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Litigation Round-Up

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Stays Pending Appeal and Equitable Mootness[1]

Questions for Discussion

I. Stays pending appeal are used to avoid an appeal becoming moot before it can be heard on the merits. We will focus on confirmation orders. Under most circumstances, a party will file an appeal of a bankruptcy court's confirmation order to the district court and then file a motion with the bankruptcy court requesting a stay to prevent the confirmation order from becoming effective and the plan substantially consummated. Whether a stay is granted, and the diligence of the parties in seeking a stay, are crucial factors when determining whether the appeal itself will be dismissed as "equitably moot." There are jurisdictional splits on how the granting of, denial of, or failure to seek a stay pending appeal may affect the equitable mootness analysis.

A. In deciding whether to grant a stay pending appeal, courts will generally consider: (1) the likelihood of success on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether other parties will be irreparably harmed if a stay is granted; and (4) The public interests that might be affected. See e.g. United States v. Grote, 961 F.3d 105, 122 (2d Cir. 2020)(citing In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007)). Should some of these factors be weighed more heavily than others in granting or denying the stay?

B. Perhaps the most crucial factor in determining whether an appeal is equitably moot is whether a stay was sought or obtained. Circuits are split on whether a stay must actually be obtained or only sought. Further, a minority of circuits holds that failure to seek a stay is not fatal. It is important to consider the jurisdiction of the bankruptcy proceedings when seeking a stay and, ultimately, to overcome arguments of mootness. Should there be uniformity on how courts make these determinations?

C. Bankruptcy Rule 8005 grants the district court discretion to grant a stay with or without requiring a bond be posted. When should a court require a bond and how should it determine the amount of the bond? What is a good reason not to require that a bond be posted?

II. Equitable mootness is a judge-made doctrine under which courts reviewing bankruptcy court confirmation orders decline to exercise their appellate jurisdiction and dismiss

[1] Compiled by Michael Luskin (Stroock & Stroock & Lavan LLP), with the assistance of law school graduate Michael Morgan, also at Stroock.

bankruptcy appeals. They do so after considering a variety of factors, including whether the appellant has been diligent in prosecuting the appeal and seeking a stay; whether the plan has been substantially consummated; to what degree innocent third parties have relied on confirmation of the plan; the likelihood of success on appeal; and whether or not effective relief could still be given. The doctrine has been criticized, principally on the ground that federal courts shouldn't (or can't) decline jurisdiction, especially when presented with a controlling issue that is fair ground for litigation and appellate review, and there is no other available forum. The chart at the end of this outline shows the different factors applied circuit-by-circuit. Descriptions of some recent cases applying and not applying the equitable mootness doctrine follow these questions for discussion. These cases in turn cite to and describe many of the older cases that gave rise to the doctrine.

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 Bankruptcy Court, the District Court, and then the Court of Appeals; and 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 if the appeal is deemed moot. 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.) or is a matter of current debate and conflicting decisions (e.g., third-party releases), but would be 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?

E. Should the courts determine whether there really is a need for speed – after all, the plan proponents are the ones who created the short deadlines and immediate plan consummation. Should they have to justify this? Should they bear the burden of proof on irreparable injury and the inability to order effective relief?

III. To what degree should appellate courts take into 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 speedy confirmation and consummation?

IV. 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.?

V. In light of the recent Supreme Court ruling in *MOAC Mall Holdings,* which held the Court disfavors *per se* equitable mootness, should lower courts be bound by precedent to prohibit *per se* equitable mootness rulings?

VI. Should parties be able to stipulate that they will not argue equitable mootness in any appeal in a case? If so, might these types of stipulations become common practice? Are they binding on the appellate court?

VII. 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. *See MOAC Mall Holdings LLC v. Transform Holdco LLC et al.,* 598 U.S. ----, 2023 WL 2992693 (2023)*; see below Cases Refusing to Dismiss for Equitable Mootness.* Should the 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? Is that okay?

VIII. 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?

Select Stay Pending Appeal Cases

A. *In re Voyager Digital Holdings, Inc.,* No. 1:2023cv02171 (S.D.N.Y. 2023)

1. Facts

In 2022, Voyager Digital Holdings, Inc. filed for voluntary chapter 11 relief. Pursuant to the plan of reorganization, Voyager marketed its assets for sale through a court-ordered auction. The now infamous crypto company FTX won the auction. In October 2022, the Bankruptcy Court authorized Voyager to enter into an asset purchase agreement with FTX through which FTX would acquire substantially all of Voyager's assets, including cryptocurrency and customer accounts. However, just weeks later, FTX's filed for bankruptcy after its fraudulent activities came to light and the parties terminated the agreement.

In December 2022, Voyager entered into a new asset purchase agreement with cryptocurrency exchange Binance.US. Voyager then filed its plan. The plan contained an exculpation provision which absolved the debtor, its agents, and the purchaser from liability for violating any rules or regulations related to the restructuring transaction, including criminal and government liability. Certain federal and state government agencies, including the SEC and U.S. Trustee, objected to the plan. They argued the plan's non-debtor releases were unconstitutional, violated the

Bankruptcy Code, and were inconsistent with Second Circuit law. The U.S. Attorney's Office filed a letter objecting to the government liability carveout, arguing that the exculpation language improperly barred the Government from enforcing its laws and regulations in the ordinary course.

In March 2023, the Bankruptcy court rejected the Government's arguments and approved a plan with a revised exculpation provision, limiting claims for "fines, penalties, damages, or other liabilities." The confirmation order also waived Fed. R. Bankr. P. 3020(e), which provides that the effects of confirmation are stayed for 14 days. Instead, the Court ruled the order would take effect six days later.

2. Procedural Posture

On March 14, 2023, the Government filed a motion for a stay pending appeal in the Bankruptcy Court. It argued that the revised exculpation provision still would indemnify actual fraud and willful misconduct and that the Court did not have the authority to exculpate anyone from future government enforcement. The Bankruptcy Court denied the motion and did not attempt to clarify the broad language of the exculpation provision. On consent of the parties, the Court extended the stay to permit the District Court to consider the Government's motion.

On March 14, 2023, the Government filed a Notice of Appeal from the Bankruptcy Court's Confirmation Order. On March 17, 2023, the Government filed an emergency motion for a stay pending appeal of the confirmation order in the District Court.

3. Issue

Has the government shown that a stay is warranted by demonstrating a substantial case on the merits and irreparable harm in the absence of a stay?

4. Holding

Yes.

5. Reasoning

The Court found that the Government raised substantial questions concerning the relationship between the bankruptcy courts and the Government's police and regulatory powers. Exculpation provisions are intended to allow settling parties to negotiate in the bankruptcy proceedings without fear of subsequent litigation over

actions in those proceedings. They do not extend to Government enforcement of the law after confirmation. Further, a bankruptcy court has limited, if any, jurisdiction over criminal cases. Allowing the exculpation provision would be at odds with the general principle that confirmation does not insulate criminal activity and could create significant delay by requiring *all* government agencies to participate in chapter 11 proceedings. At this stage in the litigation, the Government's arguments were, at minimum, entitled to additional briefing and review. The Government thus made out a case on the merits that weighed in favor of the stay.

The Court also found that, while all parties would face meaningful injury if a stay were wrongly granted or denied, "the balance of the hardship lies with the Government." There is a legitimate public interest in protecting the Executive Branch's power to enforce the laws of the United States. The risk of harm to that legitimate interest outweighed the consequences of a brief additional delay to the confirmation. Further, if the stay were denied, the Government's appeal would become equitably moot. The Government's—and the public's—interest in preserving the appeal meant that "the risk of mootness in the absence of a stay" also satisfied the prong.

In granting the Government's motion, the Court expedited briefing and determination of the appeal to minimize delay in consummating the Plan.

6. Second Circuit

On April 11, 2023, the Second Circuit rejected an emergency request from Voyager to lift the stay and dismissed the appeal, finding that the court lacked jurisdiction.

7. Agreement with U.S. Government

In late April 2023, the Government reached an agreement with Voyager, allowing it to sell user accounts to Binance.US while the appeal is pending. *See* Soma Biswas, *U.S. Lets Bankrupt Voyager Sell User Accounts to Binance.US*, W.S.J. (April 20, 2023) https://www.wsj.com/articles/u-s-lets-bankrupt-voyager-sell-user-accounts-to-binance-us-968f8259.

8. Binance.US Backs out of Sale Agreement

On April 25, 2023, Binance.US announced that it had called off the $1.3 billion deal to buy Voyager assets, citing a "hostile and uncertain regulatory climate." In a court filing, Voyager reserved all rights to the $10 million deposit from Binance.US. *See* Niket

Nishant and Hannah Lang, *Binance.US calls off $1.3 billion deal for Voyager's assets*, Reuters (April 25, 2023) https://www.reuters.com/markets/deals/binanceus-calls-off-13-bln-deal-voyagers-assets-2023-04-25/.

9. Voyager Plans to Liquidate All Assets

On May 5, 2023, Voyager announced that it would self-liquidate its assets and wind down operations after failing to secure a new sale agreement [Docket No. 1374.]

B. *Coinbase v. Bielski*, 22-105 (*Citation Pending)* S. Ct. (2023). Not a bankruptcy case, but raises the question, if reliance on the Federal Arbitration Act can compel a court to issue a stay pending appeal, can the Bankruptcy Code as well?

1. Facts

Coinbase operates an crypto currency exchange platform. Bielski created an account with Coinbase and set up a digital wallet in 2021. Later that year, a scammer transferred over $31,000 in cryptocurrency out of Bielski's account. After Bielski's attempts to seek help from Coinbase failed, he sued them under the Electronic Funds Transfer Act.

At the District Court, Coinbase moved to compel arbitration in accordance with its standard arbitration agreement. The District Court denied the motion, finding that the arbitration agreement was unconscionable and lacked mutuality.

Coinbase appealed to the Ninth Circuit. In the Ninth Circuit, the appeal of the denial of arbitration does not trigger an automatic stay, so Coinbase moved for a stay pending appeal. The District Court found that while there was a serious legal question, Coinbase would suffer no irreparable harm absent a stay. However, the stay would cause Bielski irreparable harm and contravene public interests. The court thus denied the stay.

Coinbase appealed directly to the Supreme Court, which granted cert. on December 9, 2022. Coinbase then requested a new stay pending appeal from the Ninth Circuit. The Circuit Court denied the motion but, during oral arguments, told the parties that it would wait to issue an opinion on the appeal until after the Supreme Court ruled.

Oral arguments were heard in March 2023. A ruling is due by the end of June.

2. Issues

Is a district court compelled to stay litigation when a non-frivolous appeal is filed in response to a denial of a motion to compel arbitration?

C. *In re Adelphia Commc'ns Corp.*, 361 B.R. 337 (S.D.N.Y. 2007); 368 B.R. 140, 147 (Bankr. S.D.N.Y. 2007)

1. Facts

Through the Adelphia chapter 11 cases there were numerous disputes between creditors as to how the value of the estate would be allocated. After years of litigation and months of negotiations, a settlement was reached among the creditors. As part of the settlement, the deal would be closed through a section 363 sale. Debtors and the Creditors Committee filed a plan which incorporated the settlement as a cornerstone, and more than two-thirds of the members of all classes of creditors voted to approve. The plan satisfied the Bankruptcy Code's assent thresholds, with all 30 of the 30 impaired classes that were entitled to vote approving the plan, holding $10.7 billion of the Debtors' $12.7 billion in total debt.

During the confirmation hearings, various parties in interest raised objections to the plan, including a group of senior bondholders. The bondholders claimed that, despite the overwhelming support for the plan, it was unconfirmable. Their arguments against confirmation included the claim that the plan incorporating the settlement violated neutrality requirements and earlier orders governing prior plans. Specifically, they claimed there was "no settlement" because the settlement was not "negotiated and agreed to by the parties authorized to control it."

The Bankruptcy Court denied the bondholders' motions and, on January 3, 2007, entered its order confirming the plan. Supporting its decision, the Bankruptcy Court noted that the plan was approved by 30 of the 30 impaired classes that voted and that the settlement passed muster for fairness under the applicable case law.

The bondholders appealed the confirmation order and then moved for a stay pending appeal in the District Court.

2. Issue

Should the stay be granted and, if so, should the bondholders be required to post a bond?

3. Holding

Yes and yes.

4. Reasoning

In the absence of granting a stay, the plan would take effect and distributions would be made, rendering the appeal moot. Thus the appellants would be irreparably harmed in the absence of the stay. The appellants also showed a substantial possibility of success on their claims. On the other hand, delaying the plan could unravel a carefully constructed plan that took years to litigate and negotiate, and cause value-erosion that would significantly decrease distributions. There were public interests on both sides that balanced each other out.

In weighing the four stay factors, the court concluded that a stay was warranted. However, the potential financial harm to the non-moving parties could not be ignored. In the absence of a good reason to not post a bond, the Court required the appellants to post a bond for the full amount of potential harm to the non-moving parties, which it found to be $1.3 billion. Needless to say, the bondholders did not post the bond and the confirmation order went into effect.

I. Failure to Obtain a Stay is Fatal (3d, 4th, 5th, 7th and D.C. Circuits)

A. *In re Royal St. Bistro, LLC*, No. CV 21-2285, 2022 WL 6308294 (E.D. La. Sept. 23, 2022), *appeal dismissed sub nom. Matter of Royal Alice Properties, L.L.C.*, No. 22-30629, 2022 WL 19363790 (5th Cir. Nov. 22, 2022).

1. Facts

Royal Alice Properties, LLC ("RAP"), owner of three parcels of real property in New Orleans, voluntarily filed for relief under chapter 11. RAP leased the properties to Royal Street Bistro, LLC ("RSB"), Picture Pro, LLC ("Picture Pro"), and Susan Hoffman, the sole equity holder and manager of debtor RAP. Shortly after filing chapter 11, RAP commenced adversary proceedings against AMAG, Inc., the mortgagee of the properties, seeking a determination on the validity, extent, and priority of AMAG's liens. With that proceeding pending, the court appointed a Trustee. The court then granted summary judgment in favor of AMAG.

The Trustee filed a motion with the court to settle the AMAG claim, sell the properties free and clear of AMAG's liens and tenants' leases, and distribute some of the proceeds to the Trustee to cover administrative expenses. In response, RSB and Picture Pro

filed a motion for adequate protection, seeking to remain in possession of the properties through the end of their leases. In November 2021, The Bankruptcy Court granted the Trustee's motion and denied the appellants' motion. RSB and Picture Pro then noticed an appeal to the District Court and simultaneously filed a motion in the Bankruptcy Court for a stay pending appeal, which the Bankruptcy Court denied. The Firth Circuit denied the appellants' petition for a writ of mandamus.

In January 2022, the Bankruptcy Court entered final orders approving the settlement and bidding procedures for sale of the properties. All three properties were sold at auction and the debtor settled the claim with AMAG. The Trustee then moved to dismiss the appeal in the District Court, arguing it is rendered moot by Section 363(m). The appellants argued that they are challenging the distribution of the sale proceeds to the Trustee, which is beyond the scope of 363(m). The tenants relinquished the distribution to AMAG but sought to reverse the settlement agreement as it pertained to the Trustee.

2. Issues

Was the tenants' failure to obtain a stay fatal to their appeal?

3. Holding

Yes. The case was dismissed as moot.

4. Reasoning

Under Fifth Circuit precedent, "fatal means fatal: challenges to authorized bankruptcy sales are dismissed when the party challenging the sale fails to obtain a stay." The Firth Circuit considers how closely linked the challenged settlement provision and the sale itself are in order to determine if 363(m) applies. If a provision is "integrally linked" to the underlying sale, then 363(m) will apply. Here, the settlement agreement was "part and parcel" of the sale, so 363(m) applied. The settlement agreement satisfied AMAG's claim and allocated the Trustee sufficient funds to effectuate the sale and administer the estate. These terms were necessary to facilitating the sale and thus integral.

B. *But see Trinity 83 Dev., LLC v. ColFin Midwest Funding*, LLC, 917 F.3d 599 (7th Cir. 2019)

1. Facts

In 2006, Trinity borrowed $2 million from a bank, secured by a note and mortgage on real property. The bank sold the loan to ColFin, which relied on a loan servicer to collect payments. In 2013, the loan servicer mistakenly recorded a document captioned "satisfaction" that stated the loan had been paid and the mortgage released, but the loan was still outstanding. ColFin realized the mistake in 2015 and recorded a document canceling the satisfaction. Trinity soon after stopped paying and ColFin filed a foreclosure. Trinity then commenced bankruptcy proceedings.

The Bankruptcy Court held that the mistaken satisfaction was a unilateral mistake that could be unilaterally fixed by ColFin. Since no one else recorded a security interest during that time. ColFin retained its original rights. The District Court affirmed and Trinity appealed to the Seventh Circuit.

While the appeal was pending, the real property was sold. ColFin argued that the sale made the appeal moot because Trinity did not obtain a stay and the sale was complete. Trinity sought to have the proceeds turned over to the estate.

2. Issue

Was the failure to obtain a stay fatal to their appeal?

3. Holding

No. The appeal was not seeking to reverse the sale, so 363(m) did not moot the controversy.

4. Reasoning

Clarifying a previous split within the Circuit, the court held that 363(m) does not automatically moot all disputes or prevent a bankruptcy court from deciding the distribution of proceeds from a sale. 363(m) does not mention the proceeds of a sale at all, so that discretion should be left to the bankruptcy court. Failure to obtain a stay would be fatal to a challenge seeking to reverse the sale but did not prevent the court from distributing proceeds.

The court ruled against Trinity on the merits.

II. Failure to Obtain a Stay is Not Fatal (2d, 9th, and 10th Circuits)

A. *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 479 (2d Cir. 2012)

1. Reasoning

> There is a presumption of equitable mootness where the plan has been substantially consummated. However, the presumption can be overcome if the appellants satisfy several factors examining the actual effects of the requested relief. Thus, a claim is not "*per se* equitably moot" purely because the appellants failed to obtain a stay and the plan was substantially consummated. If the parties pursued the stay with diligence, then their appeal will not be automatically rendered moot.
>
> The court ultimately ruled that the appellants' appeals were equitably moot.

2. *For a full discussion of In re Charter, see "Cases Dismissed as Equitably Moot" below*.

III. Failure to Seek a Stay is Not Fatal (6th Circuit)

A. *In re Schwartz*, 636 F. App'x 673, 674 (6th Cir. 2016)

1. Facts

> Pamela Liggett filed a proof of claim against her ex-husband, Robert Schwartz, alleging her wrongfully converted the proceeds of an IRA. The bankruptcy court allowed most of her claim but denied her treble damages or attorney's fees. After a lengthy procedural battle, Liggett appealed the confirmation of the plan, which treated her as an unimpaired creditor, and the order denying treble damages. At no point did she seek a stay of the confirmation order.

2. Issue

> Was the failure to pursue a stay fatal to the appeal?

3. Holding

> No. Failure to pursue a stay weighs against the appellant but is not *per se* fatal.

4. Reasoning

The Sixth Circuit weighs three factors when determining whether to dismiss an appeal as equitably moot: (1) whether a stay has been obtained; (2) whether the plan has been "substantially consummated"; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. The debtor's failure to seek a stay weighed heavily against factor (1) but was not fatal. The court should analyze the other factors to determine whether the balances weigh in favor of granting or denying the stay. The "most important factor" above all is the rights of the parties not before the court and the success of the plan.

Here, all three factors weighed against Liggett and the claim was dismissed as equitably moot.

Selected Recent Equitable Mootness Cases

I. Cases Dismissed As Equitably Moot

A. *Bennett v. Jefferson County, Alabama*, 899 F.3d 1240 (11th Cir. 2018)

1. Facts

In 2011, Jefferson County, Alabama filed a Chapter 9 petition to address, among other things, over $3 billion in sewer warrant debt from issuing sewer warrants. The County proposed a Chapter 9 plan that would retire the previously-issued sewer warrants in favor of new, publicly-marketed warrants, and locked warrant rate increases by County commissioners for 40 years. The County would be prevented from decreasing sewer rates in any particular year unless it could offset the decrease. A group of County ratepayers objected to the plan. They argued that the plan raised state and federal constitutional issues – first, that the retiring of the old sewer warrants glossed over government corruption that caused the warrants to be issued in the first place, and second, that the plan's restriction on rate adjustments by County commissioners violated the ratepayers' due process rights and rights to vote. The Bankruptcy Court ultimately confirmed the plan over these objections, and retained jurisdiction over the life of the new sewer warrants.

2. Procedural Posture

The ratepayers filed a notice of appeal two days before the effective date of the plan, but they did not object to waiver of the

14-day stay of the Bankruptcy Court's confirmation order, nor did they seek a stay of the confirmation order pending their appeal.

The County moved to dismiss the appeal, arguing that it was equitably moot because the plan was already substantially consummated and the transactions detailed in the plan could not be unwound. The District Court disagreed, finding that equitable mootness cannot be applied to constitutional challenges to Chapter 9 plans. It also found that, even if equitable mootness could apply, the court would be able to grant relief to the ratepayers, and the ratepayers' failure to seek a stay did not necessarily make their claim moot.

3. Issue

Whether equitable mootness can apply to Chapter 9 cases and, if so, whether the ratepayers' appeal is equitably moot.

4. Holding

Yes, it can apply, and yes, it is moot.

5. Reasoning

The Court of Appeals found that no circuit had rejected equitable mootness outright. It reviewed prior decisions in which the Circuit found equitable mootness barred an appeal, and found the most important factor was whether allowing the appeal would impinge on actions taken by stakeholders in good faith reliance on a final and unstayed judgment. Because equitable mootness has no codification or limitation, but is guided by "principles," the court found that there was no reason why the doctrine could not apply in Chapter 9 bankruptcies. It disagreed with the ratepayers' argument that the court should refuse to bar constitutional appeals in Chapter 9 cases because allegations of constitutional violations could not excuse the appellant's procedural failures. Having decided that equitable mootness could apply in Chapter 9 cases, the court found that, because the ratepayers never sought a stay of the plan; the County and other stakeholders had acted in reliance on the confirmation order to take irreversible steps; and since the locked rate increases were not per se constitutional rights violations, the ratepayers' appeal could be dismissed as equitably moot.

6. Cert. Denied

On March 4, 2019, the U.S. Supreme Court denied the ratepayers' cert. petition without explanation. The Supreme Court has now

denied petitions for writs of certiorari in all appeals (totaling over a dozen) challenging the viability of the equitable mootness doctrine.

B. *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 had 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 was equitably moot.

4. Holding

Yes, it was 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 of the 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.

C. *Beeman v. BGI Creditors' Liquidating Trust (In re BGI,* Inc.), 772 F.3d 102 (2d Cir. 2014)

1. Facts

Borders Group Inc. entered liquidation shortly after filing for Chapter 11 protection in February 2011. As part of the liquidation, Borders stopped accepting gift cards and online purchases. Borders filed a plan of liquidation in November 2011, mailed notices of the claims bar date to all known creditors, and published a notice of the bar date and confirmation hearing in *The New York Times*. The plan was confirmed in December, with an effective date of January 12, 2012. Unredeemed gift card claimants moved to file untimely proofs of claim on January 4, 2012, arguing they did not receive adequate notice, and sought to certify a class of all Borders gift card holders. They did not seek a stay of the effective date. The Bankruptcy Court denied their motions, finding that they were "unknown" creditors who were only entitled to publication

notice. The court found that the plan had already been substantially consummated, namely through a $17 million distribution to priority claimants, and that permitting late claims following this distribution would be "disastrous" on the remaining estate funds.

2. Procedural Posture

The gift card claimants appealed to the District Court. In October 2012, they sought a stay of interim distributions pending the appeal. The Bankruptcy Court denied this motion. The District Court then denied the claimants' appeal as equitably moot, finding the relief they sought would cause "drastic changes" to remaining creditor distributions. The gift card claimants then appealed to the Second Circuit.

3. Issue

Did the District Court abuse its discretion in determining the gift card claimants' appeals were equitably moot?

4. Ruling

No.

5. Reasoning

The Court of Appeals held as a matter of first impression that equitable mootness applied to chapter 11 liquidations just as it does to restructurings, citing similar conclusions in other circuits. The court then determined that the District Court did not abuse its discretion in finding the plan was substantially consummated at this point, nor that the District Court did not abuse its discretion in finding two *Chateaugay* factors adverse to the gift card claimants' appeal. First, general unsecured creditors were not notified of the gift card claimants' appeal, and their appeal could wipe out all recovery to the unsecured creditors. Second, the gift card claimants did not pursue their appeal "with all due diligence," failing to object to plan confirmation or to seek a stay of the confirmation order.

D. *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 affected 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. Cases Refusing to Dismiss for Equitable Mootness

A. *MOAC Mall Holdings LLC v. Transform Holdco LLC et al.,* 598 U.S. ----, 2023 WL 2992693 (2023)

1. Facts

In 2018, Sears, Roebuck and Co. (Sears) filed for Chapter 11. Sears, as the debtor in possession, agreed to sell most of its assets to a new shell company, Transform Holdco LLC. The Bankruptcy Court approved the agreement under Section 363(m). One of the assets assigned to Transform was the right to designate the party to whom a lease between Sears and a landlord should be assigned, including Sear's lease at the Minnesota Mall of America (MOAC). MOAC objected, arguing that Transform could not provide the required "adequate assurance of future performance by the assignee" because it did not have a "similar . . . financial condition and operating performance" as Sears. The Bankruptcy Court disagreed and issued an order approving the assignment to Transform.

2. Procedural Posture

MOAC requested a stay pending appeal of the section 365 order, but the Bankruptcy Court denied the request. It reasoned that the assignment order did not qualify as an appeal of an authorization

described in §363(m). The order became effective immediately and Sears assigned the lease to Transform.

MOAC appealed to the District Court, which sided with MOAC and ruled that Transform did not satisfy adequate protection requirements. Transform sought a rehearing and argued, for the first time, that §363(m) deprived the District Court of jurisdiction to review the lease transfer and grant MOAC the requested relief. The District Court was "appalled" at Transform's "gambit" of waiting to invoke §363(m) until after it lost on the merits, but was bound by Second Circuit precedent to treat §363(m) as jurisdictional. Thus, it was not subject to waiver or judicial estoppel.

The Supreme Court granted MOAC's petition for cert. Transform argued that the case was moot because the lease has already been transferred out of the estate via the assignment.

3. Issues

Is the case equitably moot and, if not, is §363(m) jurisdictional?

4. Holding

No and No.

5. Reasoning

Transform argued that because the lease was transferred and no stay was granted, there was no legal vehicle remaining to undue the transfer and thus MOAC's appeal is moot. The Court held that its cases disfavor such blanket mootness arguments. MOAC was simply seeking appellate relief: they wanted the Court of Appeals to reverse the District Court ruling. Further, MOAC "vigorously" disputed the argument that the lower courts were totally unable to provide relief. The Court declined to act as a court of first review and instead remanded the issue to determine if Transform was correct that there truly was no relief available.

The Court rejected Transform's jurisdictional argument. It reasoned that Congress enacts preconditions to facilitate fair and orderly disposition of litigation and courts should not treat such preconditions as jurisdictional without clear Congressional intent to do so. Nothing in in §363(m) purports to "gover[n] a court's adjudicatory capacity." Further, the statute discusses what would happen if an appellate court reversed or modified an order, plainly contemplating that such appellate review would occur.

B. *Texxon v. Getty Leasing*, No. 22-40537 (5th Cir. 2023)

1. Facts

Texxon Petrochemicals, LLC (Texxon) filed for bankruptcy in 2020 and moved to assume an executory contract to purchase property that Texxon alleged it entered with Getty Leasing. Getty objected and, after an evidentiary hearing, the Bankruptcy Court denied the motion on the grounds that there was not sufficient evidence to show a valid contract existed. The District Court affirmed and Texxon appealed to the Fifth Circuit. With that appeal pending, the Bankruptcy Court dismissed the underlying case. Getty then argued that the Fifth Circuit lacked jurisdiction to hear the appeal because, with the bankruptcy case dismissed, there could be no contract assumption and the appeal was now equitably moot.

2. Issue

Does the dismissal of the underlying bankruptcy proceeding deprive the Circuit Court of jurisdiction to decide the merits of the appeal?

3. Ruling

No. Even if the case is equitably moot, the appellate court has appellate jurisdiction to decide the merits of the appeal.

4. Reasoning

The dispute raised legitimate unsettled questions in bankruptcy law, including whether the case was equitably moot. However, since the Circuit Court was able to decide the primary dispute—the validity of the contract—on the merits, it declined to rule on those unsettled questions and instead affirmed that there was no valid contract.

5. Discussion

In contrast to courts that have avoided deciding difficult chapter 11 issues by ruling an appeal equitably moot, the Fifth Circuit's ruling grants appellate courts the ability to skip the equitable mootness question to decide those difficult issues on the merits. In light of the Supreme Court's ruling in *MOAC Mall Holdings* (see above), are appellate courts starting to trend away from equitable mootness doctrine?

C. *In re Purdue Pharma L.P.*, No. 19-23649 (RDD) (2021)

As part of its confirmation plan, Purdue Pharma sought "Non-Debtor Releases" which would release causes of action against

third parties, most notably the Sackler family. The U.S. Trustee and others objected, arguing the releases were unconstitutional, violated the Bankruptcy Code, and are inconsistent with Second Circuit law. The plan stated that the Non-Debtor Releases would be deemed effective on the plan's effective date. It also provided that on the effective date, certain trusts would begin to receive distributions with which to pay claims against Purdue.

Prior to the confirmation order, the Court entered an order (the "Advance Order") authorizing Purdue to take certain preliminary steps before the effective date so that the plan may be implemented immediately. This included paying for the creation (but not the funding) of several trusts to pay the claims against Purdue, as well as professional fees. The U.S. Trustee appealed the Advance Order.

Soon after, the Bankruptcy Court entered an order confirming Purdue's plan. The U.S. Trustee filed an appeal and, on the same day, a motion for a stay pending appeal with the Bankruptcy Court. The U.S. Trustee was concerned that if a stay were denied, Purdue would try to evade appellate review of the confirmation order by arguing the appeal was equitably moot due to the steps taken pursuant to the Advance Order. The Bankruptcy Court denied the motion, reasoning that steps Purdue took prior to the effective date "can be undone" and Purdue represented that it would not argue equitable mootness.

The U.S. Trustee filed an emergency motion for a stay pending appeal in the District Court. The District Court recognized that the U.S. Trustee's appeals raised important legal questions that should be considered. However, it agreed with the Bankruptcy Court that at that stage, all steps taken were "preliminary and administrative or ministerial." The expenditures contemplated by the Advance Order were minimal and no proposed step would commence consummation of the plan itself. Therefore, there was no "real threat that these appeals could be found equitably moot." Nonetheless, the Court conditioned its denial without prejudice on the parties entering a written stipulation that they "would not ever argue to any court that the pending appeals had been rendered equitably moot by the actions taken pursuant to the Advance Order." [7:21-cv-07969, Dkt. 48].

Pursuant to the District Court order, the parties entered into a stipulation [21-cv-07969, Dkt No. 58] agreeing that the parties "shall not at any time argue before any court that the pending appeals . . . have been rendered equitably moot by the actions undertaken in advance of the Effective Date in furtherance of

carrying out the Plan pursuant to the Confirmation Order" or the Advance Order. The stipulation carved out criminal sentencing related to the case.

D. *In re Sneed Shipbuilding, Inc.*, 916 F.3d 405 (5th Cir. 2019)

1. Facts

Sneed Shipbuilding filed for bankruptcy in 2016. The bankruptcy progressed slowly after the Sneed trustee filed a complaint alleging fraudulent conversion of a company shipyard against the probate estate of the company's principal. This caused the debtor to approach conversion to Chapter 7, and resulted in the appointment of a chapter 11 trustee. To avoid liquidation, the trustee tried to sell the shipyard. A buyer, San Jac Marine, was willing to purchase only if the trustee resolved its dispute with the probate estate.

The trustee and the probate estate structured a settlement and sale of the shipyard to San Jac Marine. According to the terms, San Jac Marine would pay $15 million to Sneed. The trustee would use that money to ensure clean title on the shipyard. The probate estate would give up its claim to the shipyard in exchange for $8 million from the trustee. The Bankruptcy Court approved this settlement and sale in a final order. Unsecured creditor New Industries unsuccessfully objected to the $8 million disbursed to the probate estate, but did not seek a stay of the court's order approving the transaction.

2. Procedural Posture

New Industries appealed. The trustee asked the District Court to dismiss the appeal as equitably moot, but also as statutorily moot under 11 U.S.C § 363(m). The District Court dismissed the appeal but did not state under which doctrine of mootness it was deciding upon.

3. Issue

Was New Industries' appeal of their objection to the disbursement of trustee funds to the probate estate moot under equitable mootness or section 363(m) mootness?

4. Ruling

Not equitably moot, but statutorily moot under section 363(m).

5. Reasoning

The Court of Appeals was "more hesitant" to use equitable mootness than other circuits. It found that the doctrine is typically used at the post-confirmation stage, when a plan of reorganization is at least substantially consummated. Equitable mootness is sensible at this stage when appellate reversal might undermine the plan and the parties' reliance on the plan; but when no plan has been proposed, there has been no reliance on it. The Court of Appeals noted that some other circuits have used equitable mootness to review "messy" settlement agreements, but distinguished the settlement at hand as "not sufficiently complex." While a complex settlement might have substantial secondary effects on parties outside of the settlement, the court found no such situation here. However, it found that section 363(m) mootness could apply because the main concern under section 363(m) is to "encourage parties to bid for estate property." The court found that once a section 363 sale is approved and consummated, no court should be able to second-guess that sale. Although New Industries argued it was not challenging the sale itself, but only the disbursement of cash to the probate estate, the court found it could not separate the disbursement from the process of the sale.

E. *Matter of M.P.M. Silicones, LLC*, 874 F.3d 787 (2d Cir. *2017)*

1. Facts

Between 2006 and 2012, Debtor Momentive Performance Materials USA LLC ("MPM") issued classes of subordinated notes, second lien notes, and senior secured notes. The senior secured notes were contractually entitled to a "make-whole" premium if MPM redeemed them prior to maturity. In 2014, MPM filed for Chapter 11, and later proposed a plan of reorganization. The subordinated noteholders and the senior secured noteholders, appellants in this case, opposed the plan. The subordinated noteholders would receive no recovery under the plan, and argued that they were not subordinated to the second lien notes. The senior secured notes opposed the plan because it did not pay them the make-whole premium and provided them with replacement notes with a lower interest rate than the market rate. The Bankruptcy Court confirmed the plan. During the automatic 14-day stay of the confirmation order, the appellants moved in the Bankruptcy and District Courts to extend the stay pending their appeal. Both courts denied these motions. The plan then became effective.

2. Procedural Posture

The appellants timely appealed the confirmation order to the District Court, which dismissed the appeal as equitably moot, and then to the Second Circuit. MPM claimed the appeal was equitably moot because the plan had been substantially consummated and the noteholders failed to show that the court could grant effective relief without substantial disruption to the plan or debilitating financial uncertainty.

3. Issue

Was the appeal equitably moot, even if the appellants timely filed their appeals and moved to extend the stay pending their appeals?

4. Ruling

No. The appeal was not equitably moot.

5. Reasoning

The Court of Appeals found that the relief sought by the appellants was too limited in scope, compared to the massive scale of MPM's reorganization, to pose a threat to the plan or unravel any intricate transactions. The subordinated noteholders only sought to reallocate recoveries between classes, and general unsecured claims were worth only two percent of the second lien noteholders' claims. The senior secured noteholders similarly only sought a higher interest rate on replacement notes. The court also emphasized that both classes of appellant noteholders promptly objected to the plan and sought a stay of the confirmation order.

F. *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 and then the Court of Appeals (both denied a stay). Quad/Graphics then moved for an injunction before the District Court (both denied a stay). 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

[2] This issue is discussed more fully in the Delaware District Court's 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). UPDATE.

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.)

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)

G. *In re Transwest Resort Props., Inc.*, 801 F.3d 1161 (9th Cir. 2015)

1. Facts

Transwest filed a Chapter 11 petition in 2010 after defaulting on a $209 million mortgage loan and $21.5 million in mezzanine financing used to acquire resort hotels in South Carolina and Arizona. JPMCC 2007-C1 Grasslawn Lodging, LLC ("JPMCC") acquired the mortgage loan and the mezzanine loan, and filed proofs of claim totaling $299 million and $39 million, respectively. The hotels were valued at $92 million. Transwest proposed a plan of reorganization that would restructure the mortgage loan to require interest-only payments for 21 years, followed by a balloon payment, but with a ten-year exception that allowed the hotels to be sold at any time from five to 15 years after the effective date of the plan without triggering the obligation to pay back the loan.

The plan also provided for the reorganized debtors to be acquired by Southwest Value Partners Fund ("SWVP"). In addition, the plan provided for no distributions with respect to the mezzanine loan unless the entity from whom JPMCC acquired the mezzanine loan voted in favor of the plan. JPMCC voted to reject the plan and objected to confirmation. It claimed its interest was impaired because of the ten-year exception in the plan, which would prevent JPMCC's claim from being satisfied by any sale proceeds during that time.

2. Procedural Posture

The Bankruptcy Court overruled JPMCC's objections, and entered an order confirming the plan. JPMCC filed timely motions with both the Bankruptcy Court and the District Court seeking to stay the confirmation pending appeal. Both courts denied these motions. The District Court then dismissed the appeal as equitably moot, finding that the plan was substantially consummated and that third parties had relied on the confirmation order. JPMCC appealed to the Ninth Circuit.

3. Issue

Was JPMCC's appeal arguing that it was an impaired creditor due to the due-on-sale clause in the plan equitably moot?

4. Ruling

The appeal was not equitably moot.

5. Reasoning

The Court of Appeals applied a four-part test from *Thorpe Insulation*. The *Thorpe Insulation* test weighs the appellant's diligent motion for a stay of the confirmation order, the substantial consummation of the plan, any effect on third parties not before the court, and whether the Bankruptcy Court can provide effective relief without irreparably disrupting the plan. Unlike the Second Circuit's rulings in *Chateaugay* and *Charter Communications*, the Ninth Circuit heavily weighed JPMCC's diligent action in moving to stay and seeking appeal as cutting "strongly in favor of appellate review," despite the fact that the plan was substantially consummated. The court found that the only parties that could be affected by any reallocation of sale proceeds would be JPMCC, reorganized Transwest, and SWVP. Additionally, granting partial relief to JPMCC would not cause the plan to unravel.

6. Dissent

The dissent argued that permitting the relief requested by JPMCC here would serve to discourage investment in companies that have begun restructuring proceedings. By doing so, it decreases the value of the bankruptcy estates. Further, granting relief because it is partial in nature can mean a court could always attach itself to some notional remedy and therefore never find an appeal to be equitably moot.

H. *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 proceedings. 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.").

I. *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 on their motion for a 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.

J. *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 and had 7,200 employees and $17.4 billion in credit facilities.

The confirmed plan grouped 16 debtors into three 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 severally liable would receive 130% of their claims from 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 three 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.

EQUITABLE MOOTNESS FACTOR	CIRCUIT										
	1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**
Has appellant sought a stay pending appeal?	√	√		√	√	√			√	√	√
Has the appealed plan been substantially consummated?	√	√	√	√	√	√			√	√	√
Would reversal of the confirmation order adversely affect innocent third parties?		√	√	√	√	√		√	√	√	√
Would public policy favoring reliance on confirmed plans be undermined?							√			√	
If appellant prevails, what would the likely impact be on a successful reorganization?		√	√	√	√	√	√	√	√	√	√
Are the merits of appellant's case legally meritorious or equitably compelling?					√			√		√	
What type of relief does the appellant seek on appeal? Can the court still order effective relief?	√	√									√

CIRCUIT	KEY RECENT CASES LISTING FACTORS
1	*Hicks, Muse & Co. v. Brandt (In re Healthco Int'l., Inc.)*, 136 F.3d 45 (1st Cir. 1998)
2	*R2 Investments, LDC v. Charter Comm., Inc. (In re Charter Comm. Inc.)*, 691 F.3d 476 (2d Cir. 2012)
3	*Tribune Media Co. v. Aurelius Capital Management, L.P.*, 799 F.3d 272 (3d Cir. 2015)
4	*Behrmann v. National Heritage Found.*, 663 F.3d 704 (4th Cir. 2011)
5	*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)
6	*In re City of Detroit, Michigan,* 838 F.3d 792, 798 (6th Cir. 2016) (citing *Curreys of Nebraska, Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947 (6th Cir. 2008))
7	*In re UNR Indus., Inc.,* 20 F.3d 766, 769 (7th Cir. 1994); *Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833 (7th Cir. 2015)
8	*FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880 (8th Cir. 2001)
9	*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)
10	*Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282-83 (10th Cir. 2013)
11	*Ulrich v. Welt (In re Nica Holdings, Inc.)*, 810 F.3d 781, 786 (11th Cir. 2015)

BANKRUPTCY VENUE*

Venue Basics

- A Debtor can file for bankruptcy relief in any district (28 USC 1408):
    - in which it is incorporated, maintains a residence, has its principal place of business, or principal assets; or
    - in which the debtor's affiliate, general partner, or partnership bankruptcy case is pending.
- The expansive nature of this venue provision has created "magnet districts," which see a large percentage of the large and middle market bankruptcy filings and, as a result, have a disproportionate impact on the evolution of chapter 11 bankruptcy law.
    - These magnet district include the bankruptcy courts for the District of Delaware, the Southern District of Texas, the Southern District of New York and the Eastern District of Virginia.

Proposed Venue Reform

- In February 2023, Representatives Zoe Lofgren (D-Calif.) and Ken Buck (R-Colo.) re-introduced the Bankruptcy Venue Reform Act ("BVRA") in the House of Representatives in an attempt to limit venue-shopping. There have been previous attempts to enact this same legislation.
- If passed, the BVRA would ensure that filings only take place in a jurisdiction in which a debtor's "principal assets" or "principal place of business" are located.
    - A debtor would no longer be permitted to file simply on the basis of their state of incorporation.

Venue Controversy

- Venue recently became a hot-button political issue in response to Purdue's filing in the SDNY White Plains division in 2019.
- LTL's reincorporation in the Western District of North Carolina and filing for bankruptcy there less than two days later also created controversy and attention around the issue of venue shopping.
    - In that case, talc plaintiffs spoke up in favor of venue transfer to New Jersey.

* This outline was prepared by Eric B. Fisher, Binder & Schwartz LLP.

- Judge Whitley ruled that his court's experience with divisional merger ("Texas Two-Step") cases was insufficient to warrant venue in North Carolina.
    - The court did not defer to the debtor's choice of venue and noted that almost all of the significant connections were with the NJ venue (*e.g.*, debtor's parent company, key witnesses and other interested parties, including claimants' already involved in proceedings in NJ).
    - The court distinguished LTL from the BestWall Texas Two-Step bankruptcy, in which venue transfer out of North Carolina was declined, because the LTL venue-transfer motion was brought promptly, while in BestWall it was brought nearly two years into the case.

- The controversy around venue shopping is not new. *See* Lynn M. LoPucki & William C. Chapman, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 Wisc. L. Rev. 11 (1991).
    - In that article, the authors focused on issues such as extension of exclusivity period and regulation of attorney's fees as issues that drove venue selection.
    - Since then, the substantive issues that impact venue selection have changed and expanded, but the question remains the same:
        - Should courts defer to a debtor's choice of venue when the debtor's connection to the venue is tenuous or recently manufactured, and where it appears that the choice of venue was driven by the debtor's desire to benefit from distinctive substantive or procedural characteristics of the selected venue?

Venue Transfer

- Transfer of venue is governed by 28 U.S.C. 1412, which provides that a district court may transfer a case "in the interest of justice or for the convenience of the parties."
- Issues concerning manufacturing of venue:
    - *In re Winn–Dixie Stores, Inc.,* Case No. 05–11063 (RDD) (Bankr. S.D.N.Y. April 12, 2005) (transferring venue from SDNY to Florida where most connections were to Florida and debtor had created a New York subsidiary just 12 days before filing for bankruptcy).
    - *In re Patriot Coal Corp*., 482 B.R. 718 (Bankr. S.D.N.Y. 2012).
        - Judge Chapman observed that "nothing in our jurisprudence requires the Court to condone every strategy devised by clever lawyers to outsmart statutory purpose and language."

Forum Shopping

- Circuit split on proprietary of non-consensual third-party releases drives filings to certain jurisdictions.
    - The majority of courts (First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits) allow for the release of claims against non-debtor third parties.
    - Minority of courts (Fifth, Ninth, and Tenth Circuits) prohibit non-debtor third-party releases.
- Developing law on use of the Texas Two-Step:
    - The Texas two-step is a corporate maneuver that involves an entity (Entity A) spinning off a unit (Entity B) and transferring Entity A's tort liabilities into Entity B. Typically, Entity A will remain liable to some extent for tort claims against Entity B pursuant to a support agreement.
    - Entity B is then put into bankruptcy to manage that liability without exposing Entity A's assets to bankruptcy.
        - Recent examples of cases where the debtor employed the Texas Two-Step include:
            - BestWall in the Western District of North Carolina;
            - DBMP in the Western District of North Carolina;
            - Aldrich Pump in the Western District of North Carolina;
            - Paddock Enterprises in the Western District of North Carolina; and
            - Johnson & Johnson/LTL, now in the District of New Jersey.
    - Various parties-in-interest have challenged bankruptcy filings based on the Texas Two-Step, arguing that, pursuant to section 1112(b), such filings were filed "in bad faith."
        - In determining whether a filing was made "in bad faith," most courts apply a totality of the circumstances test, which looks to the following non-exhaustive list of factors:
            - Whether the debtor has one asset, such as a tract of undeveloped or developed real property;
            - Whether the secured creditors' liens encumber the tract;

- Whether there are typically no employees other than the principals;
- Whether the debtor has little or no cash flow;
- Whether no available sources of income are available to sustain a reorganization plan;
- Whether few, if any, unsecured creditors exist (and whose claims are relatively small);
- Whether property has been scheduled for foreclosure due to lack of debt payments;
- Whether bankruptcy was filed as the last option to prevent loss of property; and
- Whether allegations are made of wrongdoing by the debtor or its principals.

In re Little Creek Dev. Co., 779 F.2d 1068 (5th Cir. 1986).

Judge Shopping

- Even within a specific jurisdiction, there is controversy around the selection of specific judges within that jurisdiction.
    - A notable recent example was Purdue Pharma's filing in White Plains.
        - Purdue filed in White Plains based on one of its affiliate's locations (without having significant business in White Plains) in order to have its proceeding heard in front of Judge Drain.
        - According to one study, Judge Drain heard 62% of all "mega" cases in the Southern District of New York during the most recent two-year period studied. (*See* Adam J. Levitin, "Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances," in Texas Law Review, Vol. 100 (2022)).
- To remedy this judge shopping, the Southern District of New York has adopted a new rule that ensures that "mega" Chapter 11 cases are assigned randomly to judges.

What is Financial Distress After the Third Circuit's J&J Opinion?

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New York City Bankruptcy Conference

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What is Financial Distress After the Third Circuit's J&J Opinion?

On January 30, 2023, the Third Circuit issued an opinion holding that a subsidiary of Johnson & Johnson (J&J) that had been created, and subsequently filed a bankruptcy petition, to address mass tort claims did not demonstrate financial distress sufficient to support a Chapter 11 Petition. Accordingly, the Third Circuit directed the Bankruptcy Court for the District of New Jersey to dismiss the bankruptcy petition. *See In re LTL Management*, 64 F.4th 84 (3rd Cir. 2023).

The Third Circuit declined to "attempt a tidy definition of financial distress," but held that the circumstances in the instant case did not satisfy them. *Id.* at 110. The court emphasized that Chapter 11 is appropriate only for entities truly facing financial distress because "this safeguard ensures that claimants' pre-bankruptcy remedies – here, the chance to prove to a jury of their peers that injuries claimed to be caused by a consumer product – are disrupted only when necessary." *Id.* at 111.

The Third Circuit articulated a rule that without financial distress, a bankruptcy filing should be dismissed "for cause," as a bad faith filing under § 1112(b) of the Bankruptcy Code. Ultimately, the court noted, that although insolvency is not strictly required, "a debtor's balance-sheet insolvency or insufficient cash flows to pay liabilities . . .. are likely always relevant." *Id.* at 102.

The Third Circuit balanced the interest of providing a debtor with early access to bankruptcy relief to allow it to rehabilitate before a situation becomes hopeless, with the competing creditors' interest against disruption to its existing claims. *Id.* at 102-03. That risk of disruption to creditors' claims is "particularly relevant" in the context of a "mass tort bankruptcy" because the cases involve the bankruptcy court estimating the claims on a great scale and introducing the possibility of undervaluing future claims and underfunding assets left to satisfy them. *Id.* at 103. When expressing that concern, the Third Circuit cited a 1997 Report of the National Bankruptcy Commission that discussed an underestimation of claims in the *Johns-Manville* case, one of the earliest asbestos cases, but noted adequate funding of trusts in subsequent cases such as *A.H Robbins*. *Id.* at 103, n.12,13.

The Third Circuit did not foreclose the possibility that Chapter 11 filing might be appropriate in the face of mass tort claims that cause a debtor financial distress. The court distinguished the following cases, suggesting they were rightly decided:

- *In re Johns-Manville Corp.,* 36 B.R. 727, 730 (Bankr. 1984). Prompted by a tide of asbestos litigation that, but for its filing, would have forced the debtor to book a $1.9 billion liability reserve "trigger[ing] the acceleration of approximately $450 million of outstanding debt, [and] possibly resulting in a forced liquidation of key business segments."

- *In re A.H. Robins Co., Inc.*, 89 B.R. 555, 558 (Bankr. E.D.V.A. 1988). Also faced mass product liability litigation, but before filing, Robins had only $5 million in unrestricted funds and a "financial picture ... so bleak that financial institutions were unwilling to lend it money."

faegre drinker

- *In re Dow Corning Corp.*, 244 B.R. 673, 676-77 (Bankr. E.D. Mich. 1999) (emphasis added). The Court specifically recognized that "the legal costs and logistics of defending the worldwide product liability lawsuits against the [d]ebtor threatened its vitality by depleting its financial resources and preventing its management from focusing on core business matters."

Looking solely at the newly formed *LTL*, however, the Third Circuit reasoned it was not in financial distress because a J&J funding agreement provided a backstop that was "not unlike an ATM disguised as a contract," and J&J had experienced success in the mass tort talc litigation that the subsidiary had been created to address such that the "hypothetical worst case scenario on which the bankruptcy court relied" was unlikely to occur. *LTL Management*, 64 F.4th at 106-110.

So what does a bankruptcy practitioner in the Third Circuit need to show in its first day filings to demonstrate financial distress in light of this opinion? The take-away seems to be, at least when mass torts are involved, practitioners will need to make a record that establishes:

> (1) credible projections for the debtor in light of the pending litigation, including, if at all possible, estimated defense costs and potential liability (including, if available, defense costs budgetary information), damages demands asserted to date, a history of the litigation to date, the possibility of success, or of successful settlement of that litigation; and
>
> (2) absent relief, the debtor faces a near-term threat to its ability to function or operate.

Author:

Jane Maschka, May 2023

ABI New York City Bankruptcy Conference: Litigation Round-Up
Professional Retention Issues

U.S. Trustee objections to the retention of professionals

- *In re SAS* and *In re FTX* are two recent examples
- Practitioners should also be aware of the outcome from *In re LATAM Airlines* regarding an estate professional's failed attempt to modify pre-approved terms of its retention

11 U.S.C. § 101(14) – term "disinterested person" means a person who

(A) is not a creditor, an equity security holder, or an insider,

(B) is not and was not within 2 years of the petition date, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, or connection with, or interest in, the debtor, or for any other reason

11 U.S.C. § 327 – Employment of professional persons

a) with the court's approval the debtor-in-possession may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the debtor-in-possession in carrying out the debtor-in-possession's duties under this title

b) if the debtor-in-possession is authorized to operate the business of the debtor under section 721, 1202, or 1108 of the Bankruptcy Code, and if the debtor-in-possession has regularly employed attorneys, accountants, or other professional persons on salary, the debtor-in-possession may retain or replace such professional persons if necessary in the operation of such business

c) in a case under chapter 7, 12, or 11 of the Bankruptcy Code, a person is not disqualified for employment under section 327 solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the U.S. Trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest

d) the court may authorize the trustee/debtor-in-possession to act as attorney or accountant for the estate if such authorization is in the best interest of the estate

e) with the court's approval, the trustee/debtor-in-possession may employ for a specified special purpose, other than to represent the trustee in conducting the case, an attorney who has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed

f) the trustee/debtor-in-possession may not employ a person that has served as an examiner in the case

Yonah Jaffe, a partner with Reid Collins & Tsai LLP, and Brenna A. Dolphin, an associate with Polsinelli PC, co-authored the Professional Retention Issues materials.

11 U.S.C. § 328 – Limitation on compensation of professional persons

a) permits a debtor-in-possession to seek pre-authorization of the terms of retention "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis."
   - If pre-approved, the Bankruptcy Court conducts a very limited review after-the-fact and can alter the compensation "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."

11 U.S.C. § 330 – Compensation of officers

- After notice and a hearing and subject to §§ 326, 328 and 329, the court may award reasonable compensation and reimbursement for expenses to persons employed under §§ 327, 332, 333, or 1103

11 U.S.C. § 307 – the U.S. Trustee may raise and appear and be heard on any issue in any case or proceeding under this title, but may not file a plan under section 1121(c)

- Chapter 39 of Title 28 of the United States Code – United States Trustees
- 28 U.S.C. § 586 – U.S. Trustee Duties
  - Includes express statutory responsibility to review applications for professional compensation
- U.S. Trustee has promulgated materials on compensation and retention, which include –
  - Fee Guidelines
    - Appendix A-Guidelines for Reviewing Applications for Compensation filed under 11 U.S.C. § 330 in (1) larger chapter 11 cases by those seeking compensation who are not attorneys, (2) all chapter 11 cases below the larger case thresholds, and (3) cases under other chapters of the Bankruptcy Code – May 17, 1996
    - Appendix B-Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 for Attorneys in Larger Chapter 11 Cases – June 11, 2013
    - Larger chapter 11 case = a chapter 11 case with $50 million or more in assets and $50 million or more in liabilities, aggregated for jointly administered cases and excluding SARE cases
  - Principles to Guide Enforcement of the Duty of Professionals to Disclose Connections Under 11 U.S.C. §§ 327 and 1103 and Fed. R. Bankr. P. 2014 – December 4, 2019
  - FAQ re Professional Retention and Compensation

Bankruptcy Rules:

- Rule 2014 requires the trustee/debtor-in-possession and committee to file retention applications, which shall state specific facts showing
  - Necessity for the employment
  - Name of person to be employed
  - Reasons for the selection
  - Professional services to be rendered

  - Any proposed arrangement for compensation
  - To the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, UST, or any person employed with the office of the UST
- Rule 2014 requires retention applications be accompanied by a verified statement of the person to be employed which sets forth the person's connections with the debtor, creditors, any party in interest, their respective attorneys and accountant, the UST or any person employed with the office of the UST
- Rule 2016(a) requires an entity seeking interim/final compensation for services or reimbursement of expenses from the estate to file a fee application
  - Rule 2016(b) applies to attorneys for the debtor and requires disclosure to the U.S. Trustee of any sharing or agreement to share compensation with any other entity
    - 11 U.S.C. § 504 prohibits the sharing of compensation in almost all circumstances

Local Bankruptcy Rules for the:
Southern District of New York –

- 2014-1 governs employment of Professional Persons under 11 U.S.C. §§ 327 and 328
- 2016-1 governs Compensation of Professionals
  - (a) Amended Guidelines for Fees and Disbursements for Professionals
  - (b) Form of Order Granting Application for Allowance of Interim/Final Compensation and Reimbursement of Expenses
  - (c) Form of Order establishing interim compensation procedures
- 2016-2 governs Compensation or Reimbursement of Expenses in Chapter 7 Cases

District of Delaware –

- 2014-1 governs Employment of Professional Persons (refers to those retained under 11 U.S.C. §§ 327, 1103(a) or 1114 or Fed. R. Bankr. P. 2014)
  - *See In re Mallinckrodt PLC*, 2022 WL 906462 (D. Del. March 28, 2022) for a discussion of the Supreme Court's holding in *Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) and rejection of a categorical bar on any retroactive approval of professional retention under § 327
- 2016-1 governs Disclosure of Compensation – applies to any attorney
  - *See In re NNN 400 Capital Ctr. 16, LLC*, 619 B.R. 802, 810-11 (Bankr. D. Del. 2020) (upon UST request Judge Dorsey ultimately disqualified a law firm from acting as special counsel to the debtors for its lack of disclosures, failure to ameliorate disclosure deficiencies, and improper fee sharing and ordered the disgorgement of all fees and expenses paid to the law firm), *aff'd sub nom. In re NNN 400 Capital Ctr. 16, LLC*, 632 B.R. 243 (D. Del. 2021), *aff'd sub nom. In re NNN 400 Capital Ctr. 16, LLC*, 2022 WL 17831445 (3d Cir. Dec. 21, 2022)
- 2016-2 governs Motions for Compensation and Reimbursement of Expenses
  - Applies to anyone employed under 11 U.S.C. §§ 327, 328 or 1103

In re FTX Trading Ltd. (22-11068-JTD): hearing held on January 20, 2023 on the debtors' application to retain lead bankruptcy counsel and related objections

- Debtors filed applications to retain

  - Lead bankruptcy counsel
  - Delaware bankruptcy counsel
  - Conflicts counsel
- UST filed a motion to appoint an examiner and also filed an objection to the retention of lead bankruptcy counsel
  - Focused on lack of disclosure of the relationship between two lawyers who worked for the lead bankruptcy counsel at one point before one went in house to work for the debtors and the other went to work for the debtors outside counsel firm
  - Another area of focus: the description/scope of services lead bankruptcy counsel, conflicts counsel and financial forensic investigators would provide to the debtors
    - Consensus was that the UST was "relentless"
  - Disclosure: debtors submitted supplemental declarations and disclosures and reached a mutually agreeable resolution with the UST;
- Creditors also filed objections to the retention of lead bankruptcy counsel
  - Conflict of Interest
    - Lead bankruptcy counsel represented the debtors pre-petition, there is a potential conflict of interest with any of the matters they were involved with that may require an investigation
    - Two former attorneys (one partner and one associate) who previously were employed by lead bankruptcy counsel, worked for the debtors before the petition
    - Other clients of lead bankruptcy counsel may be creditors of the debtors
  - Potential for a Preference
    - Debtors gave a $4 million retainer to lead bankruptcy counsel pre-petition and a portion of it was used to pay pre-petition invoices
      - This creates a *Pillowtex* issue and lead bankruptcy counsel holds an interest adverse to the debtors
- Legal standard governing retention of professionals
  - 11 U.S.C. § 327(a) – debtor may retain professionals that do not hold or represent an interest adverse to the estate and that are disinterested persons
- Outcome: objections were overruled, and the retention of lead bankruptcy counsel was approved
  - UST's objection was resolved amicably via supplemental disclosures
- Holding: retention of lead bankruptcy counsel is not prohibited by virtue of the existence of a conflict of interest or potential conflict of interest; reasoning –
  - 11 U.S.C. § 1107(b) tells us that a professional sought to be retained by a debtor is not disqualified because the professional was employed by or represented the debtor pre-petition
    - Mere fact lead bankruptcy counsel was retained by debtors pre-petition does not create a conflict of interest or prohibition on retention as bankruptcy counsel
  - Nothing in the record indicated that any investigation of those transactions where lead bankruptcy counsel was involved pre-petition would be required
    - Even if there were, debtors retained conflicts counsel to conduct any investigation that may touch on those issues

        - There is no evidence of any actual conflict here – to the extent there may be a potential conflict (for example, a situation that would require an investigation into a transaction where the firm may have been involved in a transaction or an investigation into the firm's former attorneys), the Third Circuit has said that a potential conflict is not *per se* disqualifying – *In re Boy Scouts of Am.*, 35 F.4th 149 (3d Cir. 2022)
        - Here, any potential conflicts are ameliorated by the fact that there is conflicts counsel
            - This happens in every large bankruptcy case
            - It would be almost impossible to find a case of this size (this is a super mega case) debtors counsel who didn't have other clients who might be creditors – this is not disqualifying; that's why we have conflicts counsel
    - Distinguished from case law relied upon by objectors
        - *In re Git-N-Go, Inc.*, 321 B.R. 54 (Bankr. N.D. Okla. 2004) and *Matter of Bohack Corp.*, 607 F.3d 258 (2d Cir. 1979) – these cases involved bankruptcy debtors and small law firms who sought to be retained as lead bankruptcy counsel
        - Big issue there – significant relationship with persons involved, there is a disqualifying conflict because it represents a large amount of the small firm's income
            - Here, the fact that two lawyers previously worked for lead bankruptcy counsel and for the debtors is not factually similar to the *Git-N-Go* and *Bohack* fact patterns
            - Here, there is the CRO (John J. Ray, III) and four other independent directors who were appointed by the CRO and not involved in the company's collapse; no evidence that the two lawyers were involved in management of the debtors are this time
            - No reason to believe CRO and other directors running the debtors and making decisions for debtors have conflicts – that would disqualify lead bankruptcy counsel form this case
- Holding: similarly, the retention of lead bankruptcy counsel is not prohibited by virtue of a preference; reasoning –
    - Court examined the evidentiary record, the unchallenged and uncontroverted declarations of a partner of the debtors' proposed lead bankruptcy law firm, which clearly shows that the payments made in the 90-day period before the petition date were made in the ordinary course and are not avoidable as preferences

In re Pillowtex, Inc., 304 F.3d 246 (3d Cir. 2002): there, a law firm's retention application was denied where the law firm's fees were not fully covered by advance retainers and where law firm may have received payments that were subject to recovery as preferences

In re SAS AB, 645 B.R. 37 (Bankr. S.D.N.Y. 2022)

- UST objected to the debtors' retention of Seabury and SEB as co-investment bankers and argued

  - SEB is not "disinterested" and therefore not eligible for employment as the debtors' investment banker under § 101 (14) and § 327 of the Bankruptcy Code
  - The connections between SEB and debtors raise "disinterestedness" issues and should disqualify SEB from acting as IB in these chapter 11 cases
    - Marcus Wallenberg's association with Wallenberg Foundations could create conflicts of interest for SEB and might cause IB to favor equity interests
  - Connection b/w SAS (debtors) and SEB had not been disclosed
- Background: SEB is a commercial and investment bank with operations in Sweden, Norway, Denmark, Finland and other Northern European countries
  - SEB was both a commercial bank and investment bank for the debtors
  - As part of plan negotiations in the chapter 11 case, debtors require new capital raises and debt-to-equity conversions, and SEB is uniquely qualified to serve as IB because of its experience and contacts in Northern Europe/Scandinavia
  - Marcus Wallenberg is the Chairperson of the SEB board of directors and his family is associated with 16 non-profit public and private foundations ("Wallenberg Foundations"), whose assets total over $24.3 billion
    - The Wallenberg Foundations own an entity called Wallenberg Investments
    - Wallenberg Investments owns 3.42% of SAS/debtor's common stock – worth about $13 million
- Court's Analysis:
  - Disclosures: purpose of disclosures required by the Code are to enable parties to evaluate possible disqualifying interests
    - Even if Marcus Wallenberg's association with the Wallenberg Foundations were an "interest" or "connection" – full disclosure was provided with ample time to permit UST and any other party in interest to file objections
    - At the hearing UST withdrew the part of its objection related to debtors' disclosure deficiencies
  - Materially Adverse Interest: under the Bankruptcy Code, a professional is disqualified only if it holds an interest that is "materially adverse" to the interest of the estate, any creditor group, or equity security holders
    - Court decides whether a given set of facts gives rise to a bias against the estate or to an economic interest that actually has a significant potential to affect the professional's loyalty, to undercut the value of the professional's services, or to give rise to a dispute in which the estate would be a rival party – *Bank Brussels Lambert v. Coan (In re AroChem Corp.)*, 176 F.3d 610, 623 (2d Cir. 1999)
    - Under this standard, SEB cannot be found to hold a material adverse interest based on loose connections to Marcus Wallenberg
      - Neither Wallenberg nor SEB own stock in debtors
      - Wallenberg is associated with Wallenberg Foundations, but there is no suggestion he has any personal interest in its investments, let alone that SEB itself has an interest in them
      - Wallenberg Foundations have a small equity stake in SAS and indirect interest is a tiny fraction of their overall assets

- Wallenberg has no day-to-day involvement with the SEB IB team who will work on the engagement
- SEB is not the only IB – it is the co-IB with Seabury; Wallenberg has no interest or control over Seabury
- SEB is going to bar communications between Wallenberg and IBs
- Wallenberg agreed he will not participate in any discussions or vote at meetings of directors of the Wallenberg Foundations in anything related to debtors

▪ The connections between Wallenberg and Wallenberg Foundations are not actual conflicts
- Ethical walls are relied on where large IBs have affiliates or divisions that engage in debt/stock trading that might give rise to potential issues
- Debtors' SEB team cannot communicate with Wallenberg, the Wallenberg Foundations, Wallenberg Investments or groups within SEB who work with Wallenberg affiliates

▪ Other miscellaneous connections, similarly, are not materially adverse interests
- Jacob Wallenberg (cousin of Marcus Wallenberg) sits on board of directors of Wallenberg Investments and another entity in which Wallenberg Investments holds 23% interest and Jacob is also a member of SAS nomination committee, but not on board of directors
  - No association with SEB
  - Possibility Jacob may try to influence Marcus and Marcus may try to influence SEB's IB team is too far attenuated
- Stege Unger (senior advisor to Wallenberg Foundations and member of SAS board) has no association with SEB – ethical wall prevents communications with Unger about IB work on engagement

o Financial Connections
▪ Outstanding loan: SEB was a lender under a 2020 loan facility guaranteed by Kingdom of Norway through Eksfin; pre-petition Eksfin purchased all of the lenders' interests in the loans and lenders assigned rights to Eksfin
- This did not improve lenders' positions; loan was already guaranteed; no avoidable transfer was made

▪ Volume/significance of SEB transactions with debtors: SEB has acted as IB or FA for debtors before and has also acted as a commercial banker
- UST complained about vast connections and that SEB may be logical entity to approach for exit financing
- Disinterestedness inquiry focuses on the here and now and an examination of specific issues that actually exist – not appropriate to refuse to permit debtors to retain professional whose expertise they need based on speculation that some unknown issue that may arise from SEB's past work

▪ Is SEB a creditor of the debtors: courts don't generally treat professionals like creditors if their prepetition fees were secured by retainer

- Debtors almost always hire insolvency professionals pre-petition
- Fact that SEB was paid for prior service does not disqualify it from providing IB services in chapter 11 cases
- SEB's commercial banking fees – UST points to no actual facts that suggest any preference issue exists as to cash management fees SEB charged pre-petition
- SEB's credit card services – collateralization of potential credit card delinquency does not create a materially adverse interest
- Debtors/SEB currency transactions – all pre-petition transactions closed according to their terms – no adverse interest
- SEB issued 42 guarantees of debtors' obligations for payment of airport fees, services, rents, ticketing charges, customs, taxes, and other (about $10 million) – this connection was the one the Court was most troubled by
    - SEB waived any and all prepetition claims for indemnification, reimbursement, or similar amounts related to these guarantees
        - This satisfied UST and Court

- Result: Court overruled UST's objections and approved debtors' retention of Seabury and SEB as co-investment bankers

In re Adoni Grp., Inc., (14-11841-REG) (Bankr. S.D.N.Y. Sept. 10, 2014)

- Debtors wanted to retain CRO and FA – they tried to use § 363 as means of compensating
- UST objected and argued section 327(a) was the only way to retain CRO and FA firm
    - CRO was not disinterested; CRO agreed to step down – UST not satisfied
- Court emphasized that creditors were at risk of losing out on potential recovery and asked parties to work together on how to satisfy section 327(a) and *J. Alix Protocol*

In re LATAM Airlines Grp. S.A., 643 B.R. 773 (Bankr. S.D.N.Y. 2022): chapter 11 debtors and brought supplemental application seeking to modify the pre-approved terms of the debtors' investment banker's engagement to increase a cap on fees from $25 million to $37 million because of extensive unanticipated additional work caused by COVID and other factors.

- Basis for supplemental application:
    - The debtors retained PJT Partners as investment bankers on May 20, 2020, at the beginning of the pandemic.
    - The court preapproved the fee agreement under 328(a) containing the following relevant terms:
        - The scope of services under the engagement letter was very broad, covering 13 types of services.
        - PJT was to be compensated monthly fees, Capital Raising Fees, and a Restructuring Fee of $17.5 million upon consummation of an approved plan.
        - All fees were subject to an aggregate cap of $25 million.
    - PJT reached the $25 million fee cap in October 2021 based on monthly fees and Capital Raising Fees because it had helped raise $2.5 billion in DIP financing, and also helped develop and negotiate a complex plan that involved $800 million of

new common stock; issuing three series of convertible notes totaling approximately $8.8 billion; and obtaining a $2.25 billion exit term loan and note facility, plus a $500 million revolving credit facility.
    - First plan and disclosure statement was not filed until November 26, 2021. Continued working through plan confirmation in June 2022.
    - Because the cap meant PJT would not be paid for a year of work, the Debtors requested approval of an additional $12 million Restructuring Fee upon plan becoming effective.
- UST objection:
    - UST argued that the duration and complexity of the cases should not have been unanticipated, and was "capable of being anticipated" such that the court could not alter the fees under 328(a).
- Holding:
    - "The Debtors have failed to meet their burden of demonstrating that the allegedly unforeseen developments that increased the duration and amount of PJT's work in these Chapter 11 Cases were incapable of being anticipated when they executed the Engagement Letter or the Court issued the Retention Order."
    - "The Court does not doubt that the Pandemic and the resulting lack of face-to-face negotiation between the Debtors and stakeholders in the Chapter 11 Cases may have hindered negotiating the Plan, obtaining financing, settling motions, and resolving other issues necessary for the Debtors to exit chapter 11. The same is true with other aspects of the Pandemic, especially the degree to which it has impacted the Debtors' business and altered their expectations for raising capital. But that is of no matter. Section 238(a) is clear: the movant must cite more than merely unanticipated circumstances—it must cite circumstances "[in]capable of being anticipated."
    - Because the services performed were within the very broad scope of the approved engagement letter, the court held that the case was distinguishable from instances where courts awarded extra compensation based on matters outside the initial engagement.

In re Smart World Techs., LLC, 552 F.3d 228, 232 (2d Cir. 2009) explains the difference between pre-approval under 328(a) and an after-the-fact reasonableness inquiry under 330(a):

> **Sections 328 and 330** establish a two-tiered system for judicial review and approval of the terms of the professional's retention. **Section 330** authorizes the bankruptcy court to award the retained professional "reasonable compensation" based on an after-the-fact consideration of "the nature, the extent, and the value of such services, taking into account all relevant factors." 11 U.S.C. § 330(a). However, **section 328(a)** permits a bankruptcy court to forgo a full post-hoc reasonableness inquiry if it pre-approves the "employment of a professional person under section 327 ... on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." Id. § 328(a). Where the court pre-approves

> the terms and conditions of the retention under section 328(a), its power to amend those terms is severely constrained. It may only "allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." *Id*.

- 328(a) pre-approval is most commonly used for contingency or other fixed fee arrangements where the reasonableness of the compensation is based on the risk counsel takes of not being paid at all, rather than the actual hours ultimately spent. It incentivizes all to reach an efficient resolution of the case without being worried about having those fees reduced.
- Attempts to change pre-approved fees are usually an objector seeking to *reduce* the amount of the preapproved fees based on "developments not capable of being anticipated."

Faculty

Brenna A. Dolphin is an associate with Polsinelli PC in Wilmington, Del., whose legal practice focuses on mid-market financial restructuring, bankruptcy and commercial transactions, primarily in the health care and retail industries. She regularly represents debtors, creditors' committees and unsecured creditors in court on bankruptcy matters both as lead counsel and Delaware counsel in cases brought under chapters 7, 11 and 15 of the Bankruptcy Code. Ms. Dolphin appears in federal and state courts to advocate on behalf of clients, and also has an active assignment for the benefit of creditors practice in the Delaware Court of Chancery. She is an active member of ABI, a board member of IWIRC's Delaware Network, and a member of the Delaware Bankruptcy Inn of Court and the Delaware Chapter of the Villanova Law Alumni Association. Ms. Dolphin received her B.A. from Franklin & Marshall College in 2007 and her J.D. *cum laude* in 2011 from Villanova University School of Law.

Eric B. Fisher is a partner with Binder & Schwartz LLP in New York, where he focuses his practice on bankruptcy litigation and other complex commercial disputes. He has led trial teams to success in numerous high-stakes bankruptcy litigations, and has represented creditors' committees and trusts in multibillion-dollar disputes with large financial institutions. He also has won notable victories against loan originators and sellers in mortgage-backed-securities litigation. Mr. Fisher has served as lead counsel in bench and jury trials in the Southern District of New York and other trial courts; argued numerous appeals before the Second Circuit and other appellate courts, including successfully arguing an issue of first impression before the Delaware Supreme Court; and litigated cases in a variety of alternative dispute resolution forums, including AAA, JAMS and FINRA. Previously, Mr. Fisher served as an assistant U.S. attorney in the Southern District of New York from 1999-2002, where he represented the U.S. in bankruptcy, civil rights, employment and regulatory matters. He has also counseled clients in business breakup, dissolution and buyout situations. Mr. Fisher has served as co-chair of the Federal Bar Council's Bankruptcy Litigation Committee. He received his B.A. *magna cum laude* in 1992 from Yale University and his J.D. in 1995 from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar.

Hon. Robert E. Gerber is Of Counsel with Joseph Hage Aaronson in New York and a retired U.S. Bankruptcy Judge for the Southern District of New York in New York, appointed in 2000 and reappointed in 2014. He assumed recall status in January 2015 and retired in January 2016. Judge Gerber offers services in bankruptcy and commercial arbitration, mediation, fiduciary work and consulting. While on the bench, Judge Gerber presided over a wide variety of chapter 11, chapter 7, chapter 15, § 304 and SIPA cases, including *PSINet*, *Ames Department Stores*, *Global Crossing*, *Adelphia*, *ABIZ*, *Basis Yield Alpha Fund*, *Lyondell Chemical*, *BearingPoint*, *DBSD North America*, *Chemtura*, *Pinnacle Airlines*, *Houghton-Mifflin Harcourt* and *General Motors*. He presided over more than 20 cases with over $100 million in debt, including 10 with over $1 billion in debt. Judge Gerber has published roughly 200 opinions, principally in the business bankruptcy and corporate governance areas, and throughout his tenure on the bench was named one of the nation's outstanding bankruptcy judges six times. Prior to taking the bench, he practiced with the firm of Fried, Frank, Harris, Shriver & Jacobson in New York City, specializing in securities and commercial litigation and, thereafter, bankruptcy litigation and counseling. He is an adjunct professor of law at Columbia Law School (where he teach-

es Columbia's Advanced Bankruptcy Seminar), a contributing author to *Collier on Bankruptcy*, and a Fellow and former director of the American College of Bankruptcy. Judge Gerber earned his B.S. with high honors in industrial engineering from Rutgers University in 1967 and his J.D. *magna cum laude* from Columbia Law School in 1970, where he was a Harlan Fiske Stone Scholar and a James Kent Scholar. He then served as a First Lieutenant in the U.S. Air Force from 1971-72.

Yonah Jaffe is a partner in the New York office of Reid Collins & Tsai LLP, where he primarily represents plaintiffs in complex financial litigation, with substantial experience litigating in the context of bankruptcy/insolvency proceedings. He has represented plaintiffs, defendants, bankruptcy trustees, liquidators and creditors in a variety of matters in state and federal courts, including professional malpractice actions, claims against fiduciaries, business tort matters, shareholder derivative litigation, judgment enforcement, fraudulent-transfer litigation, contractual disputes and other bankruptcy litigation matters. Mr. Jaffe began his career in bankruptcy court, clerking for Chief Judge Carla E. Craig of the U.S. Bankruptcy Court for the Eastern District of New York. In addition to bankruptcy matters, he has litigated extensively in New York state court, and is often consulted to provide procedural insight and strategy on matters pending in New York courts. Mr. Jaffe also has been involved in state and federal litigation matters across the country. A significant part of his practice involves investigating and assessing litigation claims pre-suit. Mr. Jaffe was selected to *Benchmark Litigation*'s "40 and Under Hot List," and has been named a *Super Lawyers* "Rising Star." He received his B.S. *magna cum laude* in marketing from Tuoro College and his J.D. *cum laude* from Brooklyn Law School, where he served as a notes and comments editor for the *Brooklyn Journal of International Law*.

Mark P. Kronfeld is a managing director at Province, LLC in New York and has over 27 years of experience as a bankruptcy lawyer, litigator, distressed investor, restructuring advisor and professor. He has led hundreds of successful restructurings, workouts and distressed transactions, and has significant expertise in high-stakes litigation and negotiations, investigations, corporate governance and investor activism. Mr. Kronfeld focuses on trustee and fiduciary services (*e.g.*, litigation trustee, independent director, special committees, examiner, etc.), investigations, litigation services, restructuring and expert testimony. He has experience in restructuring and distressed investing across the capital structure across a wide range of industries and jurisdictions. Mr. Kronfeld has led numerous ad hoc and official creditor committees in corporate, municipal and sovereign restructurings around the world. He has also been involved in numerous activist situations and has led many litigation trusts. Most recently, Mr. Kronfeld was a senior executive at BlackRock, where he was the global head of Restructuring and served on BlackRock's Global Credit Oversight Committee, where he was responsible for overseeing restructurings across the platform as well as related governance, litigation, credit-monitoring and risk functions. He was also as a senior member of the Office of the CIO, where he managed various U.S. special situations funds and credit mandates, and he led BlackRock's internal credit training programs, as well as external training programs for such clients as foreign central banks, pension funds and sovereign wealth funds. Prior to Blackrock, Mr. Kronfeld was a portfolio manager at Plymouth Lane Capital, a managing director at BlueMountain Capital, a partner at Owl Creek Asset Management and a senior analyst at Aurelius Capital. Before his career in finance, he was a bankruptcy attorney and litigator, representing debtors, creditors, trustees and boards in complex chapter 11 cases. As a litigator, he handled a wide variety of commercial and bankruptcy litigation. He also served as a prosecutor in New York City, where he was a member of the elite Investigations Division and prosecuted cases involving complex white-collar crime, fraud, money laundering, corruption, organized crime and murder, achieving a 100% jury trial conviction rate. Mr. Kronfeld is

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Hon. Sean H. Lane is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Sept. 7, 2010. He previously clerked for Hon. Edmund V. Ludwig, U.S. District Judge for the Eastern District of Pennsylvania, from 1991-92, as well as for Hon. Charles R. Richey, U.S. District Judge for the District of Columbia, from 1992-93. From 1993-97, he practiced with the law firm of BakerHostetler in Washington, D.C., and thereafter served as a trial attorney in the Department of Justice, Civil Division, National Courts Section, until 2000. From 2000 until he was appointed to the bench, Judge Lane served as an assistant U.S. attorney for the Southern District of New York and was also chief of the Tax & Bankruptcy Unit of that office. During his time in the U.S. Attorney's Office, he was awarded the Attorney General's Distinguished Service Award in 2005 and the Henry L. Stimson Medal by the New York City Bar Association in 2008. Judge Lane is a member of the Federal Bar Council and has served as an adjunct professor at both New York University School of Law and Fordham Law School. He received his B.A. from New York University College of Art & Science in 1987 and his J.D. from New York University School of Law in 1991.

Michael Luskin is senior counsel with Stroock & Stroock & Lavan LLP in New York and represents financial institutions in commercial litigation in state and federal courts, including bankruptcy courts, across the country. Much of his work involves enforcing creditor's rights under the Bankruptcy Code or defending a creditor against "lender liability," fraudulent conveyance or preference claims brought by a creditors' committee or bankruptcy trustee. Mr. Luskin also has experience representing creditors in loan restructurings and out-of-court workouts, as well as in representing trustees and examiners in cases presenting complex litigation issues. His work spans many industries, including banking and finance, real estate, energy, insurance, hospitality, health care, pharmaceuticals, airlines and automotive. Mr. Luskin has handled complex cases involving well-known companies across the U.S., serving as special counsel to the Financial Oversight and Management Board for Puerto Rico in lift-stay and related litigations, as counsel to the Government of Ontario in the Chrysler and General Motors chapter 11 cases, and as counsel to the secured lender on the "sidecar" facility in the Hertz chapter 11 proceedings. He was counsel to an aircraft financer in the American Airlines, United Airlines and US Air reorganizations and to the principal bank in the Westinghouse Electric Company chapter 11 proceedings. In addition, he served as conflicts counsel to the examiner in the Caesars case and as counsel to the trustee in Fletcher International, Ltd., a master hedge/private-equity fund that was part of a complex master-feeder fund structure. Mr. Luskin has represented lenders and other parties in numerous complex real estate restructurings, bankruptcies, foreclosures and other litigations, including in the Coltex chapter 11 case, which resulted in an important Second Circuit decision on "new value" plans and the absolute priority rule. Mr. Luskin is a Fellow of the American College of Bankruptcy and has been recognized as a leading bankruptcy lawyer by *Chambers USA: America's*

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Jane E. Maschka is a partner with Faegre Drinker Biddle & Reath LLP in Minneapolis, where she regularly defends her clients from bet-the-company risks involving insolvency, bankruptcy and receiverships. Over the last several years, she has returned millions of dollars to corporate victims of financial fraud, and she is involved in cases of fraud, fraudulent transfer, alter ego or successor liability. In one case, Ms. Maschka collected millions of dollars for her corporate client, obtained a civil arrest warrant and ultimately drove the adverse company into bankruptcy while still making sure that her client got paid. In another case, she won a dismissal with prejudice, and had sanctions placed against the plaintiffs by proving they destroyed documents to cover their fraud. In yet another, she achieved a complete defense verdict at trial in Delaware Bankruptcy Court on behalf of a client facing more than $150 million in claims asserted by a trustee. Finally, in one of the most prominent bankruptcies in the country, she led a trial team to the best kind of victory when the trustee ultimately paid on the courthouse steps rather than face Jane at trial. Ms. Maschka is admitted to practice in Minnesota, the District of Columbia and California. She received her B.A. in economics with high distinction in 1999 from the University of Virginia and her J.D. *cum laude* in 2004 from Harvard Law School.