By Christopher R. Thompson

The Finality Countdown

Supreme Court Unlikely to Adopt a "Blanket Rule" for Orders Denying Stay Relief in Jackson Masonry

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This fall, bankruptcy practitioners will have the rare excitement of the U.S. Supreme Court hearing oral argument on a bankruptcy issue.[1] In *Ritzen Group Inc. v. Jackson Masonry LLC*, the Court will determine whether a particular bankruptcy court order that denied a stay relief motion is a final, immediately appealable order under 28 U.S.C. § 158(a)(1). However, more importantly, the Court is also likely to resolve a circuit split over whether *all* orders denying stay relief are final, immediately appealable orders.

This article sets forth the logic for the so-called "blanket rule" of finality, as espoused by multiple circuit courts of appeals, including most recently by the Sixth Circuit in the decision on appeal.[2] Next, the case will be made for why the Supreme Court is unlikely to adopt the blanket rule, especially in light of its recent opinion in *Bullard v. Blue Hills Bank*.[3]

The Rationales for the Blanket Rule of Finality

The Injunction Analogy

The Eighth and Tenth Circuits have held that orders denying stay relief motions are always final by analogizing the continuation of the automatic stay to a permanent injunction.[4] Both circuits relied heavily on legislative history in which the filing of a petition was analogized to a temporary restraining order and the order denying stay relief was analogized to a permanent injunction order.[5] If a permanent-injunction order is immediately appealable, then an order denying stay relief should be as well, since the practical effect is the same (or so goes the argument).

The Mootness Argument

Some courts have justified the "blanket rule" out of concern that if a stay relief order is not immediately appealable, the stay relief issue could be moot by the time it becomes appealable (*i.e.*, at the end of the entire bankruptcy case).[6] In other words, these courts worry that if a stay relief order is not immediately appealable, then creditors may never have any recourse for appellate review. The Tenth Circuit also found support for immediate appellate review of stay relief issues in § 362(e), which the court interpreted as congressional intent to expedite adjudication of claims relating to the automatic stay.[7]

The Judicial Economy Argument

The Second and Ninth Circuits have held that orders denying stay relief are categorically final because of the need for judicial economy.[8] The Second Circuit in particular reasoned that if determination of the finality of an order turns on the basis for the order itself, then the jurisdictional briefing might consume as much time and resources as the briefing on the merits of the appeal.[9] Thus, one of the primary policies animating the finality rule — judicial economy — will be undermined by unnecessary fighting over the jurisdictional query, which will require "an analysis that goes to the underlying merits concerning protection for the creditor."[10] It is better to have a blanket rule that *all* orders granting or denying stay relief are final, immediately appealable orders to avoid such an unnecessary expenditure of resources.

Sixth Circuit's Text-Based Finality Test in *Jackson Masonry*

In *Jackson Masonry*, the Sixth Circuit grounded its analysis in the text of 28 U.S.C. § 158(a) in an attempt to set forth a clear test for whether a bankruptcy court order is final. The Sixth Circuit reasoned that the plain text of § 158(a) sets forth a two-part test for determining the finality of a bankruptcy court order.[11] The court stated that a bankruptcy court's order may be immediately appealed if it is (1) entered in a "proceeding" and (2) "final" — meaning that the order terminated that proceeding.[12]

1 Oral argument in *Ritzen Group Inc. v. Jackson-Masonry LLC*, Case No. 18-938, is set for Nov. 13, 2019.

2 *Ritzen Grp. Inc. v. Jackson Masonry LLC (In re Jackson Masonry LLC)*, 906 F.3d 494 (6th Cir. 2018).

3 *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015).

4 *Eddleman v. Dep't of Labor*, 923 F.2d 782, 784-85 (10th Cir. 1991), *overruling recognized by Rajala v. Gardner*, 709 F.3d 1031, 1034 (10th Cir. 2013); *Aetna Life Ins. Co. v. Leimer (In re Leimer)*, 724 F.2d 744, 745 (8th Cir. 1984).

5 *Eddleman*, 923 F.2d 785 (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 344, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6300); *In re Leimer*, 724 F.2d at 746 (quoting same).

6 *See, e.g., Eddleman*, 923 F.2d 785.

7 *Id.*

8 *Sonnax Indus. Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus. Inc.)*, 907 F.2d 1280, 1284-85 (2d Cir. 1990); *Industries Inc. v. Am. Mariner Indus. Inc. (In re Am. Mariner Indus. Inc.)*, 734 F.2d 426 (9th Cir. 1984), *abrogated by United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates Ltd.*, 484 U.S. 365 (1988).

9 *Sonnax Indus.*, 907 F.2d at 1285.

10 *Id.*

11 *In re Jackson Masonry LLC*, 906 F.3d 494 (6th Cir. 2018).

12 *Id.* at 499.

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Elaborating on the meaning of "proceeding," the Sixth Circuit stated that "[g]enerally speaking, a proceeding is a process whereby a court follows some formal procedural steps to adjudicate a moving party's claim for relief."[13] In bankruptcy, a "proceeding" "is a discrete dispute within the overall bankruptcy case, resolved through a series of procedural steps," with adversary proceedings being the "archetypal example."[14] Based on this definition, the Sixth Circuit determined that a bankruptcy court's stay relief adjudication fits the description of a "proceeding" because it is initiated by a motion, the bankruptcy court must conduct a hearing on the motion in a set time frame, and the bankruptcy court determines whether the relevant legal standard has been met and either grants or denies relief from stay accordingly.[15]

Turning to whether an order denying stay relief is "final," the Sixth Circuit, quoting the Supreme Court in *Bullard*, stated that the finality of a bankruptcy court order is, first and foremost, determined by whether it "alters the *status quo* and fixes the rights and obligations of the parties."[16] The circuit court further stated that "courts should look to whether the order completely resolves all substantive litigation within the proceeding."[17] Applying these principles, the Sixth Circuit determined that a bankruptcy court order on stay relief is "final" because a "stay relief motion asks its own discrete question, and this question is finally answered by either a grant or a denial."[18]

The Case Against the Blanket Rule

The Exception that Undermines the Blanket Rule

Simply put, if one can identify even one example of a non-final stay relief denial order, there can be no blanket rule. This is not difficult. The First Circuit Court of Appeals held in *Pinpoint IT Servs. LLC v. Rivera* that an order denying stay relief was not final.[19] Specifically, the First Circuit held that a stay relief denial order was not final because the moving party had recourse in another nonbankruptcy forum to have its rights determined with respect to a nonbankruptcy litigation issue that formed the basis for its stay relief motion. The main factor weighing against finality was the fact that the bankruptcy court could revisit the stay relief question again based on subsequent events in nonbankruptcy courts.[20]

To underscore the possibility that an order denying stay relief could be non-final, let's imagine a more common example: a motion for stay relief under § 362(d)(2). Under this section, the creditor must show that the debtor has no equity in its collateral property, and upon meeting this burden, the debtor then has the burden to show that the property is "necessary for an effective reorganization." Whether property is "necessary for an effective reorganization" is judged on a sliding scale. The debtor may make a lesser showing that reorganization is probable during the exclusivity period, but must show more than mere "plausibility" of its chances to reorganize after exclusivity has expired.[21]

Given this sliding scale, an order denying a § 362(d)(2) motion that is issued during the exclusivity period lacks the *indicia* of finality set forth in *Bullard*, *Jackson Masonry* and elsewhere. The *status quo* is not altered, and the rights and obligations of the parties are not set in stone by the order. The passage of time alone could lead a bankruptcy court to revisit the issue and grant stay relief. Thus, the relevant "proceeding" might not be terminated at all. These facts all suggest that an early case § 362(d)(2) denial order might not be a final, appealable order.

It is important to recall one of the major teachings of *Bullard*. That case held that an order denying confirmation of a chapter 13 plan is not a final order because the relevant proceeding for finality purposes is the process of the debtor attempting to confirm *a* plan, but not any particular plan. In reaching this conclusion, the Supreme Court rejected the argument that the relevant "proceeding" for finality purposes is synonymous with a "contested matter."[22] The Court stated that such a general rule is "implausible" because there is an endless list of contested matters in bankruptcy cases, and the "concept of finality cannot stretch to cover, for example, an order resolving a disputed request for an extension of time."[23] Thus, one of the primary teachings of *Bullard* is that courts must, at times, define the "proceeding" more broadly than just the contested matter.

The threat that *Bullard* poses to the "blanket rule" should be clear. If the Supreme Court is persuaded that *at least sometimes* an order denying stay relief does not end the relevant proceeding — because it does not determine the substantive rights of the parties or alter the *status quo* — then the Supreme Court is likely to reject the "blanket rule." Here are two such possible scenarios.

The Injunction Analogy Inverts Reality

With due respect to proponents of the injunction analogy, a stay relief denial order is *not* analogous to a permanent injunction. The default *status quo* upon the filing of a bankruptcy case is the cessation of all creditor collection activity. This is so by operation of § 362 of the Bankruptcy Code. An order *lifting* the stay upsets that *status quo* and makes the debtor's property subject to creditor collection activity again, no doubt warranting immediate appellate review.[24] By contrast, an order denying stay relief preserves the *status quo* and, in most circumstances, does not preclude the moving creditor from renewing its request for stay relief upon a change in circumstances.

13 *Id.* at 500.
14 *Id.*
15 *Id.*
16 *Id.* at 501 (quoting *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015)).
17 *Id.* (citing *Bullard* at 1692-93).
18 *Id.* at 502.
19 *Pinpoint IT Servs. LLC v. Rivera (Atlas IT Export Corp.)*, 761 F.3d 177 (1st Cir. 2014).
20 *Id.* at 186.
21 *In re SW Boston Hotel Venture LLC*, 449 B.R. 156, 178 (Bankr. D. Mass. 2011) (citing *In re Gunnison Ctr. Apartments LP*, 320 B.R. 391, 402 (Bankr. D. Colo. 2005).
22 *Bullard*, 135 S. Ct. at 1694.
23 *Id.*
24 *See, e.g., Pinpoint IT Servs. LLC v. Rivera (In re Atlas IT Export Corp.)*, 761 F.3d 177, 185 (1st Cir. 2014) ("[T]he automatic stay's continued operation — thanks to the denial of stay relief — should not be treated for finality purposes like an injunction entered at a case's start after a judge has sifted [all] the familiar injunction factors.").

The injunction analogy also gets the burden of proof wrong. A creditor moving for relief from stay bears the initial burden of showing "cause" under § 362(d)(1) or showing that the debtor lacks equity in the property under § 362(d)(2). If the creditor fails to make this *prima facie* showing, the debtor continues to enjoy the benefit of the automatic stay without having to lift a finger in opposition.

On the other hand, in order to obtain a permanent injunction, the debtor would be required to establish, at a minimum, a likelihood of irreparable harm and the unavailability of an adequate legal remedy, among other things. The debtor's burden in responding to a stay relief motion therefore bears no resemblance to the showing required to obtain permanent injunctive relief.

Mootness Argument Previously Rejected

The Supreme Court has previously rejected the consequentialist logic of the mootness argument, and there is no reason to expect that to change. In *Bullard*, the Court made it clear that the court system is not designed to provide recourse by appeal for every order.[25] In other words, the Court is not concerned that creditors might not *always* have immediate appellate recourse.

The Supreme Court stated that the prospect of "burdensome rulings" being only "imperfectly reparable" is "made tolerable in part by our confidence that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time."[26] However, what concerns the Court is whether a particular order bears the telltale signs of a final order — that it alters the *status quo* and determines the parties' substantive rights, leaving no more judicial labor for the court with respect to the issue.

A Blanket Rule Might Undermine the Judicial Economy

Admittedly, there is a surface appeal to the "blanket rule" insofar as it would provide complete certainty to practitioners and courts on the question of finality, thereby eliminating any jurisdictional fights before reaching the merits of an appeal. However, the judicial economy policy most often cited in support of the rule of finality generally is that it discourages piecemeal litigation. A "blanket rule" would likely undermine this purpose by greenlighting and *encouraging* more mid-case appeals.

One circuit has provided another rebuttal to the judicial economy argument put forward by "blanket rule" proponents. In *Atlas IT Export*, the First Circuit noted that bankruptcy courts frequently deny stay relief based on "circumstances that are often rapidly changing and on records that are not fully developed."[27] Therefore, "[l]etting parties appeal as of right in such situations inevitably will result in appeals that are superseded by events in related proceedings."[28] In other words, the fact that an order might become moot as a result of subsequent events indicates that the order is not final and should not be immediately appealable.

Conclusion

While there are multiple reasons why courts and practitioners alike might prefer the straightforward certainty of a categorical, blanket rule of finality with respect to orders denying stay relief, there are good reasons to think that the Supreme Court will not adopt such a rule. Most importantly, if a majority of the Justices are persuaded that an order denying stay relief might, at least in some circumstances, not be a final order, it seems unlikely that the Court will adopt a rule that treats all such orders uniformly. abi

25 *Bullard*, 135 S. Ct. at 1695 ("[O]ur litigation system has long accepted that certain burdensome rulings will be 'only imperfectly reparable' by the appellate process.") (quoting *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 872, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)).
26 *Id.*
27 *Atlas IT Export*, 761 F.3d at 185.
28 *Id.*

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