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Equitable Mootness

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Equitable Mootness[1]

Equitable Mootness Discussion Points

I. Equitable Mootness is a judge-made doctrine and is seemingly contrary to the principle that federal courts shouldn't (or can't) decline jurisdiction. Should equitable mootness ever be available to save a confirmed plan?

   A. Is it fair to deprive an appellant of a substantive review on the merits if it's done everything it could to preserve those rights; that is, object to the plan; seek a stay from the District Court and then the Court of Appeals; move for an expedited appeal?

   B. Unlike abstention, where there's another forum to try and review the claim, here the claim will never be reviewed. Is this okay?

   C. What if the plan does something that is, on its face, at least, contrary to the Bankruptcy Code (e.g., improper classification; violation of absolute priority; etc.) but is completely consummated before the appeal is heard?

   D. More generally, shouldn't the appellate court address the merits first and only then consider the equities?

II. To what degree should appellate courts take in to account the impact of a reversal –

   A. on creditors who agreed to compromise their claims in order to reach a consensus plan?

   B. on plan sponsors and proponents who invested in and are financing the plan?

   C. on traders who've bought and sold the debtor's securities based on a likely confirmation?

III. What if the confirmation order is reversed? What happens next? – must there be a new plan? Modification and a new vote? What of payments already made, assets transferred, etc.?

1 Compiled by Michael Luskin (Luskin, Stern & Eisler LLP) using material prepared by the American Bankruptcy Institute Law Review for the 2017 Hon. Conrad B. Duberstein Bankruptcy Moot Court Competition and by Martin Bienenstock (Proskauer).

IV. The Bankruptcy Code immunizes some actions from efforts to "unscramble" following a successful appeal – e.g., advances under an interim DIP order and § 363 sales made in good faith. Should the equitable mootness __ doctrine be used to make confirmation orders similarly immune, absent specific statutory exceptions like these? If they are, does this mean that important Bankruptcy Court decisions will never be subject to review by an Article III judge? Is that okay?

V. How is the appellate court supposed to determine "mootness"? Must the plan objector make a record on the inability to "unscramble" at the confirmation hearing? Isn't this highly speculative – what can/cannot be undone? What claims can/cannot be brought? Who should bear the burden of proof? Will Bankruptcy Judges allow these issues to be tried at confirmation? Should they?

Selected Recent Equitable Mootness Cases

I. Cases Dismissed As Equitably Moot

A. *In re City of Detroit*, 838 F.3d 792 (6th Cir. 2016)

1. Facts

The City of Detroit filed for municipal bankruptcy on July 18, 2013, pursuant to Chapter 9 of the Bankruptcy Code. At the time of filing, the City had over $18 billion in escalating debt and over 100,000 creditors, was bleeding cash and could not provide basic municipal services. At the heart of the City's reorganization plan was a settlement (dubbed the "Grand Bargain") under which the City received outside funding to pay off certain debts.

The plan was confirmed in November 2014 and became effective on December 10, 2014, and the City began implementing it immediately by, among other things, issuing $287.5 million in bonds and $720 million in new notes; irrevocably transferring all Detroit Institute of Art assets to a perpetual charitable trust; recouping substantial funds; transferring certain real property interests pursuant to separate settlement agreements incorporated in the plan; and implementing a two-year City budget. Pensioners who were forced to take a reduction in their payouts challenged the reduction.

2. Procedural Posture

Several pension fund holders appealed to the District Court challenging the reduction in their pensions and a release provision that prevented retirees from asserting claims against the State of Michigan. The city moved to dismiss the appeals as equitably moot. The District Court agreed, noting that appellants did not obtain a stay; the confirmed plan has been substantially consummated; and reversal of the plan would adversely impact third parties and the success of the plan.

3. Issue

Whether the pension fund holders' appeal is equitably moot.

4. Holding

Yes, it is moot.

5. Reasoning

The Court of Appeals analyzed equitable mootness under a three-part test: (1) whether a stay pending appeal was obtained; (2) whether the bankruptcy plan has been substantially consummated; and (3) whether the relief requested would significantly and irrevocably disrupt implementation of plan or disproportionately harm the reliance interests of parties in interest. 838 F.3d at 798. Pensioners' appeals from Bankruptcy Court order confirming the Chapter 9 plan, which had the effect of reducing pension benefits, were equitably moot. This was because the plan had been substantially consummated: numerous significant actions had been undertaken or completed, many irreversible, in reliance on the plan, and where the relief that pensioners requested on appeal would necessarily rescind the bargain that was at the heart of the City's negotiated plan and would adversely affect countless third parties, including the entire City population. The Court did not regard this as a "close call." *Id.* at 799. The Court also noted that equitable mootness is a prudential doctrine that was not overruled by recent Supreme Court cases cutting back on prudential doctrines (e.g. *Lexmark*, 134 S. Ct. 1377 (2014)). *Id.* at 800.

6. Dissent

The dissent took a contrary view of Supreme Court precedent, also citing *Lexmark*, and wrote that the doctrine amounted to an abdication of the ability of an Article III court to review cases properly before it. *Id.* at 805-813.

B. *R2 Investments, LDC. v. Charter Communications, Inc. (In re Charter Communications, Inc.)*, 691 F.3d 476 (2d Cir. 2012)

1. Facts

The bankruptcy court confirmed a chapter 11 plan and the indenture trustee for noteholders and a shareholder appealed claiming numerous errors including: (a) that without substantively consolidating the affiliated debtors the court allowed an impaired accepting class of one debtor to satisfy the requirement under Bankruptcy Code section 1129(a)(10) for all the debtors, 691 F.3d at 487-488, (b) that claims were gerrymandered into separate classes to create the impaired accepting class, 691 F.3d at 487, (c) that the debtors were valued as if they were one entity, *id*., (d) the grant of releases to nondebtors of creditor and shareholder claims against them, 691 F.3d at 480-481, 484. The bankruptcy court and district court denied requests for a stay pending appeal. 691 F.3d at 481. The plan became effective with old stock being cancelled, new stock being issued, new notes replacing old notes, and warrants being granted to noteholders. 691 F.3d at 481. The district court dismissed the appeal as equitably moot.

2. Issue

If relief can be granted, appellant diligently applied for a stay pending appeal, and many parties who would be effected by reversal are parties to the appeal, can the appeal still be dismissed as equitably moot?

3. Holding

Yes

4. Rationale

"The bankruptcy court found that the compensation to Allen and the third-party releases were critical to the bargain that allowed Charter to successfully restructure and that undoing them, as the plaintiffs urge, would cut the heart out of the reorganization. Crediting multiple witnesses, it also found that Allen was in a unique position to create a successful arrangement because only through his forbearance of exchange rights and agreement to maintain voting power could Charter reinstate its senior debt and preserve valuable net operating losses. See Findings of Fact, Conclusions of Law, and Order Confirming Debtors' Joint Plan of Reorganization ("Conf. Order") ¶¶ 32, 43; see also JA 462, 589, 605, 611. The releases, like the compensation, were important in inducing Allen to settle. See Conf. Order ¶ 32; see also JA 463, 589, 605, 611. In the face of witnesses representing that the releases and compensation were important to Allen, LDT and R2 can point to no evidence that the settlement consideration paid to Allen or the third-party releases were simply incidental to the bargain that was struck. Compare *In re Metromedia,* 416 F.3d at 145 (request to strike third-party releases equitably moot because "it was as likely as not that the bargain struck by the debtor and the released parties might have been different without the releases"), with *In re Cont'l Airlines,* 203 F.3d at 210-11 (appeal of third-party releases not equitably moot where there was "no evidence or arguments that Plaintiffs' appeal, if successful, would necessitate the reversal or unraveling of the entire plan of reorganization").

"Even if LDT and R2 are correct that the settlement consideration and releases are legally unsupportable, these provisions could not be excised without seriously threatening Charter's ability to re-emerge successfully from bankruptcy. Nor could the monetary relief requested be achieved by a quick, surgical change to the confirmation order. Allen may not be willing to give up the benefit he received from the Allen Settlement without also reneging on at least part of the benefit he bestowed on Charter. Thus the parties would have to enter renewed negotiations, casting uncertainty over Charter's operations until the issue's resolution. We therefore find no abuse of discretion in the district court's conclusion that these claims relating to the Allen Settlement are equitably moot." 691 F.3d at 486.

II. Case Refusing to Dismiss for Equitable Mootness

A. *In re One2One Communications, LLC*, 805 F.3d 428 (3rd Cir. 2015)

1. Facts

One2One Communications (the debtor) was a billing services technology company. Appellant, Quad/Graphics Inc., held the single largest claim against the debtor and the debtor's CEO. The debtor filed a voluntary petition for relief under Chapter 11 in the Bankruptcy Court for the District of New Jersey. Beginning in September 2012, the debtor filed its first, second, and third amended plans of reorganization. The debtor filed a fourth amended plan of reorganization on January 25, 2013, under which a third party, One2One Holdings, LLC, would acquire an equity interest in the debtor. The plan incorporated a plan support agreement, which provided the plan sponsor with the exclusive right to purchase 100% of the debtor's equity for $200,000, and had the support of the Creditors' Committee. Quad/Graphics, the debtor's largest creditor, objected, arguing that the plan violated the absolute priority rule by allowing equity to keep its interests without paying unsecured creditors in full. On March 5, 2013, the plan was confirmed after a five-day trial: the confirmation order was automatically stayed for 14 days. Quad/Graphics moved for a stay pending appeal before the District Court (which denied the motion) and the Court of Appeals (which also denied). Quad/Graphics then moved for an injunction before the District Court (which the Court denied). The parties briefed the merits of the appeal, but the District Court never reached the merits because it granted the debtor's motion to dismiss the appeal as equitably moot on June 24, 2013.

2. Issue

Did the District Court abuse its discretion in deciding that the bankruptcy appeal was equitably moot?

3. Holdings

a. Short answer: Yes.

b. The Court of Appeals declined to revisit the Circuit's decision in *Continental*, saying only the Court sitting en banc could do so. It also held that the Supreme Court's decision in *Stern v. Marshall* did not bear on the authority of the Bankruptcy Court to make a final ruling on the plan confirmation issues at issue in the case. 805 F.3d at 432-433. [2]

c. The Court then set out the relevant factors to be considered (*id.* at 433-434) and concluded that, "Taken together, these factors require that the equitable mootness doctrine be applied only to "prevent[] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract. The party seeking dismissal bears the burden to demonstrate that, weighing the relevant factors, dismissal is warranted." (*Id.* at 434; citations and quotes omitted).

d. It set out a two-step analysis (quoting *Semcrude*): "In practice, equitable mootness proceeds in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on the plan's confirmation." (*Id.* at 434-435; quotes omitted).

e. Again citing *Semcrude*, it concluded: "If the confirmed plan has been substantially consummated, a court should next determine whether granting relief will require undoing the plan opposed to modifying it in a manner that does not cause its collapse." (*Id.*; citations and quotes omitted).

f. Applying this analysis, the Court reversed. It highlighted the modest amounts involved, the small number (17) of unsecured creditors, the absence of complex transactions required (no financing, mergers, stock issuances, or operational changes). It found that the Debtor failed to meet its burden of demonstrating that the plan would be difficult to unravel (*id.* at 436). It found only minimal third-party reliance of the kind present in all cases (*id.* at 437). Finally, it held that public policy favored appellate review. (*Id.* at 437.)

2 This issue is discussed more fully in the Delaware District Court's recent discussion in *In re: Millennium Lab Holdings II, LLC*, 2017 U.S. Dist. LEXIS 38585 (D. Del. Mar. 17, 2017) (remanding for full briefing and decision by the Bankruptcy Court).

4. Concurring Opinion

a. Urges reconsideration of the equitable mootness doctrine. Describes its origin as judge-made and without analog in the abstention cases: "But where there is no other forum and no later exercise of jurisdiction, as in the case of equitable mootness, relinquishing jurisdiction is not abstention; it's abdication. In short, there is no analogue for equitable mootness among the abstention doctrines." (*Id.* at 440).

b. Notes that Supreme Court support is unlikely, especially in view of its recent cases narrowing the scope of abstention and other prudential doctrines. See, e.g., *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 854 (2013) (refusal to extend *Younger* abstention); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (refusal to limit cause of action created by statute as imprudent). (*Id.* at 440-441.)

c. Then (*id.* at 441-444) engages in an extended statutory analysis (beyond the scope of this outline) to show that the Bankruptcy Code and related jurisdictional statutes "provide no support for equitable mootness and actually undermine it." (*Id.* at 441.)

d. Rejects equitable mootness on Constitutional grounds under Article III § 1 (also beyond the scope of this outline). (*Id.* at 444-446.)

e. Finally, doubts efficacy of the doctrine, concluding that it just shifts the focus of the litigation from the merits of the confirmation objections to questions of plan consummation and the complexities of unwinding the plan. (*Id.* at 446-448)

B. *Samson Energy Resources Co. v. Semcrude, L.P. (In re Semcrude, L.P.),* 728 F.3d 314 (3d Cir. 2013)

1. Facts.

Some Oklahoma producers sold oil and gas on credit to the debtor before bankruptcy and contended they held statutory liens and property interests in what they sold. 728 F.3d at 318. The bankruptcy

court established resolution procedures under which there would be one representative proceeding for each estate, and all interested parties were allowed to brief and participate in oral argument on their claims. 728 F.3d at 319. The Oklahoma producers unsuccessfully requested reconsideration from the bankruptcy court and the district court denied them permission to appeal the procedures. 728 F.3d at 319. The producers commenced an adversary proceeding to assert their claims and to seek class certification to assert claims of similarly situated producers in Oklahoma. 728 F.3d at 319. The bankruptcy court stayed the adversary proceeding and granted summary judgment to the debtor in the representative Oklahoma, Kansas, and Texas proceedings, and certified them for direct appeal to the United States Court of Appeals for the Third Circuit. 728 F.3d at 319.

Then, the debtor and a statutory producers' committee reached a settlement that purported to resolve claims of all producers. 728 F.3d at 319. The debtor would pay $160 million in exchange for requiring that all adversary proceedings and other related litigation be voluntarily dismissed, and each of the producer classes accepted the plan. 728 F.3d at 319. Two of the four Oklahoma producers who started their own adversary proceeding accepted the plan and two abstained, but all of them objected to the plan, contending they should be allowed to continue their adversary proceeding.

The bankruptcy court confirmed the plan and it went effective in the absence of a request for a stay by the Oklahoma producers. 728 F.3d at 320. Certain claims were paid, and shares were issued under the plan. 728 F.3d at 320. The debtor moved to dismiss the producers' appeal as equitably moot, claiming that granting their requested relief would require unraveling the plan and would harm numerous third parties. 728 F.3d at 320. Appellants were not asking to set aside the class settlement for all Oklahoma producers. 728 F.3d at 323. They only wanted their claims allowed which would cost an incremental $207,300.62, or 0.13% of the $160 million settlement in the context of a $2 billion plan and a reorganized debtor having $140 million of working capital. 728 F.3d at 324. The debtor claimed a reversal could cost $81.7 million because the producers were seeking to bring a class action, but the appellate court declined to accept that consequence because, among other things, many producers in the class may have consented to the settlement. 728 F.3d at 324. Additionally, it was not clear that the new lenders would want to or have the right to terminate their new loans if the appeal were successful. 728 F.3d at 325.

2. Issues

What is the standard to determine the applicability of equitable mootness and who has the burden of proof?

3. Holdings

"In practice, it is useful to think of equitable mootness as proceeding in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." "If this threshold is satisfied, a court should continue to the next step in the analysis. It should look to whether granting relief will require undoing the plan as opposed to modifying it in a manner that does not cause its collapse. It should also consider the extent that a successful appeal, by altering the plan or otherwise, will harm third parties who have acted reasonably in reliance on the finality of plan confirmation." 728 F.3d at 321.

"Dismissing an appeal over which we have jurisdiction, as noted, should be the rare exception and not the rule. It should also be based on an evidentiary record, and not speculation. To encourage this, we join other Courts of Appeals in placing the burden on the party seeking dismissal." 728. F.3d at 321.

4. Rationale

Though appellants would have been wise to seek a stay, their statutory right to appeal is not premised on their doing so. 728 F.3d at 323. The evidence neither showed the plan would unravel nor third parties would suffer harm if the appeal were sustained. 728 F.3d at 324.

"The presumptive position remains that federal courts should hear and decide on the merits cases properly before them. When equitable mootness is used as a sword rather than a shield, this presumption is upended." "Denying them review now – based on speculation of future harms – would be distinctly inequitable, the antithesis of the equity required for 'mootness.'" 728 F.3d at 326.

5. Analysis

The facts of Semcrude show how equitable mootness is used as a sword by plan proponents attempting to avoid review of confirmation orders. The Third Circuit dialed this back. *Semcrude* also presents a recurring theme about 'class settlements' not agreed to by all members of the class. The debtor put all putative lienholders in one class, notwithstanding that they had different collateral. 728 F.3d at 319. Implicit in the plan was that if any statutory lienholder had a valid secured claim, it would not be paid in full. It may well turn out that the statutory liens are not allowable, but the use of classification and class voting to prevent a claimant from establishing the allowability of its secured claim not only violates the classification rule that each secured claim having different collateral must be in a different class, but also raises constitutional issues under the Fifth Amendment.

Semcrude has company in the Fifth Circuit, which states it "has taken a narrow view of equitable mootness, particularly where pleaded against a secured creditor." *Wells Fargo Bank v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 328 (5th Cir. 2013); *In re Pacific Lumber Co.*, 584 F.3d 229, 243 (5th Cir. 2009)("Secured credit represents property rights that ultimately find a minimum level of protection in the takings and due process clauses of the Constitution. Federal courts should proceed with caution before declining appellate review of the adjudication of these rights under a judge-created abstention doctrine.").

C. *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 980 (9th Cir. 2012), amended by 677 F.3d 869 (9th Cir. 2012)

1. Facts

The bankruptcy court confirmed a chapter 11 plan in an asbestos case, over the objections of insurers whose policies would be used by the asbestos trust to satisfy claims. The insurers had been denied a full hearing on their objections on the ground the plan was insurance neutral and therefore the insurers lacked standing. After the district court affirmed the confirmation order, the insurers were unsuccessful at procuring an emergency stay pending appeal, but the court of appeals expedited briefing, and the reorganized debtor started

implementing the confirmed plan and moved to dismiss the appeal for mootness.

$135 million of $600 million had been transferred to the asbestos trust. [Of that, only $44.7 million had been spent, of which only $15 million went to claimants.] The facts in brackets *were* deleted from the opinion. 677 F.3d 869. This did not amount to substantially all property to be transferred under the plan and did not constitute substantial consummation. 671 F.3d at 92. The bankruptcy court could fashion remedies that would not hurt asbestos claimants, such as directing the debtors to transfer more money to the trust. 671 F.3d at 993. The bankruptcy court would be able to fashion equitable remedies. *Id*.

2. Issue

Was the appeal from *the* confirmation order moot or equitably moot?

3. Holding

No. "The plan has thus far proceeded to a point where it may not be viable totally to upset the plan, to tip over the § 524(g) apple cart. Yet, that does not mean that there could not be plan modifications adequate to give remedy for any prior wrong." 671 F.3d at 993. The plan could be modified to compel appellees to return money, to change the *trust* governance if it is biased, to make the trust distribution procedures nonbinding on direct suits against the appealing insurers, and to change the trust distribution procedures. *Id*. at 993-994. "If abandonment of the § 524(g) plan were the only possible remedy, then there might be equitable mootness." 671 F.3d at 994.

4. Rationale

Failure to obtain a stay is not fatal. If the passage of time prevents appeal, the doctrine would be "*inequitable* mootness." 671 F.3d at 992. Substantial consummation had not occurred. *Id*. Modification would not unduly bear on the innocent. 671 F.3d at 992. The bankruptcy court can fashion equitable remedies. 671 F.3d at 993-994.

D. *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576 (D. Del. 2009)

1. Facts

In July 2008, the bankruptcy court confirmed a liquidating chapter 11 plan for New Century TRS Holdings, Inc. over objections. The company had formerly originated, *serviced*, and purchased mortgage loans with 7,200 employees and $17.4 billion of credit facilities.

The confirmed plan grouped 16 debtors into 3 groups and aggregated the assets of each group for distribution to its aggregate creditors after payment of the group's aggregate administrative, priority, and secured claims. Certain protocols adjusted the distributions to general creditors so that, for instance, creditors having claims for which two debtors in a group were jointly and/or severally liable would receive 130% of their claims against one debtor and 0% of their claims from the other.

Certain employees of the debtors were beneficiaries of a trust to which they had contributed funds under deferred compensation plans. They sued for a determination that their money was not part of the debtors' estates (i.e., that the deferred compensation plans were not unfunded "top hat" plans under ERISA, 29 U.S.C. § 1051(2)).

The employees' class rejected the plan and objected to confirmation on the grounds that (a) it was an illegal substantive consolidation and (b) the protocol caused creditors in the same class to be treated differently in violation of Bankruptcy Code section 1123(a)(4). The bankruptcy court confirmed the plan and denied the objectors a stay pending appeal, but required the liquidating trust created under the plan to provide appellants 30 days' written notice of its intent to distribute any funds to certain classes.

The plan's effective date occurred. The creditors' committee dissolved. A plan advisory committee was formed. The debtors' officers and directors were replaced. The estates' assets were distributed to the liquidating trust. All the debtors' outstanding notes and stock were cancelled. 127,000 entities received notice of the effective date of the plans. The liquidating trust entered into contracts with a temporary legal staffing agency and an information technology contractor, extended a short term lease, and spent $1.3 million on

those contracts. The trust spent $142,720 on a premium for a one-year bond covering its assets and $311,400 on a premium for a 3 year errors and omissions policy for the trust. The liquidating trust also spent $5.65 million on post-effective date professional fees. Certain claims were settled and allowed. In one settlement the trust paid $1.84 million, and paid lesser amounts to settle administrative claims. The trust also paid $2.6 million to employees to settle WARN Act claims and other claims arising from their termination.

2. Issue

Should the appeal be dismissed for equitable mootness?

3. Holding

No.

4. Rationale

An appeal should be dismissed as equitably moot if affording appellants relief "would be inequitable." 407 B.R. at 586-587 (quoting *In re PW Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000).

"It is reasonable to question whether the equitable mootness doctrine, as articulated by the Third Circuit, even applies in the liquidation context," although "the court is not aware of any reason why it should be concerned with inequitable appellate relief in a reorganization context but not in a liquidation context." 407 B.R. at 588 n. 27 (citing *In re Continental Airlines*, 93 F.3d 553, 560 (3d Cir. 1996); *Nordhoff Investments, Inc. v. Zenith Electronics Corp.*, 258 F.3d 180, 185 (3d Cir. 2001)).

"Thus, in a reorganization context, it makes sense to treat the unraveling of the plan as a significant fact weighing in favor of finding the appeal equitably moot. *See* generally *id*. However, it makes less sense to treat the unraveling of the plan with such significance in a liquidation context, since (in that context) the plan transactions tend to be discrete and relatively simple transactions aimed at disposing of the debtor's assets in the short term (sale or disposal of assets, services contracts to sustain the debtor through

liquidation, etc.) and the non-adverse third parties transacting with the debtor are not doing so with any particular interest in debtor's future condition, let alone relying on debtor's future condition as contemplated by the particulars of any chapter 11 plan." 407 B.R. at 588.

"Two countervailing considerations inform the court's exercise of discretion. On the one hand, public policy is served by encouraging non-adverse third parties to rely on the finality of bankruptcy confirmation orders. *Continental*, 91 F.3d at 565. Since applying the doctrine brings finality, this suggests that there should be a low bar for applying the doctrine and that the court should construe facts accordingly. On the other hand, however, even while encouraging reliance on finality, the court must preserve a meaningful right of appeal. If the equitable mootness bar is too low, that is if equitable mootness factors swing too easily in favor equitable mootness, the right of appeal becomes meaningless and the instruction to apply the doctrine 'cautiously' and on a 'limited' scope, *PWS Holding*, 228 F.3d at 236, is contravened." 407 B.R. at 588.

While no stay was obtained, no creditor class has received distributions. The plan components that went forward were not components on which non-adverse third parties detrimentally relied. 407 B.R. at 589.

"Where parties have not relied to their detriment on finality, which is often the case in the liquidation context, this factor does not weigh in favor of equitable mootness." 407 B.R. at 590.

The plan effected an unwarranted substantive consolidation and treated claims in the same class differently without consent in violation of Bankruptcy Code section 1123(a)(4). 407 B.R. at 592.