Curcio Rides Again

By CHARLES D. RAY and MATTHEW A WEINER

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***U.S. National Bank Association v. Crawford*, 333 Conn. 731 (2019)** brings us the Supreme Court's most recent excursion into the realm of final judgments and the intricacies of *State v. Curcio*, 191 Conn. 27 (1983). But before we get to Crawford, we need to tell you about the appellate court's decision in *Equity One, Inc. v. Shivers*, 150 Conn. App. 745 (2014), which the Supreme Court overruled in *Crawford* but served as the catalyst for the final judgment analysis that split the *Crawford* court.

Shivers was a mortgage foreclosure case. The trial court ordered a foreclosure by sale and a committee was appointed to conduct that sale. The defendant filed a petition in federal bankruptcy court two days before the sale was set to take place. That filing set in place the automatic bankruptcy stay, which brings to a halt any efforts or further efforts to recover a claim against the bankruptcy debtor that arise before the date of the bankruptcy filing. The appointed committee, hoping to get paid for the work it did to get the sale ready, filed a motion in the trial court pursuant to General Statutes § 49-25, which provides that if a foreclosure by sale does not take place for any reason, "the expense of the sale and appraisal or appraisals shall be paid by the plaintiff and be taxed with the costs of the case." In other words, the bank pays now and the debtor pays later.

The wrinkle in *Shivers* was that the committee filed its § 49-25 motion and the trial court granted that motion while the federal bankruptcy stay was in place. The question posed and resolved by the Appellate Court was whether the bankruptcy stay had been violated. The Appellate Court held that it had. Although recognizing that the filing and granting of the motion did not directly affect the debtor, the Appellate Court concluded that "unusual circumstances" were at play given that the defendant debtor was, in effect, obligated to indemnify the bank in the form of costs. Given that "identity" between the debtor and the committee, the Appellate Court held that the bankruptcy stay applied to the § 49-25 motion for fees.

The *Shivers* decision was not well received in the world of bankruptcy practice, at least not by those who get appointed as sale committees and would, as a result of *Shivers*, need to sit and wait to get paid until a bankruptcy stay was either lifted or came to its natural conclusion. Taking the bull by the horns, one appointed committee person sought and obtained the lifting of the stay in federal bankruptcy court. There, Judge Dabrowski, on the basis of two decisions that pre-dated *Shivers*, held that with due respect to the Appellate Court, they got it wrong. *In re Tasillo*, 2015 WL 78770 (Bankr. D. Conn. Jan. 6, 2015). And while that was all well and good, moving to lift the stay in order to get paid by the bank in a state court foreclosure action was counterproductive (and expensive), considering the seemingly clear mandate of § 49-25.

So *Shivers* was skating on thin ice, which brings us at long last to *Crawford*, which included a foreclosure by sale, the appointment of a committee, the filing of a bankruptcy petition, a § 49-25 motion, and the *Shivers* based denial of that motion by the trial court. Grabbing more bull horns, the committee in *Crawford* filed a writ of error and asked the Supreme Court to overrule *Shivers*. It did, concluding that the Appellate Court lacked subject matter jurisdiction to extend the bankruptcy automatic stay provisions to proceedings against nondebtors; i.e., the banks being asked to pay committee fees and costs for sales that did not take place. But overruling *Shivers* was, in the end, the easy part.

Getting to the end proved much more difficult. First, there was the final judgment question, which, it turns out, was a good one, given that the foreclosure action was on hold rather than at an end when the writ was filed and, on top of that, the trial court denied the § 49-25 motion without prejudice to the committee reclaiming it once the automatic stay was no longer in place. Second, there was the issue of mootness, which came into play by the simple fact that the bankruptcy matter had been dismissed and the automatic stay with it long before the Supreme Court issued its decision in *Crawford*. The final judgment issue is the more interesting of the two, mootness having been ultimately resolved under the exception for orders that are capable of repetition yet evading review.

Indeed, it was the final judgment issue that split the Court. The committee tried to skirt the final judgment issue by claiming that the proceedings involving the § 49-25 motion were, in essence, a separate third-party claim that had been finally resolved. That didn't work, the majority (then Justice Robinson for himself and Justices Palmer, D'Auria, and Ecker) concluding that, given the trial court's ruling that the motion could be renewed once the bankruptcy stay went away, the denial order was interlocutory rather than final.

That left the limited ways in which an interlocutory order can be treated as a final judgment for purposes of an immediate appeal. If you, like us, thought that this might be a good instance in which to invoke General Statutes § 52-265a, think again. Although that statute allows a discretionary appeal of an interlocutory order that involves a matter of substantial public interest, it, like a direct appeal, is limited to a "party" to the underlying action, which the committee is not, as evidenced by the writ of error rather than an appeal.

So now, finally, we're into the meat of *State v. Curcio*, that all-purpose bowl of mush that even the majority recognizes as having produced a body of case law that "is hardly a model of clarity or consistency" and that can seemingly support both sides of the question of whether a particular interlocutory order is immediately appealable. Here, we're dealing with the second prong of *Curcio*, under which an immediate appeal may be taken where the order "so concludes the rights of the parties that further proceedings cannot affect them." The majority offers a number of reasons why this test applies to the order in *Crawford*.

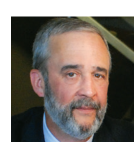
First, an immediate appeal would not run afoul of the public policy against piecemeal appeals because it would have no impact on the "speedy and orderly" resolution of the underlying foreclosure case, given that the committee was not a party to that case and the issue raised in the writ of error implicates a right that is separable from and collateral to the rights being resolved in the foreclosure case. In this regard, the majority found persuasive the fact that without an immediate appeal, the issue of whether *Shivers* was correctly decided would likely never get resolved, because once the stay gets lifted the committee's motion will be granted and the issue will become moot.

Second, according to the majority, the trial court's ruling threatens to abrogate a right that the committee now holds—the right to be reimbursed for its fees and costs under § 49-25. Third, the majority relies on the fact that the issue of whether *Shivers* was correctly decided does involve a question of "some public importance." Namely, the possible reluctance of attorneys to serve as committees of sale where they are forced to sit and wait rather than get paid in cases where the debtor files a bankruptcy petition or, alternatively, head to bankruptcy court in order to lift the stay. Finally, considering the issue now would not result in an influx of appeals in related circumstances. Indeed, reviewing the issue would resolve it once and for all, a result that makes sense given that the alternative, at least for the majority, would mean that the issue never gets resolved.

For the dissent (Justice McDonald, for himself and Justice Mullins and Kahn), allowing an appeal in these circumstances does nothing to improve the state of the Court's *Curcio* jurisprudence. First, while mere delay might impinge on an existing right, it does not destroy the legal and practical value of the right of the committee to recover its fees and costs. The committee can wait, get the stay lifted or, perhaps, bring a declaratory judgment action seeking to overrule *Shivers*. Second, public policy, according to the dissent, plays no role in a *Curcio* analysis. The legislature could have included writs of error in the public policy exception set forth in § 52-265a but did not. And if the issue is finally resolved in the trial court once any bankruptcy stay disappears, there likely will be no need for any appeal at all.

In the eyes of the dissent, the majority's approach "exacerbates the already murky state of [the Court's] final judgment jurisprudence…." And while it may not disagree completely with that charge, the majority concludes that an immediate appeal in this situation "merely provides a pragmatic solution to a problem of the courts' own creation that would otherwise remain forever unresolved." Can both sides be right? Or is there a correct answer buried somewhere in all of this? If precision and certainty in a *Curcio* analysis are what you crave, the dissent is more convincing. If, on the other hand, you don't mind a little opaqueness, the majority approach should be right up your alley. But in the end, *Shivers* was clearly standing in the way of lawyers promptly being paid—never a good place to be. ■

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.



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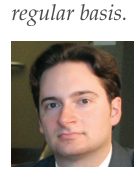

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