III* because the case presented an unsettled question of law. *See id.* at 489-90 (conceding option to avoid statutory jurisdiction unavailable); *see also* Alvardo v. Holder, 743 F.3d 271, 276 (1st Cir. 2014) (furthering *Restoration Pres. Masonry* standard to include precedent must dictate results on merits); Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd., 325 F.3d 54, 59 (1st Cir. 2003) (ruling statutory jurisdiction questions avoided when merits inquiry easily decided in challenging party's favor). In *Bullard*, the debtor's mortgage was underwater, meaning the debtor owed more on the property than it was worth. *In re* Bullard (*Bullard I*), 475 B.R. 304, 305-06 (Bankr. D. Mass. 2012). The debtor filed a Chapter 13 bankruptcy and attempted to reorganize his debentures. *Id.* (elaborating on creditor and debtor's relationship). The case's underlying issue centered on the debtor's proposed plan and whether it conformed to 11 U.S.C. § 1322(b)(5) and 11 U.S.C. § 1322(b)(2). *See id.*; *see also* 11 U.S.C. § 1322(b)(2) (2012) (allowing debtor to modify rights of secured claim holder); 11 U.S.C. § 1322 (b)(5) (codifying debtor's right to cure any arrearage and maintain payments).

[7] *See Bullard III*, 752 F.3d at 484-85 (examining case's procedural posture in detail). This case began in Massachusetts Bankruptcy Court and garnered judicial attention because the debtor proposed a "hybrid" plan. *See Bullard I*, 475 B.R. at 307-14 (focusing analysis on debtor's "hybrid" plan); *see also Bullard III*, 752 F.3d at 484-85 (awaiting opportunity to decide unsettled question involving "hybrid" plan's legality). In *Bullard I*, the debtor attempted to bifurcate an undersecured claim into secured and unsecured portions—also known as cure and maintain—and then, extend payments on the secured portion beyond the statutorily mandated time frame—known as modifying the claim. *Bullard I*, 475 B.R. at 306-07 (explaining debtor's and creditor's contentions). The creditor believed that the debtor could *either* cure and maintain *or* modify the claim. *See id.* at 306 (emphasis added). Ultimately, the Massachusetts Bankruptcy Court ruled in the creditor's favor and held that a plan which modifies *and* cures and maintains cannot be confirmed. *See id.* at 314 (emphasis added) (proclaiming debtor's misguided reliance on Bankruptcy Code). Importantly, the Massachusetts Bankruptcy Court ordered the debtor to file an amended plan within thirty days or face dismissal. *See id.* After the Massachusetts Bankruptcy Court's ruling, the debtor appealed to the United States Bankruptcy Appellate Panel of the First Circuit. *See* Bullard v. Hyde Park Sav. Bank (*In re* Bullard) (*Bullard II*), 494 B.R. 92, 94 (B.A.P. 1st Cir. 2013) (reviewing case on debtor's appeal); *see also Bullard III*, 752 F.3d at 484-85 ("[The debtor] [r]ecogniz[ed], though disagree[d] with [Bankruptcy Appellate Panel]

Circuit initially questioned the appeal's validity on jurisdictional grounds, the court ordered the parties to brief both the jurisdictional and merit questions.[8] The First Circuit dismissed the appellant's appeal and decided that if a bankruptcy court refuses to confirm a reorganization plan, and the debtor can submit an amended plan, then the order is not final and hence not appealable as of right.[9]

The Founding Fathers conceptualized a system of comprehensive bankruptcy regulation to strengthen American commerce and foster consistent insolvency proceedings.[10] Congress overhauled federal bankruptcy law with The Bankruptcy Reform Act of 1978 ("The 1978

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precedent holding that denial of confirmation of a reorganization plan is not a final order appealable as of right . . . ."). The debtor also filed a motion for leave to appeal the bankruptcy court's interlocutory order pursuant to 28 U.S.C. § 158(a)(3), (b). *Bullard III*, 752 F.3d at 484-85; *see* 28 U.S.C. §158(a)(3), (b) (granting Bankruptcy Appellate Panel's jurisdiction over appeals of bankruptcy court's interlocutory orders). The Bankruptcy Appellate Panel of the First Circuit granted the debtor's appeal. *Bullard II*, 494 B.R. at 101. After reviewing the case's facts, the Bankruptcy Appellate Panel (BAP) held that the debtor could not both cure and maintain *and* modify his debts. *See id.* (emphasis added) (ruling in creditor's favor while adopting different reasoning than lower court). After the BAP's decision, the debtor appealed to the First Circuit. *See Bullard III*, 752 F.3d at 484-85 (reviewing case on debtor's appeal). Subsequently, the First Circuit asked the debtor (appellant) to explain why the case should not be dismissed if the BAP's order affirming the denial of confirmation was not final. *See id.* (foreshadowing First Circuit's concern with debtor's appeal).

[8] *See Bullard III*, 752 F.3d at 485-86 (ordering parties to brief jurisdictional and merits questions).

[9] *See id.* at 489-90 (holding denial of confirmation of proposed plan not final order).

[10] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12-14 (1995) (developing history of American bankruptcy law); *see also* Kristin D. Kiehn, Note, *Jurisprudence and Jurisdiction: Toward a More Flexible Approach to Bankruptcy Interlocutory Appeals*, 67 FORDHAM L. REV. 3261, 3261 (1999) ("Bankruptcy law not only determines the rights of individual litigants . . . but it regulates the commercial sector, the operation of businesses, and the financial relationships between people."). Although bankruptcy law received little attention at the Constitutional Convention of 1787, the Bankruptcy Clause was codified into law before the convention's closing remarks. *See* Tabb, *supra*, at 13 (detailing Constitutional Convention's proceedings); *see also* U.S. CONST. art. I, § 8, cl. 4 (permitting Congress to pass uniform laws on bankruptcy). In *The Federalist*, James Madison opined about the importance of bankruptcy laws:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

THE FEDERALIST No. 42 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_42.html. Despite the Founding Fathers' interest, permanent federal bankruptcy law did not exist until 1898. *See* Tabb, *supra*, at 13-14 (tracking progression of bankruptcy law). The Bankruptcy Reform Act of 1898 was substantially amended in 1938 by the Chandler Act. *See* Tabb, *supra*, at 28-30 (explaining federal bankruptcy law's evolution).

Act").[11] The 1978 Act focused on establishing a unified jurisdictional system and avoided addressing flaws in bankruptcy appellate procedure.[12]

Whereas The 1978 Act founded a unified jurisdictional system, Congress drafted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (The 1984 Act) to restructure bankruptcy appellate procedure.[13] The 1984 Act still primarily governs bankruptcy appeals.[14] Despite the

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[11] *See* Tabb, *supra* note 10, at 32-33 (illustrating importance of The 1978 Act to federal bankruptcy law's development). The 1978 Act was gradually phased in during a transition period. *See id.* at 34 (elaborating on The 1978 Act's implementation); *see also* H.R. REP. No. 95-595, at 1 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5963 (codifying Congressional amendments into bankruptcy law).

[12] *See* Tabb, *supra* note 10, at 34-35 (listing problems Congress hoped to fix with The 1978 Act); *see also* S. REP. No. 95-989, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787 (revealing legislature's desire to create comprehensive federal bankruptcy law); James M. Grippando, *Circuit Court Review of Orders on Stays Pending Bankruptcy Appeals to U.S. District Courts or Appellate Panels*, 62 AM. BANKR. L.J. 353, 354-56 (1988) (reviewing problems with development of bankruptcy appellate procedure). The 1978 Act altered the status of bankruptcy judges, improved the administration of bankruptcy cases, and merged sections of the Bankruptcy Code. *See* Tabb, *supra* note 10, at 33-37 (specifying The 1978 Act's achievements). In *Northern Pipeline*, the Supreme Court determined that The 1978 Act was unconstitutional. *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (holding The 1978 Act unconstitutional for exceeding Article III's scope); *see also* Kiehn, *supra* note 10, at 3261 (highlighting *Northern Pipeline*'s importance). Therefore, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("The 1984 Act") to align the Bankruptcy Code with the *Northern Pipeline* decision. *See* Tabb, *supra* note 10, at 38-39 (illustrating uncertainty caused by *Northern Pipeline* decision); *see also* Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 and 28 U.S.C.) (restructuring bankruptcy court system). Next, Congress passed The Bankruptcy Reform Act of 1994 ("The 1994 Act"), which created a National Bankruptcy Review Commission that assessed and reformed the Bankruptcy Code. *See* Tabb, *supra* note 10, at 42 (explaining importance of The 1994 Act); *see also* Act of October 22, 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.) (amending Bankruptcy Code and creating second National Bankruptcy Review Commission).

[13] *See* Grippando, *supra* note 12, at 358-63 (reviewing problems with development of bankruptcy appellate procedure); *see also* Maiorino v. Branford Sav. Bank, 691 F.2d 89, 92 (2d Cir. 1982) (dismissing The 1978 Act as "hastily drawn" and "jumble[d]"); Frank W. Volk, *Closing a Deep Divide: Appealing a Denial of Plan Confirmation*, 32-NOV AM. BANKR. INST. J. 34, 34 (2013) (describing finality's elusiveness in bankruptcy context).

[14] *See* Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty Predictable Precedent*, 159 U. PA. L. REV. 543, 550 (2011) (elaborating on bankruptcy appellate procedure); *see also* Carlos J. Cuevas, *Judicial Code Section 158: The Final Order Doctrine*, 18 SW. U. L. REV. 1, 25-49 (1988) (displaying bankruptcy appellate procedure's intricacies). Although district courts retain original jurisdiction over bankruptcy proceedings, most jurisdictions automatically transfer bankruptcy matters to bankruptcy courts. *See* Freeman, *supra*, at 550 (confirming bankruptcy court's jurisdiction over bankruptcy matters); Katelyn Knight, Comment, *Equitable Mootness in Bankruptcy Appeals*, 49 SANTA CLARA L. REV. 253, 253-55 (2009) (illustrating bankruptcy court's jurisdictional right). When a proceeding reaches bankruptcy court, a bankruptcy judge can rule on issues central to the bankruptcy proceeding. *See* Freeman, *supra*, at 550-51 (distinguishing between "core" and ancillary issues); *see also* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL §14.1 (5th ed. 2007) (stating

Bankruptcy Code's reformulations, judges and practitioners still trudge through inconsistencies when handling a bankruptcy appeal.[15]

An appellate court encounters an unsettled issue of law when determining an order's finality in a bankruptcy proceeding.[16] Appellate courts disagree about the degree of finality needed for an appeal to proceed on the merits, and their perplexing decisions highlight the Bankruptcy Code's inadequacies.[17] The judiciary created the flexible finality doctrine to provide clarity and consistency to bankruptcy appeals.[18] Nonetheless,

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bankruptcy judge's right to draft recommendations to district court for "noncore" issues). Normally, a district court hears a bankruptcy case's initial appeal. *See* Freeman, *supra*, at 550-51 (outlining trajectory of bankruptcy case's appeal); *see also* 28 U.S.C. § 158(a)(1) (2012) (granting district court's right to hear appeals from bankruptcy court's final judgments, orders, and decrees). In certain jurisdictions, a BAP can hear the appeal instead of the district court. *See* Freeman, *supra*, at 550-51 (revealing some jurisdictions established BAPs specifically to hear bankruptcy appeals). Additionally, "with leave of the court," a district court can adjudicate interlocutory orders and decrees. *See* § 158(a)(3) (permitting district courts right to hear interlocutory appeals). After the district court's or BAP's decision, a federal court of appeals has jurisdiction. *See* Freeman, *supra*, at 551 (tracking travel of bankruptcy appeals).

[15] *See* Adam D. Cole, Comment, *"It Ain't Over Till It's Over:" Interpreting 28 U.S.C. S 158(D) Finality for Bankruptcy Appeals to Circuit Courts*, 53 ALB. L. REV. 889, 889-90 (1989) (opining The 1984 Act failed to address fundamental issues with bankruptcy appellate procedure); Freeman, *supra* note 14, at 546 (stating bankruptcy appellate procedure attempts to balance practical considerations and constitutional values); *see also* John P. Hennigan, Jr., *Toward Regularizing Appealability in Bankruptcy*, 12 BANKR. DEV. J. 583, 584-85 (1996) (acknowledging fundamental problem with bankruptcy appeals stems from determining order's finality); Sarah E. Vickers, *Interlocutory Appeals in Bankruptcy Cases: The Conflict Between Judicial Code Sections 158 and 1292*, 8 BANKR. DEV. J. 519, 519-20 (1991) (arguing problems within bankruptcy appellate procedure evolves from structure itself); Joseph Mitzel, Note, *When is an Order Final?: A Result-Orientated Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts*, 74 MINN. L. REV. 1337, 1337-39 (1990) (examining fundamental problems with bankruptcy appellate procedure).

[16] *See* Hennigan, *supra* note 15, at 583-84 (portraying vastly different applications of finality in federal and bankruptcy cases); Mitzel, *supra* note 15, at 1349-54 (recounting two philosophies of finality adopted by federal courts); *see also* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1354 (7th Cir. 1990) ("Appellate jurisdiction in bankruptcy cases is a murky subject."); COLLIER ON BANKRUPTCY ¶ 5.08 (Alan N. Resnick & Henry J. Sommer eds.,16th ed. 2014) ("In the specific context of bankruptcy cases, the courts have had a difficult time in determining what is a final order and what is an interlocutory order.").

[17] *See* 28 U.S.C. § 158 (illustrating statutory foundation for bankruptcy appeals). Generally, federal courts require finality before an appeal may be heard. *See* Hennigan, *supra* note 15, at 583-84 (explaining only final order appealable). On a direct appeal, a case can be heard without any preceding determination of finality, but the Bankruptcy Code's management of direct appeals has been criticized. *See* Freeman, *supra* note 14, at 546-47 (disagreeing with how Bankruptcy Code handles direct appeals). Many courts have voiced their displeasure with the inefficient structure governing bankruptcy appeals. *See Maiorino*, 691 F.2d at 92 (criticizing legislatures attempt to create efficient bankruptcy appellate procedure); *see also Kham & Nate's Shoes No. 2, Inc.*, 908 F.2d at 1354 (describing bankruptcy appellate landscape as "murky"); *In re* Gould & Eberhardt Gear Mach. Corp., 852 F.2d 26, 28 (1st Cir. 1988) (opining "final is a pregnant word" in bankruptcy context) (internal quotation marks omitted).

[18] *See Bullard III*, 752 F.3d 483, 485-86 (1st Cir. 2014) (adopting flexible interpretation of

courts reach inconsistent rulings because they struggle to determine whether the denial of an organization plan is a final order if the debtor can still amend the plan.[19]

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finality), *cert. granted* 135 S. Ct. 781 (2014); Bourne v. Northwood Props., LLC (*In re* Northwood Props., LLC), 509 F.3d 15, 21 (1st Cir. 2007) (acknowledging bankruptcy cases' unique nature demands flexible application of finality); Watson v. Boyajian (*In re* Watson), 403 F.3d 1, 4 (1st Cir. 2005) (ruling appellate court proper venue if underlying bankruptcy court order final); Perry v. First Citizens Fed. Credit Union (*In re* Perry), 391 F.3d 282, 285 (1st Cir. 2004) (determining disposal of all issues within discrete dispute rendered case final in bankruptcy context); *In re* G.S.F. Corp., 938 F.2d 1467, 1473 (1st Cir. 1991) ("[B]ecause bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other, 'finality' is given a flexible interpretation in bankruptcy."), *abrogated on other grounds by* Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (basing finality on practical judgment); *see also In re* Armstrong World Indus., Inc., 432 F.3d 507, 511 (3d Cir. 2005) (codifying four factor test to determine finality). *But see In re* St. Charles Pres. Investors, Ltd., 916 F.2d 727, 729-30 (D.C. Cir. 1990) (adopting practical application of finality to avoid piecemeal litigation); Simons v. Fed. Deposit Ins. Corp. (*In re* Simons), 908 F.2d 643, 644-45 (10th Cir. 1990) (interpreting finality for bankruptcy in traditional not flexible terms). Courts further dissected the "finality" requirement and distinguished ministerial and significant further proceedings. *See In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (differentiating between ministerial and further proceedings). Ministerial proceedings involve minimal discretion, whereas, significant further proceedings require courts to make discretionary rulings. *See* Gordon v. Bank of Am., N.A. (*In re* Gordon), 743 F.3d 720, 723 (10th Cir. 2014) (ruling order not final when significant further proceedings remained); *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (reasoning ministerial proceedings leave little discretion for court).

[19] *See* Volk, *supra* note 13, at 34 (noting judiciary's struggle with determining finality of denial of reorganization plan). Although most circuit courts have adopted the flexible finality standard, courts have disagreed about how to apply this standard to the denial of a reorganization plan. *See Bullard III*, 752 F.3d at 486 ("The finality of an order denying confirmation of a reorganization plan is the subject of a circuit split."); *see also In re* Gordon, 743 F.3d at 722 (finding denial of confirmation of proposed plan not final order while debtor may amend plan); Lindsey v. Pinnacle Nat'l Bank (*In re* Lindsey), 726 F.3d 857, 861 (6th Cir. 2013) (same); Zahn v. Fink (*In re* Zahn), 526 F.3d 1140, 1142-43 (8th Cir. 2008) (same); Lievsay v. W. Fin. Sav. Bank (*In re* Lievsay), 118 F.3d 661, 662 (9th Cir. 1997) (same); *In re* Lopez, 116 F.3d 1191, 1194 (7th Cir. 1997) (same); Maiorino v. Branford Sav. Bank, 691 F.2d 89, 89-90 (2d Cir. 1982) (same). *But see* Mort Ranta v. Gorman, 721 F.3d 241, 246 (4th Cir. 2013) (finding denial of conformation of proposed plan not final order while debtor may amend plan); *In re Armstrong World Indus., Inc.*, 432 F.3d at 511 (same); Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 283-84 (5th Cir. 2000) (same). The minority circuits stretch the flexible finality standard and validate their rulings with discussions of practicality and judicial efficiency. *See Mort Ranta*, 721 F.3d at 248 (agreeing with pragmatic approach adopted by minority circuits); *In re Armstrong World Indus., Inc.*, 432 F.3d at 511 (concluding denial of confirmation, final order due to practical considerations); *In re* Bartee, 212 F.3d at 283-84 (declaring practical considerations compel adoption of minority circuit's approach). The majority circuits rigidly interpret the flexible finality standard and focus their decisions on: (1) the difference between ministerial and significant further proceedings; and (2) whether all issues pertaining to a discrete dispute were finally dispensed. *See Bullard III*, 752 F.3d at 486-87 (focusing analysis on disposal of discrete dispute and bankruptcy court's responsibilities on remand); *In re* Gordon, 743 F.3d at 723 (fixating decision on difference between ministerial and significant further proceedings); *In re* Lindsey, 726 F.3d at 859-61 (contrasting ministerial and significant further proceedings to reach decision); *In re* Zahn, 526 F.3d at 1143 (centering analysis on whether lower court's

In *Bullard III*, the First Circuit adopted the majority approach and determined that the denial of confirmation of a proposed plan is not a final order if the debtor can propose an amended plan.[20] The *Bullard III* decision was founded on a suggestion made in *Watson* and precedent established by *Perry* and *Gould & Eberhardt*.[21] Despite the debtor-appellant's contentions, the First Circuit sided with the creditor-appellee's position, and joined the majority circuits.[22] The *Bullard III* court reasoned

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decision finally resolved discrete segment of proceeding); *In re Lopez*, 116 F.3d at 1192 (relying on distinction between ministerial remand and remand with significant further proceedings). *But see In re* Lievsay, 118 F.3d at 662-63 (ruling denial of confirmation interlocutory therefore jurisdiction not conferred to court by § 158(d)); *Maiorino*, 691 F.2d at 89-90 (concluding denial of confirmation interlocutory only and not appealable). The flexible finality standard promotes a circuit split because this standard attempts to fix nuanced issues with a broad-brush stroke. *See* Volk, *supra* note 13, at 35-36 (recognizing problems on both sides of circuit split).

[20] *See Bullard III*, 752 F.3d at 486-489 (adopting majority's position); *see also supra* note 19 and accompanying text (explaining divergence between majority and minority circuits). The *Bullard III* court did not thoroughly analyze any of its sister circuits' decisions, instead, it acknowledged the circuit split's existence and utilized favorable cases to support its position. *See Bullard III*, 752 F.3d at 486 (paying credence to sister circuits' decisions).

[21] *See Bullard III*, 752 F.3d at 485-89 (basing decision on established and implicit precedent); *see also In re* Watson, 403 F.3d at 4 (implying court believed denial of proposed plan not final order if debtor could amend); *In re* Perry, 391 F.3d at 285 (establishing discrete dispute framework for First Circuit); *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (drawing distinction between ministerial and significant proceedings). The *Bullard III* court declined to dismiss the *Watson* court's suggestion. *See Bullard III*, 752 F.3d at 485-86 (refusing to disregard *Watson* court's subliminal adoption). In *Watson*, the court did not expressly decide the issue because both parties agreed that the order denying confirmation was not final. *See In re* Watson, 403 F.3d at 4-5 (explaining why court avoided answering unsettled jurisdictional question). Next, the *Bullard III* court established the framework for determining finality in a bankruptcy proceeding with *Perry* and *Gould & Eberhardt*. *See Bullard III*, 752 F.3d at 486-87 (creating framework for analyzing finality in First Circuit). The *Bullard III* court read *Perry* to establish that a bankruptcy court's order is final if it disposes of all issues within a discrete dispute. *See id.* at 485-87 (reasoning flexibility does not require resolution of all issues in case); *see also In re* Perry, 391 F.3d at 285 (forming First Circuit's understanding of finality in bankruptcy context). Then, the *Bullard III* court used *Gould & Eberhardt* to emphasize the difference between ministerial and significant further proceedings. *See Bullard III*, 752 F.3d at 486-87 (finding order final where remanded for ministerial proceedings but not for significant further proceedings); *see also In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 29 (establishing First Circuit's framework for analyzing finality in bankruptcy context).

[22] *See Bullard III*, 752 F.3d 487-89 (acknowledging positions of debtor and creditor, yet refusing to overturn precedent). The appellant argued that a denial of a confirmation order is presumptively final, unless the appellee proves otherwise. *See id.* at 486 (describing appellant's proposed standard as rigid). The appellee suggested the court hold that an order denying confirmation is not final if the debtor can propose an amended plan. *See id.* (urging court to join majority of circuits). The *Bullard III* court stated that the appellant's position promoted judicial inefficiency. *See id.* at 488-89 (concluding appellant's request would inevitably clog appellate dockets with issues better decided elsewhere); *see also Maiorino*, 691 F.2d at 91 ("Otherwise, at every stage of the bankruptcy proceedings the parties will run to the court of appeals for higher advice."). The appellant declared that if he could not appeal the denial of his plan, he would have two options: (1) propose an unwanted plan, object to it, and appeal its confirmation; or (2) allow

that because the debtor was allowed to propose an amended plan, the bankruptcy court could still exercise significant discretion over the proceeding and no discrete dispute within the proceeding had been resolved.[23] Hence, the bankruptcy court's decision was not final or appealable.[24]

The circuit split exists because courts inconsistently apply the flexible finality standard.[25] The majority circuits focus their rulings on a

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his petition to be dismissed and appeal the dismissal. *See Bullard III*, 752 F.3d at 487 (enumerating appellant's options). However, the court asserted that the appellant had other options available which he did not peruse: (1) he could have sought certification and authorization to appeal the bankruptcy court's order to the First Circuit directly under 28 U.S.C. § 158(d); or (2) he could have taken his appeal to the district court, instead of the BAP, and attempted to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b). *See id.* (describing all options available to debtor in bankruptcy as laid out by Congress); *see also* 28 U.S.C. § 158(d) (2012); 28 U.S.C. § 1292(b) (2012). Furthermore, the appellant alleged that because his appeal presented a question of unsettled law, proposing an unwanted plan was superfluous. *See Bullard III*, 752 F.3d at 487-88. Notwithstanding, the court determined that the appellant's situation fit within the rigid parameters of 28 U.S.C. § 158(d)(2)(A)(i) not 28 U.S.C. § 158(d)(1) as the appellant contended. *See id.* at 488 (directing appellant to appropriate statute); *see also* § 158(d)(2)(A) (allowing lower court to certify direct appeal when challenged order implicates pure question of law); *In re* Lindsey, 726 F.3d at 860 ("Why certify such issues for appeal if 'final' in § 158(d)(1) covers them anyway? And why add § 158(d)(2) to the Code in 2005 if § 158(d)(1) already did the work?"); *Mort Ranta*, 721 F.3d at 258 (Faber, J., dissenting) ("[T]his Court . . . should not bend the judicially-crafted 'flexible finality' concept such that it renders the multiple avenues for interlocutory appeals unnecessary.").

[23] *See Bullard III*, 752 F.3d at 487-89 (founding decision on distinction between ministerial and significant proceedings, while acknowledging effects on judicial efficiency). The *Bullard III* court specified that its analysis may differ when the bankruptcy court confirmed a plan and the BAP or district court reversed the ruling. *See id.* at 489 n.9 (limiting applicability of holding to *Bullard*'s facts). The *Bullard III* court distinguished the two fact sets, reasoning that when the plan is denied and allowed to be amended, the court with jurisdiction over the remanded case has significant discretion, whereas, when the bankruptcy court confirms the plan and the case is later remanded, only ministerial tasks are left. *See id.* at 487-88 (adopting similar rational, but applying different analytical framework).

[24] *See id.* at 490 (ruling in appellee's favor).

[25] *See id.* at 485-88 (applying rigid interpretation of flexible finality in bankruptcy context); Gordon v. Bank of Am., N.A. (*In re* Gordon), 743 F.3d 720, 723 (10th Cir. 2014) (interpreting flexible finality rigidly); *In re Lindsey*, 726 F.3d at 858-61 (structuring decision on strict reading of flexible finality); Zahn v. Fink (*In re* Zahn), 526 F.3d 1140, 1142-43 (8th Cir. 2008) (implementing rigid interpretation of flexible finality); *In re* Lopez, 116 F.3d 1191, 1191-94 (7th Cir. 1997) (basing decision on strict translation of flexible finality). *But see Mort Ranta*, 721 F.3d at 245-50 (endorsing pragmatic reading of flexible finality); *In re* Armstrong World Indus., Inc., 432 F.3d 507, 511 (3d Cir. 2005) (adopting practical approach to assess finality); Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 281-84 (5th Cir. 2000) (relaxing flexible finality standard). Courts have grounded their decisions on other factors. *See* Lievsay v. W. Fin. Sav. Bank (*In re* Lievsay), 118 F.3d 661, 662 (9th Cir. 1997) (analyzing interplay between § 158 and interlocutory orders); *Maiorino*, 691 F.2d at 89-90 (fixating on public policy discussion). Scholars have opined on the circuit split because of the circuit courts' inconsistent rulings. *See* Cuevas, *supra* note 14, at 31-35 (siding with majority because contrary decision would contravene language of § 158(d)); Cole, *supra* note 15, at 891-92 (supporting majority's

plain reading of § 158's language.[26] The majority courts, with near unanimity, plainly read § 158 and rigidly apply the flexible finality standard, thereby forcing the courts to rule that an order denying a plan's reorganization is not final if the debtor can amend the plan.[27] Dissenters argue that the majority court's rulings are incomplete without considering the Bankruptcy Code's comprehensive statutory framework and the judiciary's limited resources.[28]

Minority courts apply a lenient flexible finality standard and supplement their decisions with discussions of public policy, judicial efficiency, and statutory construction.[29] The majority and minority circuits disagree about the most basic decision needed in appellate practice:

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approach because of its consistency with traditional determinations of finality); *see also* Volk, *supra* note 13, at 34-36 (pinpointing weaknesses in majority and minority decisions). *But see* Mitzel, *supra* note 15, at 1337-39 (opining bankruptcy appellate inconsistencies exist because Bankruptcy Code's language).

[26] *See Bullard III*, 752 F.3d at 487-88 (directing discussion to statute's language); *In re* Gordon, 743 F.3d at 723 (spotlighting finality's meaning); *In re* Zahn, 526 F.3d at 1142-43 (honing opinion on interpretation of statute's language); *see also* Volk, *supra* note 13, at 35 (criticizing majority's strict textual approach). A strict textual analysis disregards why Congress restructured bankruptcy appellate procedure. *See* H.R. CONF. REP. No. 98-882 (1984), *reprinted in* 1984 U.S.C.C.A.N. 576, 601-04 (detailing Congress' attempt to provide consistency to bankruptcy appellate proceedings); Volk, *supra* note 13, at 35 (discouraging courts from strict textual approach).

[27] *See Bullard III*, 752 F.3d at 486-89 (centering discussion on hardline reading of flexible finality and reaching majority position); *In re* Gordon, 743 F.3d at 723 (focusing on rigid textual analysis and reaching majority position); *In re* Zahn, 526 F.3d at 1142-43 (aiming opinion's analysis on strict textual interpretation and reaching majority position).

[28] *See* Hennigan, *supra* note 15, at 585 (acknowledging problem with bankruptcy procedure stems from finality's construction); Vickers, *supra* note 15, at 519-20 (arguing statutory framework creates problems within bankruptcy appellate practice); Volk, *supra* note 13, at 35 (illuminating important factors disregarded by strict textual analysis); Mitzel, *supra* note 15, at 1337-39 (expressing concern about bankruptcy appellate procedure). The Bankruptcy Code's inconsistencies justify courts expanding their analysis beyond the statute's language. *Cf. In re* Lindsey, 726 F.3d at 860 (assessing multiple factors prior to reaching conclusion); *In re Armstrong World Indus., Inc.*, 432 F.3d at 511 (expanding inquiry to incorporate many factors); *In re Lopez*, 116 F.3d at 1191-94 (increasing number of factors considered in analysis).

[29] *See Mort Ranta*, 721 F.3d at 245-50 (applying lenient interpretation of flexible finality and focusing on public policy and judicial efficiency); *In re* Bartee, 212 F.3d at 282-84 (concentrating on public policy concerns and loosely interpreting flexible finality). Minority and majority circuits utilize the same statutory framework and reach markedly different conclusions. *See Bullard III*, 752 F.3d at 487-88 (devoting portion of decision to interplay between § 158's subsections, yet siding with majority); *Mort Ranta*, 721 F.3d at 248 (interpreting interplay between Bankruptcy Code's sections and adopting minority approach); *In re* Bartee, 212 F.3d at 283 (analyzing how statutory framework awards appellants options, yet siding with minority); *In re* Lievsay, 118 F.3d at 662-63 (inquiring about interaction between § 158 and interlocutory orders, then adopting majority position). Many scholars and judges disagree with the minority approach. *See Mort Ranta*, 721 F.3d at 255-63 (Faber, J., dissenting) (dissecting and disagreeing with court's entire opinion); *In re Lopez*, 116 F.3d at 1192-94 (dismantling minority court's position); Volk, *supra* note 12, at 35 (articulating belief minority approach flawed).

determining whether the previous proceeding's order was final.[30] If bankruptcy appellate judges cannot consistently answer such a basic question, then a fatal problem exists within the Bankruptcy Code.[31]

Despite the Founding Fathers's desire to establish consistent bankruptcy proceedings and the Bankruptcy Code's many reformulations, litigants, attorneys, and judges still must question the Bankruptcy Code's most rudimentary declarations.[32] Bankruptcy appellate procedure provides litigators with less predictability than its civil and criminal counterparts.[33] Congress could reformulate bankruptcy appellate procedure without

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[30] *See supra* note 19 and accompanying text (illustrating discrepancies between circuits in handling questions of finality); *see also* Hennigan, *supra* note 15, at 583-84 (emphasizing determination of finality initial step in majority of bankruptcy proceedings). Courts focus on determining the order's finality, yet considerations of public policy and legislative intent should not be disregarded, because they are needed to understand the statute's purpose and intended application. *See* Hennigan, *supra* note 15, at 583-85 (clarifying importance of determining finality); *see also Bullard III*, 752 F.3d at 487-89 (complementing finality analysis with brief discussion of public policy); *Mort Ranta*, 721 F.3d at 245-50 (supplementing discussion of finality with considerations of public policy and judicial efficiency). When analyzing the finality of a denial of a confirmation plan, courts disregard pragmatic considerations and play legal gymnastics, allowing minority and majority circuits to divaricate on issues of public policy and judicial efficiency. *See Bullard III*, 752 F.3d at 487-89 (using public policy arguments to substantiate majority's position); *In re* Lindsey, 726 F.3d at 861 (construing public policy as consistent with majority position); *In re Lopez*, 116 F.3d at 1194 (employing public policy to corroborate majority's position); *Maiorino*, 691 F.2d at 91 (interpreting public policy considerations as consistent with majority position). *But see Mort Ranta*, 721 F.3d at 247-49 (focusing court's discussion on considerations of public policy to justify minority's position); *In re Armstrong World Indus. Inc.*, 432 F.3d at 511 (formulating test with public policy considerations and taking minority's position); *In re* Bartee, 212 F.3d at 282-83 (arguing public policy considerations compatible with minority's analysis). The judiciary's focus on purely legal issues limits the creation of lasting precedent and leaves lawyers, debtors, creditors, and lower courts with their fingers crossed. *Cf.* Volk, *supra* note 13, at 34-36 (denouncing appellate court's handling of jurisdictional question surrounding denial of confirmation order).

[31] *See* Hennigan, *supra* note 15, at 584-86 (recognizing confusion within bankruptcy appellate practice); Vickers, *supra* note 15, at 519-22 (arguing inconsistencies exist within Bankruptcy Code's framework); Mitzel, *supra* note 15, at 1337-39 (conveying belief bankruptcy appellate procedure mired in confusion).

[32] *See* Tabb, *supra* note 10, at 32-36 (illustrating Congress' attempted reformulations of Bankruptcy Code); Kiehn, *supra* note 10, at 3261 (detailing Constitutional Convention's proceedings and recounting Founding Fathers's formulation); *supra* notes 18-19 and accompanying text (highlighting judiciary's struggle determining finality of denial of confirmation plan despite attempts to establish consistency).

[33] *See* Hennigan, *supra* note 15, at 583-84 (drawing distinctions between criminal, civil, and bankruptcy appellate practice); Mitzel, *supra* note 15, at 1345-50 (presenting differences between criminal, civil, and bankruptcy appellate practice). Much to the judiciary's dismay, it has been forced to make decisions better left to Congress. *Cf. Maiorino*, 691 F.2d at 92 (criticizing bankruptcy appellate procedure); *see also* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1354 (7th Cir. 1990) (conveying displeasure with bankruptcy appellate procedure); *In re* Gould & Eberhardt Gear Mach. Corp., 852 F.2d 26, 28-29 (1st Cir. 1988) (opining bankruptcy appellate procedure riddled with inconsistencies).

backlash.[34] A thorough and final reformulation of bankruptcy appellate procedure would provide debtors and creditors with consistency, an ideal conceptualized at the Constitutional Convention.[35]

The Book of Deuteronomy stated "[a]t the end of every seven years you must cancel debts . . . . Every creditor shall cancel any loan they have made to a fellow Israelite. They shall not require payment from anyone among their own people, because the LORD's time for canceling debts has been proclaimed."[36] Approximately twenty-seven centuries after Mosaic Law established this principle, the United States' Bankruptcy Code is still underdeveloped. Congress has half-heartedly attempted to restructure the Bankruptcy Code, and done even less to amend bankruptcy appellate procedure. Scholars, lawyers, litigants, and judges have complained for over thirty years about the inconsistencies within bankruptcy appellate practice, without efficient Congressional action. To provide the consistent bankruptcy proceedings our Founding Fathers dreamt of, Congress must amend the Bankruptcy Code and fix the flawed system governing bankruptcy appeals.

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[34] *See* Tabb, *supra* note 10, at 32-43 (detailing reformulation adopted between 1978 and 1994); Kiehn, *supra* note 10, at 3261-62 (outlining bankruptcy appellate procedure's modernization); *see also* Volk, *supra* note 13, at 37 (calling for Congressional reform of bankruptcy appellate procedure). The legal community would appreciate an efficient overhaul of bankruptcy appellate procedure. *See Maiorino*, 691 F.2d at 92 (opining about bankruptcy appellate procedure's weaknesses); *see also Kham & Nate's Shoes No. 2, Inc.*, 908 F.2d at 1354 (voicing concerns with bankruptcy appellate procedure); *In re Gould & Eberhardt Gear Mach. Corp.*, 852 F.2d at 28-29 (revealing unease with bankruptcy appellate procedure); Hennigan, *supra* note 15, at 597-603 (criticizing bankruptcy appellate procedure's formulation); Vickers, *supra* note 15, at 519-20 (denouncing bankruptcy appellate procedure); Volk, *supra* note 13, at 37 (opposing current bankruptcy appellate procedure); Mitzel, *supra* note 15, at 1337-39 (condemning bankruptcy appellate procedure).

[35] *See* Tabb, *supra* note 10, at 32-43 (explaining Congress's history of unsuccessfully reforming bankruptcy law); Kiehn, *supra* note 10, at 3261 (conveying Founding Fathers's desire to establish thorough and consistent bankruptcy law); *see also* Volk, *supra* note 13, at 37 (envisioning comprehensive bankruptcy reform initiated by Congress).

[36] *Deuteronomy* 15:1.