AMERICAN BANKRUPTCY INSTITUTE

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Equitable Mootness: What Should the Law Be?

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CONCURRENT SESSION

2022

ILLINOIS LAW

EQUITABLE MOOTNESS

ILLINOIS LAW

Proposal 1

No change in equitable mootness practice

ILLINOIS LAW

Proposal 2

Stay pending appeal presumptively issues if movant makes sufficient showing:

(1) of likelihood of success on appeal, and

(2) that plan consummation would effectively preclude meaningful relief in the event of reversal on appeal,

unless:

(a) plan proponent makes clear and convincing evidentiary showing of, and

(b) bankruptcy court makes specific findings of and quantifies,

irreparable injury from stay,

which movant can then obtain by posting a bond in the quantified amount.

ILLINOIS LAW

Proposal 3

Stay pending appeal presumptively issues if movant makes sufficient showing of likelihood of success on appeal, unless plan proponent:

(1) demonstrates ability to give movant effective relief in the event of reversal on appeal, or

(2) posts a bond or provides other security for the relief sought by the movant.

ILLINOIS LAW

In conjunction with either Proposal 2 or 3

Requisite showing of likelihood of success on appeal should be?:

(a) appeal raises serious issues regarding the merits, or

(b) substantial likelihood of success on the merits, or

(c) success on the merits is more likely than not.

ILLINOIS LAW

In conjunction with either Proposal 2 or 3

Movant can obtain preliminary stays, pending the hearings and rulings required by Proposal 2 or 3, on a lesser showing of likelihood of success on appeal.

ILLINOIS LAW

Doomsday?

No equitable mootness doctrine (e.g., because SCOTUS declares it unconstitutional)

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EQUITABLE MOOTNESS: WHAT SHOULD THE LAW BE?

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I. Introduction

Equitable mootness is a judicially created doctrine through which district and circuit courts hearing appeals from bankruptcy courts decline to exercise their appellate jurisdiction under 28 U.S.C. § 158(a) and (d) and dismiss bankruptcy appeals on equitable grounds. Generally, under the equitable mootness doctrine, an appellate court declines to consider an appeal from an order of a bankruptcy court on the merits because of consummation of the transactions authorized by that order and the reliance by third parties on such transactions. The doctrine of equitable mootness has most frequently been invoked in the context of appeals of orders confirming chapter 11 plans of reorganization and approving settlements.

As discussed below, courts employ different tests for equitable mootness. In recent years, the doctrine has come under increased scrutiny.

II. Mootness Generally

Mootness is a doctrine that precludes a reviewing court from reaching the underlying merits of a controversy. In federal courts, an appeal can be either constitutionally, statutorily, or equitably moot.

Constitutional mootness is derived from Article III of the U.S. Constitution, which limits the jurisdiction of federal courts to actual cases and controversies and precludes adjudication of

cases that are hypothetical or merely advisory.[1] A case is constitutionally moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[2]

An appeal can also be rendered moot by statute. For example, in bankruptcy cases, sections 363(m)[3] and 364(e)[4] of the Bankruptcy Code provide that the reversal or modification on appeal of an order authorizing a sale of assets or financing does not affect the validity of the sale or the enforceability of any debt or lien created as part of the financing if the purchaser or lender acted in "good faith" and no stay of the order was obtained.[5]

Equitable mootness is not technically "mootness" but is instead "a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality" by "prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract."[6] "That is, unlike conventional mootness, equitable mootness is not concerned with the court's ability or inability to grant relief; it is concerned with protecting the good faith reliance interests created by implementation of the bankruptcy plan from being undone afterwards."[7] As stated by the Sixth Circuit:

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[1] *See* U.S. Const. Art. III, § 2, Cl. 1.
[2] *Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1086 (11th Cir. 2004).
[3] Section 363(m) provides: "The reversal or modification on appeal … of a sale or lease of property does not affect the validity of a sale or lease … to an entity that purchased or leased such property in good faith."
[4] Section 364(e) provides: "The reversal or modification on appeal … does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith"
[5] *See In re One2One Commc'ns*, *LLC,* 805 F.3d 428, 443 (3d Cir. 2015) (noting that, by their terms, sections 363(m) and 364(e) do not prevent an appellate court from hearing an appeal but simply prevent the appellate court's remedy from affecting certain transactions).
[6] *Ochadleus v. City of Detroit, Michigan (In re City of Detroit, Michigan)*, 838 F.3d 792, 798 (6th Cir. 2016).
[7] *Id.* (citing *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

> More akin to waiver or forfeiture (or perhaps estoppel) than to conventional mootness, equitable mootness is "grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." Stated bluntly, equitable mootness negates appellate review of the confirmation order or the underlying plan, regardless of the problems therein or the merits of the appellant's challenge.[8]

III. The Circuit Authority

The origins of equitable mootness trace back to the Ninth Circuit Court of Appeals' opinion in *In re Roberts Farms, Inc.*[9] In that case, the bankruptcy court confirmed a plan of arrangement under the Bankruptcy Act of 1898. A creditor objected. The appellees sought dismissal of the appeal on mootness grounds. The district court granted the dismissal and the creditor appealed to the Ninth Circuit. The court stated:

> Here the many intricate and involved transactions … were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand solely upon the order confirming the plan of arrangement for court approval and confirmation of the transactions. Were we to deny the motion to dismiss for mootness and on consideration of the merits reverse the order of the District Court, what would be the result? Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.[10]

The Ninth Circuit also noted that the appellant had failed to seek a stay of the confirmation order. The court stated, "An entirely separate and independent ground for dismissal has also been established because Appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable order of the Bankruptcy

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[8] *Id.* (internal citations omitted).
[9] *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981).
[10] *Id.* at 797.

Court and have permitted such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal."[11] The court continued:

> [I]t is obligatory upon appellant in a situation like the one which we are faced to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order … if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.[12]

Thus, the Ninth Circuit found two independent grounds for dismissal: (i) futility of remedy, and (ii) the failure of the appellant to obtain a stay.

The Third Circuit Court of Appeals built on the doctrine of equitable mootness in its 1996 opinion in *In re Continental Airlines*.[13] In that case, the court articulated five factors that courts should consider in determining whether a bankruptcy appeal is moot, stating:

> Factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.[14]

Since *Continental Airlines*, every circuit has addressed and adopted some form of equitable mootness. *Collier on Bankruptcy* notes that the tests articulated by the circuits generally adopt the following factors, which mirror the factors set forth in *Continental Airlines*:

- Could the appellant have obtained a stay of the confirmation order during the pendency of the appeal, and, if so, did the appellant request such a stay?
- Has the plan been substantially consummated, or has the reorganized debtor transferred significant assets or issued securities?
- Have third parties who are not parties to the appeal relied on the plan's implementation to their detriment, or in a fashion such that it would be unfair

[11] *Id.* at 798.
[12] *Id.*
[13] *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996).
[14] *Id.* at 560.

> or inequitable to require those third parties to disgorge any plan consideration received, or to fashion another remedy?
>
> - Is the challenged provision central to the success of the reorganization, or can the claimed error be corrected by adjustment among a select group of creditors?
> - Is hearing the appeal on the merits consistent with public policy?[15]

Some of the key circuit court authority is summarized below.

a. First Circuit

In *In re Healthco Int'l., Inc.*,[16] the First Circuit Court of Appeals stated that analysis of equitable mootness requires consideration of a two-part test, made up of both equitable and pragmatic considerations. First, the "equitable" prong inquires whether repeated failures to request a stay caused reliance on the bankruptcy order to such a degree that remediation has become impossible. Second, the "pragmatic" prong requires a showing that the order at issue has been implemented to such a degree that appellate review is no longer practical, even though the appellant may have sought a stay with all reasonable diligence.

More recently, in *In re SW Boston Hotel Ventures, LLC*, the First Circuit reframed the *In re Healthco Int'l., Inc.* test, stating:

> The doctrine of equitable mootness allows an appellate court to dismiss a bankruptcy appeal if "an unwarranted or repeated failure to request a stay enabled developments to evolve in reliance on the bankruptcy court order to the degree that their remediation has become impracticable or impossible," or if "the challenged bankruptcy court order has been implemented to the degree that meaningful appellate relief is no longer practicable even though the appellant may have sought a stay with all due diligence."[17]

b. Second Circuit

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[15] 7 COLLIER ON BANKRUPTCY ¶ 1129.09[3][a] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2019).
[16] *Hicks, Muse & Co. v. Brandt (In re Healthco Int'l., Inc.)*, 136 F.3d 45 (1st Cir. 1998).
[17] *Prudential Ins. Co. of Am. v. SW Boston Hotel Venture, LLC (In re SW Boston Hotel Ventures, LLC)*, 748 F.3d 393, 402 (1st Cir. 2014) (citing *In re Healthco, Int'l. Inc.*, 136 F3d at 48).

The Second Circuit Court of Appeals adopted the doctrine of equitable mootness in *In re Charter Communications, Inc.*[18] In that case, creditors appealed confirmation of the debtor's chapter 11 plan. The appellants sought a stay from the bankruptcy and the district courts, but such requests were denied. The plan proponents "immediately took actions under the Plan, including cancelling the equity issued by the prepetition Charter, issuing shares in the reorganized Charter, converting notes issued by the prepetition Charter entities into new notes, and issuing warrants to Charter's prepetition noteholders."[19]

The Second Circuit set forth the following standard for equitable mootness:

> In this circuit, an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated. "Substantial consummation" is defined in the Bankruptcy Code to require that all or substantially all of the proposed transfers in a plan are consummated, that the successor company has assumed the business or management of the property dealt with by the plan, and that the distributions called for by the plan have commenced. *See* 11 U.S.C. § 1102(2).
>
> The presumption of equitable mootness can be overcome, however, if [the following] five … factors are met:
>
> (1) "the court can still order some effective relief";
> (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity";
> (3) "such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court";
> (4) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and
> (5) "the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure."[20]

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[18] *R2 Investments, LDC v. Charter Comm., Inc. (In re Charter Comm. Inc.)*, 691 F.3d 476 (2d Cir. 2012).
[19] *Id.* at 481.
[20] *Id.* at 481 (citing *Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996) and *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993)).

Notably, the Second Circuit approach is unique in that an appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated.[21]

c. Third Circuit

Although the Third Circuit has modified its approach to equitable mootness a few times since *In re Continental Airlines*, the most recent test is set forth in *Tribune Media Co. v. Aurelius Capital Management, L.P.*[22] In that case, the court stated as follows:

> Over the years, our precedential opinions have refined the doctrine to its current, more determinate state. As we recently put it, "equitable mootness … proceed[s] 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."[23]

Regarding the rationale for equitable mootness, the court continued:

> The theme is that the third parties with interests protected by equitable mootness generally rely on the emergence of a reorganized entity from court supervision. When a successful appeal would not fatally scramble a confirmed and consummated plan, this specific reliance interest most often is not implicated, as the plan stays in place (with manageable modifications possible) and the reorganized entity remains a going concern.[24]

In other words, if a successful appeal simply moves money around from one creditor to another, it is less likely to be deemed moot. Conversely, an appeal that impacts the interests of a third party who took action pursuant to a confirmed plan will likely be deemed equitably moot.

The Third Circuit has noted, however, that once a bankruptcy appeal has been filed, federal courts have a "'virtually unflagging obligation'" to exercise the jurisdiction conferred on

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[21] *See Apollo Global Management, LLC v. Bokf, NA (In re MPM Silicones, LLC)*, 874 F.3d 787, 804 (2d Cir. 2017).
[22] *Tribune Media Co. v. Aurelius Capital Management, L.P.*, 799 F.3d 272 (3d Cir. 2015).
[23] *Id.* at 278 (quoting *Samson Energy Resources Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 321 (3d Cir. 2013)).
[24] *Id.* at 280.

them.[25] Before there is a basis to avoid deciding the merits of an appeal, an appellate court "must first determine that granting the requested relief is almost certain to produce a 'perverse' outcome – significant 'injury to third parties' and/or 'chaos in the bankruptcy court' from a plan in tatters."[26] "Only in such circumstances is equitable mootness a valid consideration."[27]

d. Fourth Circuit

The Fourth Circuit test for equitable mootness is set forth in *Behrmann v. National Heritage Foundation*.[28] In that case, the court stated that "[t]he doctrine of equitable mootness represents a pragmatic recognition by courts that reviewing a judgment may, after time has passed and the judgment has been implemented, prove impractical, imprudent, and therefore inequitable."[29] The court articulated four factors to be considered:

> (1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated; (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties.[30]

e. Fifth Circuit

The Fifth Circuit's test for equitable mootness comes from *In re Texas Grand Prairie Hotel Realty, LLC*.[31] In that case, the court noted that "the doctrine of equitable mootness is unique to bankruptcy proceedings, responsive to the reality that "there is a point beyond which a

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[25] *In re Semcrude, L.P.*, 728 F.3d at 320.
[26] *In re Phila Newspapers, LLC*, 690 F.3d 161, 168 (3d Cir. 2012).
[27] *In re One2One Comm., LLC*, 805 F.3d 428, 434 (3d Cir. 2015).
[28] *Behrmann v. National Heritage Found.*, 663 F.3d 704 (4th Cir. 2011).
[29] *Id.* at 713.
[30] *Id.* (citing *Retired Pilots Assoc. of US Airways v. US Airways Group (In re US Airways Group, Inc.)*, 369 F.3d 806 (4th Cir. 2004)).
[31] *Wells Fargo Bank N.A. v. Texas Grand Prairie Hotel Realty, LLC (In re Texas Grand Prairie Hotel Realty, LLC)*, 710 F.3d 324 (5th Cir. 2013).

court cannot order fundamental changes in reorganization actions."[32] To court continued: "to establish equitable mootness, a debtor must show that (i) the plan of reorganization has not been stayed, (ii) the plan has been 'substantially consummated,' and (iii) the relief requested by the appellant would "affect either the rights of parties not before the court or the success of the plan."[33] The Fifth Circuit has noted the doctrine of equitable mootness should be applied sparingly.[34]

f. Sixth Circuit

The most recent discussion of equitable mootness in the Sixth Circuit arose in the context of the City of Detroit's chapter 9 bankruptcy case, wherein pensioners appealed confirmation of the City's plan of adjustment which incorporated the so-called Grand Bargain, a complex network of settlements and agreements that resulted in over $800 million dollars coming into the bankruptcy estate. In that case, the court set forth a three-part test, which is substantially similar to the Fifth Circuit test: "(1) whether a stay has been obtained; (2) whether the plan has been substantially consummated"; and (3) whether the relief requested would significantly and irrevocably disrupt the implementation of the plan or disproportionally harm the reliance interests of other parties not before the court."[35] The most important factor, the court held, "is whether the relief requested would affect the rights of third parties or the overall success of the plan."[36] This requires a case-by-case assessment of the feasibility and effect of the relief

[32] *Id.* at 327 (citing *In re Scopac,* 624 F.3d 274, 281 (5th Cir. 2010)).
[33] *Id.* at 327-28.
[34] *Id.* at 328 (citing *Bank of N.Y. Trust Co. v. Marathon Structured Finance Fund, LP (In re Pac. Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009) (equitable mootness should be applied "with a scalpel rather than an axe").
[35] *In re City of Detroit, Michigan,* 838 F.3d at 798 (citing *Curreys of Nebraska, Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947 (6th Cir. 2008)).
[36] *Id.* at 799.

requested, and determination of "whether it amounts to a piecemeal revision of the plan or a wholesale rewriting of it."[37]

Regarding that third factor, the Sixth Circuit noted that:

> Significant – even colossal – actions have been undertaken or completed, many irreversible; and the requested relief of omitting the bargained-for (and by majority vote agreed-upon) pension reduction would necessarily rescind the Grand Bargain, its $816 million in outside funding, and the series of other settlements and agreements contingent upon the Global Retiree Settlement, thereby unraveling the entire Plan and adversely affecting countless third parties, including, among others, the entire City population.[38]

The court detailed significant post-confirmation transactions which had occurred in reliance on the confirmation order, including issuance of bonds and notes, the irrevocable transfer of all Detroit Institute of Arts assets to a perpetual charitable trust and the transfer of interests in real property pursuant to certain settlement agreements, as the basis of dismissal of the appeal.

The court concluded:

> This is not a close call. In fact, the doctrine of equitable mootness was created and intended for exactly this type of scenario, to "prevent a court from unscrambling complex bankruptcy reorganizations" after "the plan [has become] extremely difficult to retract…." Given the immensity of the Grand Bargain, even within this enormous bankruptcy, such a drastic action would unavoidably unravel the entire Plan, likely force the City back into emergency oversight, and require a wholesale recreation of the vast and complex web of negotiated settlements and agreements. At this point, the harm to the City and its dependents—employees and stakeholders, agencies and businesses, and 685,000 residents—so outweighs the harm to these appellants that granting their requested relief and unravelling the Plan would be "impractical, imprudent, and therefore inequitable." In short, this is the scenario that equitable mootness was designed to avoid.[39]

g. <u>Seventh Circuit</u>

The Seventh Circuit rejects the use of the term "equitable mootness." In *In re UNR Indus., Inc.*, the court stated:

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[37] *Id.*
[38] *Id.*
[39] *Id.* (internal citations omitted).

> There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome (equitable mootness). Using one word for two different concepts breeds confusion. Accordingly, we banish "equitable mootness" from the local lexicon. We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.[40]

Nevertheless, the Seventh Circuit has held, post *UNR Indus.*, that:

> An appellate court may properly refuse to decide the merits of a challenge to a bankruptcy or receivership plan where unwinding the plan (even if legally justifiable) would be difficult and inequitable in light of the complexity of the transactions and the reliance interests involved. This is not "real mootness"; the court has jurisdiction to alter the outcome, but equitable considerations make it unfair or impracticable to intervene…. [T]he two key factors are "(1) the legitimate expectations engendered by the plan; and (2) the difficulty of reversing the consummated transactions." This fact-intensive inquiry weighs "the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances."[41]

Unlike in most other circuits, whether the appellant sought a stay pending appeal is not a significant factor in the Seventh Circuit.[42]

h. <u>Ninth Circuit</u>

In recent years, the Ninth Circuit has modified its standard for equitable mootness from the standard initially set forth in *In re Roberts Farms, Inc.* The Ninth Circuit has applied a four-factor test:

> We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable

[40] *In re UNR Indus., Inc.,* 20 F.3d 766, 769 (7th Cir. 1994) (emphasis in original).
[41] *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833 (7th Cir. 2015) (internal citations omitted).
[42] *See SEC v. Wealth Mgmt., LLC*, 628 F.3d 323, 332 n. 5 (7th Cir. 2010).

> relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.[43]

Regarding the last factor (*i.e.,* the power to grant equitable relief), the Ninth Circuit has noted that the party asserting mootness "has a heavy burden to establish that there is no effective relief remaining for a court to provide."[44]

i. Tenth Circuit

The Tenth Circuit Court of Appeals has described equitable mootness as "a discretionary, prudential doctrine."[45] The court considers six factors for purposes of determining whether reaching the merits of an appeal would be unfair or impractical:

> (1) Has the appellant sought and/or obtained a stay pending appeal? (2) Has the appealed plan been substantially consummated? (3) Will the rights of innocent third parties be adversely affected by reversal of the confirmed plan? (4) Will the public-policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely on bankruptcy court decisions—be undermined by reversal of the plan? (5) If appellant's challenge were upheld, what would be the likely impact upon a successful reorganization of the debtor? And (6) based upon a quick look at the merits of appellant's challenge to the plan, is [the argument] legally meritorious or equitably compelling?[46]

The last of the six factors is notable. The Tenth Circuit test takes a "quick look" at the merits of appellant's challenge to the plan, a factor not generally considered by other circuits.

j. Eleventh Circuit

The Eleventh Circuit articulated its test for equitable mootness in *In re Nica Holdings, Inc.*[47] In that case, the court stated that: "Central to a finding of mootness is a determination by

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[43] *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161, 1167–68 (9th Cir. 2015).
[44] *First Southern Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (In re Sunnyslope Hous. Ltd. P'ship)*, 818 F.3d 937, 944 (9th Cir. 2016).
[45] *C.O.P. Coal Dev. Co. v. C.W. Mining Co. (In re C.W. Mining Co.)*, 641 F.3d 1235, 1239-40 (10th Cir. 2011).
[46] *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282-83 (10th Cir. 2013)
[47] *Ulrich v. Welt (In re Nica Holdings, Inc.)*, 810 F.3d 781, 786 (11th Cir. 2015).

an appellate court that it *cannot* grant effective judicial relief."[48] Deciding whether a case is equitably moot requires a multifactor analysis:

> Has a stay pending appeal been obtained? If not, then why not? Has the plan been substantially consummated? If so, what kind of transactions have been consummated? What type of relief does the appellant seek on appeal? What effect would granting relief have on the interests of third parties not before the court? And, would relief affect the re-emergence of the debtor as a revitalized entity?[49]

No single factor is determinative, and a court must consider "all the circumstances of the case to decide whether it can grant effective relief."[50]

The court specifically noted that "substantial consummation by itself does not resolve the issue" and "[d]espite the appearance that a failure to obtain a stay is a blanket discharge of an appellate court's duty to review a bankruptcy court's confirmation order, the fact remains that the absence of a stay does not compel a finding of mootness."[51]

IV. Criticism of the Doctrine

In a few recent opinions, federal circuit judges have called into question the propriety of the doctrine of equitable mootness. They have characterized the doctrine as an abrogation of federal courts' "virtually unflagging obligation" to hear appeals within their jurisdiction.[52] According to this view, dismissing an appeal on equitable mootness grounds "should be the rare exception."[53] Several academics have likewise questioned the propriety of the doctrine in recent years.[54]

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[48] *Id.* at 786 (citing *First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992)).
[49] *Id.*
[50] *Id.* at 786-87.
[51] *Id.* at 786 n. 5 (citing *In re Club Assocs.*, 956 F.2d at 1069-70).
[52] *In re One2One Commc'ns, LLC*, 805 F.3d at 433.
[53] *In re Tribune Media Co.*, 799 F.3d at 288.
[54] *See e.g.,* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects,* 93 Am. Bankr. L.J. 377 (2019); Christopher W. Frost, *Pragmatism vs. Principle: Bankruptcy*

a. *In re One2One Communications, LLC*

In *In re One2One Communications, LLC,*[55] the Third Circuit Court of Appeals held that the district court had abused its discretion in dismissing, as equitably moot, an appeal of an unstayed order confirming a debtor's chapter 11 plan of reorganization. The appellant had asked the court to overrule its adoption of equitable mootness in *In re Continental Airlines*, contending that the doctrine was unconstitutional and contrary to the Bankruptcy Code, particularly in light of the Supreme Court's recent ruling in the *Stern v. Marshall* line of cases.[56] The panel held that *In re Continental Airlines* remains the law in the Third Circuit and noted that it was not free to overturn a precedential opinion absent an *en banc* reversal. Nevertheless, acknowledging that the Third Circuit has "emphasized that the doctrine must be construed narrowly and applied in limited circumstances,"[57] the court ultimately reversed and remanded the matter (which was not complex and involved only a handful of creditors) back to the district court for an adjudication of the appeal on the merits.

A concurring opinion by Judge Krause was particularly critical of the doctrine. Judge Krause stated at the outset of her concurrence that she did not believe the Third Circuit should continue in what she described as its "failed attempts" to limit the doctrine of equitable mootness, a "legally ungrounded and practically unadministrable 'judge-made abstention doctrine.'"[58] Rather, she said, "the time has come to reconsider whether it should exist at all,

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Appeals and Equitable Mootness, 15 N.Y.U. J.L. & Bus. 477 (2019); Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 Ky. L.J. 269 (2019).

[55] *In re One2One Communication, LLC*, 805 F.3d 428 (3d Cir. 2015).

[56] *See Stern v. Marshall*, 564 U.S. 462 (2011); *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014); *Wellness Intern. Network, Ltd. v. Shariff*, 575 U.S. 665 (2015).

[57] *In re One2One Communication, LLC*, 805 F.3d at 435.

[58] *Id.* at 438 (citing *In re Semcrude, L.P.*, 728 F.3d at 317).

and, if we conclude it should, to reform it substantially."[59]

Judge Krause noted that although the court had adopted equitable mootness in *In re Continental Airlines*, neither the constitutional nor the statutory basis for the doctrine were challenged in that case, and "the court was still nearly evenly divided—with then-Judge Alito leading the dissent."[60] She continued:

> The doctrine was designed to be "limited in scope and cautiously applied," specifically in highly complex cases where limited relief was not feasible and upsetting a reorganization would cause substantial harm to numerous third parties. In the nearly twenty years since we launched that experiment, it has proved highly problematic, with district courts continuing to dismiss appeals in the simplest of bankruptcies. Further, as courts and litigants (including Appellees) have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none. Moreover, a series of Supreme Court decisions since our adoption of the doctrine makes clear that, whatever doubts we set aside twenty years ago to embrace the doctrine, it cannot survive constitutional scrutiny today. I therefore urge our Court to consider eliminating, or at the very least, reforming, equitable mootness.[61]

Judge Krause rhetorically asked: "So what is the constitutional or statutory anchor for declining to exercise jurisdiction over bankruptcy appeals dubbed 'equitably moot'? Simply put, there is none."[62] She noted that the mandate that federal courts hear cases within their statutory jurisdiction "is a bedrock principle of our judiciary."[63] She explained that Supreme Court case law handed down since the Third Circuit adopted the doctrine of equitable mootness suggested that the doctrine would likely not survive Supreme Court scrutiny. She expressly rejected the use of the doctrines of abstention, and the invocation of sections 363(m), 364(e) and 1127(b) of the Bankruptcy Code, as a basis for equitable mootness. Indeed, she noted, "[b]ecause Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of

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[59] *Id.*
[60] *Id.*
[61] *Id.* (internal citations omitted).
[62] *Id.* at 439.
[63] *Id.*

statutory construction compel us to presume that Congress did *not* intend for other orders [*i.e.*, confirmation orders] to be immune from appeal."[64]

Even if there was a reading of the statute that supported equitable mootness, Judge Krause stated that she would be compelled to reject it because of the serious constitutional questions that reading would raise. More specifically, she expressed concern that equitable mootness infringes on a litigant's entitlement to an Article III adjudicator, "a personal right recently reaffirmed in *Wellness International Network, Ltd. v. Sharif*…."[65] She noted that, in *Wellness International*, the Supreme Court approved adjudication of *Stern* claims by bankruptcy judges where the parties consent, but explicitly premised its decision on the availability of appellate review by Article III courts.

Additionally, Judge Krause posited that although equitable mootness "was intended to promote finality, ... it has proven far more likely to promote uncertainty and delay."[66] Proponents of reorganization plans, she stated, now rush to implement them so they may avail themselves of an equitable mootness defense, using the doctrine as a sword instead of a shield. Rather than litigate the merits of an appeal, she observed, parties spend years litigating equitable mootness.[67]

Finally, Judge Krause suggested that even if the court were to decide not to revisit equitable mootness, it should delineate its contours more precisely. She proposed four specific reforms. First, she suggested, the court could place greater weight on an appellant's attempts to obtain a stay, perhaps permitting dismissal only where an appellant does not seek one. Second, she proposed that the court could clarify what constitutes "significant harm" to "third parties who

[64] *Id.* at 443.
[65] *Id.* at 444 (citation omitted).
[66] *Id.* at 446.
[67] *Id.* at 446.

have justifiably relied on plan confirmation."[68] Third, the court could reconsider its standard of review of determinations of equitable mootness, suggesting that a *de novo* standard of review might be more appropriate than an abuse of discretion standard. Finally, she suggested that the court could incorporate into its equitable mootness test "a quick look at the merits of [an] appellant's challenge" to determine if it is "legally meritorious or equitably compelling."[69]

b. *In re City of Detroit, Michigan*

As noted above, the Sixth Circuit Court of Appeals dismissed a group of pensioners' objections to the City of Detroit, Michigan's chapter 9 plan of adjustment on equitable mootness grounds. In dissent, Judge Karen Nelson Moore took direct aim at the viability of the doctrine of equitable mootness explaining that "[t]he current trend at the Supreme Court is toward a greater recognition of our 'virtually unflagging obligation ... to exercise jurisdiction given [us].'"[70] Judge Moore stated:

> At bottom, this is a recognition that it is rarely our job as judges to decline to exercise our judicial power in a case that is otherwise within our jurisdiction. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence dictates.' Deciding not to decide can thus be a form of judicial overreach, not restraint."[71]

Judge Moore criticized her colleagues and the district court for declining to hear the pensioners' appeal, reasoning that such parties had a constitutional right to have their objections heard.

After a fulsome analysis, Judge Moore concluded that there was no legal basis for the equitable doctrine in the Bankruptcy Code. She noted that most circuit courts which have

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[68] *Id.* at 452.
[69] *Id.* at 454.
[70] *In re City of Detroit, Michigan,* 838 F.3d at 805 (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).
[71] *Id.*

adopted it have made little inquiry into a basis for it[72] and stated that the doctrine "enjoys minimal textual support, if any" and "contradicts the relevant appellate-jurisdiction statutes."[73]

Judge Moore also suggested that application of the equitable mootness doctrine raises separation of powers concerns. She stated:

> Divorced as it is from any statutory basis, equitable mootness is nothing but a prudential doctrine of "judicially self-imposed limits." However, "prudential" equitable mootness may be, it operates to cut off entirely a litigant's right to appeal in a case that would otherwise be within our appellate jurisdiction. Such a self-imposed straitjacket contradicts our 'virtually unflagging obligation' to exercise the jurisdiction that we have been given. Although equitable mootness is imposed by judges on ourselves, it is no less an affront to the separation of powers than a doctrine usurping jurisdiction that Congress never provided…. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.[74]

Judge Moore also criticized the doctrine of equitable mootness because it precludes appellate review by an Article III court, stating: "The problem with equitable mootness is not only that it cuts off entirely the right to appeal to an Article III court, but that 'it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue' because 'bankruptcy courts control nearly all of the variables' that are considered in assessing whether an appeal is equitably moot."[75]

Judge Moore concluded her powerful dissent by stating:

> In deciding not to decide this case, the Majority decides much. The Majority extends our ill-reasoned equitable-mootness doctrine to a new context, imposing an unsupported and damaging limit on our appellate review that will be impossible to cabin in a principled way. There is no textual support for this limitation, even accepting the minimal textual support for applying equitable mootness to Chapter 11 cases. Instead, the Majority expands a species of

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[72] *Id.* at 808-809 (citing *In re Semcrude, L.P.*, 728 F.3d at 317 ("Courts have rarely analyzed the source of their authority to refuse to hear an appeal on equitable mootness grounds.").
[73] *Id.*
[74] *Id.* at 810 (internal citations omitted).
[75] *Id.* at 812 (internal citations omitted).

> prudential mootness, the precise kind of pseudo-jurisdictional doctrine that the Supreme Court has suggested conflicts with our "virtually unflagging obligation ... to exercise the jurisdiction given [us]." And in doing so, the Majority further upends the delicate constitutional balance on which our bankruptcy-adjudication system is based by ensuring that those who seek to appeal the approval of a bankruptcy plan may never have their claims heard by an Article III judge. The Majority makes these missteps all in the name of protecting reliance interests. I have my doubts about the reasonableness of any reliance on a reorganization plan that is known to be subject to significant challenge on appeal, but even if the Majority's concern about reliance interests is fully valid, it is not our job to write a law to protect those interests. "Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."[76]

c. *In re VeroBlue Farms USA, Inc.*

In *In re VeroBlue Farms USA, Inc.,*[77] the bankruptcy court confirmed a chapter 11 plan over the objection of a shareholder. The shareholder appealed the confirmation order to the district court, which granted a motion to dismiss the appeal based on the doctrine of equitable mootness. On further appeal, the Eighth Circuit reversed and remanded, finding the doctrine of equitable mootness to be on, at best, shaky ground and holding that the doctrine required application of a more rigorous test before an Article III court should abstain from exercising its subject matter jurisdiction.

In reaching this conclusion, the Eighth Circuit first remarked that the doctrine's name was misleading. "A case is moot, that is, beyond a federal court's Article III jurisdiction, only if 'it is impossible for a court to grant any effectual relief whatsoever.'"[78] The court agreed with the *In re UNR Indus., Inc.* court, opining that there is a difference between *inability* to alter the outcome and *unwillingness* to alter the outcome. The equitable mootness doctrine, the court

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[76] *Id.* at 814.
[77] *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880 (8th Cir. 2001).
[78] *Id.* at 888 (citing *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, __ U.S. __, 139 S. Ct. 1652, 1660 (2019)).

noted, arises from a recognition that even when dismissal is not warranted on Article III grounds, common sense or equitable considerations may justify a court deciding not to rule on the merits.

Because the determination is an equitable one, the court continued, a variety of factors could be relevant in a particular case. Nevertheless, the court refused to adopt two-step or five-step analyses used by other courts or, for that matter, any specific multi-factor test. It cited with favor the *In re One2One* concurrence, noting that equitable mootness delays finality of bankruptcy court decisions, rather than speeding things up.[79] In the instant case, the court found, the record suggested that the plan confirmation dispute was exactly the type of dispute that should be reviewed on the merits by an Article III appellate court.

Again, referencing Judge Krause's concurrence in *In re One2One*, the court stated:

> The panel in *One2One* was bound to apply the equitable mootness doctrine as adopted by the Third Circuit's 7-6 en banc decision in *Continental Airlines*. Writing on a clean Eighth Circuit slate, we conclude that an inquiry into these issues is required before equitable mootness may be invoked in this case. This means that, on remand, the district court must make at least a preliminary review of the merits of [the] appeal to determine the strength of [appellant's] claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available -- including possible dismissal -- to avoid undermining the plan and thereby harming third parties…. A "quick look at the merits of an appellant's challenge" is … "particularly important for complex questions, like whether a plan comports with the Bankruptcy Code's cram down provisions, an issue that often cries out for appellate review ... or claims involving conflicts of interest or preferential treatment that go to the very integrity of the bankruptcy process."[80]

Finally, citing *Wellness Int'l Network Ltd. v. Sharif,* the court concluded that the Article I power of bankruptcy courts was permissible only because the exercise of those powers was subject to Article III review. Avoiding the exercise of subject matter jurisdiction by utilizing a judicially created doctrine flies in the face of the "presumptive position … that federal courts

[79] *Id.* at 889.
[80] *Id.* at 890.

should hear and decide on the merits cases properly before them."[81] In this respect, the court concluded by stating: "If equitable mootness … becomes the rule of appellate bankruptcy jurisprudence, rather than an exception to the Article III-based rule that jurisdiction should be exercised, we predict the Supreme Court, having up to now denied petitions for certiorari to review the doctrine, will step in and severely curtail -- perhaps even abolish -- its use…."[82]

[81] *Id.* at 891 (citing *In re Semcrude*, 728 F.3d at 326).
[82] *Id.*

Faculty

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Hon. Robert D. Drain is a U.S. Bankruptcy Judge for the Southern District of New York in White Plains. Since his appointment in May 2002, he has presided over such chapter 11 cases as *Loral*, *RCN*, *Cornerstone*, *Refco*, *Allegiance Telecom*, *Delphi*, *Coudert Brothers*, *Frontier Airlines*, *Star Tribune*, *Reader's Digest*, *A&P*, *Hostess Brands*, *Christian Brothers* and *Momentive*. He also has presided over the ancillary or plenary cases of *Corporacion Durango*, *Satellites Mexicanas*, *Parmalat S.p.A.* and its affiliated U.S. debtors, *Varig S.A.*, *Yukos* (II), *SphinX*, *Galvex Steel*, *TBS Shipping*, *Excel Maritime*, *Nautilus*, *Landsbanki Islands*, *Roust* and *Ultrapetrol*. He has served as the court-appointed mediator in a number of chapter 11 cases, including *New Page*, *Cengage*, *Quicksilver*, *LightSquared*, *Molycorp*, *Breitburn Energy* and *China Fishery*. Previously, Judge Drain was a partner in the bankruptcy department of Paul, Weiss, Rifkind, Wharton & Garrison, where he represented debtors, trustees, secured and unsecured creditors, official and unofficial creditors' committees, and buyers of distressed businesses and distressed debt in chapter 11 cases, out-of-court restructurings and bankruptcy-related litigation. He was also actively involved in several transnational insolvency matters. Judge Drain is a Fellow of the American College of Bankruptcy and a member and board member of ABI, a member of the International Insolvency Institute, a member and former Secretary of the National Conference of Bankruptcy Judges, and a founding member and chair of the Judicial Insolvency Network. He also is the current chair of the Bankruptcy Judges Advisory Group established through the Administrative Office of the U.S. Courts, and was appointed to the FDIC's Systemic Resolution Advisory Committee through May 1, 2021. Judge Drain was an adjunct professor for several years at St. John's University School of Law's LL.M. in Bankruptcy Program

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