Emory Bankruptcy Developments Journal

Volume 31
Issue 1 *A Tribute to David Epstein*

2014

Interpreting Finality in § 158(d): Whether an Order Denying Confirmation of a Debtor's Reorganization Plan Should Be Considered Final or Interlocutory for the Purpose of Appeal

Drew Vermette

INTERPRETING FINALITY IN § 158(D): WHETHER AN ORDER DENYING CONFIRMATION OF A DEBTOR'S REORGANIZATION PLAN SHOULD BE CONSIDERED FINAL OR INTERLOCUTORY FOR THE PURPOSE OF APPEAL

ABSTRACT

A debtor appealing a bankruptcy reorganization plan to the second level of appellate review is faced with uncertainty. The federal courts of appeals are split over whether an order denying confirmation of a reorganization plan is final or interlocutory for the purpose of appeal.

Two recent circuit court decisions represent this ideological split. First, on July 1, 2013, the Fourth Circuit, in Mort Ranta v. Gorman*, held, under a flexible interpretation of finality, that a court order denying confirmation of a debtor's proposed reorganization plan is final for the purpose of appeal. Second, on August 13, 2013, the Sixth Circuit, in* In re Lindsey*, held, under a rigid interpretation of finality, that a court order denying confirmation of a debtor's proposed reorganization plan is interlocutory and, therefore, not final for the purpose of appeal.*

Congress and the Supreme Court have given little insight as to how to interpret "finality" within 28 U.S.C. § 158(d)(2). This uncertainty has caused courts to perform fact-intensive inquiries that focus little on text and heavily on policy. This Comment analyzes these policy arguments and offers an explanation for why a flexible interpretation should be uniformly implemented throughout the circuits.

While the circuits are still split over the finality of an order denying confirmation of a reorganization plan, the majority of circuits interpret 28 U.S.C. § 158(d)(2) to read that the denial of a reorganization plan is an interlocutory order, and therefore, not final for the purpose of appeal. However, in the interest of judicial economy and the prevention of harm, courts should interpret orders denying confirmation of reorganization plans as final for the purpose of appeal.

INTRODUCTION

Reorganization plans are proposed in both chapter 11 and chapter 13 proceedings.[1] Debtors spend a substantial amount of time and financial resources structuring these reorganization plans to comply with the Bankruptcy Code (the "Code").[2] After the debtor submits its plan to a court, the court is then tasked with either confirming or denying the plan.[3] If the court confirms the plan, the debtor can begin moving towards financial solvency. Alternatively, a court can deny the debtor's plan.[4] Courts reach this conclusion for various reasons.[5] Critical questions about a debtor's ability to appeal this denial remain unanswered.

The majority of circuits hold that a court order denying confirmation of a debtor's reorganization plan is interlocutory and, therefore, not final for the purpose of appeal.[6] Many of these circuits come to this conclusion based on attenuated arguments from parties such as: "[T]he debtor is free to propose alternative plans."[7] These alternative proposed plans will be less favorable to the debtor and will likely force the debtor to transfer more of the debtor's assets to the bankruptcy estate, and ultimately creditors. Courts have continued to tighten their grasps around this concept of limited jurisdiction based on the argument that the debtor is free to appeal the denial order once a different plan has been confirmed.[8]

Forcing the debtor to wait until the end of the proceeding negatively affects the debtor because of the increased time and financial resources the debtor is forced to expend.[9] When drafting the Code, Congress created safeguards to

---

[1] 11 U.S.C. §§ 1121, 1321 (2012); *see* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 396–97 (6th ed. 2009).

[2] Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 625 (2009).

[3] 11 U.S.C. §§ 1129, 1325; *see* WARREN & WESTBROOK, *supra* note 1, at 614.

[4] *See* 11 U.S.C. §§ 1129, 1325; WARREN & WESTBROOK, *supra* note 1, at 614.

[5] *See, e.g.*, Lindsey v. Pinnacle Nat'l Bank (*In re* Lindsey), 726 F.3d 857 (6th Cir. 2013) (denying confirmation because the court believed the plan violated the absolute priority rule); Mort Ranta v. Gorman, 721 F.3d 241, 244 (4th Cir. 2013) (denying confirmation because the court believed the plan was unfeasible).

[6] *See, e.g.*, Bullard v. Hyde Park Sav. Bank (*In re* Bullard), 752 F.3d 483, 489 (1st Cir. 2014); *Lindsey*, 726 F.3d at 861; Lewis v. U.S., Farmers Home Admin., 992 F.2d 767, 772 (8th Cir. 1993); Maiorino v. Bradford Sav. Bank, 691 F.2d 89 (2d Cir. 1982).

[7] Brief for Appellee at 15, *Bullard*, 752 F.3d 483 (No. 13-9009); *see Lindsey*, 726 F.3d at 859; Simons v. FDIC (*In re* Simons), 908 F.2d 643, 645 (10th Cir. 1990); *Maiorino*, 691 F.2d at 91.

[8] *See, e.g.*, *Lindsey*, 726 F.3d at 860–61; *Mort Ranta*, 721 F.3d at 246; *Lewis*, 992 F.2d at 773; *Simons*, 908 F.2d at 645.

[9] Warren & Westbrook, *supra* note 2, at 625.

protect both the debtor and the creditor. For example, the debtor has an exclusive period to file a plan.[10] While Congress created the exclusivity period as a pro-debtor device, the exclusivity period also protects creditors from a debtor trying to prolong the proceedings.[11] Once the exclusivity period expires, the creditor is at a greater advantage because the creditor is now free to propose a less-debtor-friendly plan.

The federal circuits are split on the finality of an order denying confirmation of a debtor's reorganization plan.[12] Congress failed to define "final" when drafting 28 U.S.C. § 158, the section of the U.S. Code that deals with jurisdiction of courts to hear bankruptcy appeals.[13] Additionally, the Supreme Court has provided little insight into interpreting this section, which has led to diametrically opposed circuits and inconsistent results across jurisdictions.[14]

Two recent circuit court decisions exemplify this unsettled concept within the bankruptcy appeals system. In *Mort Ranta v. Gorman*, the Fourth Circuit held that a court order denying confirmation of a debtor's proposed reorganization plan was final for the purpose of appeal.[15] In *Lindsey v. Pinnacle National Bank* (*In re Lindsey*), the Sixth Circuit held that a court order denying confirmation of a debtor's proposed reorganization plan was interlocutory and, therefore, not final for the purpose of appeal.[16]

The majority of circuits interpret § 158 to hold that the rejection of a reorganization plan is an interlocutory order and, therefore, not final for the purpose of appeal.[17] However, in the interest of judicial economy and the

---

[10] *See* 11 U.S.C. § 1121(b) (2012).

[11] The exclusivity period acts as a check to ensure that the debtor is not using the appeal as an expensive delaying tactic. The debtor cannot slow down the process without causing harm to himself. If the debtor does appeal a plan he knows is unconfirmable, the debtor wastes the time allotted to him under the exclusivity period, and once that period is expired creditors are free to propose less-debtor-friendly plans. *See generally id.*

[12] *See* 28 U.S.C. § 158 (2012).

[13] *Id.*

[14] *Compare In re* Armstrong World Indus., 432 F.3d 508 (3d Cir. 2005) (determining that final should be interpreted flexibly based on a four factor test), *with* Maiorino v. Bradford Sav. Bank, 691 F.2d 89, 91 (2d Cir. 1981) (determining that final should be interpreted rigidly based on policy arguments).

[15] 721 F.3d 241 (4th Cir. 2013).

[16] Lindsey v. Pinnacle Nat'l Bank (*In re* Lindsey), 726 F.3d 857 (6th Cir. 2013). More recently the First Circuit reached the same conclusion. *See* Bullard v. Hyde Park Sav. Bank (*In re* Bullard), 752 F.3d 483, 489 (1st Cir. 2014) (holding that an order denying a reorganization plan is not final for the purpose of appeal).

[17] *See, e.g.*, *Bullard*, 752 F.3d at 489; *Lindsey*, 726 F.3d at 861; *Maiorino*, 691 F.2d at 91; Lewis v. U.S., Farmers Home Admin., 992 F.2d 767, 772 (8th Cir. 1993).

prevention of harm, courts should interpret orders denying confirmation of reorganization plans as final for the purpose of appeal.

Pursuant to § 158(d)(1), an individual can appeal a bankruptcy court decision if it is final.[18] This Comment addresses whether an order denying confirmation of a debtor's proposed reorganization plan is final pursuant to § 158(d)(1). It argues that allowing a debtor to appeal orders denying plan confirmation benefits the debtor, the creditors, and the bankruptcy system as a whole.

Part I of this Comment summarizes the process for plan confirmation, the bankruptcy appeals structure, and the rules for determining finality. Next, Parts II.A and II.B analyze the two main approaches courts use to determine the finality of appealable orders: the flexible approach and the rigid approach. Finally, Part II.C discusses the policy arguments in favor of the flexible approach.

I. BACKGROUND

This Part begins by providing an overview of the plan confirmation process. It then explains the bankruptcy appeals process, from the evolution of the appellate structure to the current appeals systems. It then concludes with a discussion of finality and provides a number of policy arguments for determining whether an order is final.

A. The Bankruptcy System: Plan Confirmation

Debtors in bankruptcy share a common reason for filing: the inability to meet financial obligations owed to creditors. Whether the debtor is an individual or a public corporation, the ultimate goal of the debtor is to achieve a state of financial solvency. For chapter 11 and chapter 13 debtors this means obtaining confirmation of a reorganization plan.[19] In fact, "plan confirmation is surely the central measure of success in [a bankruptcy reorganization]."[20] The

---

[18] *See* 28 U.S.C. § 158(d)(1) ("The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.").

[19] *See* W. HOMER DRAKE, JR. ET AL., CHAPTER 11 REORGANIZATIONS § 12:1 (2d ed. 1998).

[20] Warren & Westbrook, *supra* note 2, at 611–12 ("[W]e stand by the proposition that confirmation results constitute the most important single criterion for judging the benefits of the Chapter 11 system.").

confirmed plan will allow the debtor to shed its financial burden and reorganize the debt into a more manageable form.[21]

The plan confirmation process is lengthy and costly.[22] Thus, the "reorganization system should move cases through the system quickly . . . ."[23] Plan confirmation takes an average of nine months.[24] For a large corporate debtor in chapter 11, the "average ratio of fees and expenses to assets was 2.2 percent."[25]

Generally, only around thirty percent of debtors filing for chapter 11 bankruptcy will obtain plan confirmation.[26] The process of creating a plan will force out many debtors that do not have a business that can be successfully reorganized.[27] The plan negotiation stage consists of an intricate process of "negotiations, notice, voting, confirmation hearings, and the like."[28]

Reorganization plans are proposed in chapter 11 and chapter 13.[29] In chapter 13, a debtor proposes a plan to the court and the court confirms the

---

[21] *See* 11 U.S.C. § 1141(d)(1)(A) (2012) ("[T]he confirmation of a plan—discharges the debtor from any debt that arose before the date of such confirmation . . . ."); Warren & Westbrook, *supra* note 2, at 610.

[22] *See* Warren & Westbrook, *supra* note 2, at 625 ("The problem of costs is often overstated, but cost remain substantial nonetheless. . . . In addition, the time spent in bankruptcy itself leads to the loss of value, comprising an indirect cost.").

[23] *Id.*

[24] *Id.* at 629. The size of the debtor has little effect on the amount of time it takes a chapter 11 case to progress to plan confirmation. *Id.* at 637.

> There is no significant difference between the length of time to confirm a plan of reorganization for debtors with above median debt and the length of time to confirm a plan for their below median counterparts. The same is true when the dividing line is mean debt rather than median debt.

Id. at 637 n.113.

[25] WARREN & WESTBROOK, *supra* note 1, at 405 ("While these percentages seem small, the absolute values can be quite high. In Enron, for example, professional fees alone approached a billion dollars with the case far from over.").

[26] *Id.* at 399.

[27] *See* Warren & Westbrook, *supra* note 2, at 631–32. While researching a sample of cases filed eight years apart, the authors came to the conclusion that "the reorganization system was sorting out the winners from the losers in reasonably short periods of time" and that "[f]rom the viewpoint of these exit cases, the system's performance was remarkably quick." *Id.* The process of plan creation alone can force the debtor out of the system because of the financial burden it imposes on debtors: "There might have been a perfect solution lurking out there for the business, but finding that solution could cost more than the business could afford." *Id.* at 619. Additionally, attempting to create a plan might shed light on the actual state of the business: "[O]nce their bankruptcy lawyer or someone else helped them understand just how much trouble the business was in, those in control of the business realized there was no hope." *Id.*

[28] *Id.* at 632.

[29] 11 U.S.C. §§ 1121, 1321 (2012); *see* WARREN & WESTBROOK, *supra* note 1, at 396–97.

plan as long as the plan meets the requirements of the Code.[30] Bankruptcy reorganization in chapter 11 adds another dimension to the process: plan voting.[31] Plan voting makes the chapter 11 process longer and more intricate to navigate.[32] The ultimate goal of a chapter 11 reorganization is the "acceptance of a financial plan by majorities of each class of creditors."[33] As parties negotiate an acceptable plan, the negotiation process places an additional burden on the debtor by extending the cost and time to proceed through the system. Each time the debtor is forced back into the plan creation process, the temporal and financial burden imposed on an already burdened debtor is increased.[34]

B. The Bankruptcy System: Appeals

The Constitution gives Congress the ability to establish a uniform bankruptcy law throughout the nation.[35] Therefore, bankruptcy cases are subject to federal jurisdiction and begin in the federal court system.[36] Under 28 U.S.C. § 157(a),[37] a system of federal bankruptcy judges is established within the federal district court system.[38] While bankruptcy judges are regulated under Article I, federal district court judges derive their power under Article III.[39] This difference between the sources of authority from which bankruptcy and federal judges derive their powers impacts the type of decisions each may render and changes the structure of appeals.[40]

Congress bifurcated judicial bankruptcy power into two categories under 28 U.S.C. § 157.[41] First, bankruptcy judges can both hear and determine "core

---

30 *See* WARREN & WESTBROOK, *supra* note 1, at 396–97.

31 *Id.*

32 *See id.*

33 *Id.* at 616.

34 *See id.* at 405.

35 U.S. CONST. art I, § 8, cl. 4 ("[The Congress shall have Power] to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . .").

36 Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145, 146 (2010).

37 28 U.S.C. § 157(a) (2012) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

38 Bartell, *supra* note 36, at 146.

39 *Id.*

40 *Id.* ("[B]ankruptcy judges are not Article III judges, and therefore do not have the Constitutional authority to hear and determine state law causes of action . . . .").

41 *See* 28 U.S.C. § 157(b)(1). Section 158 discusses the jurisdiction of bankruptcy judges, stating:

proceedings."[42] Section 157(b)(2) does not define the term core proceedings but rather presents a non-exclusive list of issues that fall into the category.[43] Furthermore, in drafting § 157(b), Congress did not limit the bankruptcy judge's power to hear and determine issues in core proceedings.[44] Therefore, when deciding core proceedings the bankruptcy court has the power to issue final orders and judgments.[45] Confirmation of bankruptcy reorganization plans are considered core proceedings and, therefore, bankruptcy judges have the power to issue confirmation orders as final orders.[46]

Second, bankruptcy judges may hear, but not rule on, "non-core proceedings."[47] Bankruptcy judges may only submit findings of fact and conclusions of law to the federal district court, and then the district court issues a final order after considering the bankruptcy court's findings.[48] After the

---

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

Id.

[42] *Id.*

[43] *See id.*

[44] *See generally id.* § 157(b).

[45] *Id.* § 157(b)(1); Bartell, *supra* note 36, at 146; *cf.* Stern v. Marshall, 131 S. Ct. 2594 (2011) (finding that some core proceedings exceed the bankruptcy court's jurisdiction because they violate Article III's delegation of power to the judiciary).

[46] *See* 28 U.S.C. § 157(b)(1), (2)(L). Section 157(b)(2) defines the type of proceedings that Congress intended to be core proceedings, including § 157 (b)(2)(L) which states that confirmation of plans are core proceedings.

[47] *See id.* § 157. Congress failed to define core and non-core proceedings and "[c]ourts rarely shed light on this confusion with the definitions they have chosen to use; instead, courts typically rely on the vague statutory language or a generally understood meaning of the terms." Jason C. Matson, Comment, *Running Circles Around* Marathon*? The Effect of Accounts Receivable as Core or Noncore Proceedings on the Article III Courts*, 20 EMORY BANKR. DEV. J. 451, 452 (2004). Congress provided a list of proceedings that qualify as core proceedings. *See* 28 U.S.C. § 157. While this list is not exhaustive, since the statute only describes core and non-core proceedings, proceedings that do not fall into the core proceeding category would be considered non-core proceedings. *See id.*

[48] *Id.* § 157(c)(1).

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Id.

district court has issued a final order or judgment on the issue, the losing party may appeal the decision directly to the appropriate court of appeals.[49]

Additionally, the federal court system's appeals structure differs from that of the bankruptcy court system.[50] First, the number of bankruptcy cases that actually get appealed through the bankruptcy system is much lower than non-bankruptcy matters appealed to the federal appellate system, as Figure 1 demonstrates.

Figure 1

	2011	2012
Civil and Criminal Cases Filed in Federal District Court[51]	392,183	372,563
Civil and Criminal Cases Appealed from the District Court to the Courts of Appeals[52]	42,931	44,034
Total Bankruptcy Petitions Filed in Bankruptcy Courts[53]	1,467,221	1,261,140
Total Bankruptcy Appeals to the District Courts and BAPs[54]	3,312	3,219
Total Bankruptcy Appeals to the United States Court of Appeals[55]	683	811

Per Figure 1, in 2011 bankruptcy appeals made up 1.6% of the total appeals filed with the U.S. Circuit Courts of Appeals, and in 2012, that number rose

---

[49] Bartell, *supra* note 36, at 145.

[50] *Id*.

[51] Thomas F. Hogan, Admin. Office of the U.S. Courts, *Judicial Business 2012: Judicial Caseload Indicators*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/judicial-caseload-indicators.aspx (last visited Dec. 16, 2014).

[52] Thomas F. Hogan, Admin. Office of the U.S. Courts, *Judicial Business 2012: U.S. Courts of Appeals*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx (last visited Dec. 16, 2014).

[53] Thomas F. Hogan, Admin. Office of the U.S. Courts, *Judicial Business 2012: U.S. Bankruptcy Courts*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-bankruptcy-courts.aspx (last visited Dec. 16, 2014).

[54] Thomas F. Hogan, Admin. Office of the U.S. Courts, *Judicial Business 2012: Table C-2A*, U.S. COURTS [hereinafter Hogan, *Table C-2A*], http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02ASep12.pdf (last visited Dec. 16, 2014) (noting 2227 bankruptcy cases filed in 2011 and 2168 filed in 2012); Thomas F. Hogan, Admin. Office of the U.S. Courts, *Judicial Business 2012: Table B-10*, U.S. COURTS [hereinafter Hogan, *Table B-10*], http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B10Sep12.pdf (last visited Dec. 16, 2014) (noting 1085 cases filed in BAPs in 2011 and 1051 filed in 2012).

[55] Hogan, *supra* note 52.

slightly to 1.8%.[56] Despite the large number of bankruptcy petitions filed each year, less than 0.1% of cases are appealed to the circuit courts.[57]

Second, in the federal court system there is a single level of appeal—a party can appeal directly to the applicable court of appeals.[58] The bankruptcy system differs from the federal system by having a dual system of appeals: the district court and the circuit court.[59] The reason for this different treatment can be attributed to the structure and the organization of the bankruptcy court system.[60]

C. A Brief History of the Evolving Appeals Process

The two-tiered approach to the bankruptcy appeals process has been present and modified throughout the history of bankruptcy law.[61] Under the Bankruptcy Act of 1898, parties dissatisfied with decisions of the bankruptcy "referees" could seek review by the federal district courts, but only after the district court rendered a decision could the parties appeal to the court of appeals.[62]

Under the Bankruptcy Reform Act of 1978, bankruptcy courts gained more autonomous power.[63] While the federal district courts would still hear appeals on final orders from the bankruptcy courts, the discretion to hear appeals was eliminated.[64] Congress also created the option of establishing bankruptcy

---

[56] *See id.* (dividing the number of bankruptcy appeals to the circuit courts by the total number of civil and criminal appeals to the circuit court from the district court).

[57] In 2011, only 0.04% of bankruptcy petitions resulted in an appeal to the circuit court; in 2012, only 0.06% were appealed. Hogan, *supra* note 53; Hogan, *supra* note 52.

[58] Bartell, *supra* note 36, at 146 ("[A] party seeking review of a final judgment appeals directly to the court of appeals for the applicable circuit . . . .").

[59] *Id.* at 147.

[60] *See id.*

[61] *See generally id.* (providing a more in-depth analysis of the evolution of the bankruptcy system).

[62] *Id.* at 148.

[63] *See id.* at 150. For a more in-depth analysis of the Bankruptcy Reform Act of 1978 see Richard B. Levin, *Bankruptcy Appeals*, 58 N.C. L. REV. 967 (1980).

[64] *See* Suburban Bank of Cary Grove v. Riggsby (*In re* Riggsby), 745 F.2d 1153, 1154 (7th Cir. 1984).

> However, we think it reasonably clear that the dismissal by the bankruptcy judge of a complaint objecting to the discharge of the bankrupt is final. The proceeding that such a complaint kicks off has traditionally been treated as a separate adversary proceeding within the framework of the overall bankruptcy . . . Congress in overhauling the system of bankruptcy appeals in the 1978 act apparently meant to continue the former practice whereby orders disposing of such proceedings were appealable as final orders.

appellate panels ("BAPs") which, if a circuit wished, could hear appeals from the bankruptcy court instead of the district court.[65] Additionally, the 1978 Act added the notion that if both parties consented, they could appeal directly to the court of appeals from the bankruptcy court.[66]

The Bankruptcy Amendments and Federal Judgeship Act of 1984 further changed the structure of the system and removed the parties' abilities to consent to a direct appeal to the court of appeals.[67] Under these modifications, BAPs remained an alternative to sending appeals to the district court; however, certain conditions were established.[68] One theory for why Congress removed the direct appeal by consent is that "Congress was concerned that allowing an appeal before a final decision has been rendered by an Article III judge might somehow be unconstitutional."[69]

Under the Bankruptcy Reform Act of 1994, Congress set up a review commission that was given two years to investigate problems with the Code.[70] One of the issues the commission reviewed was the appellate structure of the bankruptcy courts.[71] The commission issued its findings in 1997 and recommended Congress eliminate "'the first layer of review' to the district court or bankruptcy appellate panel from bankruptcy court orders."[72] While Congress sought to pass legislation providing a form of direct appeal, President Clinton eventually vetoed the legislation.[73]

Id. at 1154 (citing Saco Local Dev. Corp., 711 F.2d 441, 443 (1st Cir. 1983)). The sections of the judicial code "added by the new law, govern appeals under the Bankruptcy Code. Sections 1334 and 1482 provide mandatory appellate jurisdiction (appeals as of right) to the district courts . . . ." Levin, *supra* note 63, at 967.

65 Bartell, *supra* note 36, at 150–51.

66 *Id.* ("[T]he courts of appeals were to be given jurisdiction over direct bankruptcy appeals from the new bankruptcy courts with the agreement of the parties to the appeal.").

67 *See id.* at 151–52.

68 *See id.* at 152. The conditions were satisfied "if the district judges in the applicable district authorize[d] such appeals . . . and then only if the parties elect[ed] to appeal to the BAP rather than to the district court . . . ." *Id.*

69 *Id.*

70 *See id*. This was the first major change to bankruptcy law in ten years. *See id.*

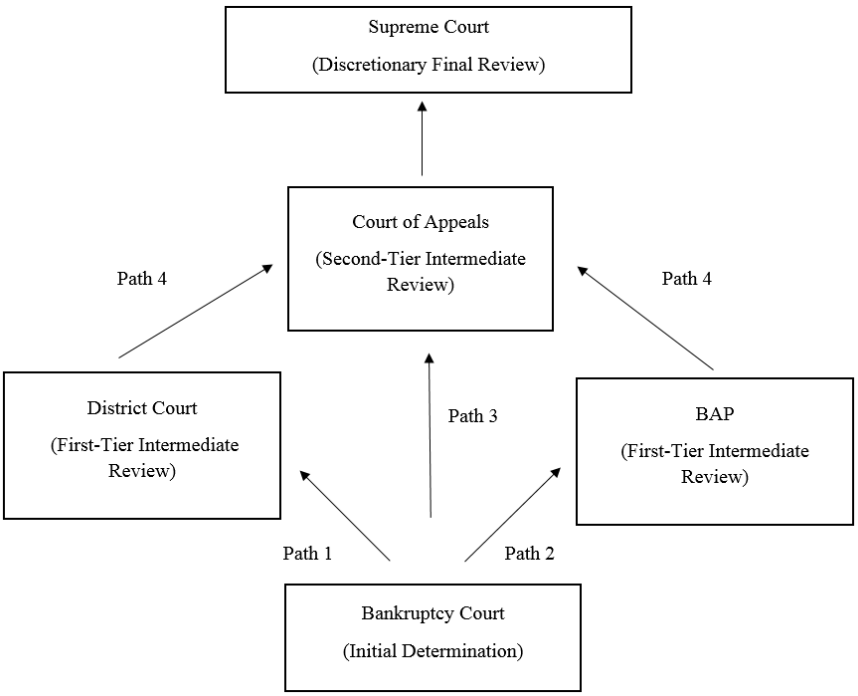
71 *Id.* at 153.

72 *Id.*

73 *See id.* at 154.

The final major congressional change to the bankruptcy appeals procedure took effect with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[74] BAPCPA transformed the appeals process into the procedure the bankruptcy court system is bound by today.[75] Professors Jonathan Remy Nash and Rafael I. Pardo illustrate this pathway in *Rethinking the Principle-Agent Theory of Judging*, depicted below as Figure 2.

Figure 2[76]



D. Current Methods to Appeal a Bankruptcy Court Decision

Since the passage of BAPCPA, the controlling authority for appealing an initial determination from the bankruptcy court is 28 U.S.C. § 158.[77] Congress

---

[74] *Id.* at 155.

[75] *See id.* at 154.

[76] Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principle-Agent Theory of Judging*, 99 IOWA L. REV. 331, 341 (2013).

created two levels of intermediate review for bankruptcy appeals.[78] First, under first-tier intermediate review, appeals of initial determinations can be heard by federal district courts, BAPs, or federal circuit courts.[79] Second, under second-tier intermediate review, parties can appeal the decisions of the federal district courts and BAPs to the applicable federal circuit court.[80]

When appealing an initial determination for first-tier intermediate review, appeals can be heard by federal district courts, BAPs, or federal circuit courts.[81] First, under § 158(a), a debtor may appeal an initial determination to the federal district court.[82] Federal district courts can hear three types of appeals: "(1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees . . . ; and (3) with leave of the court, from other interlocutory orders and decrees . . . ."[83] These appeals to the federal district courts are represented as Path 1 in Figure 2.

Second, a debtor may appeal an initial determination to a BAP.[84] Section 158(b)–(c) establishes standards for creating BAPs and appealing decisions from those panels.[85] If the circuit has created a BAP, § 158(b) and (c) allow a debtor to appeal an initial determination directly to the BAP.[86] These appeals to BAPs are represented as Path 2 in Figure 2.

Third, a debtor can appeal an initial determination through the recently added §158(d)(2)(A), otherwise known as certification.[87] Under § 158(d)(2)(A), the federal circuit court can obtain jurisdiction to hear direct appeals for initial determinations "if the court of appeals authorizes the direct appeal of the judgment, order, or decree" and one of the three following factors is met:

---

77 *See* 28 U.S.C. § 158 (2012).

78 Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1753 (2008).

79 28 U.S.C. § 158(a) (stating that the district court has jurisdiction to hear appeals from initial determinations); *id.* § 158(b)(1) (stating that BAPs have jurisdiction to hear appeals from initial determinations); *id.* § 158(d)(2)(A) (stating that federal circuit courts have jurisdiction to hear appeals, if the requirements of certification are met).

80 *Id.* § 158(d)(1) (stating that federal circuit courts have jurisdiction to hear appeals from all "final decisions, judgments, orders, and decrees").

81 *Id.* § 158(a), (b)(1), (d)(2)(A).

82 *Id.* § 158(a).

83 *Id*.

84 *Id.* § 158(b)(1).

85 *Id.* § 158(b)–(c).

86 *See id.*

87 *Id.* § 158(d)(2)(A); *see* Ben L. Mesches, *Bankruptcy Appeals*, 45 TEX. J. BUS. L. 107, 109–10 (2013).

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken . . . .[88]

Additionally, the issue must be certified by one of the following: the lower level bankruptcy court, the federal district court, the BAP, or jointly by the parties.[89] These direct appeals to the federal circuit court are represented as Path 3 in Figure 2.[90]

When appealing a decision for second-tier intermediate review, from first-tier intermediate review, § 158(d)(1) controls.[91] Section 158(d)(1), states that the federal circuit court can hear appeals from "all final decisions, judgments, orders, and decrees."[92] These appeals to the federal circuit courts are represented as Paths 4 in Figure 2.

While there are other ways that debtors can reach the second-tier appellate level,[93] including certification,[94] this Comment specifically focuses on Path 4, the second-tier appellate review, i.e., appeals to the circuit court from the district court or BAP.

---

88 28 U.S.C. § 158(d)(2)(A).

89 *Id.*

90 *See generally* Mesches, *supra* note 87.

91 28 U.S.C. § 158(d)(1).

92 *Id.*

93 Not represented in Figure 2 are certain bankruptcy proceedings that originate in the district court that are not bound by 28 U.S.C. § 158. *See* Sarah E. Vickers, Comment, *Interlocutory Appeals in Bankruptcy Cases: The Conflict Between Judicial Code Sections 158 and 1292*, 8 BANKR. DEV. J. 519, 521 (1991). Under these circumstances a debtor can look to 28 U.S.C. §§ 1291 and 1292 to appeal directly to the federal circuit court. Congress has provided far more guidance on how to interpret finality in this non-bankruptcy setting. *See* FED. R. CIV. P. 54(b); Vickers, *supra*, at 521.

94 Vickers, *supra* note 93, at 524 ("[T]he general rule is that courts should grant leave 'sparingly, since interlocutory bankruptcy appeals should be the exception, rather than the rule.'" (internal citations omitted) (quoting U.S. Tr. v. PHM Credit Corp. (*In re* PHM Credit Corp.), 99 B.R. 762, 767 (E.D. Mich. 1989))).

E. Determining Finality

The question of finality is not as clear-cut as one might assume. When determining whether an order denying confirmation of a debtor's proposed reorganization plan is a final, appealable order, the federal circuit court's first step is to analyze the plain meaning of the statute.[95] While 28 U.S.C. § 158(d) requires that an order be final for the purpose of appeal, Congress neglected to define the term final.[96] In fact, of the 8,224 words Congress used in 11 U.S.C. § 101, the word final is only used once and provides no insight into Congress's intent.[97]

The Supreme Court has previously noted that due to the plethora of changes involved when the bankruptcy system is modified, it is inappropriate to look beyond the text of the Code.[98] Black's Law Dictionary defines the term final order as "[a]n order that is dispositive of the entire case."[99] Under a plain meaning analysis, an order denying confirmation of a debtor's reorganization plan would most likely not qualify as an appealable order. Nevertheless, while the majority of courts[100] have reached similar conclusions, the route taken to

---

[95] *E.g.*, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989).

> We must begin our inquiry with the plain language of the statute. As the Supreme Court has noted, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'"

In re Cont'l Airlines, 932 F.2d 282, 287 (3d Cir. 1991) (quoting *Ron Pair Enters., Inc.*, 489 U.S. at 242).

[96] *See* 28 U.S.C. § 158(d).

[97] *See* 11 U.S.C. § 101 (2012). The word final is used exactly one time in 11 U.S.C § 101, in the definition of settlement payment: "The term 'settlement payment' means . . . a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade." *Id.* § 101(51A).

[98] *In re Cont'l Airlines*, 932 F.2d at 287.

> With respect to the Bankruptcy Reform Act of 1978, the Supreme Court has cautioned that "in such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute."

Id. (quoting *Ron Pair Enters., Inc.*, 489 U.S. at 240–41).

[99] BLACK'S LAW DICTIONARY (9th ed. 2009).

[100] *See, e.g.*, Lindsey v. Pinnacle Nat'l Bank (*In re* Lindsey), 726 F.3d 857, 861 (6th Cir. 2013); Maiorino v. Bradford Sav. Bank, 691 F.2d 89 (2d Cir. 1982).

get to this conclusion focuses heavily on policy and little on statutory text.[101] Therefore, in order to understand how courts interpret finality, it is important to look at the vastly different fact-intensive policy judgments courts make when adjudicating the issue.

In *Catlin v. United States*, the Supreme Court faced the question of whether a condemnation proceeding was final for the purpose of appeal.[102] Here, the Supreme Court defined a final order as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[103] While some courts have broadened the definition of finality since the Supreme Court's ruling in *Catlin,* the majority of courts still apply the "ends the litigation" standard in some way.[104]

Congress's failure to define the term final in this bankruptcy context has forced courts to conduct fact-intensive inquiries based on "judicial economy and prevention of harm."[105] There are six major policy arguments, all of which are derived from Congress's intent to foster judicial economy and prevent harm.[106] The six policy arguments are (1) greater efficiency; (2) the possibility that an appeal will not be required; (3) a broader scope of review; (4) faster resolution; (5) preservation of the trial judge's authority; and (6) preventing the use of interlocutory appeals as an expensive delaying tactic.[107]

The Supreme Court addressed the first of these policy concerns, efficiency, in *Cohen v. Beneficial Industrial Loan Corp.*[108] In *Cohen*, the Supreme Court was tasked with resolving whether an order determining a right to security was final in a shareholder derivative action.[109] The Court stated that an "[a]ppeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by

---

101 *See, e.g.*, *Lindsey*, 726 F.3d at 859 (deciding the case based on various policy factors including greater efficiency, faster resolution, the fact that appeal may not be required, and preserving the trial judge's authority).

102 *See* 324 U.S. 229, 234 (1945).

103 Vickers, *supra* note 93, at 523 (quoting *Catlin*, 324 U.S. 229).

104 *See, e.g.*, United States v. Muniz, 540 F.3d 310, 314 (5th Cir. 2008) (expanding the ends-the-litigation standard to ask whether "the ruling involved is fundamental to the future conduct of the case" (quoting United States v. 101.88 Acres of Land, 616 F.2d 762, 766 (5th Cir. 1980))).

105 Vickers, *supra* note 93, at 523.

106 *See id.*; *see also* H.R. REP. NO. 109-31, pt. 1, at 22, 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 107, 207.

107 Vickers, *supra* note 93, at 523.

108 *Id.* (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

109 337 U.S. at 546.

appeal."[110] This view runs parallel to the sentiment expressed in *Catlin*.[111] The Court further reiterated the views expressed in *Catlin* by stating that "the purpose [of consolidating issues for appeal] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[112] Here, the Court claimed that it is more efficient to defer all excess litigation, such as appealing interlocutory matters, to the absolute end of the case.[113]

However, the Court created an important exception to this general rule. It held that the order determining a right to security was final and appealable.[114] The Court stated that, "when [the time for appeal] comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."[115] The Court relaxed the rule established in *Catlin* because "[t]his decision appears to fall in that small class which finally determine claims of right . . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[116] The Court acknowledged that in some instances it would be inefficient to wait until the end of a case to determine an issue "separable from, and collateral to, rights asserted in the action."[117]

The second policy argument used by courts is that an appeal may not be required.[118] The Seventh Circuit relied on this policy in *Suburban Bank of Cary Grove v. Riggsby* (*In re Riggsby*).[119] In that case, the court was tasked with determining whether a court order remanding a proceeding from the district court to the bankruptcy court was a final order.[120] The court noted:

> If a district judge remanded a case for further proceedings that would take a week to complete, and the remand order was appealable and was upheld on appeal, a year or more might elapse before the proceedings on remand were concluded. Yet if those proceedings had

---

110 *Id.*
111 *See* Catlin v. United States, 324 U.S. 229, 233–34 (1945).
112 *Cohen*, 337 U.S. at 546.
113 *Id.*
114 *Id.* at 546–47.
115 *Id.* at 546.
116 *Id.*
117 *Id.*
118 Vickers, *supra* note 93, at 523 (citing *In re* Gould & Eberhardt Gear Mach. Corp., 852 F.2d 26, 29 (1st Cir. 1988)).
119 Suburban Bank of Cary Grove v. Riggsby (*In re* Riggsby), 745 F.2d 1153, 1154 (7th Cir. 1984).
120 *Id.*

> been conducted without this interruption, then, depending on their outcome, there might be no appeal at all . . . .[121]

Thus, the court took a wait-and-see approach.[122] The outcome of the proceeding might be subject to change, but the court wanted to wait and see if the negotiations with creditors were sufficiently developed that the case was ripe for appeal.[123] A debtor that has gone through the process of formulating and negotiating a subsequent reorganization plan may be deterred from appealing the original, more beneficial plan, because of the tediousness of the process.[124]

The third policy argument courts consider when interpreting finality is the "broader scope of review" argument.[125] In *Taylor v. Board of Education*, the Second Circuit Court of Appeals was tasked with determining the finality of an order refusing to modify an injunction.[126] The circuit court reasoned that by taking an appeal before the ultimate conclusion of the case, it would be making its determination before the lower court fully developed the record.[127] The court stated, "[W]e think more informed consideration would show that the balance of advantage lies in withholding such review until the proceedings in the District Court are completed."[128] The court went even further and claimed that it would rather "consider the decision of the District Court, not in pieces but as a whole, not as an abstract declaration inviting the contest of one theory against another, but in the concrete."[129] By arguing for a broader scope of review, the court positioned itself to consider only final cases completed by the lower court and justified this decision through the arguments of judicial economy[130] and prevention of harm.[131]

---

121 *Id.* at 1155–56. The court additionally contributed to the judicial economy argument by stating that if the appeal was allowed there would be potential for even more appeals and "in any event there would be no chance of two appeals—one from the order of remand and the other from whatever order the district judge entered on appeal from the bankruptcy judge's final decision following remand." *Id.* at 1156.

122 *See id.*

123 *See id.*

124 *See id.* at 1155–56.

125 Vickers, *supra* note 93, at 523 (citing Taylor v. Bd. of Educ., 288 F.2d 600, 605 (2d Cir. 1961)).

126 288 F.2d at 602.

127 *Id.* at 605.

128 *Id.*

129 *Id.*

130 *See id.* ("[It] would not be conducive to . . . the conclusion of this controversy with speed consistent with order, which the Supreme Court has directed and ought to be the objective of all concerned.").

131 *See id.*

The fourth policy argument that courts consider when interpreting finality is the "faster resolution argument."[132] The Tenth Circuit Court of Appeals in *Magic Circle Energy 1981–A Drilling Program v. Lindsey* (*In re Magic Circle Energy Corp.*) was faced with determining whether the denial of an application for a writ of prohibition was final for the purpose of appeal.[133] In making its determination, the court justified applying the *Catlin* standard of interpreting finality because it would result in a faster resolution of the case.[134] The court stated that the *Catlin* method of finality "furthers the policy underlying the finality doctrine by controlling piecemeal adjudication and eliminating delays caused by interlocutory appeals."[135] The court reasoned that this faster resolution, coupled with the fact that the "[a]ppellants' remedy is to challenge the bankruptcy court's exercise of jurisdiction by bringing an appeal from the final judgment ultimately rendered by that court," fostered judicial economy and the prevention of harm and therefore, it was not necessary for the order to be final.[136]

The fifth policy argument courts consider when determining finality is that it "preserves the trial judge's authority."[137] In *Coopers & Lybrand v. Livesay*, the Supreme Court determined whether an order denying class certification is a final order for the purpose of appeal.[138] The Court was concerned that allowing interlocutory orders to be appealed would "authorize[] *indiscriminate* interlocutory review of decisions made by the trial judge."[139] The Court stated that Congress created interlocutory orders to prevent this "indiscriminate interlocutory review" and that "[a] party seeking review of a nonfinal order must first obtain the consent of the trial judge."[140] The Court further stated, "The screening procedure serves the dual purpose of ensuring that such review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals."[141]

---

132 Vickers, *supra* note 93, at 521 (citing Magic Circle Energy 1981–A Drilling Program v. Lindsey (*In re* Magic Circle Energy Corp.), 889 F.2d 950, 953 (10th Cir. 1989)).

133 889 F.2d at 953.

134 *Id.*

135 *Id.* (citing *In re* Commercial Contractors, Inc., 771 F.2d 1373, 1375 (10th Cir. 1985)).

136 *Id.*

137 Vickers, *supra* note 93, at 523 (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978)).

138 437 U.S. at 474.

139 *Id.*

140 *Id.*

141 *Id.* at 474–75.

The sixth policy argument courts use is the concern that debtor will use interlocutory appeals as "an expensive delaying tactic."[142] In *In re Recticel Foam Corp.*, the First Circuit Court of Appeals had to decide whether a case management order was final for the purpose of appeal.[143] The court stated that "[t]he finality rule, after all, was designed to conserve judicial energy and eliminate the 'delay, harassment and cost' that would result from a barrage of interlocutory appeals."[144] The court was concerned with the threat of appellants using interlocutory appeals to slow down the judicial process.[145] The court stated,

> It would disserve the proper relationship between trial and appellate courts in the federal system, and wreak havoc with the taxing demands of modern-day case management, were the court of appeals gratuitously to inject itself as a super-navigator of sorts, second-guessing the district court from turn to turn as that tribunal wended its way through the thickets and brambles of complex litigation. To do so, we suggest, would be to concentrate on the trees at the expense of a balanced vision of the forest.[146]

The court believed that allowing the appeal to continue as final would lead to lowered judicial economy and cause more harm than it prevented.[147]

II. PROOF OF CLAIM

Two recent circuit court decisions have reached different results on the question of whether an order denying confirmation of a debtor's reorganization plan is final for the purpose of appeal. In *Mort Ranta v. Gorman*, the Fourth Circuit held that a court order denying confirmation of a debtor's proposed reorganization plan was final for the purpose of appeal.[148] In *In re Lindsey*, the Sixth Circuit held that a court order denying confirmation of a debtor's proposed reorganization plan was interlocutory and, therefore, not final for the purpose of appeal.[149]

---

142 Vickers, *supra* note 93, at 523 (quoting *In re* Recticel Foam Corp., 859 F.2d 1000, 1006 (1st Cir. 1988)).

143 *See* 859 F.2d at 1003.

144 *Id.* at 1006 (quoting MANUAL FOR COMPLEX LITIGATION (SECOND) § 25.1 (1985)).

145 *See id.*

146 *Id.* at 1007.

147 *Id.* at 1006.

148 721 F.3d 241, 246 (4th Cir. 2013).

149 726 F.3d 857, 861 (6th Cir. 2013).

The courts in both cases struggled with the question of whether they had jurisdiction to hear the appeals.[150] A court of appeals "is obligated to raise such jurisdictional issues on its own if it perceives any."[151] As one court stated, "It is too elementary to warrant citation of authority that a court has an obligation to inquire sua sponte into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting."[152] The same court stated, "No matter how tantalizing a problem may be, a federal appellate court cannot scratch intellectual itches unless it has jurisdiction to reach them."[153] If the circuit court determines that the order is interlocutory, it lacks jurisdiction and must dismiss the appeal.[154] Alternatively, if the court finds that the order is final, it can proceed with reviewing the appeal.[155]

When determining whether an order denying confirmation of a debtor's reorganization plan is final for the purpose of appeal, courts engage in lengthy, fact-intensive decision-making. Courts generally take one of two approaches: the flexible approach or the rigid approach. The flexible approach interprets finality more leniently for bankruptcy appeals to conclude that orders denying reorganization plans are final and appealable.[156] In contrast, the rigid approach utilizes a strict *Catlin* standard, analyzing finality traditionally, and leading to the conclusion that orders denying reorganization plans are interlocutory and not appealable.[157]

Due to the fact-intensive nature of judicial decision-making, even those circuits that agree on finality reach these conclusions through different methods.[158] The following Parts will explore both the flexible and the rigid approaches to determining finality. The interpretations will be examined through six finality policy arguments to ultimately demonstrate how the flexible approach leads to a more efficient outcome for both the debtor and the creditor.

---

150 *See Lindsey*, 726 F.3d at 858–59; *Mort Ranta*, 721 F.3d at 246.

151 Lewis v. U.S., Farmers Home Admin., 992 F.2d 767, 771 (8th Cir. 1993).

152 *Recticel Foam Corp.*, 859 F.2d at 1002.

153 *Id.* (citing Director, OWCP v. Bath Iron Works Corp., 853 F.2d 11, 13 (1st Cir. 1988)).

154 *See Lindsey*, 726 F.3d at 861.

155 *See Mort Ranta*, 721 F.3d at 246.

156 *See id.* at 247.

157 *See Lindsey*, 726 F.3d at 859–61.

158 *Compare In re* Armstrong World Indus., 432 F.3d 508 (3d Cir. 2005) (determining that final should be interpreted flexibly based on a four-factor test), *with Mort Ranta*, 721 F.3d at 243 (concluding the same based on policy arguments).

A. Flexible Approach Determining that the Court's Denial of a Debtor's Proposed Reorganization Plan Is Final for the Purposes of Appeal

This Part begins with a discussion and analysis of the general flexible approach to interpreting finality employed in a recent case, *Mort Ranta v. Gorman*, in which the Fourth Circuit Court of Appeals held that an order denying confirmation of a debtor's reorganization plan is final.[159] Following a discussion of *Mort Ranta*, this Part explores the court decisions that influenced the *Mort Ranta* decision. This Part then concludes with an analysis of decisions where courts utilized a flexible approach but adopted it through a methodological framework.

1. General Flexible Approach to Interpreting Finality

Courts that take a flexible approach to interpreting finality rely on more lenient interpretations of finality to find that plan denial orders are final.[160] In *Mort Ranta*, the Fourth Circuit addressed the question of whether it had jurisdiction over an appeal based on whether the denial of the debtor's reorganization plan was final or interlocutory.[161] The court in *Mort Ranta* held that an order denying confirmation of a debtor's reorganization plan is a final, appealable order.[162]

In *Mort Ranta*, a debtor attempted to exclude Social Security income from his projected disposable income.[163] The chapter 13 trustee objected to the debtor's proposed plan because unsecured creditors would be paid back less than one percent of the debt.[164] If Social Security income was included then unsecured creditors would "get paid pretty much in full like everybody else."[165] The lower bankruptcy court held that the debtor's plan was not feasible.[166]

The debtor petitioned the bankruptcy court to grant an interlocutory appeal but the court denied the request and subsequently denied confirmation of the debtor's reorganization plan.[167] The debtor appealed the order to the district

159 721 F.3d at 243–46.
160 *See id.* at 247.
161 *See id.* at 245.
162 *Id.* at 246.
163 *Id.*
164 *Id.* at 244.
165 *Id.* (referring to the trustee's statements).
166 *Id.*
167 *Id.*

court.[168] The district court ruled against the debtor without addressing the jurisdictional issues.[169] The debtor then appealed to the Fourth Circuit Court of Appeals.[170]

Before the Fourth Circuit could address the legal issues, the court first analyzed whether it possessed the necessary appellate jurisdiction to hear the case, asking whether an order denying confirmation of a debtor's reorganization plan is final.[171] The court introduced the issue by stating that, unlike other circuits, the Fourth Circuit has a long history of allowing debtors to appeal orders denying confirmation of reorganization plans.[172] The court also noted that this conclusion was similar to its holdings that creditors can appeal court decisions that have overruled objections to reorganization plans.[173]

The court began its analysis by discussing different interpretations of finality that exist within bankruptcy law and then analyzed the "greater efficiency" and "faster resolution" policy arguments.[174] The court reasoned that "the concept of finality in bankruptcy traditionally has been applied in a 'more pragmatic and less technical way,'" and stressed the notion of interpreting flexibility into § 158(d)(1)'s finality requirement.[175] The court stated that "bankruptcy proceedings are often protracted, involving multiple parties, claims, and procedures" and that "postponing review of discrete portions of the action until after a plan of reorganization is approved could result in the waste of valuable time and scarce resources."[176] This efficiency argument is diametrically opposed to the efficiency argument used by courts that take the rigid approach to disallow appeals for plan denials.[177]

---

168 *Id.*

169 *Id.* at 245.

170 *Id.*

171 *Id.*

172 *Id.* ("[W]e have a long history of allowing appeals from debtors whose proposed plans are *denied* confirmation, without questioning the finality of the underlying order.") (emphasis added); *see, e.g.*, *In re* Quigley, 673 F.3d 269, 270 (4th Cir. 2012).

173 *Mort Ranta*, 721 F.3d at 245 ("When a bankruptcy debtor's proposed plan is confirmed, we have generally allowed creditors and trustees whose objections to the plan were overruled to appeal as a matter of right."); *see, e.g.*, *Quigley*, 673 F.3d at 270.

174 *See Mort Ranta*, 721 F.3d at 245.

175 *Id.* at 246 (citing McDow v. Dudley, 662 F.3d 284, 287 (4th Cir. 2011)).

176 *Id.*

177 *Compare Mort Ranta*, 721 F.3d at 246–49, *with* Lindsey v. Pinnacle Nat'l Bank (*In re* Lindsey), 726 F.3d 857, 859–61 (6th Cir. 2013) (In *Mort Ranta* the court believed that interpreting the plan deal as final was "hardly less economical, for it simply delays the inevitable in cases where the amended plan is unacceptable to

In its analysis, the court also looked at how courts dealing with finality in other areas of bankruptcy law interpreted the term and utilized the broader scope of review policy argument.[178] The foundation of the court's decision focused on whether the order "finally dispose[s] of discrete disputes within the larger case."[179] Eventually, the court held that final orders "resolve a specific dispute within the larger case without dismissing the entire action or resolving all other issues."[180] The court gave examples such as the denial of a trustee's motion to dismiss an abusive bankruptcy case[181] or the denial of a request by a claimant to appoint a trustee.[182] Alternatively, the court held interlocutory orders "are provisional in nature and subject to revision."[183] The court reasoned that since the order dismissed the debtor's reorganization plan there was nothing remaining for the bankruptcy court to determine.[184]

Additionally, the court discussed the policy argument that an appeal would not be required.[185] The court disagreed with other circuits that have held that orders denying confirmation of reorganization plans are interlocutory "simply because the debtor may propose an amended plan."[186] The court explained that even a confirmed plan that is considered final for the purpose of appeal can be altered by the debtor such that it would "substantially modify the terms of repayment and the rights of creditors."[187] The court held that the dismissal of a debtor's reorganization plan is a final appealable order and this conclusion "is all but compelled by considerations of practicality."[188]

The *Mort Ranta* decision was not the first instance in which a circuit relied on the flexible approach to determine that an order denying confirmation of a debtor's reorganization plan was final.[189] While in the minority, other circuits

---

the debtor," while in *Lindsey* the court believed interpreting the appeal as final would lead to wasted time and resources).

178 *See Mort Ranta*, 721 F.3d at 246 (quoting *In re* Computer Learning Ctrs., Inc., 407 F.3d 656, 660 (4th Cir. 2005)).

179 *Id.* (quoting *McDow*, 662 F.3d at 286–90).

180 *Id.* (citing *McDow*, 662 F.3d at 286–90).

181 *Id.* (citing Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc., 828 F.2d 239, 241 (4th Cir. 1987)).

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.* at 248.

186 *Id.*

187 *Id.*

188 *Id.* (quoting Bartee v. Tara Colony Homeowners Ass'n (*In re* Bartee), 212 F.3d 277, 283 (5th Cir. 2000)).

189 *See, e.g.*, *Bartee*, 212 F.3d 277.

have concluded similarly based on judicial economy and the prevention of harm.[190]

Bartee v. Tara Colony Homeowners Ass'n (*In re Bartee*) is a Fifth Circuit Court of Appeals case that involved a chapter 13 debtor whose plan was denied confirmation because of a dispute regarding the secured status of a creditor.[191] The court began its analysis by stating that it had "jurisdiction over this case only to the extent that the judgments below are considered 'final' within the meaning of § 158(d) or § 1291."[192]

The court reasoned that "'finality' for the purposes of bankruptcy appeals under § 158(d) is considered more liberally or flexibly than 'finality' under § 1291 . . . ."[193] The court believed that § 158(d) provided a less-rigid standard and found that appeals in bankruptcy, which otherwise would be considered interlocutory, could be final to the extent that the decision "constitute[d] 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.'"[194]

The court also argued for the flexible interpretation because the court considered it to be the practical approach.[195] The foundation for considering practicality rested in the court's understanding of the significance of the decision to confirm or deny a reorganization plan.[196] This is reflected in the court's statement: "[H]ere, one independent decision materially affects the rest of the bankruptcy proceedings."[197] The court believed that because the order denying a debtor's reorganization plan has such a large impact on the entire bankruptcy proceeding, courts should interpret finality more flexibly to allow the debtor to the appeal the order.[198] Additionally, the court relied on the potential that an appeal will not be required.[199] The court refuted the proposition that an order denying confirmation is interlocutory simply because the debtor could propose a new plan.[200] The court feared that disallowing

---

190 *See, e.g.*, *id.*
191 *Id.* at 280.
192 *Id.* at 282.
193 *Id.* at 281.
194 *Id.* (quoting IRS v. Orr (*In re* Orr), 180 F.3d 656, 659 (5th Cir. 1999)).
195 *Id.* at 282–83.
196 *Id.* at 282.
197 *Id.*
198 *See id.*
199 *Id.* at 283.
200 *Id.*

appeal of a plan denial would lead the debtor to an illogical conclusion in which the debtor would choose "[f]iling an unwanted or involuntary plan and then appealing his own plan . . . ."[201] The court stated, "Often an appeal is the only reasonable course, since the debtor is left without any real options in formulating his plan."[202]

2. Methodological Flexible Approach to Interpreting Finality

While the court in *Bartee* qualified the impact of its decision,[203] other courts have expanded on the idea of flexibility in interpreting finality for orders denying reorganization plans.[204] *In re Armstrong World Industries* involved the denial of a chapter 11 reorganization plan.[205] There, the court made the same basic assumption the *Bartee* court made—that finality for the purpose of bankruptcy cases should be treated differently than finality for the purposes of civil cases.[206]

In analyzing whether to consider a plan denial order final, the court in *Armstrong* stated, "Because bankruptcy proceedings are often protracted, and time and resources can be wasted if an appeal is delayed until after a final disposition, our policy has been to quickly resolve issues central to the progress of a bankruptcy."[207] The court took a methodological approach and created a system of four factors for use when analyzing whether an order should be considered final.[208]

The first factor the *Armstrong* court emphasized was "the impact on the assets of the bankruptcy estate."[209] The court reasoned, "[T]he District Court's denial of confirmation will likely affect the distribution of assets between the

---

201 *Id.*

202 *Id.*

203 *See id.* at 281. The court stated, "If the order was not intended to be final—for example, if the order addressed an issue that left the debtor able to file an amended plan (basically to try again)—appellate jurisdiction would be lacking." *Id.* at 283.

204 *See In re* Armstrong World Indus., 432 F.3d 508 (3d Cir. 2005) (affirming the district court's decision denying confirmation of the bankruptcy reorganization plan because the plan violated the absolute priority rule).

205 *Id.* at 509, 518.

206 *Id.* at 511 (citing *In re* Marvel Entm't Group, Inc., 140 F.3d 463, 470 (3d Cir. 1998)).

207 *Id.* at 511 (citing *In re* Owens Corning, 419 F.3d 195, 203 (3d Cir. 2005)).

208 *See id.* Other courts have also used similar factor tests to determine finality, for example, in *Marvel Entertainment Group, Inc.*, the court considered "the impact of the matter on the assets of the bankruptcy estate, the preclusive effect of a decision on the merits, and whether the interests of judicial economy with be furthered." *See Marvel Entm't Group, Inc.*, 140 F.3d at 470.

209 *Armstrong World Indus.*, 432 F.3d at 511.

different creditor classes."[210] It supported its reasoning by looking to an earlier Third Circuit opinion that stated, "The most important of these factors is the impact on the bankruptcy estate."[211] While the court in *Armstrong* did not elaborate on its analysis of this factor, the court in *Buncher Co. v. Official Committee of Unsecured Creditors of GenFarm Ltd. Partnership IV* provided more insight.[212] *Buncher* answered the question of whether a subordination order issued by the district court was final.[213] The *Buncher* court stated that the impact of the order at issue on the bankruptcy estate would be significant enough that "any substantial recovery by the unsecured creditors will be affected by the outcome of this appeal."[214] This is a broad factor because of the high likelihood that multiple aspects of a reorganization will be affected when one portion is changed, thus altering the schedule for asset distribution.

The second *Armstrong* factor analyzes "the need for further fact-finding on remand."[215] This factor relies on the policy argument for broader scope of review.[216] The *Armstrong* court determined that no additional fact finding was necessary to analyze the decision denying the plan, and, further, that a court was not at a disadvantage by considering the denial order when the order was issued.[217]

The third *Armstrong* factor analyzes "the preclusive effect of a decision on the merits."[218] Inherent in this factor are policy arguments favoring greater efficiency and faster resolution.[219] Under this factor, the court believed that the "appeal would require [it] to address a discrete question of law that would have a preclusive effect on certain provisions of the [p]lan."[220] This argument is similar to arguments made by other courts that have held that an order is final if it finally disposes of discrete disputes within the larger case.[221]

---

210 *Id.* (internal citations omitted).

211 Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000).

212 *See id.*, *cited with approval in Armstrong World Indus.*, 432 F.3d at 511.

213 *Id.* at 249.

214 *Id.* at 250.

215 *Armstrong World Indus.*, 432 F.3d at 511.

216 *See id.*

217 *Id.*

218 *Id.*

219 *See id.*

220 *Id.*

221 *See*, *e.g.*, Mort Ranta v. Gorman, 721 F.3d 241, 246 (4th Cir. 2013).

The last factor the court emphasized was "the interests of judicial economy."[222] The court reasoned that "practical consideration in the interests of judicial economy require that we hear this appeal now."[223] This factor directly reflects the congressional intent to promote greater judicial economy.[224]

B. The Rigid Approach to Determining that the Court's Denial of a Debtor's Proposed Reorganization Plan Is Interlocutory for the Purpose of Appeal

This Part begins with a discussion and analysis of the general rigid approach to interpreting finality demonstrated in a recent case, *Lindsey,* in which the court held that an order denying confirmation of a debtor's reorganization plan is interlocutory.[225] Following a discussion of *Lindsey,* this Part looks to other court decisions that influenced the *Lindsey* decision. It then concludes with an analysis of courts that have utilized a rigid approach, but that have adopted it through a methodological framework.

1. The General Rigid Approach to Interpreting Finality

Courts that take a rigid approach to interpret finality rely on traditional interpretations of finality, rather than the more lenient interpretations used by courts in bankruptcy, to find that plan denial orders are interlocutory.[226] In *Lindsey*, the bankruptcy court dismissed a debtor's reorganization plan because the plan violated the absolute priority rule.[227] The district court affirmed the bankruptcy court's decision and the debtor appealed the decision to the Sixth Circuit Court of Appeals.[228] After discussing the various ways that an order may be appealed, the court determined that the order was not a final judgment.[229] Going forward, the question the court addressed was "whether the district court's decision—rejecting a proposed plan of reorganization—nonetheless amounts to a 'final' order."[230]

---

222 *Armstrong World Indus.*, 432 F.3d at 511.

223 *Id.*

224 *See* Vickers, *supra* note 93; *see also* H.R. REP. NO. 109-31, pt. 1, at 22, 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 107, 207.

225 726 F.3d 857, 861 (6th Cir. 2013).

226 *Id.* at 859.

227 *Id.* at 858. The debtor believed that the absolute priority rule did not apply to individual debtors; "Lindsey responded that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 abrogated the absolute priority rule with respect to individual debtors." *Id.*

228 *Id.* at 857.

229 *Id.* at 858–59.

230 *Id.* at 859.

First, the court began its analysis by looking at prior decisions and concluded that a district court order "is not final for purposes of § 158(d)(1) unless the remand is 'of a ministerial character.'"[231] The court then went on to discuss the different interpretations of finality that exist within bankruptcy law.[232] The first analysis centered on policy arguments favoring greater efficiency and faster resolution.[233] The court found that the interpretation of finality in § 158(d)(1) should mirror the court's interpretation of finality under § 1292.[234] The court explained, "[W]e see no good reason to have 'final' 'mean one thing in the former cases and another in the latter.' This straightforward test also has the virtue of being easy to implement and resistant to time-consuming and costly side shows about the meaning of jurisdictional requirements."[235]

Second, the court moved on to discuss the potential that an appeal may not be required.[236] Even though the court found that the debtor could not appeal the denial of the reorganization plan, the court noted, "Far more than a few ministerial tasks remain to be done after such a decision."[237] The court explained that

> Unless Lindsey abandons his petition, he may, indeed must, propose another confirmation plan. Once that happens, the creditors may or may not support the plan, the new plan may or may not require further fact finding and the bankruptcy court may or may not exercise its discretion to confirm the plan. Nothing about these tasks is mechanical or ministerial or otherwise leaves only the job of executing the judgment. Only after these positions are taken and decisions made may a party appeal . . . .[238]

The court presented the debtor with an exact timeframe within which the denial of the plan could be appealed.[239] When determining whether the order was final or interlocutory, the court relied heavily on the fact that the debtor was free to propose a new plan and then appeal the decisions at the end of the proceeding.[240]

---

231 *Id.* at 859 (quoting Settembre v. Fidelity & Guaranty Life Ins. Co., 552 F.3d 438, 442 (6th Cir. 2009)).
232 *Id.* at 862.
233 *See id.* at 859.
234 *Id.* at 862 (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).
235 *Id.* at 859 (quoting *Settembre*, 552 F.3d at 441).
236 *Id.*
237 *Id.*
238 *Id.*
239 *Id.*
240 *See id.*

The fact that an appeal may not be required counters the reasoning used by the *Lindsey* court.[241] The sooner a debtor exits the bankruptcy process, the sooner the debtor may begin moving towards financial solvency. For this reason, it would be more efficient to resolve the issue now rather than bringing up the issue after a new plan has already been formulated and confirmed, as the *Lindsey* approach may necessitate.[242] With the debtor's first proposed plan, a tedious process of deliberation and negotiation has already taken place.[243] Both the debtor and the creditor waste valuable time and resources when the debtor is forced to renegotiate a new plan for the purpose of appealing the original denial order.

Finally, the court in *Lindsey* touched upon the policy argument for preserving the trial judge's authority and discussed courts in other jurisdictions that have held that finality in § 158(d)(1) should be interpreted flexibly in the bankruptcy context.[244] The court applied the cannon of statutory interpretation that "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."[245]

The court believed that Congress created flexibility in terms of appeals when it added § 158(d)(2) to the Code under BAPCPA.[246] Pursuant to BAPCPA, "Congress gave parties and courts flexibility to certify issues for appeal . . . ."[247] The court also utilized the statutory cannon of interpretation not to construe any section as redundant.[248] The court asked, "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?"[249]

While the *Lindsey* court and supporters of a rigid interpretation argue that the parties are free to certify the question to obtain an appeal, this may not be entirely effective. With the enactment of BAPCPA, Congress added § 158(d)(2), which allows for appeals on certification if certain requirements are met.[250] However, this certification is not granted often, and "[t]he general rule is that courts should grant leave 'sparingly, since interlocutory bankruptcy

241 *Id.* at 860; *see In re* Armstrong World Indus., 432 F.3d 508, 511 (3d Cir. 2005).
242 *See Lindsey*, 726 F.3d at 860.
243 *See* WARREN & WESTBROOK, *supra* note 1, at 396–99.
244 726 F.3d at 860–61.
245 *Id.* at 860 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).
246 *Id.* at 858.
247 *Id.* at 860.
248 *Id.*
249 *Id.*
250 *See* 28 U.S.C. § 158(d)(2)(A) (2012).

appeals should be the exception, rather than the rule.'"[251] If courts adhering to the rigid interpretation of finality consider the availability of certification to be the appropriate alternative to a debtor waiting until the end of a proceeding to appeal the plan dismissal, and those courts only grant certification requests "sparingly," then the debtor is effectively left with no option but to wait until the conclusion of the proceeding.

Supporters of the rigid approach to finality argue that forcing the debtor to wait until the conclusion of the proceeding fosters the goal of preserving the trial court's authority.[252] However, this reasoning is at odds with the congressional intent of fostering the creation of judicial precedent behind Congress enabling certification of interlocutory review of non-final orders.[253] One of the aims of the Bankruptcy Amendments and Federal Judgeship Act of 1984 was to encourage the creation of judicial precedent for the lower bankruptcy courts to follow.[254] The concern was that there was not enough guidance coming from the higher courts.[255] If a court holds that an order is interlocutory, arguing that it wishes to uphold the discretion of the trial court, it is going against the congressional intent behind the reform of the Code.[256] By going against congressional intent, these appellate courts only exacerbate the ambiguity over the interpretation of finality among the federal circuits.

Lindsey was not the first case to utilize the rigid interpretation of finality. *Maiorino v. Bradford Savings Bank* was an decision from the Second Circuit that exemplifies that circuit's rigid approach to interpreting finality.[257] In *Maiorino,* the bankruptcy court denied confirmation of a chapter 13 reorganization plan.[258] The debtor attempted to appeal this decision to the Second Circuit Court of Appeals.[259] Before analyzing any of the substantive arguments about the lower court's denial of the plan, the court first had to determine whether it had the jurisdiction to hear the appeal.[260] The court eventually held that the order denying plan confirmation was interlocutory and

---

[251] Vickers, *supra* note 93, at 524 (quoting U.S. Tr. v. PHM Credit Corp. (*In re* PHM Credit Corp.), 99 B.R. 762, 767 (E.D. Mich. 1989)).

[252] Vickers, *supra* note 93, at 526–27.

[253] *Id.*; *see* H.R. REP. NO. 109-31, pt. 1, at 22, 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 107, 207.

[254] Vickers, *supra* note 93, at 527.

[255] *Id.* at 524.

[256] *Id.*

[257] 691 F.2d 89 (2d Cir. 1982).

[258] *Id.*

[259] *Id.* at 90.

[260] *See id.*

not appealable.[261] Thus, the court held it did not have jurisdiction to hear the appeal.[262]

The court utilized policy arguments that centered on judicial economy and the prevention of harm.[263] First, the court relied on arguments favoring greater efficiency and the preservation of the trial judge's authority.[264] The court stated,

> [W]e believe there is something to be said in a day of burgeoning appellate dockets for taking care not to construe jurisdictional statutes—particularly those conferring power on the parties to agree to a direct appeal to the court of appeals—with great liberality. Otherwise, at every stage of the bankruptcy proceedings the parties will run to the court of appeals for higher advice.[265]

The court was concerned that the bankruptcy system would be inundated with requests to usurp the decisions of the lower bankruptcy court judges if debtors were allowed to appeal interlocutory orders.[266]

While the *Maiorino* court and other courts taking the rigid approach believe saving the appeal until the end of a case is more efficient, not all courts agree.[267] The *Armstrong* court stated, "[P]ractical considerations in the interests of judicial economy require that we hear this appeal now."[268] This contrasts with the rigid approach rationalization relied on in *Maiorino*.[269] Furthermore, *Armstrong* is one of the multiple cases that stands for the proposition that an immediate appeal of orders denying confirmation of reorganization plans is more efficient.[270] The court in *Buncher* stated, "From a pragmatic standpoint, resolution of this matter must be made at some point, and expeditious disposition would best serve the interests of all concerned."[271]

---

261 *Id.*
262 *Id.*
263 *See id.* at 91.
264 *See id.* at 90.
265 *Id.* at 91.
266 *See id.*
267 *See In re* Armstrong World Indus., 432 F.3d 507, 511 (3d Cir. 2005).
268 *Id.*
269 *See* 691 F.2d at 90.
270 *See Armstrong World Indus.*, 432 F.3d at 511; Mort Ranta v. Gorman, 721 F.3d 241, 247 (4th Cir. 2013); Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000).
271 229 F.3d at 250.

Second, the *Maiorino* court relied on the argument that an appeal may not be required.[272] The court understood that there were times when debtors needed a way to access a higher court.[273] The court believed that Congress had created "a safety valve" in 28 U.S.C. § 1334(b).[274] This safety valve is the ability of the district courts to grant leave to the debtor to appeal to higher courts.[275] More importantly, the court recognized that debtors who have plans of reorganization have additional remedies available.[276] For example, the debtor may propose another plan to the court.[277] The court further speculated that this newly proposed plan might be acceptable to all parties involved, presenting an outcome that would have been prevented or delayed had the debtor been able to automatically appeal the plan denial to a higher court.[278] If the original plan were denied, the debtor would need to offer a plan that granted some sort of concession to the creditors in order to gain the court's approval.[279]

This argument resonates throughout those circuits that have taken the rigid approach to determine finality.[280] The Tenth Circuit reiterated this message in *Simons v. FDIC* (*In re Simons*).[281] In *Simon*s, the court stated, "[S]o 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 . . . ."[282]

The rationale suggests that a plan denial order is interlocutory and should be so because, at the end of the case, the debtor may not want to appeal, and, therefore, it makes more sense to follow the wait-and-see approach. There are, however, three arguments that this approach is inefficient: (1) the debtor is not

---

272 *See* 691 F.2d at 91.

273 *See id.*

274 *Id.* Section 1334(b) states,

> Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b) (2012).

275 *Maiorino*, 691 F.2d at 91.

276 *Id.*

277 *Id.* ("[I]t is open to the debtor to propose another plan.").

278 *Id.*

279 *See id.*

280 *See* Simons v. FDIC (*In re* Simons), 908 F.2d 643 (10th Cir. 1990).

281 *See id.*

282 *Id.* at 645 (citing *Maiorino*, 691 F.2d at 91).

the only party who may appeal, (2); the law-of-the-case doctrine prevents further appeals; and (3) the wait-and-see approach undermines the interest in judicial economy and the prevention of harm.

First, at the end of a case, the debtor is not the only party who may appeal. Other parties impacted by the decision have the same ability that the debtor has throughout the proceeding to appeal. In fact, assuming the debtor relied on his own self-interest and the proposed plan met all requirements for confirmation, the original plan proposed should be the plan most beneficial to the debtor because it would have the debtor ceding only the minimum amount necessary to satisfy plan requirements. A debtor seeking to satisfy his own self-interest is more likely to appeal the original plan denial because any plan proposed after the initial plan will be less favorable for the debtor. The end result of the rigid approach argument detracts from courts seeking to foster greater efficiency and ensures that the litigation will be protracted, which is precisely at odds with courts attempting to foster a faster resolution of cases.

Second, allowing a debtor to appeal an order denying his reorganization plan would ensure that there would not be an appeal at the end of the case for that issue because of the "law of the case" doctrine.[283] Generally, the law of the case doctrine works to avoid relitigation of specific disputes within a single lawsuit.[284] Whether or not the debtor is successful on the immediate appeal is irrelevant because after the appeal, both the creditor and the debtor are barred from relitigating the issue.[285] The debtor has an incentive to compromise because now he knows his plan has been denied and the process of negotiation will need to be repeated.

Third, the wait-and-see approach taken by rigid-interpretation courts completely undermines the interests of judicial economy and the prevention of harm. One of the conclusions that can be drawn from the wait-and-see approach is that if a plan is brought all the way through confirmation, a debtor is less likely to relitigate the original plan denial for the sake of efficiency.[286] For example, an individual chapter 13 debtor is not going to want to enter the costly realm of appeals when his fresh start is within his grasp. This approach

---

283 *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 18B FEDERAL PRACTICE AND PROCEDURE § 4478 (2d ed. 2013).

284 *Id.* ("As rules that govern within a single action, they do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment.").

285 *See id.*

286 *See* Suburban Bank of Cary Grove v. Riggsby (*In re* Riggsby), 745 F.2d 1153, 1154 (7th Cir. 1984).

puts the debtor at a disadvantage because the debtor is forced to agree to a suboptimal plan.

Furthermore, if the debtor appeals on the basis of the initial plan denial order after another plan has already been confirmed, all of the debtor's and the creditors' time and money that was put into creating and negotiating the subsequent plan would have been wasted. It is in the best interest of all parties involved to litigate one plan at a time to ensure that the time being put into the reorganization is as efficient as possible.

2. The Methodological Rigid Approach to Interpreting Finality

While courts in rigid interpretation circuits generally argue that plan denial orders should be considered interlocutory, other courts have taken a more methodological approach.[287] Some courts have expanded on *Maiorino*'s analysis to reject the notion that courts of appeals have jurisdiction to hear appeals from interlocutory orders denying confirmation of a debtor's reorganization plan.[288] These courts utilize concrete steps to determine whether an order should be considered final.[289] The basis for these approaches stems from the arguments expressed by other rigid-interpretation circuits.[290]

In *Lewis v. United States, Farmers Home Administration*, the Eighth Circuit utilized a three-part test to determine if the denial of a chapter 11 plan was final for the purpose of appeal.[291] The three-part test considered,

> (1) the extent to which the order leaves the Bankruptcy Court nothing to do but to execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) the extent to which a later reversal on that issue would require recommencement of the entire proceedings.[292]

The first *Lewis* factor, "the extent to which the order leaves the bankruptcy court nothing to do but to execute the order," relies on the argument that further appeal may not be required and a policy favoring a broader scope of review.[293] The court relies on the fact that "there is no finality when the . . .

---

287 *See* Lewis v. U.S., Farmers Home Admin., 992 F.2d 767, 772 (8th Cir. 1993).
288 *Id.* (citations omitted).
289 *See id.* (citing Currell v. Taylor, 963 F.2d 166, 167 (8th Cir. 1992)).
290 *See id.*
291 *Id.*
292 *Id.* (quoting *Currell*, 963 F.2d at 167).
293 *See id.*

court must exercise considerable further discretion" and that a decision is not final until the court resolves the merits of the controversy.[294] Furthermore, the court stated that "even under a liberal finality standard, the bankruptcy court has not sufficiently resolved the issue to allow the district court to simply affirm the decision and pass the case along to this court for appellate review."[295] The court believed that the proceeding was not yet at a stage in the case where the court had all of the necessary information to make an accurate determination on the issue.[296] Therefore, waiting until the end of the case would allow the court to make a more informed ruling.[297]

Not all circuits agree that the information necessary to make an informed decision is lacking at the time of denial.[298] The court in *Armstrong* believed that no additional fact-finding was necessary to analyze the lower court's decision denying the plan.[299] Supporting that proposition, the court in *Buncher* stated that, "because the record from the trial has been fully developed, it appears unlikely that additional fact-finding would be required in the Bankruptcy Court."[300] The *Buncher* court also agreed that there was sufficient information for an appellate court to review the lower court's order denying confirmation of a debtor's reorganization plan at the time of the order, rather than waiting until a final order issued by the court.[301]

Furthermore, the court would not need any additional information to conclude on the accuracy of a lower court's plan denial. If the court initially confirmed the plan, then the appellate court would not need any additional information to hear a creditor's appeal. All the information leading up to the confirmation would be available for the appellate court to review. In fact, creditors and trustees are granted the ability to appeal a plan confirmation "as a matter of right."[302] If that same plan were denied, the debtor would be forced to delay the appeal to the end of the proceeding. The *Maiorino* court stated, "Nor do we find it strange as a matter of policy that an order confirming a plan

---

294 *Id.* (citing Schneider v. U.S. Dep't of Agric., Farmers Home Admin. (*In re* Schneider), 873 F.2d 1155, 1157 (8th Cir. 1989); Vekco, Inc. v. Fed. Land Bank (*In re* Vekco, Inc.), 792 F.2d 744, 745 (8th Cir. 1986)).

295 *Lewis*, 992 F.3d at 773.

296 *See id.*

297 *See id.*

298 *See In re* Armstrong World Indus., 432 F.3d 508, 511 (3d Cir. 2005).

299 *See id.*

300 Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000).

301 *See id.*

302 *See* Maiorino v. Branford Sav. Bank, 691 F.2d 89, 91 (2d Cir. 1982).

which would, we agree, be final, is appealable by an objecting creditor while an order rejecting a proposed plan is not final and not appealable by the . . . debtor . . . ."[303]

Following the logic of the *Lewis* court and analyzing it under the policy argument for broader scope of review, two outcomes are presented.[304] First, if a debtor proposes a plan and that plan is confirmed, the appellate court would have enough information to render a decision. Second, alternatively, if the debtor proposes a plan and that plan is denied, the debtor would not be able to appeal the decision because the appellate court lacks the full information to make an informed decision.[305] It stands to reason that the court would have the same information whether the court was faced with the first or second outcome, leading to inconsistent results.

The second factor that the court relied on is "the extent to which delay in obtaining review [will] prevent the aggrieved party from obtaining effective relief."[306] Applying this factor, the court in *Lewis* held that "delay should not burden either party from obtaining relief."[307] Under this factor, the denial of a reorganization plan does not prevent or burden a party from obtaining relief because "[a]ll that is needed in this case is a final confirmation or dismissal."[308] This argument is based on the idea that a debtor can propose a new plan.[309] Once the new plan is confirmed, an aggrieved party has the ability to appeal the decision.[310] The court believed that because the debtor could propose a new plan, neither party is burdened or prevented from obtaining effective relief.[311]

The conclusion of the *Lewis* court contravenes a policy favoring faster resolution of cases in three ways.[312] First, the court in *Mort Ranta* stated that "postponing review of discrete portions of the action until after a plan of

---

303 *Id.*; *see also* Mort Ranta v. Gorman, 721 F.3d 241, 245 (4th Cir. 2013) ("When a bankruptcy debtor's proposed plan is confirmed, we have generally allowed creditors and trustees whose objections to the plan were overruled to appeal as a matter of right.").

304 *See Maiorino*, 691 F.2d 89 at 91.

305 *See* Lewis v. U.S., Farmers Home Admin., 992 F.2d 767, 773 (8th Cir. 1993).

306 *See id.*

307 *Id.*

308 *Id.*

309 *Id.*

310 *See id.* (citing Gaines v. Nelson (*In re* Gaines), 932 F.2d 729, 732 (8th Cir. 1991)); Simons v. FDIC (*In re* Simons), 908 F.2d 643, 645 (10th Cir. 1990)).

311 *See Lewis*, 992 F.2d at 773 (citing *Gaines*, 932 F.2d at 732; *Simons*, 908 F.2d at 645).

312 *See id.*

reorganization is approved could result in the waste of valuable time and scarce resources."[313] This waste of time and resources is a direct harm to the debtor who is trying to emerge from bankruptcy. The court in *Mort Ranta* saw the strain on judicial economy that a delay in the appeal caused and the resulting harm to the debtor, the creditors, and the courts.[314]

Second, allowing the debtor to appeal the plan denial offsets harm to both the debtor and the creditor. Absent a remand, there are two possible outcomes that result from allowing an appeal of an order denying confirmation of a debtor's reorganization plan. The appellate court can either affirm the decision of the lower court denying confirmation, or the court can cause the plan to be confirmed. If the debtor's plan gets confirmed as a result of the appeal, depending on the length of time it took for the appeal, the direct appeal may have been faster than the debtor recreating and renegotiating a new plan. If the plan is denied, then time is reduced from the end of the case because the debtor will be barred from relitigating the issue.

Third, the *Lewis* court also neglected to consider the debtor's exclusivity period.[315] The debtor's exclusivity period ensures appeals will not be used as an expensive delaying tactic. Under 11 U.S.C. § 1121(c), the debtor has the exclusive ability to propose a plan for a period of 180 days from the date of filing if certain requirements are met.[316] This statute protects the debtor by giving the debtor exclusive control over the negotiating parameters for a certain period of time.[317] If the debtor appeals the order denying a plan that he knows is unconfirmable, the debtor risks wasting even more of his exclusivity period time. In effect, the debtor cannot slow the process down without also harming himself.

The third *Lewis* factor is "the extent to which a later reversal on that issue would require recommencement of the entire proceedings."[318] The *Lewis* court believed that treating orders denying confirmation of plans as interlocutory would not throw a case into extensive litigation.[319] The court believed that the issue of plan confirmation did not involve a dispute of substantive facts and that a large bulk of the proceedings took place before the issue of confirmation

313 721 F.3d 241, 246 (4th Cir. 2013) (citing McDow v. Dudley, 662 F.3d 284, 287 (4th Cir. 2011)).
314 *See id.*
315 *See Lewis*, 992 F.2d 767.
316 11 U.S.C. § 1121(c) (2012).
317 *See id.*
318 *See Lewis*, 992 F.2d at 772.
319 *Id.* at 773.

arose.[320] Additionally, the court was concerned with the threat of substantial piecemeal adjudications, rising to the level of extensive relitigation, which the court believed would undermine the determination of the lower court judge.[321]

However, other circuits have persuasively concluded that, if a court follows the flexible approach and allows the appeal, the court is not creating piecemeal adjudication.[322] The court in *Mort Ranta* first made the distinction between orders that "resolve[d] . . . specific dispute[s] within the larger case" and orders "that are provisional in nature and subject to revision."[323] While it is plausible to consider that the second type of orders could be abused, the first type of orders resolve an issue that needs to be determined anyway and will have to be addressed at the end of the case. Therefore, the appellate court does not need to recommence the entire proceeding; rather, it merely needs to "resolve a specific dispute."[324]

C. Summary of Policy Arguments in Favor of the Flexible Approach to Interpreting Finality for Orders Denying Confirmation of a Debtor's Reorganization Plan

Congress and the Supreme Court have given little insight as to how to interpret "finality" within 28 U.S.C. § 158(d)(2). This uncertainty has caused courts to perform fact-intensive inquiries that focus little on text and heavily on policy. Due to this ambiguity, policy analysis in jurisdictions that utilize the rigid approach to determine plan finality is in direct contrast with the policy analysis utilized in jurisdictions that take the flexible approach to determine finality. In the interest of judicial economy and the prevention of harm, courts should interpret orders denying confirmation of reorganization plans as final for the purpose of appeal for all of the reasons that follow.

First, interpreting an order denying confirmation of a reorganization plan as final fosters greater efficiency.[325] There is greater efficiency in resolving the case with one confirmation plan sooner rather than later.[326] With the debtor's

---

320 *Id.*

321 *Id.* (citing Gaines v. Nelson (*In re* Gaines), 932 F.2d 729, 732 (8th Cir. 1991)).

322 *See* Mort Ranta v. Gorman, 721 F.3d 241, 246 (4th 2013).

323 *Id.* (citing McDow v. Dudley, 662 F.3d 284, 286–90 (4th Cir. 2011)).

324 *Id.*

325 *See* Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (*In re* Prudential Lines), 59 F.3d 327, 331 (2d Cir. 1995).

326 *See* Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000).

first proposed plan, a time-consuming process of deliberation and negotiation has already taken place.[327] Both the debtor's and the creditor's time and resources would be wasted if the debtor had to renegotiate a new plan for the purpose of appealing the original denial order.

Second, if an order denying confirmation of a reorganization plan is interpreted as final, it may eliminate the need for further appeal.[328] Under the wait-and-see approach, a debtor seeking to maximize his own self-interest is incentivized to appeal the subsequent, less-beneficial plan. Then if the debtor were allowed to appeal the denial of a confirmation order into the second level of appellate review, once the issue was resolved, the law of the case doctrine would prohibit any further appeals on the subject matter, disposing of a discrete dispute within the case.[329] The law of the case doctrine works to avoid relitigation of specific disputes within a single lawsuit.[330] Whether the debtor is successful on the immediate appeal is irrelevant because after the appeal, both the creditor and the debtor are barred from relitigating the issue.[331] This would ensure that there would be no further appeal on the plan in question.[332]

Third, interpreting as final an order denying confirmation of a reorganization plan furthers a policy favoring broader scope of review.[333] In circuits that have ruled that plan denials are interlocutory, courts justify their lack of jurisdiction as preventing the harm that would be caused by an appellate court making a decision without all of the facts necessary to adequately do so.[334] However, this argument is flawed because, while there may be more fact finding necessary were the debtor required to propose a new plan, there would be no need for further fact finding if the original plan was confirmed.[335] This is because the appellate court would have all the necessary information to make a final decision.[336] The court in *Taylor* advocated for a broader scope of review because it was concerned with judicial economy and

---

327 *See* Warren & Westbrook, *supra* note 2.

328 *See* Vickers, *supra* note 93, at 523 (citing *In re* Gould & Eberhardt Gear Mach. Corp., 852 F.2d 26, 29 (1st Cir. 1988); Suburban Bank of Cary Grove v. Riggsby (*In re* Riggsby), 745 F.2d 1153, 1154–56 (7th Cir. 1984)).

329 *See* WRIGHT & MILLER, *supra* note 283.

330 *Id.* ("As rules that govern within a single action, they do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment.").

331 *See id.*

332 *See id.*

333 *See* Vickers, *supra* note 93, at 523.

334 *See* Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013).

335 *See In re* Armstrong World Indus., 432 F.3d 507, 511 (3d Cir. 2005).

336 *See id.*

the harm that came from the limited scope of review of adjudicating claims in pieces.[337] Since all the information necessary to adjudicate the appeal of a denied plan are present at the time of denial, the concerns related to a broader scope of review, expressed in *Taylor*, are addressed.[338]

Fourth, an order denying confirmation of a reorganization plan should be interpreted as final because doing so would lead to a faster resolution of cases.[339] Forcing the debtor to wait until the end of the case to appeal a plan denial order places a strain on judicial economy and causes further harm to both debtors and creditors.[340] In the short term, the court avoids the time and cost of an appeal; however, this approach only postpones the appeal to later. Courts that take the rigid approach argue that the debtor may not need to appeal because he may come to a compromise through another plan; however, assuming the first plan was the most beneficial for the debtor, less-advantageous, subsequent plans provide the debtor an incentive to appeal the order anyway. By resolving the issue early in the case, courts do not need to be concerned about the appeal being raised on the back end of the case.

Fifth, an order denying confirmation of a reorganization plan should be interpreted as final because it does not diminish the authority of the trial judge.[341] The Court in *Coopers & Lybrand* was concerned that allowing the appeal of interlocutory orders would lead to "indiscriminate interlocutory review of decisions made by the trial judge."[342] However, the court in *Mort Ranta* stated that interpreting a denial order as final "does not extend our appellate jurisdiction but instead justifies its existing parameters."[343] Preserving the trial judge's authority must be weighed against the congressional intent of fostering the creation of judicial precedent. While debtors now have the option of seeking certification of appeals directly to the second appellate level, courts at this level rely on the rule that these

---

337 288 F.2d 600, 605 (2d Cir. 1961).

338 *See id*; *see also Mort Ranta*, 721 F.3d at 247 (stating that "[n]othing in either of the orders indicates that any issues concerning the proposed plan remained for the bankruptcy court's consideration" after the plan denial order was issued).

339 *See* Magic Circle Energy 1981-A Drilling Program v. Lindsey (*In re* Magic Circle Energy Corp.), 889 F.2d 950, 953 (10th Cir. 1989) (citing *In re* Commercial Contractors, Inc., 771 F.2d 1373, 1375 (10th Cir. 1983)).

340 *See Mort Ranta*, 721 F.3d at 243.

341 *See* Vickers, *supra* note 93, at 523 (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978)).

342 437 U.S. at 474.

343 721 F.3d at 249.

certifications should be limited greatly.[344] Furthermore, if a court holds that an order is interlocutory arguing that it wishes to uphold the discretion of the trial court, it is going against the congressional intent behind the reform of the Code.[345] By going against congressional intent, these appellate courts only exacerbate the ambiguity over the interpretation of finality among the federal circuits.

Sixth, an order denying confirmation of a reorganization plan should be interpreted as final because there are other legislative safeguards to the bankruptcy system intended to prevent the use of interlocutory appeals as expensive delaying tactics.[346] Under 11 U.S.C. § 1121(c), Congress gave the debtor the exclusive ability to propose a reorganization plan up to 180 days from the date of filing, if certain conditions are met.[347] Once the exclusivity period terminates, other parties are free to propose their own reorganization plans.[348] By limiting the debtor's exclusive period to file a plan of reorganization, this safeguard prevents the appeal from being used as an expensive delaying tactic.[349]

CONCLUSION

The federal circuit courts of appeals are split on the finality of an order denying confirmation of a debtor's reorganization plan. This circuit split impacts judicial economy and the prevention of harm within bankruptcy courts. By blocking the debtor's appeal to the second level of review until the conclusion of the proceedings, the debtor is forced to attempt confirmation of a new plan before resolving whether the initial plan was actually confirmable. The Supreme Court in *Cohen* believed that an order should be considered final if it "appears to fall in that small class which finally determine claims of right . . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[350] In a bankruptcy reorganization, the ultimate goal is to achieve plan confirmation so the debtor may begin moving towards financial

---

344 *See* Vickers, *supra* note 93, at 549; *see also* H.R. REP. NO. 109-31, pt. 1, at 22, 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 107, 207.

345 *See* Vickers, *supra* note 93, at 549; *see also* H.R. REP. NO. 109-31.

346 *See In re* Recticel Foam Corp., 859 F.2d 1000, 1003 (1st Cir. 1988); Vickers, *supra* note 93, at 523 (citing *In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1000, 1006 (1st Cir. 1988)).

347 11 U.S.C. § 1121(c) (2012).

348 *See id.*

349 *See* Vickers, *supra* note 93, at 523 (quoting *Recticel Foam Corp.*, 859 F.2d at 1006).

350 337 U.S. 541, 546 (1949).

solvency.[351] Therefore, if the debtor's goal in a bankruptcy reorganization is achieving confirmation, then a debtor must be able to appeal a denial of its proposed plan before the process of creating and negotiating a new plan begins.

Allowing the debtor to appeal the denial order in this manner would ease the burden currently on the debtor and increase judicial efficiency. Currently, a debtor who wishes to appeal a plan denial to the second level of appellate review is forced to go through the motions of creating and negotiating a new plan simply to appeal the original plan. If the debtor had instead been able to utilize the second level of appellate review after the original denial, and the lower court was held to be wrong, both parties would save the time and money of negotiating a new plan. If the lower court correctly denied confirmation, the debtor would bear the cost of the additional litigation because the appeal prolongs the bankruptcy process and keeps the debtor in the bankruptcy system. Furthermore, knowing the original plan is now denied, the debtor has an increased incentive to compromise in order to obtain a confirmable plan.

When considering whether to allow these appeals, the burden on creditors should not be overemphasized. First, even if debtors were allowed this appeal, it would not bar creditors from exercising any of their existing rights. Second, the appeal does not impose a burden on the creditor because the debtor would be more likely to appeal at the end of the case. The ultimate result is that the timing of the appeal merely shifts. The temporal and fiscal burden of allowing the debtor to appeal is levied on the debtor. The debtor's exclusivity period acts as a check to increase the burden on the debtor.[352] By pursuing a frivolous cause, the debtor risks running out the exclusivity period and providing creditors and other parties the ability to submit their own less-debtor-friendly plans to the court.

Finally, any increase in burden on federal circuit caseload should be interpreted against the relatively low number of bankruptcy cases that are currently appealed. In 2012, bankruptcy cases made up 1.8% of all appeals to the circuit courts.[353] In the same year, the rate of appeal from bankruptcy courts to the first level of intermediate review, i.e., the district courts and BAPs, was only 0.26%.[354] The percentage of bankruptcy cases appealed to the

---

351 *See* Warren & Westbrook, *supra* note 2, at 612.
352 *See* 11 U.S.C. § 1121(c).
353 *See* Hogan, *supra* note 52.
354 *See* Hogan, *supra* note 53; Hogan, *Table C-2A*, *supra* note 54; Hogan, *Table B-10*, *supra* note 54.

second level of intermediate review was even smaller, only 0.06%.[355] In contrast, the rate of appeal for all criminal and civil cases to the circuit courts was 11.8%.[356]

A majority of circuit courts considers an order denying confirmation of a reorganization plan as interlocutory. While this result might stem from a strict interpretation of the statute, courts have departed from this textual analysis and created a vast body of conflicting common law on the subject.[357] Courts in the majority utilize the rigid approach to strictly determine that orders denying confirmation of a debtor's reorganization plan are interlocutory.

A minority of circuit courts takes another approach. Those circuits prefer a method that fosters judicial economy and prevents harm to both debtors and creditors. They adopt a flexible interpretation of finality to allow debtors to appeal these reorganization plan denials when the denial order is given, rather than forcing debtors to wait until the conclusion of the proceedings.

The outcome of the minority's flexible interpretation is greater efficiency for debtors, creditors, and the court; the knowledge that there will be no appeal; a broader scope of review; faster resolution; the preservation of the trial judge's authority; and prevention of costly delay tactics. For these reasons, courts should adopt the minority approach and interpret orders denying confirmation of reorganization plans as final for the purpose of appeal.

DREW VERMETTE*

---

355 *See* Hogan, *supra* note 53; Hogan, *supra* note 52.

356 *See* Hogan, *supra* note 51; Hogan, *supra* note 52.

357 *See, e.g.*, Lindsey v. Pinnacle National Bank (*In re* Lindsey), 726 F.3d 857 (6th Cir. 2013); Mort Ranta v. Gorman, 721 F.3d 241, 246 (4th Cir. 2013).

* Notes and Comments Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2015); B.S., *summa cum laude*, Florida State University (2008); Winner of the 2014 Keith J. Shapiro Award for Excellence in Corporate Bankruptcy Writing. I would like to thank Professor Rafael Pardo for his guidance in developing this Comment and the staff of the *Emory Bankruptcy Developments Journal* for their thorough work. Finally, I would like to thank my loving wife, Holly, and my son, Alexander, because without them none of this matters.