SOUTHEASTERN BANKRUPTCY LAW INSTITUTE
48th ANNUAL SEMINAR ON BANKRUPTCY LAW & RULES

Equitable Mootness: Still an Open Issue

Friday, March 25, 2022

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Northern District of Georgia

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The Needs of the Many: Equitable Mootness' Pernicious Effects

by

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I. INTRODUCTION

Business bankruptcies typically move fast. In many cases, this is desirable.[1] Fragile finances deteriorate quickly, reducing recoveries for creditors and eliminating value for owners. Congress thus intended chapter 11, the primary vehicle for business reorganizations, to process distressed entities quickly and decisively. Compared to routine civil litigation, chapter 11 procedures are speedy. This results from estate representatives being statutorily empowered to resuscitate the debtor by means entirely foreign to nonbankruptcy law.[2]

The reorganization process centers around a chapter 11 plan of reorgani-

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[1] *See* Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527, 529 (1983) (identifying speed as one of "three principal characteristics desirable for a reorganization mechanism").

[2] These means include the powers (1) to transfer property free of existing liens, 11 U.S.C. § 363 (2012), (2) to disallow claims otherwise valid under state law, 11 U.S.C. § 502(b)(2), (6) (2012), (3) to discount and alter existing debt, 11 U.S.C. §§ 1123(a) & (b)(2012), (4) to recover transfers and set aside

zation, a document that adjusts and alters the rights of creditors and owners. Instead of a statutory form, Congress largely left the structure and content of such plans to the parties. As a result, creditors will enthusiastically endorse some plans and strenuously scorn others. One issue, then, is how to handle a feasible and sensible plan opposed by a minority of creditors.

Congress answered this question in part by arming plan proponents with "cramdown" powers;[3] that is, an otherwise appropriate plan that is opposed by one or more classes may be confirmed so long as it is fair and equitable and does not discriminate against a dissenting class.[4] As Congress placed the bankruptcy power in a court system rather than in an administrative process, judges rather than administrators apply the rules of cramdown. That is, judges apply the law to the facts, and in theory confirm and approve only those plans that conform to Congress' cramdown and other confirmation requirements.

Judges, however, can and do make mistakes. Congress realized as much and authorized appeals of bankruptcy court final orders.[5] These appeals correct errors in discrete cases; but they also assure the uniform implementation of bankruptcy law.[6]

A disturbing trend in bankruptcy litigation, however, challenges this notion of the proper role of appeals. The judge-made doctrine of equitable mootness allows appellate courts to dismiss meritorious appeals in order to

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liens otherwise valid under state law, 11 U.S.C. §§ 545, 547, 726(b), and (5) to accomplish as much without the unanimous consent of all creditors, 11 U.S.C. §§ 1129(a)(8), (b)(1) (2012).

[3]This is a reference to the § 1129(b)(1) power to confirm a plan over the dissent of a class of creditors or, in common parlance, to cram it down their throats. This article uses the portmanteau form "cramdown." Courts tend to use the terms "cramdown," "cram down," and "cram-down" interchangeably. Indeed, a Justice of the Supreme Court has used both "cramdown" and "cram-down" in the same sentence. Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102, 167 (1974) (Douglas, J., dissenting).

[4]11 U.S.C. § 1129(b)(1) (2012).

[5]28 U.S.C. § 158(a) (2012); *see* ACC Bondholder Grp. v. Adelphia Commc'ns. Corp. (*In re* Adelphia Commc'ns. Corp.), 361 B.R. 337, 342 (S.D.N.Y. 2007) ("The ability to review decisions of the lower courts is the guarantee of accountability in our judicial system. In other words, no single judge or court can violate with impunity the Constitution and laws of the United States, or the rules that govern court proceedings, because nearly all decisions are subject to appellate review. At the end of the appellate process, all parties and the public accept the decision of the courts because we, as a nation, are governed by the rule of law. Thus, the ability to appeal a lower court ruling is a substantial and important right.").

[6]*See generally* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1246 (2013) (discussing generally the nature of an appeal). I acknowledge that there is no constitutional right to an appeal. The Supreme Court has stated that a right of appeal is "not essential to due process, provided that due process has already been accorded in the tribunal of first instance." Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80 (1930); *see also* McKane v. Durston, 153 U.S. 684, 688 (1894).

It is of some note that, under prior bankruptcy statutes, the Supreme Court held it did not have appellate jurisdiction over "pure" bankruptcy issues such as resolution of an individual proof of claim. *See* Wiswall v. Cambell, 93 U.S. (3 Otto) 347, 348 (1876) (dismissing appeal for lack of jurisdiction with respect to order disallowing "a claim presented by a supposed creditor against the estate of a bankrupt.").

preserve the expectations of the other participants in the reorganization.[7]

In other words, the needs of the many justify running roughshod over the rights of the few, a perverted implementation of utilitarianism.[8] Not surprisingly, especially given the previous sentence, I believe that appellate courts have used equitable mootness too broadly and in ways that undermine tenets central to our jurisprudential and bankruptcy systems.

This article explores the contours of equitable mootness to illustrate the untenable position in which it places meritorious appellants. It will then demonstrate how this process is corrosive to the role of our courts and how it can undermine the very principles it purports to protect. The article closes with some radical suggestions for reform.

II. EQUITABLE MOOTNESS[9]

As Judge Posner has put it, equitable mootness "is perhaps best described as merely an application of the age-old principle that in formulating equitable

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[7]There are a host of articles devoted to the doctrine of equitable mootness, most of which attempt to describe or explain the doctrine. *See, e.g.*, Dennis J. Connolly & Sage M. Sigler, *The Issue is Moot. Or is it? Rethinking the Application of Equitable Mootness to Bankruptcy Appeals*, 2016 ANN. SURV. OF BANKR. LAW 2 (2016); Ross E. Elgart, *Bankruptcy Appeals and Equitable Mootness*, 19 CARDOZO L. REV. 2311 (1998); Katelyn Knight, *Equitable Mootness in Bankruptcy Appeals*, 49 SANTA CLARA L. REV. 253 (2009); George W. Kuney, *Understanding and Taming the Doctrine of Equitable Mootness*, 2018 NORTON ANN. SURV. OF BANKR. LAW 1 (2018); David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine?*, No. 4, J. BANKR. L. & PRAC. NL Art. 2 (2016); Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L.J. 269 (2018-19); Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 J. BANKR. L. & PRAC. 1 Art. 2 (2010); Matthew D. Pechous, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness Determinations*, 28 EMORY BANKR. DEV. J. 547 (2012); Caroline L. Rosiek, *Making Equitable Mootness Equal: The Need for a Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans*, 57 SYRACUSE L. REV. 685 (2007); Chad Shokrollahzadeh, *Equitable Mootness and its Discontents: The Life of the Equitable Mootness Doctrine in the Third Circuit After* In re One2One Communications L.L.C. and *In re* Tribune Media Co., 18 DUQ. BUS. L.J. 129 (2016); R. Jake Jumbeck, Comment, *"Complexity" as the Gatekeeper to Equitable Mootness*, 33 EMORY BANKR. DEV. J. 171 (2016); Paul A. Avron, *Equitable Mootness: Is it Time for the Supreme Court to Weigh in?*, AM. BANKR. INST. J., Mar. 2017, at 36; Lenard Parkins et al., *Equitable Mootness: Will Surgery Kill the Patient?*, AM. BANKR. INST. J., Sept. 2010, at 40; *see also* WILLIAM L. NORTON, 8 NORTON BANKR. L. & PRAC. 3d § 170:87 (2017); 13B CHARLES ALAN WRIGHT, ET AL., FED. PRAC. & PROC. § 3533.2.3 (3d ed. 2018 & Supp. 2019).

[8]I say "perverted" because most iterations of utilitarianism contain a version of the "harm principle," which does not permit unilateral reallocation of resources for the greater good when such reallocation harms others. As stated by John Stuart Mill: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant." JOHN STUART MILL, ON LIBERTY 21-22 (2d ed. 1859).

[9]This and the two subsequent sections are based upon, and draw heavily from, Bruce A. Markell, *Equitable Cuteness: Of Mountains and Mice*, BANKR. L. LETTER (Nov. 2015), and from 7 COLLIER ON BANKRUPTCY ¶ 1129.09 (Richard Levin & Henry J. Sommer eds., 16th ed. 2019). The author is the principal contributing author for section 1129 in *Collier on Bankruptcy*.

relief a court must consider the effects of the relief on innocent third parties."[10] The main consideration inherent in equitable mootness is the effect of the implementation of an order confirming a plan of reorganization on those not directly involved in any appeal of that order.[11]

When equitable mootness is invoked, appellate courts often reach an extraordinary conclusion: even if the appellant has a meritorious case, the court will decline to hear the appeal.[12] This leaves aggrieved appellants with no recourse for even profound errors made during the confirmation process. Especially given the Supreme Court's broad interpretation of the preclusive effect of confirmation orders,[13] this doctrine can work significant hardship on innocent creditors.

A. The History and Background of Equitable Mootness

A legitimate question is how such a doctrine originated. As doctrines go, equitable mootness in bankruptcy is relatively new, originating in 1981. Most trace its origins to *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*.[14]

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[10]*In re* Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994); *see also In re* Tribune Media Co., 799 F.3d 272, 287 (3d Cir. 2015) (Ambro & Vanaskie, JJ., concurring) (collecting cases); Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1335 n.7 (10th Cir. 2009) ("[T]he doctrine of equitable mootness is rooted, at least in part, in the court's discretionary power to fashion a remedy in cases seeking equitable relief."); *In re* AOV Indus., Inc., 792 F.2d 1140, 1147-48 (D.C. Cir. 1986) ("[T]here exists . . . a melange of doctrines relating to the court's discretion in matters of remedy and judicial administration. Even when the moving party is not entitled to dismissal on [A]rticle III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits."); 13B Charles Alan Wright et al., Fed. Prac. & Proc. § 3533.1 (3d ed. 2018).

[11]Bate Land Co. LP v. Bate Land & Timber LLC (*In re* Bate Land & Timber LLC), 877 F.3d 188, 195 (4th Cir. 2017) ("Equitable mootness is a pragmatic doctrine 'grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.'") (quoting Mac Panel Co. v. Va. Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002)).

Courts have extended equitable mootness to appeals from cash collateral orders, sales, settlements, liquidations (both under chapter 7 and chapter 11), and equity receiverships. 7 Collier on Bankruptcy ¶ 1129.09[8] (Richard Levin & Henry J. Sommer eds., 16th ed. 2019). This article focuses only on appeals from chapter 9 and chapter 11 confirmation orders.

[12]This facet of the doctrine has not gone unnoticed. *See, e.g., In re* MPM Silicones, L.L.C., 874 F.3d 787, 805 (2d Cir. 2017); *cert. denied sub nom.* BOKF, N.A. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018) and *cert. denied sub nom.* Wilmington Tr., N.A. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018) ("It is generally considered inappropriately harsh to deny relief to which one is entitled on the purportedly equitable ground that the unfair (or illegal) plan has been put into effect, especially where a creditor took all appropriate steps to secure judicial relief. In such a case, we have held that it is proper to 'provide relief if it is at all feasible.'") (quoting *In re* Metromedia Fiber Network, *Inc.*, 416 F.3d 136, 144 (2d Cir. 2005)).

[13]*See, e.g.,* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); Stoll v. Gottlieb, 305 U.S. 165 (1938).

[14]652 F.2d 793 (9th Cir. 1981).

1. *The Ninth Circuit and Roberts Farms*

In *Roberts Farms*, the bankruptcy court had confirmed a plan of arrangement under Chapter XI of the 1898 Bankruptcy Act. Trone, a creditor, objected. Before noticing his appeal of the confirmation order, Trone sought a writ of mandamus from the district court barring the bankruptcy judge from implementing the plan.[15] The request for a writ was denied.[16] The appellees then moved to dismiss the appeal as moot. The district court granted the motion. Trone appealed that order and, inadvisedly, sought the writ anew.

As a consequence, the only issue on appeal to the circuit court was the propriety of the mootness dismissal. The appellees again moved to dismiss the appeal on mootness grounds. After discussing cases involving sales from bankruptcy estates, and the adoption of former *Rule* 805 of the *Federal Rules of Bankruptcy Procedure* (a precursor to section 363(m) of the Bankruptcy Code),[17] the circuit court said this:

> Here the many intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand solely upon the order confirming the plan of arrangement for court approval and confirmation of the transactions. Were we to deny the motion to dismiss for mootness and on consideration of the merits reverse the order of the District Court, what would be the result? Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossi-

[15]*Roberts Farms* arose under the 1898 Bankruptcy Act, but the current Bankruptcy Code maintains a similar two-level system of appeal to the circuit courts. To oversimply, under the current Bankruptcy Code an appeal from a final order of a bankruptcy court lies in the district court in the district in which the bankruptcy court sits. 28 U.S.C. § 158(a) (2012). An appeal from a final order of the district court disposing of the appeal from the bankruptcy court lies in the circuit court in which the district court sits. 28 U.S.C. § 158(d) (2012).

In circuits that have adopted bankruptcy appellate panels, those panels may hear initial appeals from a final bankruptcy court order with the consent of all parties. 28 U.S.C. § 158(b), (c) (2012). As not all circuits have authorized bankruptcy appellate panels, this article will refer to district courts as the first level appellate court.

[16]The Ninth Circuit characterized the decision to seek a writ of mandamus instead of an appeal as "a procedural monstrosity." Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 795 (9th Cir. 1981).

[17]As quoted by *Roberts Farms*, Rule 805, as then in effect, stated:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 796 (9th Cir. 1981).

> ble to fashion effective relief for all concerned? Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.[18]

Interestingly, the Ninth Circuit dealt with Trone's failure to seek a stay as a separate ground for dismissal.[19] On this ground, the Ninth Circuit said:

> [I]t is obligatory upon appellant in a situation like the one with which we are faced to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief (Rule 51, Supreme Court Rules)) if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.[20]

Thus, there were two grounds in *Roberts Farms* for dismissal: one founded upon futility of remedy and the other founded upon an equity-based analysis arising from a lack of diligence and a change of circumstances.

As authority for the first proposition, the court relied on *Mills v. Green*,[21] an 1895 Supreme Court decision in which the Justices dismissed an appeal seeking to enjoin the selection of a committee to attend a constitutional convention that had already occurred by the time the Court heard the appeal. This was odd; *Mills* dealt with deprivation of a political right, something that is not ordinarily compensated for with monetary damages. In contrast, reorganizations are all about money and the allocation of value. Even when property rights change or are eliminated, the reason is the allocation of value in line with the reorganization's new capital structure. Within the closed universe of participants to a reorganization, value is not lost as were

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[18]Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 797 (9th Cir. 1981).

[19]Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981) ("An entirely separate and independent ground for dismissal has also been established because Appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court and have permitted such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal.").

[20]Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981). At least one panel of the Ninth Circuit appears to have backed off this strict formulation, allowing appeals to proceed even if the appellant does not seek a stay from the circuit court. *See* First S. Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (*In re* Sunnyslope Hous. Ltd. P'ship), 818 F.3d 937, 944 & n.4 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied,* 138 S. Ct. 648 (2018) ("A secured creditor might be wise to err on the side of caution and seek a stay from this court, but the failure to do so in this case should not, we conclude, mean that these appeals should be dismissed as moot.").

[21]159 U.S. 651 (1895).

political rights in *Mills*; that value is simply reallocated among the participants. The issue on appeal then becomes the difficulty in reallocating those rights, not with restoring a lost right.

2. *The Third Circuit and Continental Airlines*

Roberts Farms and the doctrine of equitable mootness gained slow acceptance after 1981.[22] In 1996, the Third Circuit gave the doctrine a boost in *In re Continental Airlines*.[23] There, the full court by a narrow majority of 7-6 explicitly embraced equitable mootness but without explicitly defining it. Instead, the majority opinion noted five factors that courts had considered:

> Factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.[24]

Among other authorities, the majority used *Roberts Farms* to justify this set of factors. But as then-Judge Alito pointed out in dissent, *Roberts Farms* was a narrow decision, and was apparently based on the theory that courts should refrain from deciding a case where "no relief was practicable as a result of the many post-confirmation transactions that were irreversible" due to former *Bankruptcy Rule* 805.[25] Judge Alito concluded the statutory basis and facts present in *Roberts Farms* were absent in *Continental*. As he explained, "the holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested."[26] And as there was no clear statutory basis precluding the court from hearing the case, he dissented.

Since *Continental Airlines*, every circuit court has addressed and adopted some form of equitable mootness.[27] The approaches, however, are a study in

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[22]*See, e.g.*, *In re* AOV Indus., Inc., 792 F.2d 1140, 1147-48 (D.C. Cir. 1986).

[23]91 F.3d 553 (3d Cir. 1996) (en banc).

[24]*In re* Continental Airlines, 91 F.3d 553, 560, (3d Cir. 1996) (citation omitted).

[25]*In re* Continental Airlines, 91 F.3d 553, 569 (3d Cir. 1996) (Alito, J., dissenting). Rule 805 formerly provided that, unless stayed, "an order approving a sale of property . . . to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal."

[26]91 F.3d 553, 570 (Alito, J., dissenting).

[27]7 Collier on Bankruptcy ¶ 1129.09[3][a] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2019). Each circuit's formulation of the test for equitable mootness appears in Collier on Bankruptcy at paragraph 1129.09[4].

disuniformity.[28]

B. THE FACTORS

As the doctrine's name implies, equitable mootness is absent from the statutory apparatus of chapter 11 and the associated parts of the Judicial Code in title 28. It is a judge-made doctrine originating in equity. While there is no definitive statement of the components of equitable mootness in bankruptcy, appellate courts often resort to five common elements. Although the expression of these elements may vary from circuit to circuit, they distill into the following:

- Could the appellant have obtained a stay of the confirmation order during the pendency of the appeal, and, if so, did the appellant request such a stay?
- Has the plan been substantially consummated, or has the reorganized debtor transferred significant assets or issued securities?
- Have third parties who are not parties to the appeal relied on the plan's implementation to their detriment, or in a fashion such that it would be unfair or inequitable to require those third parties to disgorge any plan consideration received, or to fashion another remedy?
- Is the challenged provision central to the success of the reorganization, or can the claimed error be corrected by adjustment among a select group of creditors?
- Is hearing the appeal on the merits consistent with public policy?[29]

Each of these elements will be examined in turn.

1. *Lack of a Stay Pending Appeal*

Many appellate courts focus initially on whether the appellant applied for or received a stay pending appeal.[30] The main reason is obvious: obtaining a

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[28]*Id.* ¶ 1129.09[5].

[29]7 COLLIER ON BANKRUPTCY ¶ 1129.09[3][a] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2019).

[30]As the Ninth Circuit recently put it: "It is 'obligatory' that one seeking relief from plan confirmation 'pursue with diligence all available remedies to obtain a stay of execution of the objectionable order.' Failure to do so without adequate explanation should result in dismissal." *In re* City of Stockton, 909 F.3d 1256, 1264 (9th Cir. 2018) (quoting Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981)). *But see In re* Semcrude, L.P., 728 F.3d 314, 322 (3d Cir. 2013) ("[N]either the Bankruptcy Code nor any other statute predicates the ability to appeal a bankruptcy court's ruling on obtaining a stay. As such, we are unwilling to shift the burden to the appealing party based on its failure to do something Congress has not required it to do."); *In re* Millennium Lab Holdings II, LLC, 591 B.R. 559, 579 (D. Del. 2018) (applying *Semcrude*).

stay pending appeal moots equitable mootness. If a plan proponent cannot consummate a plan due to a stay, then the parties' positions are frozen and events cannot overtake the appeal. All remedies are preserved. An appeal from the confirmation order never becomes moot.

As equitable mootness is a prudential restriction on judicial power rather than a structural or constitutional limitation, courts look to whether the appellant has taken appropriate steps to preserve its rights before deciding whether any relief is warranted. This is as much a matter of causation as of equity. If a stay is available but spurned, then any harm is chargeable against the appellant's inaction.[31]

The obstacle here is that stays pending appeal may be difficult or expensive to obtain. A meritorious appellant can be at a disadvantage seeking a stay from a court which has just confirmed a plan, and the cost of a bond backing any stay is likely to be nothing less than the value of the reorganization itself.[32] As noted by the Ninth Circuit, "[t]he reality is that this court does not often grant stays in circumstances like these."[33]

Notwithstanding this pragmatic insight, some circuit courts essentially require the appellant to show futility in order to successfully invoke appellate review. Indeed, some lower courts in the Second Circuit have stated that "the Second Circuit demands that a party seek a stay 'even if it may seem highly unlikely that the bankruptcy court will issue one.'"[34]

Many factors may work against the likelihood of a stay, especially in large, complex reorganizations. A request for a stay might be futile, given the history and circumstances of the reorganization at hand. Bankruptcy courts

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[31]As the Ninth Circuit noted in a recent equitable mootness case where the appellant had not sought a stay, "The reorganization train has left the station. Cobb did not pursue any bankruptcy stay remedies, much less pursue them with the requisite diligence. The plan has long been substantially consummated. He offers too little, too late. None of the factors that we consider in deciding whether to apply the doctrine of equitable mootness favor Cobb." *In re* City of Stockton, 909 F.3d 1256, 1266 (9th Cir. 2018).

[32]*See infra* Section III.C.

[33]First S. Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (*In re* Sunnyslope Hous. Ltd. P'ship), 818 F.3d 937, 944 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied*, 138 S. Ct. 648 (2018).

[34]Carrega v. Grubb & Ellis Co. (*In re* Grubb & Ellis Co.), 523 B.R. 423, 440-42 (S.D.N.Y. 2014) (quoting *In re* Granite Broad. Corp., 385 B.R. 41, 51 (S.D.N.Y. 2008)(quoting Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005)).

If the stay is denied, however, the Second Circuit draws no adverse inference from that denial. *In re* MPM Silicones, L.L.C., 874 F.3d 787, 804-05 (2d Cir. 2017), *cert. denied sub nom.* BOKF, N.A. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018), and *cert. denied sub nom.* Wilmington Tr., N.A. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018) ("Along these lines, we concluded that '[i]f a stay was sought, we will provide relief if it is at all feasible, that is, unless relief would "knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court."'") (quoting *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 144 (2d Cir. 2005)).

might not issue a stay after a long confirmation fight because they reasonably believe that no error infected the confirmation proceedings; the district court might defer to that conclusion. Also, some courts may simply not act at the expedited pace that is often necessary to resolve a request for a stay prior to plan confirmation.

The increased cost of a stay is also a hindrance. Unlike a normal two-party appeal, in which the appellant only has to provide a bond to cover the loss it was found to have caused, a bond for a stay of a confirmation order requires the appellant to essentially guarantee all of the other parties' interests under the plan that it seeks to challenge. The scope of this protection includes sheltering entities who are not parties to the appeal but would be affected by any reversal. In large reorganizations, this cost might be prohibitive, especially if the appellant's own interests differ from the interests of the rest of the creditor body.[35] In the *Tribune Media* reorganization, for example, the appellant was owed in excess of $2 billion and believed the bankruptcy court had erred in approving the plan. It sought a stay pending appeal, only to learn the underwriting cost would be $1.5 billion, an amount equal to approximately 75% of the debt held by the appellant.[36] Pause here for a second. The effect of that bond ruling was to require the appellant, whose only error was to lend money to the debtor, to post a bond (if it could even obtain one) of almost 75% of its claim.[37] Put in perspecvtive, the bankruptcy court required the appellant to risk 75% of the money the appellant was owed as a condition of obtaining appellate review.

2. *The Effect of Substantial Consummation, the Transfer of Assets or the Issuance of Securities*

A stay simply seeks to prevent the plan proponent from implementing or consummating the plan. If a stay is not forthcoming, courts then review the progress of the plan's implementation. Many courts tie this to the Code's concept of "substantial consummation," defined in section 1101(2).[38] Indeed, the Second Circuit presumes an appeal is "equitably moot where the debtor's

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[35] *See generally* Jessica J. Berch, *The Costs of Litigation: A Proposal to Amend Federal Rule of Appellate Procedure 39(a)(4)*, 83 TEMPLE L. REV. 103 (2010).

[36] *In re* Tribune Media Co., 799 F.3d 272 (3d Cir. 2015).

[37] *Id.* The general cost of a bond is sketched in Section III.C below.

[38] 11 U.S.C. § 1102(2) (2012):

> (2) "substantial consummation" means— [¶] (A) transfer of all or substantially all of the property proposed by the plan to be transferred; [¶] (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and [¶] (C) commencement of distribution under the plan.

Id.

plan of reorganization has been substantially consummated."[39]

This factor can be justified by reference to the Bankruptcy Code. "Substantial consummation" is part of the test for determining whether a plan may be modified after confirmation. Section 1127(b) allows for post-confirmation modification only "before substantial consummation of such plan . . . ."[40] This signals that Congress did not intend for court-approved modification to occur after a plan had been implemented beyond a certain point.

The statutory point is "substantial consummation." Section 1101(2) defines that phrase as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.[41]

As a consequence, substantial consummation can be used as a proxy for the overall effect of reversal of a confirmation order on stakeholders in the reorganization. The reasoning is that if the plan is too far implemented to be modified under section 1127, reversal of the plan would also entail too many changes, long after parties had relied upon the plan. In particular, when a plan calls for the issuance of securities, and those securities have traded after confirmation, the remedy of reversal would appear to be futile.[42]

Circuit courts have been colorful in their elucidation of this factor. The Second Circuit requires that the requested relief not "knock the props out" of the plan.[43] The Third Circuit asks whether reversal of the confirmation order will "fatally scramble the plan."[44] The Ninth Circuit, which originated the "props" metaphor,[45] has continued its use, finding equitable mootness

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[39]R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 482 (2d Cir. 2012).

[40]11 U.S.C. § 1127(b) (2012).

[41]11 U.S.C. § 1101(2) (2012).

[42]One2One Comm., LLC v. Quad/Graphics, Inc., 805 F.3d 428, 436 (3d Cir. 2015) ("We have most frequently found that a plan could not be retracted when the reorganized debtor issued publically traded debt or securities."); *see also In re* Tribune Media Co., 799 F.3d 272, 279 (3d Cir. 2015) ("[W]e decline to disturb 'complex transactions undertaken after the Plan was consummated' that would be most difficult to unravel.") (quoting R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 485 (2d Cir. 2012)); Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 186 (3d Cir. 2001).

[43]R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 481 (2d Cir. 2012) (quoting Frito-Lay, Inc. v. LTV Steel Co. (*In re* Chateaugay Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993)).

[44]*In re* Tribune Media Co., 799 F3d. 272, 278 (3d Cir. 2015) (quoting Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 321 (3d Cir. 2013)).

[45]Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 797 (9th Cir. 1981).

likely applies if reversal of the confirmation order will not completely "knock[ ] the props out from under the plan and thereby creat[e] an uncontrollable situation for the bankruptcy court.[46]

Although the metaphors effectively convey the chaos that can result from reversal of a confirmation order, they do not define this factor in a manner capable of consistent application. One might say that the clarity of the test applied is inversely correlated to the flash and dash of the metaphors used. Lower appellate courts are left with general directives to avoid catastrophic consquences without an index of catastrophe.[47]

Courts such as the Third Circuit tend to find that if confirmation provides for the issuance of securities, this factor is met, and courts have limited power to reverse subsequent trades or their effects.[48] The Seventh Circuit, however, seems to be able to at least conceptualize how to unwind such transactions. As Judge Easterbrook has stated, "Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations."[49]

As a consequence, it is difficult to formulate a precise statement of this factor. This is particularly so in the Fifth Circuit, which adheres to the view that even "fractional relief" for an appellant can defeat an equitable mootness argument.[50] Courts will look at the extent to which reversal will cause a number of transactions to be vulnerable to avoidance. This leads, however,

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[46]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) (quoting Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012)); *see also* First S. Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (*In re* Sunnyslope Hous. Ltd. P'ship), 818 F.3d 937 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied*, 138 S. Ct. 648 (2018).

[47]In one case in which the court did not dismiss the appeal due to equitable mootness, the court found that the plan itself provided a source for payment of the appellant's claim, and thus there would be no great disruption to the plan if the appeal were successful. *In re* Sotera Wireless, Inc., 591 B.R. 453, 467-68 (S.D. Cal. 2018).

[48]*See* cases cited in note 42, *supra*.

[49]*In re* Res. Tech. Corp., 430 F.3d 884, 886-87 (7th Cir. 2005) (Easterbrook, J.); *see also In re* Kmart Corp., 359 F.3d 866 (7th Cir. 2004) (Easterbrook, J.) ("Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization.") (citation omitted)); *In re* Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.) ("We could order the bankruptcy judge to modify the plan of reorganization to reallocate $20 million worth of the stock that the 14 percent noteholders received to the appellants, the 13.5 percent noteholders. Some of the 14 percent noteholders, it is true, have already sold their stock, but they could be ordered to surrender some or all of the proceeds to the appellants."). See *infra* Section III.E for a more detailed discussion of this topic.

[50]*See In re* Texas Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324, 327-28 (5th Cir. 2013) (quoting Bank of N.Y. Trust Co. NA v. Pacific Lumber Co. (*In re* Scopac), 649 F.3d 320, 322 (5th Cir. 2011)).

Even though fractional recovery is possible in the Fifth Circuit, that court still requires substantial consummation. As that court recently phrased the test, "[e]quitable mootness typically requires a reor-

to the next factor: the effect on parties who have justifiably relied on the validity of the confirmation order.

3. *Effect on Third-Party Reliance and Expectations*

The third factor courts consider—the effect on third parties—deviates somewhat from the core prudential concerns traditionally expressed. Normally, a court has the obligation to decide cases before it.[51] By including third-party reliance[52] as a factor in the equitable mootness calculus, however, the focus shifts from a court's duty to decide to, instead, the effect of discharging that duty on non-parties. Including this factor in the equitable mootness analysis can thus partially absolve a court from doing its duty.

To be sure, the protected reliance must be justifiable; "reliance on consummation of a plan would not be justified if a third party obtained a benefit that was inconsistent with a contract, statute, or judgment, as any benefit from such an error would result in 'ill-gotten gains.'"[53]

Although circuit courts are generally in agreement that reliance by creditors can contribute to equitable mootness, they have set somewhat different boundaries on reliance. The Third Circuit, for example, treats whether reversal will "significantly harm third parties who have justifiably relied on plan confirmation" as an alternate factor to the possibility of effective relief.[54] That is, even if relief is feasible upon reversal, the court may stay its hand if there is significant creditor reliance such as the purchase and sale of plan consideration on public markets. The Fifth Circuit follows the Third Circuit in this respect in considering whether "the relief requested by the appellant

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ganization plan that is at least 'substantially consummated.'" *In re* Sneed Shipbuilding, Inc., 916 F.3d 405, 409 (5th Cir. 2019).

[51]As stated in a recent dissent from the application of equitable mootness, "The current trend at the Supreme Court is toward a greater recognition of our 'virtually unflagging obligation . . . to exercise the jurisdiction given [us].'" Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 811 (6th Cir. 2016) (Moore, J., dissenting) (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 821 (1976)); *see also* One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 433-34 (3d Cir. 2015) ("[T]his Court has recognized an appealing party's 'statutory right to review of the [Bankruptcy] Court's decision.' Further, '[t]he presumptive position remains that federal courts should hear and decide on the merits cases properly before them.'") (quoting *In re* Phila. Newspapers, LLC, 690 F.3d 161, 171 (3d Cir. 2012) and Samson Energy Res Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 326 (3d Cir. 2013)).

[52]Courts often do not view the debtor as an innocent party who may rely on confirmation, even if the debtor is an individual. *See* Dill Oil Co. v. Stephens (*In re* Stephens), 704 F.3d 1279, 1283 (10th Cir. 2013) (finding that debtor's reliance on confirmation was not reasonable when key issue of whether the absolute priority rule applies to individuals had not been definitively determined).

[53]*In re* Tribune Media Co., 799 F.3d 272, 278 (3d Cir. 2015); *see also* R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 484 (2d Cir. 2012) ("[I]t would not be inequitable to require the parties to [an illegal] agreement to disgorge their ill-gotten gains, participation in the appeal or not.").

[54]*In re* Tribune Media Co., 799 F3d. 272, 278 (3d Cir. 2015) (quoting Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 321 (3d Cir. 2013)).

would 'affect either the rights of parties not before the court or the success of the plan.'"[55]

Other courts only count "innocent" creditors as acceptable candidates for reliance protection. For these courts, reliance will "weigh in favor of holding a party's appeal to be equitably moot, [where] the specific relief sought . . . bear[s] unduly on innocent third parties."[56]

Courts also part ways respecting the "innocence" of third parties. In two recent cases,[57] the Ninth Circuit noted that an outside investor not party to the appeal had participated in the plan process, even negotiating with the lenders over the final confirmation order. In the second case, given the absence of a stay, the outside investor had assumed post-confirmation control of the debtor and its appeal. As the parties had such intimate knowledge of the plan process, the Ninth Circuit thus held in both cases that such participation meant the outside investor was not an innocent third party, and thus not within the zone of parties protected by equitable mootness.[58]

Still other courts seek to protect reliance interest by requiring notice to non-parties, such that they are able to participate in the appeal and protect their interests. The Second Circuit, for example, examines whether "'the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings.'"[59]

4. *Contribution to Plan Success*

A fourth factor is whether the provisions challenged on appeal are central to the plan as confirmed. If they are, an equitable mootness finding is more

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[55]Wells Fargo Bank N.A. v. Tex. Grand. Prairie Hotel Realty, L.L.C. (*In re* Texas Grand Prairie Hotel Realty, L.L.C.), 710 F.3d 324, 327–28 (5th Cir. 2013) (quoting *In re* Scopac, 624 F.3d 274, 281 (5th Cir. 2010)) (emphasis added).

[56]JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props. Inc.), 801 F.3d 1161, 1167 (9th Cir. 2015).

[57]First S. Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (*In re* Sunnyslope Hous. Ltd. P'ship), 818 F.3d 937, 944 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied*, 138 S. Ct. 648 (2018); JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props. Inc.), 801 F.3d 1161, 1169-70 (9th Cir. 2015).

[58]First S. Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (*In re* Sunnyslope Hous. Ltd. P'ship), 818 F.3d 937, 944 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied*, 138 S. Ct. 648 (2018); JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props. Inc.), 801 F.3d 1161, 1169-70 (9th Cir. 2015).

[59]R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 481 (2d Cir. 2012) (quoting Frito-Lay, Inc. v. LTV Steel Co. (*In re* Chateaugay Corp.), 10 F.3d 944, 952–53 (2d Cir. 1993)); *see also* JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props. Inc.), 801 F.3d 1161, 1167 (9th Cir. 2015) (quoting Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012)); First S. Nat'l Bank v. Sunnyslope Hous. Ltd. P'ship (*In re* Sunnyslope Hous. Ltd. P'ship), 818 F.3d 937, 944 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied*, 138 S. Ct. 648 (2018) (noting a court "will look to the effect a remedy may have on third parties not before the court").

likely.[60] As a consequence, appeals which focus on just one small part of a plan, or which can be cured by a monetary payment, rarely will be deemed equitably moot.[61] For example, the Third Circuit has often declined to dismiss non-stayed, substantially consummated cases if the challenge centered on a provision that was not critical to the plan's overall success.[62]

The Second Circuit is more blunt. It states that a factor in finding equitable mootness is whether "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity."[63]

5. *Public Policy*

Appellate courts also attempt to link equitable mootness doctrine to other policies at play in chapter 11. They begin with the general proposition, disfavoring equitable mootness, that courts should hear and decide the meritorious appeals pending before them.[64]

But courts then cite countervailing policies. In particular, some courts explicitly consider the public policy of promoting reorganization over liquidation. The Tenth Circuit, for example, asks whether "the public-policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely on bankruptcy court decisions—[will] be under-

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[60]The Third Circuit has stated that "typically 'the foremost consideration' requires that a court consider whether allowing an appeal to go forward will undermine the plan . . . ." *In re* Phila. Newspapers, LLC, 690 F.3d 161, 168 (3d Cir. 2012) (quoting *In re* PWS Holding Corp., 228 F.3d 224, 236 (3d Cir. 2000)); *see also In re* Millennium Lab Holdings II, LLC, 591 B.R. 559, 580-81 (D. Del. 2018) (finding that releases given to plan funders "cannot equitably be excised as they were the very centerpiece of the Plan.").

[61]*See, e.g.*, Bate Land Co. LP v. Bate Land & Timber LLC (*In re* Bate Land & Timber LLC), 877 F.3d 188, 195 (4th Cir. 2017) (involving appellant seeking only additional collateral for its reorganized claim, and court held that providing such collateral would be feasible if appellants obtained reversal).

[62]*See In re* Tribune Media Co., 799 F.3d 272 (3d Cir. 2015) (finding appeal not moot when remedy was to shift consideration from one class under the plan to another); Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314 (3d Cir. 2013); *In re* Zenith Elecs. Corp., 329 F.3d 338, 343-44 (3d Cir. 2003) (concluding appeal not equitably moot where disgorgement of professional fees would not unravel plan); United Artists Theatre Co. v. Walton, 315 F.3d 217, 228 (3d Cir. 2003) (finding appeal not equitably moot where striking indemnification provision would allow the plan to stay otherwise intact); *In re* PWS Holding Corp., 228 F.3d 224, 236 (3d Cir. 2000) (deeming appeal not equitably moot where plan could go forward even if certain releases were struck from it); *see also* Lowenschuss v. Selnick, 170 F.3d 923, 933 (9th Cir. 1999) (holding that a claim was "not equitably moot because this case does not present transactions that are so complex or difficult to unwind").

[63]R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 481 (2d Cir. 2012) (quoting Frito-Lay, Inc. v. LTV Steel Co. (*In re* Chateaugay Corp.), 10 F.3d 944, 952-53 (2d Cir. 1993)).

[64]*See, e.g.*, One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 433-34 (3d Cir. 2015) ("[T]his Court has recognized an appealing party's 'statutory right to review of the [Bankruptcy] Court's decision.' Further, '[t]he presumptive position remains that federal courts should hear and decide on the merits cases properly before them.'") (quoting *In re* Phila. Newspapers, LLC, 690 F.3d 161, 171 (3d Cir. 2012) and Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 326 (3d Cir. 2013)).

mined by reversal of the plan."[65]

Another policy is the Code's own treatment of the finality of reorganization despite countervailing concerns. Section 1127(b), for example, only allows modification if the plan has not been substantially consummated.[66] Similarly, section 1144 modifies the general federal rule on revocation of court orders[67] by shortening to six months the time within which a party may attack a confirmed plan based upon fraud.[68]

C. Circuit Conflicts

Although there are common elements to each circuit's expression of equitable mootness, no common test has emerged; one might expect as much with respect to a relatively recent judge-made doctrine. Indeed, there are variances in each circuit's expression of the doctrine.

1. *Differences over Statement of the Doctrine*

The circuits consider different factors in deciding whether to dismiss based on equitable mootness. The Second Circuit has five seemingly independent factors,[69] the Third Circuit has four factors, but condenses their analysis into "two analytical steps,"[70] the Fourth Circuit also has four factors, but does not condense the analysis into two steps,[71] and the Fifth Circuit (with the Sixth following)[72] recites only three.[73] Finally, the Tenth Circuit tops

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[65]Dill Oil Co. v. Stephens (*In re* Stephens), 704 F.3d 1279, 1282-83 (10th Cir. 2013) (citing Search Market Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1339 (10th Cir. 2009)).

[66]11 U.S.C. § 1127(b) (2012).

[67]*See* Fed. R. Civ. P. 60(b), which generally applies in bankruptcy proceedings; Fed. R. Bankr. P. 9024. *But see* Fed. R. Bankr. P. 9024(3) (stating that Rule 60(b) does not apply when section 1144 is applicable).

[68]11 U.S.C. § 1144 (2012). The propriety of equitable mootness has been properly questioned when the appeal involves section 1144 issues. *See* Mesdag v. Nancy Sue Davis Trust (*In re* Davis Offshore, L.P.), 644 F.3d 259, 262 n.2 (5th Cir. 2011) ("Allowing a judicially-crafted doctrine to override this statutory protection seems dubious.").

[69]R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 481-82 (2d Cir. 2012); *see also* Elliott v. GM LLC (*In re* Motors Liquidation Co.), 2016 U.S. App. LEXIS 12848 (2d Cir. July 13, 2016).

[70]*In re* Tribune Media Co., 799 F3d. 272, 278 (quoting Samson Energy Ress Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 321 (3d Cir. 2013)), *cert. denied*, 136 S. Ct. 1459 (2016).

[71]Bate Land Co. LP v. Bate Land & Timber LLC (*In re* Bate Land & Timber LLC), 877 F.3d 188, 195 (4th Cir. 2017); Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 713 (4th Cir. 2011) (citing Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005)).

[72]Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 798 (6th Cir. 2016) ("We analyze equitable mootness under a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been "substantially consummated"; and (3) whether the relief requested would significantly and irrevocably disrupt the implementation of the plan or disproportionately harm the reliance interests of other parties not before the court."); *see also In re* Johnson, 583 B.R. 682, 688 (B.A.P. 6th Cir. 2018) (quoting Bank of Montreal v. Official Comm. of Unsecured Creditors (*In re* Am. HomePatient, Inc.), 420 F.3d 559, 563-64 (6th Cir. 2005)).

the list with "six questions," including a "quick look" at the merits.[74] While the general ingredients of equitable mootness are common, the variations in the statement of the doctrine persist.

2. *Differences over Role of Seeking or Obtaining Stay Pending Appeal*

In all but one of the circuits that have adopted equitable mootness, an appellant's effort to obtain a stay pending appeal is relevant to the analysis.[75] But in practice the degree of relevance is uncertain. The baseline level of "diligence" required to avoid equitable mootness is inconsistently applied,[76] both among the circuits, and even within one circuit.[77]

3. *Differences over Degree of Reliance*

The circuits are also divided over whether a court may dismiss for equitable mootness as a method of protecting the reliance interests of creditors indirectly involved in the appeal. In *Tribune*, the Third Circuit specifically invoked the interest of creditors "who voted for the Plan"[78] notwithstanding their extensive participation in the bankruptcy proceedings. The circuit court reasoned that protection of a stakeholder's interests—whether a proponent of the disputed plan or a true third party—is important if the stake-

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[73]*In re* Texas Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324, 327-28 (5th Cir. 2013) (quoting Bank of N.Y. Trust Co. NA v. Pacific Lumber Co. (*In re* Scopac), 649 F.3d 320, 322 (5th Cir. 2011)).

[74]Dill Oil Co. v. Stephens (*In re* Stephens), 704 F.3d 1279, 1282-83 (citing Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1339 (10th Cir. 2009)).

[75]*See, e.g.*, R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 481-82 (2d Cir. 2012); Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 713 (4th Cir. 2011); Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1339 (10th Cir. 2009); Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (*In re* Pacific Lumber Co.), 584 F.3d 229, 240 (5th Cir. 2009); *In re* Continental Airlines, 91 F.3d 553, 560 (3d Cir. 1996) (en banc). *But see* SEC v. Wealth Mgmt. LLC, 628 F.3d 323, 332 n.5 (7th Cir. 2010) (disputing relevance of seeking a stay).

[76]R2 Invs., LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.), 691 F.3d 476, 484 (2d Cir. 2012) (stating, "That [appellants] were not granted a stay does not affect the analysis[,] . . . which looks only to diligence in seeking a stay."). *Cf. In re* UNR Indus., Inc., 20 F.3d 766, 769-70 (7th Cir. 1994) (finding appeal equitably moot notwithstanding denied motion to stay implementation, reasoning that "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization").

[77]In *Tribune*, the Third Circuit acknowledged that the appellant had "promptly moved for a stay," but still stated that the failure to obtain a stay—which would have required a $1.5 billion bond—was an "important reason" to dismiss the appeal as equitably moot. *In re* Tribune Media Co., 799 F.3d 272 (3d Cir. 2015) (characterizing the failure to post a $1.5 billion bond as a "risk-adjusted choice by . . . a rational actor"); *see also* Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 191-92 (3d Cir. 2001) (Alito, J., concurring) (characterizing "appellants' failure to seek a stay" as the "primar[y] influence[ ]" in decision to affirm dismissal) (emphasis added).

Just two years earlier, however, the Third Circuit had reversed the dismissal of an appeal notwithstanding the appellant's utter failure to seek a stay. Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 322 (3d Cir. 2013) (stating that, "[N]either the Bankruptcy Code nor any other statute predicates the ability to appeal a bankruptcy court's ruling on obtaining a stay.").

[78]*In re* Tribune Media Co., 799 F.3d 272, 281 (3d Cir. 2015).

holder "rel[ied] on the emergence of a reorganized entity from court supervision."[79]

In contrast, the Ninth Circuit has rejected this broad approach. In *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Properties Inc.*,[80] and again in *First Southern National Bank v. Sunnyslope Housing Limited Partnership*,[81] the circuit court held that a creditor who supported and funded the plan, and participated to a high degree in the confirmation process could not be deemed an "innocent third party" protected by the equitable mootness doctrine.[82] The court reasoned that when a "sophisticated financial entity" involves itself in a bankruptcy and "helps craft a reorganization plan that 'press[es] the limits' of the bankruptcy laws, appellate consequences are a foreseeable result."[83] Other circuits appear to share that limitation on reliance.[84]

4. *Differences over Use of Presumption of Mootness upon Substantial Consummation*

Equitable mootness is not, by definition, a trial court issue. It is is generally raised by the appellee at the district court or circuit level. This places the appellate court in the unfamiliar role as a factfinder in adjudicating an equitable mootness challenge.

In fulfilling their role as factfinders, appellate courts have parceled out to different parties the obligation of "proving" the equitable mootness factors.[85]

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[79]*Id.* at 280. Since *Tribune*, Delaware courts appear to be taking third party reliance quite seriously, even if that reliance was by a non-appellee. *See* Opt-Out Lenders v. Millennium Lab Holdings II, LLC (*In re* Millennium Lab Holdings II, LLC), 591 B.R. 559, 581 (D. Del. 2018) ("If unwound, third parties who reasonably relied on Plan confirmation would be injured. Voya has conceded that third parties have engaged in 'myriad transactions' pursuant to the Plan . . . . The revocation of the global settlement would certainly 'require a sufficient redistribution of assets to destabilize the financial basis of the settlement.' . . . . The Court agrees with Debtors that third parties, most of whom are not participating in this appeal, have relied upon the global settlement and Plan confirmation and will be harmed if the Confirmation Order is reversed or vacated.").

[80]801 F.3d 1161 (9th Cir. 2015).

[81]818 F.3d 937 (9th Cir. 2016), *vacated on other grounds on reh'g en banc*, 859 F.3d 637 (9th Cir. 2017), *cert denied*, 138 S. Ct. 648 (2018).

[82]JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props. Inc.), 801 F.3d 1161, 1169-70 (9th Cir. 2015).

[83]801 F.3d 1161, 1170 (quoting Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (*In re* Pacific Lumber Co.), 584 F.3d 229, 244 (5th Cir. 2009)).

[84]*See* Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1344 (10th Cir. 2009) (finding it "hard to consider" plan proponent "a 'third party' or at least an innocent third party" given its "pivotal role in the bankruptcy proceedings"); Bank of N.Y. Trust Co. v. Pacific Lumber Co. (*In re* Scopac), 624 F.3d 274, 282 (5th Cir. 2010) (noting major creditors who participated in confirmation proceedings "should not be considered third parties for the purposes of mootness analysis").

[85]Dill Oil Co. v. Stephens (*In re* Stephens), 704 F.3d 1279, 1283 (10th Cir. 2013) ("The party seeking to prevent the court from reaching the merits bears the burden of proving these factors weigh in favor of dismissal."). *Cf.* R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 482 (2d Cir. 2012) ("In this circuit, an appeal is presumed equitably moot where the debtor's plan of

Indeed, in some cases, actual proof may be unnecessary; the Second Circuit presumes equitable mootness if there is substantial consummation.[86] This discrepancy has been observed by other appellate courts.[87] At the same time, courts such as the Fourth Circuit have found substantial consummation irrelevant if appellant's requested relief is feasible.[88]

5. *Differences over Standard of Review*

Finally, the circuits "are split" over the applicable standard of review for a district court's decision to dismiss an appeal as equitably moot.[89] The Second, Third, and Tenth Circuits apply an abuse-of-discretion standard.[90] The Third Circuit does so because equitable mootness determinations "involve[ ] a discretionary balancing of equitable and prudential factors rather than the limits of the federal courts' authority under Article III."[91]

In contrast, the Fifth, Sixth, Ninth, and Eleventh Circuits review equita-

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reorganization has been substantially consummated."). The Third Circuit places the burden on the appellee. Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 321 (3d Cir. 2013) ("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.").

[86]"Where, as here, a reorganization plan has been substantially consummated, we presume that an appeal of that plan is equitably moot." *In re* MPM Silicones, L.L.C., 874 F.3d 787, 804 (2d Cir. 2017), *cert. denied sub nom.* BOKF, N.A. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018), and *cert. denied sub nom.* Wilmington Tr., N.A. v. Momentive Performance Materials, Inc., 138 S. Ct. 2653 (2018) (citing *In re* BGI, Inc., 772 F.3d 102, 104 (2d Cir. 2014)).

[87]*See, e.g.*, Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1338-39 (10th Cir. 2009).

[88]Bate Land Co. LP v. Bate Land & Timber LLC (*In re* Bate Land & Timber LLC), 877 F.3d 188, 196 (4th Cir. 2017) ("[B]ecause the relief requested does not seek to undo any aspect of the Confirmed Plan that has been consummated, it would not be impractical, imprudent, or inequitable to allow the appeal to proceed.").

[89]Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1334-35 (10th Cir. 2009). The split was noted by the First Circuit in *In re* SW Bos. Hotel Venture, LLC, 748 F.3d 393, 402 (1st Cir. 2014):

> As a threshold issue, the parties dispute the appropriate standard of review, the subject of a circuit split that this circuit has not yet addressed. *Compare* Liquidity Solutions, Inc. v. Winn-Dixie Stores, Inc. (*In re* Winn-Dixie Store, Inc.), 286 Fed.Appx. 619, 622 & n. 2 (11th Cir. 2008) (per curiam) (adopting de novo standard), Curreys of Neb., Inc. v. United Producers, Inc. (*In re* United Producers, Inc.), 526 F.3d 942, 946-47 (6th Cir. 2008) (same), and United States v. Gen. Wireless, Inc. (*In re* GWI PCS 1 Inc.), 230 F.3d 788, 799-800 (5th Cir. 2000) (same), with R 2 Invs., Inc. v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 483 (2d Cir.2012) (adopting abuse-of-discretion standard), Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1334-35 (10th Cir. 2009) (same), *In re* Continental Airlines, 91 F.3d 553, 560 (3d Cir. 1996) (en banc) (same), and *In re* AOV Indus., Inc., 792 F.2d 1140, 1148 (D.C. Cir. 1986) (same).

[90]*See* R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 483 (2d Cir. 2012); Search Market Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1335 (10th Cir. 2009). It likely also results in process-related costs that concomitantly increase reorganization expense; these added costs doubtless redound to the detriment of creditor dividends, debtor rehabilitation, or both.

[91]*In re* Continental Airlines, 91 F.3d 553, 560 (3d Cir. 1996) (en banc).

ble mootness dismissals de novo.[92] These circuit courts reason that equitable mootness dismissals should be subject to plenary review just like any other district court decision made while sitting in an appellate capacity.[93]

III. THE PERNICIOUS EFFECTS

These differences belie the uncomplicated fact that equitable mootness is an extraordinary remedy that, by design, denies review of meritorious appeals. To summarize and simplify, equitable mootness expressly provides that a meritorious individual claim of trial court error should not be heard, let alone decided, if the plan has been consummated and reversal would unsettle reasonable reliance interests of "innocent" creditors. Although the Bankruptcy Code provides for analogous treatment with respect to certain sales and loans,[94] it does so within a statutory framework established by Congress exercising its bankruptcy power.

By contrast, equitable mootness is a judge-made doctrine that cuts off appeal rights. Moreover, the doctrine is structured to be keenly sensitive to the facts in any particular case. This sensitivity leads to fine distinctions in applying precedent, which gives rise to diverging lines of cases. As shown in the last Section, these factors lead to confusion in the development of a consistent and coherent doctrine.

Finally, the doctrine also generates more work for an appellate court. Courts often choose to augment their equitable mootness dismissal with a review of the merits. The reasons are more equitable than legal; as one court put it: "The Court provides this alternative analysis because of the high burden that exists for equitable mootness, the parties have devoted a great deal of attention to these additional issues, and the appeal has been pending for quite a while."[95]

This state of affairs has led to confusion. This confusion has a cost that exceeds the benefit of insulating consummated plans from alteration after ap-

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[92] *See* Curreys of Nebraska, Inc. v. United Producers, Inc. (*In re* United Producers, Inc.), 526 F.3d 942, 946–47 (6th Cir. 2008) (acknowledging conflict with Third Circuit); United States *ex rel.* FCC v. GWI PCS 1, Inc. (*In re* GWI PCS 1 Inc.), 230 F.3d 788, 799–800 (5th Cir. 2000); Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nevada (*In re* Baker & Drake, Inc.), 35 F.3d 1348, 1351 (9th Cir. 1994); First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (*In re* Club Assocs.), 956 F.2d 1065, 1069 (11th Cir. 1992). The Eleventh Circuit recently questioned whether it should change the standard but decided it was bound by prior circuit precedent. Bennett v. Jefferson Cty., 899 F.3d 1240, 1246 n.2 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1305 (2019).

[93] *See, e.g.*, Curreys of Neb., Inc. v. United Producers, Inc. (*In re* United Producers, Inc.), 526 F.3d 942, 947 (6th Cir. 2008).

[94] 11 U.S.C. §§ 363(o), 364(m) (2012).

[95] *In re* Millennium Lab Holdings II, LLC, 591 B.R. 559, 583 n.32 (D. Del. 2018); *see also In re* Nuverra Envtl. Sols., Inc., 590 B.R. 75, 89 (D. Del. 2018) ("although I find the appeal meets the criteria for equitable mootness, the Court can 'readily resolve the merits of [the] appeal against the appealing party,' so I hold, in the alternative, that the Confirmation Order is affirmed.").

peal. In particular, there are at least eight ways in which the current application of equitable mootness has a pernicious effect. These are:

- an undermining of the standard of review regarding facts and law;
- a perversion and disruption of appellate jurisdiction;
- the placing of unfair burdens on appellants with meritorious cases;
- a destabilization of the special status Congress gave to sales and lending appeals;
- a discounting of courts' ability to fashion remedies in complex cases;
- a subversion of the ability to rely upon contracts;
- a dilution and impoverishment of the sources of interpretation of the Bankruptcy Code, and, last but not least;
- the perpetuation of a possibly unconstitutional deference by Article III courts to courts not possessed of the judicial power of the United States.

A. Undermining the Fact/Law Distinction

It is well-settled that while little deference is paid to a trial court's interpretation of law, great deference is given to its findings of fact. Factual findings made during confirmation proceedings stand unless they are "clearly erroneous."[96]

In a world without equitable mootness, an appeal from a confirmation order would be subject to these principles. Issues of fact—such as whether administrative expenses are paid at confirmation[97] or the complicated issue of feasibility[98]—would be given deference, whereas issues regarding interpretation of what, for example, section 1129(a)(10) requires if the plan contemplates substantive consolidation, would not.

This distinction permits courts to develop consistent doctrine. It allows for different interpretations to percolate up for resolution by higher courts with broader geographic jurisdiction. In a word, it prevents Balkanization.

Equitable mootness undercuts this process. If parties can block appellate review by quickly consummating a plan, then each bankruptcy district—if not each bankruptcy judge—becomes an independent fief. The judge can es-

[96]A confirmation hearing at which an objection is heard is a contested matter under Fed. R. Bankr. P. 9014. Fed. R. Bankr. P. 3020(b). Under Rule 9014(c), Rule 7052 applies to the confirmation hearing; that rule in turn incorporates Fed. R. Civ. P. 52, which states that "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6).

[97]11 U.S.C. § 1129(a)(9) (2012).

[98]11 U.S.C. § 1129(a)(11) (2012).

sentially create rules for his or her court that go unchallenged even if they are objectively incorrect. It thus gives trial courts' interpretations of legal rules a different standard and status than those courts' findings of fact.

One response to this might be to decline to use equitable mootness if the appeal primarily involves issues of law. One reason for this suggestion is that decisions on legal issues have far more impact and relevance nationally than do contested factual issues, and therefore there is more national interest in having appeals involving disputed legal issues heard. But the essence of many equitable mootness cases is reliance, and reliance can hinge on a conclusion of law just as much as on an issue of fact. If reliance interests are to be protected, equitable mootness must have a broad sweep. It thus lessens the doctrine's effectiveness to suggest its restriction.

B. Perverting Appellate Jurisdiction

The process of equitable mootness highlights and exacerbates a feature of normal appeals. Once a notice of appeal is filed, standard appellate doctrine is that the jurisdiction for all matters covered by the appealed order transfers to the appellate court.[99] In short, once a party appeals from a final order (and despite confusion in other areas, an order confirming a plan is about as final as an order gets in bankruptcy),[100] a trial court can no longer alter or modify the substance of its ruling.

One exception to this, however, is the determination of whether to stay the consummation of the plan pending appeal. In bankruptcy, confirmation orders are stayed for 14 days unless otherwise ordered by the court;[101]and

[99]*In re* Adams Apple, Inc., 829 F.2d 1484, 1489 (9th Cir. 1987); *In re* G-I Holdings, Inc., 568 B.R. 731, 764 (Bankr. D.N.J. 2017) (stating, "[A]n appeal of a bankruptcy order will not only divest the bankruptcy court of jurisdiction if the issues on appeal are identical to the issues presently before the bankruptcy court, but also if the bankruptcy court's determination of the issues before it would interfere with or undermine the appellate process."); *In re* Winimo Realty Corp., 270 B.R. 99, 105 (S.D.N.Y. 2001) ("It is well established that the filing of a notice of appeal 'confers jurisdiction on the [appellate court] and divests the [trial] court of control over those aspects of the case involved in the appeal.'") (quoting United States v. Rodgers, 101 F.3d 247, 251 (2d Cir.1996)); *In re* FBI Distrib. Corp., 267 B.R. 655, 656 (B.A.P. 1st Cir. 2001) ("The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal. Since the filing of a notice of appeal is an event of jurisdictional significance, the bankruptcy court no longer has control over those aspects of the case involved in the appeal.").

[100]"'A confirmed reorganization plan operates as a final judgment with res judicata effect.'" *In re* City of Stockton, Calif., 909 F.3d 1256, 1263 (9th Cir. 2018) (quoting Unsecured Creditors Comm. v. Southmark Corp. (*In re* Robert L. Helms Constr. & Dev. Co.), 139 F.3d 702, 704 (9th Cir. 1998) (en banc)); *see also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010) (chapter 13); Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 376 (1940) (Chapter IX; Court refused to permit review of a plan of debt adjustment, even though the statute upon which the adjustment was based had been held unconstitutional in another case); Stoll v. Gottlieb, 305 U. S. 165, 171-172 (1938).

[101]Fed. R. Bankr. P. 3020(e). In bankruptcy generally, there is no automatic stay of the enforcement of a bankruptcy court order. Rule 9021 clearly states that "[a] judgment or order is effective when entered . . . ." Fed. R. Bankr. P. 9021.

courts are often asked to "otherwise order," and make the plan effective immediately.[102] After that 14-day period, the confirmation order is effective, meaning that the plan can be consummated in full reliance on the effectiveness of the confirmation order. The plan proponent can cause money and property to be transferred and ownership of the debtor to change. These actions, of course, form the basis for the request for dismissal on equitable mootness grounds.

But these actions can be stayed under Rule 8007.[103] The appellant may seek to hold in abeyance the actions that might moot its appeal. The rub is the general rule that any stay should "ordinarily" be directed to the bankruptcy court first, before the appellate court reviews the matter.[104] In essence, this asks the bankruptcy judge, who has just ruled in favor of confirmation and against the appellant, if she or he "really meant it." Of course, in most cases, the judges tend to confirm that they did.

Viewed differently, this procedure asks the bankruptcy judge to review his or her order through an appellate prism, especially if denial of a stay leads to equitable mootness and absence of review. While this might not pose a practical problem with factual issues, it unduly imbues the bankruptcy judge with a sense of invulnerability on issues of law.

The confusion follows the appeal to the first appellate level, the district court. Is that court now reviewing the stay request as a new and separate matter? Or is it reviewing the bankruptcy court's initial determination to not issue a stay? Is that "review" an appeal?" If so, should the court defer to the bankruptcy court's factual findings? If not, what is the precedential or persuasive effect of the bankruptcy court's decision?

If the first level appellate court denies the stay, does the circuit court, as the next higher court, have any different issues? Is it bound by factual findings by either the bankruptcy or the district court? And what about an application to an associate justice of the Supreme Court?[105]

The argument might be made that this procedure is standard practice for all civil appeals in which a stay is sought.[106] A key difference is in the scope

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[102]*See, e.g.*, Bennett v. Jefferson Cty., 899 F.3d 1240, 1244 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1305 (2019); *In re* ADPT DFW Holdings LLC, 577 B.R. 232, 243 (Bankr. N.D. Tex. 2017); *In re* Rubicon U.S. REIT, Inc., 434 B.R. 168, 191 (Bankr. D. Del. 2010).

[103]FED. R. BANKR. P. 8007.

[104]Rule 8007(a)(1) states, "*Ordinarily*, a party must move first in the bankruptcy court for the following relief: [¶] (A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal; . . . ." (emphasis supplied).

[105]Recall that one of the first equitable mootness cases indicated that an aggrieved appellant would have to seek relief "even to the extent of applying to the Circuit Justice for relief." Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981).

[106]Rule 8007 is an adaptation of Appeals Rule 8, which also indicates that the trial court "ordinarily" should be the first court requested to issue a stay. FED. R. APP. P. 8(a)(1)(A).

of relief that a confirmation order can effect. A confirmation order seismically impacts all debts of and claims against the debtor. In stays involving most routine civil litiation, the issues are not so much about the correctness of the rulings made, but on the amount of the bond necessary to protect the prevailing party.

C. UNFAIRLY BURDENING THE RIGHT OF APPEAL

The uniqueness of confirmations is in tension with the procedures in standard civil post-judgment stays pending appeal. In damage cases, an appellant obtains a stay by posting a bond, usually in the amount of 100% to 200% of the judgment, plus costs and fees.[107] The requirement protects the prevailing party's liquidated right to compensation for past damage and ensures the ability of the appellee to pay the judgment assessed if an affirming mandate issues.[108] In a chapter 11 confirmation, however, an appellant's bond flips the protection: rather than pay for its transgressions, the appellant is bound to guaranty the rights of the appellees and other creditors for the benefits that they would have received had the plan been consummated.

The general standard governing a stay pending appeal has borrowed the four-factor standard for issuing a preliminary injunction in civil cases.[109] The Third Circuit has refined this analysis in the context of an appeal from a bankruptcy court order and restated the standard as follows:

> [A]ll four stay factors are interconnected, and thus the analysis should proceed as follows. Did the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%) and (b) will suffer irreparable harm absent a stay? If it has, we "balance the relative harms considering all four factors using a 'sliding scale' approach. However, if the movant

[107] *See* Olcott v. Del. Flood Co., 76 F.3d 1538, 1559 (10th Cir. 1996) ("Typically, the amount of the bond matches the full amount of the judgment."); CAL. CIV. PROC. CODE § 917.1(b) ("The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order.").

[108] Olcott v. Del. Flood Co., 76 F.3d 1538, 1559 (10th Cir. 1996) ("The purpose of requiring a supersedeas bond pending appeal 'is to secure the judgment throughout the appeal process against the possibility of the judgment debtor's insolvency.'") (quoting Grubb v. FDIC, 833 F.2d 222, 226 (10th Cir. 1987)).

[109] That standard requires a determination of "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). I note the standard for stay of an action and for a prelimimnary injunction are not entirely coextensive. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon *a clear showing* that the plaintiff is entitled to such relief.") (emphasis in original).

> does not make the requisite showings on either of these [first] two factors, the [ ] inquiry into the balance of harms [and the public interest] is unnecessary, and the stay should be denied without further analysis." . . . But depending on how strong a case the stay movant has on the merits, a stay is permissible even if the balance of harms and public interest weigh against holding a ruling in abeyance pending appeal.[110]

While some courts indicate that a likelihood of equitable mootness equates to the irreparable harm or forfeiture of appeal rights,[111] most have not,[112] and thus the Third Circuit's formulation initially focuses on the merits. Since that question is generally posed first to the bankruptcy judge, who has already spoken on the matter, an appellant's hopes generally lie with the appellate court and, in some circuits, the bankruptcy court's determination on the matter is entitled to deference.

Although this standard does not refer to an appeal bond, bankruptcy courts nonetheless often require one in order to balance the equities. And in large cases, the bond requirement has been large: the bond in *Tribune* was set at $1.5 billion;[113] in *Adelphia* it was $1.3 billion.[114]

As these examples illustrate, the amount can often be ruinous to the point of significantly burdening—if not crushing—the ability to appeal an erroneous ruling. Even if available, at 1%[115] the cost of the bonds in *Tribune* and

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[110]Revel AC, Inc. v. IDEA Boardwalk LLC, 802 F.3d 558, 571 (3d Cir. 2015) (quoting *In re* Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300-01 (7th Cir. 1997). *But see* Richard S. Kanowitz & Michael A. Klein, *The Divergent Interpretations of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders*, 17 J. BANKR. L. & PRAC. 4 (2008).

[111]*In re* DAEBO Int'l Shipping Co., No. 15-10616 (MEW), 2016 WL 447655, at *3, 2016 Bankr. LEXIS 356, at *8 (Bankr. S.D.N.Y. Feb. 4, 2016) ("SPV has alleged that the appeal could be rendered moot in the absence of a stay; courts have reached different conclusions as to whether such a risk amounts to irreparable injury, but this Court agrees that the 'loss of appellate rights is a 'quintessential form of prejudice' warranting a finding of irreparable harm.'") (quoting ACC Bondholder Group v. Adelphia Commc'ns Corp. (*In re* Adelphia Commc'ns Corp.), 361 B.R. 337, 347-48 (S.D.N.Y. 2007); Beeman v. BGI Creditors' Liquidating Tr. (*In re* BGI, Inc.), 504 B.R. 754, 763 (S.D.N.Y. 2014) ("In my view, 'where the denial of a stay pending appeal risks mooting any appeal of significant claims of error, the irreparable harm requirement is satisfied.' But 'the seriousness of that threat is inextricably related to the appellants' likelihood of success on the merits.'").

[112]*In re* Sports Auth. Holdings, Inc., No. 12-13262 (BLS), 2016 WL 3041846, at *1 (D. Del. May 27, 2016) (stating "[E]quitable mootness of an appeal, without more, does not constitute irreparable harm"); *In re* Sabine Oil & Gas Corp., 548 B.R. 674, 682 (Bankr. S.D.N.Y. 2016) ("A majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm.") (quoting *In re* General Motors Corp., 409 B.R. 24, 31 (Bankr. S.D.N.Y. 2009); *In re* Sunflower Racing, Inc., 225 B.R. 225, 228 (D. Kan. 1998) (collecting cases).

[113]*In re* Tribune Co., 477 B.R. 465, 482 (Bankr. D. Del. 2012), *aff'd*, *In re* Tribune Media Co., 799 F.3d 272, 276 (3d Cir. 2015).

[114]ACC Bondholder Group v. Adelphia Commc'n. Corp. (*In re* Adelphia Commc'n. Corp.), 361 B.R. 337, 368 (S.D.N.Y. 2007).

[115]The 1% rate assumes that the bond can be fully collateralized and that discounts available to pub-

Adelphia would have been $15 million and $13 million respectively. And while winning appellants receive the cost of their bond back from the appellees as costs,[116] they do not receive the borrowing and other costs of obtaining the funds to pay for the bond, the expense of collateralizing the bond, the attorneys' fees for prosecuting the appeal, and related customary costs.[117]

Through the bonding process in equitable mootness cases, the appellant from a confirmation order is required to protect not only the plan proponent, but all the other beneficiaries of the plan (without those beneficiaries necessarily being made formal appellees). Bankruptcy courts thus impose upon appellants the protection of those who are not parties to the appeal—parties whose reliance interests often factor into the equitable mootness decision. There is irony here; if the appellant prevails, the appellate court will have no jurisdiction to disgorge from these relying parties whatever benefits they may have received from an improperly confirmed plan.

This perspective leads to requests for bonds in huge amounts, as does the fact that the plan proponent will be arguing for lightening-quick actions to forestall the debtor's financial ruin, and a court might thus err on the side of a large bond to protect the reorganization. To make matters worse, there is no concomitant upside to the appellant. If it wins, its attorneys' fees in pursuing the appeal are its own cost, as are the costs of financing its appeal bond, and cannot be shifted. The appellant gets, at best, only a shot at a different plan that better addresses its concerns.

D. Erosion of Exceptional Nature of Statutory Mootness Provisions

The urgency driving much of equitable mootness is present in other procedures under the Bankruptcy Code. In sales of assets, and in the granting of post-petition credit, Congress found a need to protect the reliance interests of those who buy and lend.

To address this need, Congress created provisions imposing statutory mootness in specific situations. Sections 363(m) and 364(o) provide that certain components of sales and loans cannot be attacked on appeal if undertaken in good faith.

Congress did not enact similar provisions with respect to confirmations of

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licly-traded companies are not available. *See* Stay Pending Appeal Bond, https://jurisco.com/what-is-surety-bond-definition/defendants-bonds/stay-pending-appeal-bond/ (last visited March 26, 2019).

[116] Fed. R. Bankr. P. 8022(c)(4).

[117] Lerman v. Flynt Distrib. Co., 789 F.2d 164, 167 (2d Cir. 1986) ("FDC's borrowing expense, sought in addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate costs . . . ."); Klapmeier v. Cirrus Indus., Inc., 900 N.W.2d 386, 393-96 (Minn. 2017).

These direct costs are supplemented by the added indirect costs of expedited treatement, from the rushed briefing to the urgent demands on court time; this fire-drill process that equitable mootness creates is unparalled in other civil litigation.

chapter 11 plans. The simple argument is that this lacuna means that confirmation orders should not have the presumptions of finality without review that sale orders and lending orders enjoy. Judge Krause of the Third Circuit succinctly put forth this argument:

> But then-Judge Alito aptly explained why we should reject this argument in his *Continental Airlines* dissent: "[N]arrow provisions" such as §§ 363(m) and 364(e), "which merely prevent the upsetting of certain specific transactions if stays are not obtained," cannot support the broad doctrine of equitable mootness.[118]

Congress' omission may or may not be telling, depending on one's view of statutory interpretation.[119] What is concerning, however, is that courts, not Congress, have developed an analogous immunity for confirmation orders as exist for sales and lending appeals. While Congress, vested with its bankruptcy power, unquestionably has the ability to immunize from appeal those bankruptcy-created rights arising from sales and loans, a like authority for an Article III, not to mention an Article I, court is opaque. It may very well be that, for issues controlled by non-bankruptcy rules, the flux of events in bankruptcy cases may render the remedy of reversal useless or futile. But it is not so clear that appeals from bankruptcy court orders that restructure state law rights, and impose releases and injunctions on third parties, are subject to such common-law principles.

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[118]One2One Comm., LLC v. Quad/Graphics, Inc., 805 F.3d 428 (3d Cir. 2015) (Krause, J., concurring) (quoting *In re* Continental Airlines, 91 F.3d 553, 570 (3d Cir.1996) (en banc) (Alito, J., dissenting)).

[119]A recent example is *Mission Products Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). There the Court was asked whether the exclusion of trademarks from the definition of "intellectual property" in section 101(35A) affected rejections of trademark licenses The Court held that, given Congress' intentional omission of trademarks from section 101(35A), which definition section 365(n) incorporates to give special protections to licensees of rejected patent and copyright licenses, no special treatment should be given to the rejection of a trademark licenses. As the Court put it:

> That section's special provisions, as all agree, do not mention trademarks; and the general provisions speak, well, generally. So Tempnology is essentially arguing that distinctive features of trademarks should persuade us to adopt a construction of Section 365 that will govern not just trademark agreements, but pretty nearly every executory contract. However serious Tempnology's trademark-related concerns, that would allow the tail to wag the Doberman.

Id. at 1665. The Court thus found that trademark licenses are subject to the regular rules relating to rejection of executory contracts. *Id.* at 1666.

Were similar arguments used with respect to equitable mootness, Congress' removal of review of certain sale and lending orders from appeallate review under sections 363(o) and 364(m) would preclude extending removal of appellate review of other orders such as confirmation orders under section 1129. One main difference in extending *Tempnology's* analysis, however, would be that there is no evidence that Congress considered excluding confirmation orders from review in the same way Congress rejected inclusion of trademarks in the definition of intellectual property.

E. Improperly Discounting Courts' Ability to Fashion Remedies

A different concern is the attitude of some appellate courts that it is just too difficult to revisit plan confirmations. The analogy to unscrambling eggs comes to mind.

This is true to a point. A plan is a complex thing; so requiring the parties to reboot the process will never restore them to the exact position they occupied before the adjudicative error.

But I question if that perspective correctly frames the concern. To be sure, plans eliminate and create debt, often replacing one complex corporate financial structure with another. Then again, that is an insufficient reason to avoid hearing a meritorious appeal. As Judge Frank Easterbrook has written, "Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations."[120]

Judge Easterbrook has the proper view. The Clayton Antitrust Act,[121] for example, authorizes injunctive relief that can include an order obliging the acquiring company to divest the assets of the acquired firm, even when the plaintiff is a private party.[122] Indeed, although a "far-reaching and drastic remedy,"[123] the Supreme Court has described divestiture as "the most important of antitrust remedies."[124] The Department of Justice has promulgated guidelines for this remedy, which at least theoretically can "unscramble" the eggs.[125]

Courts that are, in effect, purporting to exercise the Constitution's bankruptcy power should not be restricted to remedies that are easy to implement. If an error has occurred, and relief of some type is possible, it should be no objection that the relief sought would be too difficult or complicated to

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[120]*In re* Resource Tech. Corp., 430 F.3d 884, 886-87 (7th Cir. 2005) (Easterbrook, J.); *see also In re* Kmart Corp., 359 F.3d 866 (7th Cir. 2004) (Easterbrook, J.) ("Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization.") (citation omitted); *In re* Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.) ("We could order the bankruptcy judge to modify the plan of reorganization to reallocate $20 million worth of the stock that the 14% noteholders received to the appellants, the 13.5% noteholders. Some of the 14% noteholders, it is true, have already sold their stock, but they could be ordered to surrender some or all of the proceeds to the appellants.").

[121]Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (2012).

[122]*See* California v. Am. Stores Co., 495 U.S. 271, 295-96 (1990); Steves & Sons, Inc. v. Jeld-Wen, Inc., 292 F. Supp. 3d 656, 673-74 (E.D. Va. 2018).

[123]United States v. Coca-Cola Bottling Co., 575 F.2d 222, 229 (9th Cir. 1978).

[124]United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330 (1961).

[125]U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.

implement. The Supreme Court has invoked the All Writs Act[126] to give effect to antitrust laws;[127] courts administering the Bankruptcy Code might similarly consider the bankruptcy analogue, section 105, even as limited in recent decisions.[128]

An example of the timid and jumbled decisionmaking in this area is *Hargreaves v. Nuverra Env'tl Solutions, Inc.*[129] In *Nuverra*, the plan provided for horizontal gifting—a senior class proposed to transfer part of its plan distribution to a prechosen subset of the general class of unsecured creditors. The result was that creditors with equal priority against the debtor would have received unequal distributions depending on the whim of a senior creditor.

A non-favored creditor appealed. After failing to obtain a stay, the court found that, because the plan had been consummated, trade creditors paid, and new stock issued, the case was equitably moot as there was no longer any effective remedy.[130] Respecting the argument that recovery of the amounts paid might be ordered, the court responded:

> [D]isgorgement would require the claw back, not only of cash payments made to hundreds of individual creditors, but also . . . stock that is trading on the national stock exchange, and which now may be held by third parties who purchased those securities in the ordinary course.[131]

This view seems to adopt the perspective that the remedies could only be property based—why else would the court mention "clawing back" stock? But that ignores the fact that if the appeal were granted, the estate had non-property remedies. It could simply sue those who received distributions under the improper plan. Stock would not have to be clawed back; rather, the estate could simply seek restitution from the initial recipient and let that person worry about recovering its payments from its buyer. Similarly, the

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[126]28 U.S.C. § 1651(a) (2012): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[127]In *F.T.C. v. Dean Foods Co.*, 384 U.S. 597 (1966), the Court used the All Writs Act to justify an injunction issued by the Court of Appeals to prevent a corporate combination.

[128]11 U.S.C. § 105(a) (2012): "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The objection might be raised that a limited remedy for appellants is often worse for all other creditors, and thus should be avoided. But that argument is based upon crabbed and specious logic. It absolves the plan proponent for responsibility for promulgating a plan that should not have been confirmed. In other cases, creditors take the risk of their debtor's incompetence, see 11 U.S.C. § 1112(b)(4), and that risk should not be immunized by the bankruptcy court's error in confirming a plan that should not have been confirmed.

[129]590 B.R. 75 (D. Del. 2018).

[130]Hargreaves v. Nuverra Env'tl Solutions, Inc. (*In re* Nuverra Env'tl Solutions, Inc.), 590 B.R. 75, 89 (D. Del. 2018).

[131]*Id.* at 88.

fact that "hundreds" of lawsuits would have to be brought should not factor into denial of the appellant's right to be heard. In any event, the estate could calculate and pursue only those recoveries that made economic sense.[132] Full and precise relief is not required.[133]

To hold otherwise is to enfeeble and erode courts' abilities to remedy wrongs. It is insufficient reason to withhold a remedy because it would be incomplete or imprecise. But that is where equitable mootness leads. Courts pervert the "irreparable injury" requirement to preclude reversals that would result in incomplete or imprecise remedies. In one respect, that is not the court's concern. If an appellant with a meritorious appeal wishes to press it, even in light of less-than-perfect remedies, it should have that choice.

F. Subversion of the Reliance on Contracts Generally

Equitable mootness also saps the sanctity of contract. Contract rights are fundamental rights. Indeed, the Constitution protects them from undue impairment by the states.[134] And many equitable mootness cases focus on third-party contractual reliance as grounds for discarding meritorious appeals.

In the long run though, the doctrine of equitable mootness will have the opposite effect. If contract rights can be ignored and countermanded by an unreviewable and erroneous trial court ruling, the ability to rely on contracts generally is lessened.

This is different than the general argument made that contracts implicitly incorporate the law in effect at the time of formation. Lenders lend knowing about cramdown and how it can alter their rights. Landlords know that ipso facto clauses will not be enforced in bankruptcy. But such risks are known and, if known, can be calculated and provided for by other terms in the contract, including price.

Equitable mootness injects terminal uncertainty into this calculus. The

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[132] *Nuverra* is also notable for allowing over $7 million in unsecured claims (out of an initial indication of $12 million) to be paid before plan confirmation. Permission to pay such pre-petition claims without a plan was based solely on the testimony of the debtor's president who indicated need, but who also indicated that neither he nor his staff had contacted any prepetition creditors regarding the necessity of payment. 3 Appendix of Appellant David Hargreaves at Tab 28, pp. A1753-54, *In re* Nuverra Environmental Solutions, Inc., 590 B.R. 75 (D. Del. 2018) (reprinting Transcript of the Con?rmation Hearing held on July 21, 2017, pp. 32-33); *see* Bruce A. Markell, *The Clock Strikes Thirteen: The Blight of Horizontal Gifting*, Bankr. L. Letter 4-5 (Dec. 2018).

[133] Indeed, in the area of constitutional mootness, the Court has recently indicated that the practical aspects of recovery matter little so long as a right to recovery at least theoretically exists. *See* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1661 (2019) ("But courts often adjudicate disputes whose "practical impact" is unsure at best, as when "a defendant is insolvent." . . . And Mission notes that if it prevails, it can seek the unwinding of prior distributions to get its fair share of the estate. . . . So although this suit "may not make [Mission] rich," or even better off, it remains a live controversy—allowing us to proceed.").

[134] U.S. Const., art. I, § 10.

doctrine basically permits a bankruptcy court to alter a non-debtor's contract rights in a manner contrary to law and then bars any appeal therefrom. Moreover, this alteration cannot be anticipated, since whether an appeal will be available at all could turn on whether third parties once or more removed will have relied on the improper alteration.

That such alterations will be the exception rather than the rule is no defense. The precautions or pricing used to protect against this unreviewable alteration risk will, almost by definition since the risk is incalculable, be noneconomic. To protect themselves, parties to the types of financial contracts capable of being restructured have to calculate the unknowable. This calculation adds (if they are risk averse) terms and pricing to such contracts likely to be out of proportion to the actual risk.

G. Diluting Sources of Interpretation and Perceptions of Justice

One by-product of equitable mootness is that the development and evolution of precedent is stunted, due to the concentration of major chapter 11 cases in New York and Delaware. Of the 6,078 business chapter 11 cases filed in the United States in 2018,[135] 626 were filed in the Southern District of New York (10.3%), and 615 were filed in the District of Delaware (10.1%).[136] These two districts have but 17 bankruptcy judges[137] out of the 354 total bankruptcy judges in the United States.[138] Accordingly, roughly 5% of the bankruptcy judges in the United States decide more than 20% of all business chapter 11 cases,[139] and those cases comprise a large majority of the chapter 11 publicly-held and mega-cases.

The limited number of bankruptcy courts is mirrored by the limited number of district court and circuit court judges. There are 673 positions for

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[135]The numbers are taken from Administrative Office of the United States Courts, Table F-2 Quarterly: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the Three-Month Period Ending March 31, 2019, Based on Data Current as of March 31, 2019, *available at* https://www.uscourts.gov/file/26267/download.

[136]The third runner up was the Southern District of Texas with 453 cases, although that may be because that district has created a complex chapter 11 sub-group of judges, consisting of two of the six authorized judges. *See* General Order 2018-1, Order Regarding Complex Case Assignment (Bankr. S.D. Tex., Jan. 28, 2018).

[137]The Southern District of New York has nine authorized judgeships, 28 U.S.C. § 152(a)(2) (2012), and Delaware has one. *Id.* Delaware, however, has seven temporary judgeships allocated to it. *See* Bankruptcy Judgeship Act of 2005, Pub. L No. 109-8, § 1223, 119 Stat. 23, 196–98 (2005); Temporary Bankruptcy Judgeships Extension Act of 2012, Pub. L. No. 112-121 (2012); and Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1003, 131 Stat. 1224, 1231 (2017).

[138]This number includes all 38 temporary judgeships, including the seven in Delaware.

[139]If the two specialist judges of the Southern District of Texas and their case loads are considered, the comparison is that about 5.4% of judges decide 28% of all business chapter 11 cases.

district court judges; 179 authorized positions for circuit judges.[140] The Southern District of New York and the District of Delaware have 32 district court judges combined,[141] while the Second and Third Circuits account for 27 circuit judges.[142] These allocations mean that about 5% of all district court judges, and about 15% of all circuit judges, decide appeals from the 20% of bankruptcy cases mentioned above.

These imbalances reduce the number of qualified decisionmakers regarding interpretation of the Bankruptcy Code. If each of the judges has different bits of information or insight about the proper construction of the Bankruptcy Code, the best estimate of value is, other things being equal, that value estimated by the median judge. This is a standard observation from "wisdom of the crowds" literature.[143]

The narrowed and concentrated nature of the judiciary reviewing bankruptcy appeals also has an effect on perceived system fairness. As noted by Professor Melissa Jacoby:

> The prospect of appellate review by a multi-judge court fosters confidence in the system. Indeed, "the value of the appellate system's ability to increase public trust in judicial outcomes may exceed the amount of error correction actually accomplished." Judith Resnik has emphasized the importance of public participation (including observation) in adjudicatory processes as a democratic practice. As a result of equitable mootness, even fewer people get to tell their

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[140] *See* Authorized Judgeships, https://www.uscourts.gov/file/document/all-authorized-judgeships-1789-present (last visited July 2, 2019).

[141] 28 U.S.C. § 133(a) (2012).

[142] 28 U.S.C. § 44.

[143] *See, e.g.*, JAMES SUROWIECKI, THE WISDOM OF THE CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS 3-22 (2005) (providing an overview of the wisdom of the crowds principle in action); *see also* Douglas G. Baird *et. al.*, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1714 n.30 (2018). For a thoughtful consideration of the many factors involved in deferring to the "wisdom of the crowds," see Lyon Aidan & Eric Pacuit, *The Wisdom of Crowds: Methods of Human Judgement Aggregation*, *in* HANDBOOK OF HUMAN COMPUTATION 599-614 (2018).

Recent literature indicates that it may be the case that "[w]hen expertise is not evenly spread throughout the crowd, it is better to focus on the concentration of the expertise as opposed to diluting it with experts of a lower quality. As a result, the wisdom of the experts in the crowd can beat the wisdom of the whole crowd." Daniel G. Goldstein, R. Preston McAfee & Siddharth Suri, *The Wisdom of Smaller, Smarter Crowds*, *in* PROCEEDINGS OF THE FIFTEENTH ASS'N FOR COMPUTING MACHINERY CONFERENCE ON ECONOMICS AND COMPUTATION 471, 487 (2014); *see also* Clintin P. Davis-Stober, David V. Budescu, Stephen B. Broomell & Jason Dana, *The Composition of Optimally Wise Crowds*, 12 DECISION ANALYSIS 130 (2015). There is nothing in the current system, however, to indicate that the judges in this small subset of bankruptcy judges are any better (or worse) at interpreting the law than all bankruptcy judges generally.

> stories to a court of higher authority, or to observe an appellate court considering the matter.[144]

As a result, a small sample of available decision makers formulate the confirmation policies protected by equitable mootness. This weakens the long-term quality of Code interpretations while undermining public perception of bankruptcy as an objectively fair system.[145] Neither consequence is desirable.

H. CONSTITUTIONAL ISSUES?

In addition to the statutory and policy arguments against equitable mootness, there are also constitutional concerns. How can an Article I judge make decisions that an Article III judge cannot review? One of the most thoughtful analyses of this question is found in a spirited but ultimately unsuccessful attack on equitable mootness by Third Circuit Judge Cheryl Ann Krause in her concurring opinion in *One2One Communications, LLC v. Quad/Graphics, Inc.*[146]

1. *Judge Krause and One2One*

Judge Krause made two basic constitutional arguments against equitable mootness in *One2One*. First, she noted that while Article III of the Constitution imposes certain requirements on officials who exercise the judicial power of the United States,[147] Congress often grants adjudicative powers to officials who do not meet those criteria. She perceived this delegation to raise two distinct constitutional concerns: impairment of a litigant's right to an Article III adjudicator and erosion of the judiciary's constitutional exclusivity to determine certain claims.

2. *Waivable Right to Adjudication by an Article III Court*

Judge Krause's first concern was the infringement on a litigant's "entitlement to an Article III adjudicator,"[148] a personal right she believed had been established in *Wellness International Network, Ltd. v. Sharif.*[149] *Wellness,*

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[144]Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1735 (2018) (quoting Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 259, 283 (Katharine G. Young, ed., 2019) ("States *need* their members and residents to participate in adjudicatory processes, both to maintain peace and security as well as to generate and to reinforce their own authority to do so.") (emphasis in original).

[145]The notion of fairness in financial restructuring is explored in Sarah Paterson, *Debt Restructuring and Notions of Fairness*, 80 MODERN L. REV. 600 (2017).

[146]805 F.3d 428 (3d Cir. 2015) (Krause, J., concurring). In many respects, the same arguments were made by Sixth Circuit Judge Karen Nelson Moore in the Detroit bankruptcy. *See* Ochadleus v. City of Detroit (*In re* City of Detroit, Michigan), 838 F.3d 792, 811 (6th Cir. 2016) (Moore, J., dissenting), *cert. denied*, 137 S. Ct. 1584 (2017).

[147]U.S. CONST. art. III § 1.

[148]805 F.3d 428, 445 (3d Cir. 2015) (Krause, J., concurring).

[149]135 S. Ct. 1932, 1944 (2015).

however, indicated that the right can be waived. Current practice seems to have evolved to the point that a mere appearance in a case by counsel waives any Article III objection the client may have.

This waiver, however, may not be coextensive with a waiver of the right to review by a court vested with the judicial power of the United States. As Judge Krause pointed out, appellants in such cases lack an alternative forum in which to pursue their claims against a debtor, thus depriving their "consent" of content,[150] a concern raised in *Stern* itself.[151] She also noted that in *Wellness International*, the Court approved adjudication of *Stern* claims by bankruptcy judges where the parties consent, but explicitly premised its decision on the existence of appellate review by Article III courts, reasoning that "'allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.'"[152]

3. *Non-Waivable Structural Concerns*

Judge Krause's second concern was that equitable mootness raised a non-waivable, structural concern that would "'impermissibly threaten[ ] the institutional integrity of the Judicial Branch.'"[153] Institutional integrity, in turn, is established and preserved by "'the extent to which the 'essential attributes of judicial power' are reserved to Article III courts.'"[154] The availability of appellate review by an Article III court following an Article I judge's determination, of matters central to common-law claims, would seem to be crucial to the constitutional integrity of that determination.[155]

To support this view, Judge Krause cited *Crowell v. Benson*.[156] In *Crowell*, the Supreme Court upheld a system of adjudication by an administrative agency on the rationale that "the reservation of full authority to [an Article III] court to deal with matters of law provide[d] for the appropriate exercise of the judicial function."[157] Judge Krause then noted that *Crowell*'s central

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[150] 805 F.3d 428, 445 (3d Cir. 2015) (Krause, J., concurring).

[151] *See* Stern v. Marshall, 564 U.S. 462, 480-81 (2011).

[152] 805 F.3d 428, 445 (3d Cir. 2015) (Krause, J., concurring) (citing *Stern*, 135 S. Ct. at 1944 (emphasis added)).

[153] One2One, 805 F.3d 428, 444 (Krause, J., concurring) (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

[154] One2One, 805 F.3d 428, 444 (Krause, J., concurring) (citing *Schor*, 478 U.S. at 851).

[155] One2One, 805 F.3d 428, 444 (Krause, J., concurring) (citing *Schor*, 478 U.S. at 853). One prominent commentator has argued that review by an Article III judge is both necessary and sufficient to uphold adjudication by any non-Article III judge. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916 (1988); *see also* Douglas G. Baird, *et al.*, *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1714 n.35 (2018) (stating "when the action in question is a contract dispute or some other common law action, the bankruptcy judge herself does not even have the power to resolve it on the merits without the consent of the parties, as she is not an Article III judge.").

[156] 285 U.S. 22, 52 (1932).

[157] *Id.* at 54.

thesis - the availability of Article III review - was also essential to the Court's imprimatur on agency adjudications in *Thomas v. Union Carbide Agricultural Products Co.*,[158] and *Commodity Futures Trading Commission v. Schor*.[159]

Applying these principles in the bankruptcy context, Judge Krause noted that "the Supreme Court held in *Northern Pipeline*[160] and *Stern* that because a bankruptcy court is not an Article III tribunal, it may not enter final judgments regarding certain kinds of claims . . . even when the bankruptcy judge's decision will be reviewed on appeal by an Article III judge."[161] The essence of equitable mootness, which if strictly applied precludes Article III judges from hearing the substance of the decisions of Article I judges, thus "drastically weakens that supervisory authority, and therefore threatens a far greater 'impermissibl[e] intru[sion] on the province of the judiciary'"[162] than the Court confronted in *Northern Pipeline*, *Stern*, or *Wellness International*. As Judge Krause further observed, equitable mootness "not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue."[163] Although that power may not be formal—Article III judges after all formulated and apply the equitable mootness doctrine:

> [B]ankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new entities (in which third parties may invest) are formed, and whether distributions (including to third par-

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[158]473 U.S. 568, 593-94 (1985).

[159]478 U.S. 833, 853 (1986). Similarly, in *United States v. Raddatz*, 447 U.S. 667 (1980), the Court upheld decision-making by magistrate judges only because "the ultimate decision is made by the district court." *Id.* at 683; *see also* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) ("Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court.").

[160]Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[161]One2One, 805 F.3d 428, 445 (3d Cir. 2015) (Krause, J., concurring) (citing *Stern*, 564 U.S. 302-03); Northern Pipeline, 458 U.S. at 86-87 (plurality opinion); *see also id.* at 91, 102 (Rehnquist, J., concurring in the judgment)).

Indeed, in most sizeable bankruptcy cases counsel for a plan proponent who is aware of the equitable mootness doctrine may begin to take steps to set up a subsequent dismissal effort before a plan has even been confirmed. *See, e.g.*, Bennett v. Jefferson County, 518 B.R. 613, 639 (N.D. Ala. 2014) (quoting statements of debtor's counsel at the confirmation hearing regarding the debtor's specific intent to quickly consummate a plan "and to moot out any appeal" and the bankruptcy judge's acquiescence in this "rush to consummation"), *rev'd*, 899 F.3d 1240 (11th Cir. 2018).

[162]805 F.3d 428, 445 (3d Cir. 2015) (Krause, J., concurring) (citing *Schor*, 478 U.S. at 851-52).

[163]*Id.* (Krause, J., concurring).

ties) under the plan begin—all before plan challengers reach an Article III court.[164]

This control of the variables gives bankruptcy courts powers not given to magistrate judges or to administrative law judges; namely, powers to "insulate their decisions from review at their discretion."[165]

4. *Rejection of One2One: Tribune*

Judge Krause's strong concurrence in *One2One* gave the impression that the Third Circuit might have to reassess the doctrine. But then came *In re Tribune Media Co.*[166] In *Tribune*, Judge Thomas Ambro, one of the most skilled Article III judges in the country on bankruptcy matters, confirmed that equitable mootness was still the law in the Third Circuit. In an odd twist, however, Judge Ambro then concurred in his own opinion.[167] The purpose was plain: to respond to Judge Krause's concurrence in *One2One* by laying "out briefly why this judge-made doctrine is abided by every Court of Appeals."[168]

Judge Ambro addressed Judge Krause's constitutional issues: whether Article III supervision is eroded beyond recognition if Article III judges decline to hear appeals from confirmations entered by bankruptcy judges. He made quick work of her arguments. He disposed of the personal right argument by stating that "[a]s an equitable doctrine applied by Article III courts, equitable mootness does not implicate this right."[169] In short, no consent is required to have an Article III court make a decision, and equitable mootness is applied not by bankruptcy courts but by Article III judges.

Judge Ambro next addressed Judge Krause's structural concern. He also found it absent. Equitable mootness did not raise a structural concern regarding congressional usurpation of the judicial power for the same reason as there is no personal right—the equitable mootness doctrine is one developed and applied by the Article III judiciary, so that there is no congressional "aggrandizement" of the type sought to be addressed by fears regarding structural concern.[170] Unanswered, however, were Judge Krause's concerns that applying equitable mootness essentially abdicates an Article III court's duty

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[164] *Id.*

[165] *Id.* Judge Krause also noted that "[i]n turn, opportunistic plan proponents can (and . . . regularly do) use this to their advantage. As then-Judge Alito warned in *Nordhoff Investments*, "our court's equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges." *Id. at* 445-46 (citing *Nordhoff Invs. Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring in the judgment)).

[166] 799 F.3d 272 (3d Cir. 2015).

[167] He was joined by another member of the panel, Judge Thomas I. Vanaskie.

[168] *Id.* at 285 (Ambro & Vanaskie, JJ., concurring).

[169] *Id.*

[170] *Id.*

to decide the case before it.[171]

Given the stark difference between *Tribune* and *One2One*, it was no surprise that the parties in *Tribune* sought rehearing and rehearing en banc. The stage was thus set for a battle on equitable mootness. However, Judge Ambro, in accordance with Third Circuit rules, signed an order indicating that (1) there would be no rehearing, and (2) a majority of active judges had not supported a rehearing en banc.[172] The Supreme Court later denied certiorari.[173] *Tribune*'s view of equitable mootness thus prevailed.

IV. RECONCEPTUALIZING EQUITABLE MOOTNESS

Despite these many failings, equitable mootness does have some utility. To repeat Judge Posner's characterization, equitable mootness "is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."[174] Aside from tinkering with how best to bestow the "innocent" label, the cynosure of many equitable mootness cases has been the need to seek a stay of the confirmation order.

A. Summary of the Issues

While this centrality may appear useful in theory, it stinks in practice. As indicated above, unlike normal civil litigation in which the damage of a stay can be localized and quantified by the money judgment appealed, confirmations in chapter 11 are different. As a condition of obtaining a stay, appellants are asked to provide possible compensation not only to the transgressors—the plan proponents—but also every interested party in the reorganization. In essence, this treats plan proponents as agents and representatives of the entire remainder of the creditor body, without those parties being named as appellees. Such reasoning leads to the exorbitant bonds mentioned earlier in *Tribune* and *Adelphia*.[175] At some point, the question needs to be raised as to whether the price of seeking an appeal should impose upon an appellant the cost of protecting absent non-appellees.[176]

The magnitude of the cost of appeal also affects other aspects. An increase in non-localized costs of appeal deters effective appeals and thus enhances the importance and immunity of the non-Article III judge's initial

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[171] One2One, 805 F.3d 428, 444 (Krause, J., concurring).

[172] Sur Pet. for Reh'g, *In re* Tribune Media Co., 799 F.3d 272, ECF No. 003112071981 (3d Cir. 2015)

[173] 136 S. Ct. 1459 (2016).

[174] *In re* Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994).

[175] *In re* Tribune Co., 477 B.R. 465, 482 (Bankr. D. Del. 2012), *aff'd In re* Tribune Media Co., 799 F.3d 272, 276 (3d Cir. 2015); ACC Bondholder Group v. Adelphia Commc'n. Corp. (*In re* Adelphia Commc'n. Corp.), 361 B.R. 337, 368 (S.D.N.Y. 2007).

[176] This point is explored thoughtfully in Eleanor H. Gilbane, *Investing in an Appeal: The Dilemma Facing an Appellant of Confirmation Orders*, Am. Bankr. Inst. J. 38 (May 2013).

decision. Put differently, a bankruptcy judge's confirmation decision is given greater effect and authority than other orders because it is less likely to be disturbed. Given the immense effect a confirmation order has, it is perversely ironic that it cannot be reviewed, while a host of more common and mundane decisions can be. In addition, the increased costs decrease appellate decisions on the merits, which effectively decreases the effective oversight of the Article III Judiciary.

Even if these concerns can be addressed, the amassing of chapter 11 cases in a small number of jurisdictions and judges correspondingly concentrates the general interpretation process in comparatively few appellate judges and even fewer bankruptcy judges. The resulting illusion of certainty corrodes the systemic process of reaching consensus on disputed provisions of the Bankruptcy Code.

B. Radical Proposals

To redress these pernicious effects, Congress could of course amend the Bankruptcy Code to provide confirmation orders with the type of immunity conferred upon sale and financing orders. But Congress did not and has not; and only Rebecca of Sunnybrook Farm or Professor Pangloss would conceive that Congress, as currently constituted, would enact such an amendment, assuming that its members could first apprecate the need for it.

As I have argued, however, such immunity is not only unnecessary, it is dangerous to parties with meritorious arguments and to the court system in general.

So how does one approach the issue? I suggest a package of changes, phrased mainly as interpretive presumptions. These changes focus on the procedure of processing the appeal, with the intent of preserving the ability of litigants to have issues heard on the merits in a manner designed to reach the best result.

1. *Reforms Regarding Stays*

The first subset of these practices examines the stay pending appeal. The current state of the law on stays is the crux of the problem with equitable mootness; the doctrine has its strongest justification when an appellate court, regardless of the magnitude of any error that might have been made, cannot restore the parties to anything like their original positions. It is at its weakest when the appeal, if denied, will simply lead to another similar, reorganization.

Stays are governed by Rule 8007, which mirrors Rule 8 of the *Federal Rules of Appellate Procedure* and Rule 62 of the *Federal Rules of Civil Procedure*.[177] Courts approach a request for a stay pending appeal under those

[177]As stated in the Advisory Committee Notes to the Rule: "This rule is derived from former Rule

rules by noting:

> [T]he factors relevant under Civil Rule 62(c) and Appellate Rule 8 "are generally the same:" (1) whether there is a strong showing of likelihood of success on the merits; (2) whether there will be irreparable injury absent a stay; (3) whether a stay would substantially injure other interested parties; and (4) the public interest. The analysis thus somewhat resembles the test applied in the district court when evaluating a request for a preliminary injunction, though the differences in posture mean that the two tests are not identical.[178]

In an appeal from confirmation, the likelihood of success factor is odd—at most, it should be an initial test to see if the appellant has a good faith chance at reversal. The Third Circuit recognizes as much. It asks whether the "applicant ma[de] a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%). . . ."[179]

The irreparable injury inquiry cuts many different ways. The plan proponent is usually heard to argue that its plan is the only possible plan, and the only alternative is liquidation. Although such "Chicken Little" claims usually are not taken at face value, they often find their way into opinions.[180] But on the appellant's side, the loss of a meritorious right without a hearing on the merits is a concrete irreparable injury, usually subject to determination with greater certainty than claims of future illiquidity. Standard doctrine is that when considering these factors, there "should be balance[ ]; thus, for example, if the balance of harms tips heavily enough in the stay applicant's favor then the showing of likelihood of success need not be as strong, and vice versa."[181]

Against this background, I offer three suggestions regarding the granting of stays of a confirmation order entered by a bankruptcy judge:

- A stay should presumptively issue if confirmation was made possible only by adoption of a disputed rule of law;
- Given the extraordinary nature of equitable mootness, and the time pressures surrounding confirmation, appel-

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8005 and F.R.App.P. 8." Advisory Comm. Notes to Rule 8007 (2014); *see also* Advisory Comm. Notes to Rule 8007 (2018) ("The amendments to subdivisions (a)(1)(B), (c), and (d) conform this rule with the amendment of Rule 62 F.R.Civ.P., which is made applicable to adversary proceedings by Rule 7062.").

[178] 16A Charles Alan Wright, et al., Fed. Prac. & Proc. § 3954 (4th ed. 2009 & Supp. 2018).

[179] Revel AC, Inc. v. IDEA Boardwalk LLC, 802 F.3d 558, 571 (3d Cir. 2015) (quoting *In re* Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300-01 (7th Cir. 1997)).

[180] *See, e.g.*, ACC Bondholder Group v. Adelphia Commc'ns Corp. (*In re* Adelphia Commc'ns Corp.), 361 B.R. 337, 350 (S.D.N.Y. 2007) (assuming, without much evidence, that amount necessary to protect a decline in property value was close to equity value under plan appealed from).

[181] 16A Charles Alan Wright, et al., Fed. Prac. & Proc. Juris. § 3954 (4th ed. 2009 & Supp. 2019).

lants should automatically be able to present their stay requests in the first instance to the reviewing court, and should not be bound by the Rules' direction that "ordinarily" such requests should go first to the trial court; and
- If the appeal is nonfrivolous and in good faith, there should be no bond imposed as a condition of a stay.

Each of these is explored in detail below.

a. Presumptive Grant of Stay If Appeal Turns on Substantial Question of Law

The first suggestion is that a stay should be presumptively granted if confirmation was made possible only by adoption of a disputed issue of law—one which I loosely define as an issue upon which courts or commentators have disagreed as to scope or content.

A current example might be a plan of a group of companies that could only be confirmed by adopting the interpretation that section 1129(a)(10) applies on a plan rather than on an entity basis.[182] Section 1129(a)(10) does not address the complex issues arising when a plan proposes to substantively consolidate several debtors into one or more reorganized debtors. The issue presented is, however, easily defined: Does section 1129(a)(10) require one consenting impaired class from each of the pre-petition debtors ("per debtor" application), or does it simply require one impaired consenting class from the classes as specified in the plan sought to be confirmed ("per plan" application)?[183]

Bankruptcy courts in the Southern District of New York, in significant and large chapter 11 cases, have adopted the "per plan" interpretation, especially in cases in which the plan proposes to substantively consolidate affiliated debtors.[184] Bankruptcy courts in Delaware, however, have not followed suit and have adopted a "per debtor" construction.[185]

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[182]Another issue current in the courts might well be the proper characterization of make-whole premiums as unmatured interest or liquidated damages. *See, e.g.*, Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors of Ultra Res., Inc. (*In re* Ultra Petroleum Corp.), 913 F.3d 533, 547-49 (5th Cir. 2019).

[183]*See In re* Tribune Co., 464 B.R. 126, 180 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011). These issues are explored in Suzanne T. Brindise, Note, *Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U.L. Rev. 1355 (2014).

[184]JPMorgan Chase Bank, N.A. v. Charter Communs. Operating, LLC (*In re* Charter Communs.), 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009); *In re* Enron Corp., 2004 Bankr. LEXIS 2549, *234-236 (Bankr. S.D.N.Y. July 15, 2004); *see also In re* SGPA, Inc., No. 1-01-02609, 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. Sept. 28, 2001). The Ninth Circuit has held that there had to be at least one impaired creditor class that had accepted the plan, applied on a per-plan, rather than on a per-debtor basis. JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Prop. Inc. (*In re* Transwest Resort Props., Inc., 881 F.3d 724 (9th Cir. 2018).

[185]*In re* JER/Jameson Mezz Borrower II, LLC (*In re* JER/Jameson), 461 B.R. 293, 300-02 (Bankr. D.

Those favoring the "per plan" interpretation point to the plain language of section 1129(a)(10) and the fact that it applies to the plan proposed by the plan proponent, not other, hypothetical, plans regarding other affiliated debts.[186] In response, those favoring the "per debtor" approach observe that in cases in which there has not been substantive consolidation before confirmation, "each joint plan actually consists of a separate plan for each debtor."[187] This view allows a plan proponent to achieve substantive consolidation through a plan only if (1) the creditors of each debtor consent to the consolidation (through voting as set forth in section 1129(a)(8)), or (2) if entity separateness would not be respected by nonbankruptcy law. In other words, the legitimate expectations of creditors regarding such separateness cannot be overcome or disturbed by those who are not creditors of their debtor.[188]

In these cases of disputed interpretation, the issue is legitimate and deserves more consideration than just the isolated bankruptcy judge relying on self-selected authorities.[189] If this type of plan is denied review due to the cost of an appeal bond, it deprives Article III courts the ability to review and develop precedent in a timely and orderly fashion.

b. Stays of Confirmation Orders Should Be Directed Initially to the Reviewing Court

A second suggestion is that the stay application not be addressed to the trial court in the first instance. This rule might work with respect to appeals in traditional civil litigation, but it is less effective when the issue affects not only parties to the appeal but also every other creditor. At this point, local lore and practice cannot be allowed to influence decision. A new perspective is needed.

Fortunately, the system already has the ability to accommodate this suggestion; the appellate court can be the first instance court. Rule 8007(a)(1) simply states that "*[o]rdinarily*, a party must move first in the bankruptcy

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Del. 2011); *In re* Tribune Co., 464 B.R. 126, 180 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

[186]*See, e.g.*, JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (*In re* Transwest Resort Props., Inc.), 554 B.R. 894, 901 (D. Ariz. 2016), *aff'd*, 881 F.3d 724 (9th Cir. 2018) ("unlike the *Tribune* court, this Court finds the plain language of the statute to be dispositive.").

[187]*In re* Tribune Co., 464 B.R. 126, 182 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011). The court rebutted the "plain meaning" argument by noting that section 102(7) permits singular terms to be read as plural, thus the use of the singular term "plan" in section 1129(a)(10) is not to be read as applying to only one plan. *Id.*

[188]*In re* Tribune Co., 464 B.R. 126, 182-84 (Bankr. D. Del. 2011), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

[189]Congress has acknowledged that some bankruptcy appeals present significant issues that require a prompt decision from a circuit court, with one of the grounds being that that "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions." *See, e.g.*, 28 U.S.C. § 158(d)(2)(A)(ii) (2012).

court . . . ."[190] Equitable mootness, however, is anything but ordinary. The present system's direction to apply first to the bankruptcy court will almost always lead to a second application at the reviewing court as the bankruptcy court has, as part of confirmation, already weighed and taken a considered position on the overall effect of the stay; in essence, its confirmation is its ruling that a stay is not appropriate—otherwise the court would have delayed confirmation on its own.[191]

Adoption of this suggestion may require changing existing precedent. In the Second Circuit, for example, "the applicant must first move for the stay in bankruptcy court. . . . 'If the party improperly bypasses the bankruptcy court and seeks a stay first from the district court, the district court lacks the jurisdiction to hear the matter.'"[192] Initially, this line of authority seems suspect. The applicable rule permits application to the reviewing court, and only indicates that, in the ordinary case, one seeking a stay should start at the trial court. This stated preference falls far short of a jurisdictional rule. And once that false consequence is dissolved, the argument returns to whether equitable mootness is outside of the mine run or "ordinary." As I suggest, it is.

Another concern addressed by this bypass is constitutional. As supervision is a key component to the legitimacy of the bankruptcy court system,[193] it is essential that an Article III court conduct the review.[194] In this way, a district judge or the motions panel of several circuit judges can weigh in and leave no doubt concerning *Stern* compliance.

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[190]FED. R. BANKR. P. 8007(a)(1) (emphasis supplied).

[191]*See generally In re* Anderson, 560 B.R. 84, 89 (S.D.N.Y. 2016) ("the Court has already determined that Credit One failed to succeed on the merits. Asking the . . . court to then find that . . . Credit One is likely to succeed on the merits on appeal . . . would require the district court to find that its own order is likely to be reversed. This is a standard that is rarely going to be satisfied."). Anderson cited *In re* A2P SMS Antitrust Litig., No. 12 Cv. 2656 (AJN), 2014 WL 4247744, at *2 (S.D.N.Y. Aug. 26, 2014), which holds a similar view:

> A "serious questions" standard is particularly appropriate when a district court is asked to stay its own order; under such circumstances, the court has already determined that the applicant failed to succeed on the merits. Asking the district court to then find that the movant is likely to succeed on the merits on appeal would require the district court to find that its own order is likely to be reversed—a standard that for practical purposes is rarely going to be satisfied.

[192]*In re* Anderson, 560 B.R. 84, 90 (S.D.N.Y. 2016) (quoting *In re* BGI, Inc., 504 B.R. 754, 761 (S.D.N.Y. 2014), which in turn cited *In re* Taub, 470 B.R. 273, 276 (E.D.N.Y. 2012)).

[193]*See* Section III.H, *supra; see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) ("allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process."); Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) (magistrate judges may adjudicate civil cases by consent because the Federal Magistrates Act "invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system").

[194]This may not be the case when the appeal is to be heard by a Bankruptcy Appellate Panel.

c. Eliminate Bonds

A third suggestion is to eliminate any rule requiring appeal bonds from confirmation orders. Typically, a bond is required to ensure that an appellant, typically found to owe money, will pay that money if the appeal is unsuccessful. In routine civil litigation, an appellant has been found to bear some blame or owe some amount, and thus is required to provide some security that it will pay or perform if it loses on appeal.[195]

But in an appeal from a confirmation order there is no blame, and typically no order to pay money by creditors. The appeal focuses not on what the appellant owes the appellee, and is delaying, but what the appellee owes the appellant. A bond under such circumstances essentially forces a party without blame to insure, at potentially great cost, the correctness of its views.

This change of circumstances should cause a similar reappraisal of the presumptive correctness of a bankruptcy court's ruling that forms the basis for bonding rules. Putting appeals involving issues of fact aside—since they will always be subject to a clearly erroneous standard of review—an appeal from a confirmation order is simply an appeal over the correct view of the law; it is not an appeal over a legal determination that the appellant owes someone else money. In short, the plan proponent as appellee is simply backing the correctness of the trial court's view.

With this change of circumstances, a bond would insure the speculative injury that might arise if the parties could not replicate a reorganization of equal value if the appellant loses. But why should the appellant insure this loss? It typically does not owe money to the estate; the reverse is true. The debtor has essentially filed a declaratory class action against all of its creditors to determine what it, the debtor, owes each of them. If the appeal is in good faith, all the appellant seeks is correction of an erroneous legal decision as to the amount owed; at the extreme, it seeks to stop the needs of the many from improperly impinging on its rights of the few.

This should cause pause in requiring a bond to insure the ability to pay damages assessed, or what might be called a supersedeas bond. Such a bond would serve no purpose, and the confirmation order does not determine that the appellant owed money or obligations to the estate that it would have to pay if it loses the appeal. *Collier* recognizes this situation when it says, "Generally courts are more inclined to consider not requiring a bond or other security when the order does not involve a monetary judgment."[196]

Courts that have visited this issue have focused on the wrong type of

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[195]At least one state has capped appeal bonds to avoid ruinous costs of appeal. *See* FLA. STAT. ANN. § 45.045 (capping maximum supersedeas bond at $50 million).

[196]10 COLLIER ON BANKRUPTCY ¶ 8007.09 (Richard Levin & Henry Sommer, eds., 16th ed., 2019).

harm. In *Tribune*, for example, the bankruptcy court stated that the test for a bond amount should be undertaken as follows:

> In determining whether a bond should be ordered, the court looks to whether the bond would be necessary to protect "against diminution in the value of property pending appeal" and to "secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal." Moreover, the posting of a bond "guarantees the costs of delay incident to the appeal."[197]

The only authority cited for this standard was *ACC Bondholder Group v. Adelphia Communications Corp.*,[198] which stated the exact same principles.[199] *Adelphia* supported these principles, however, by uncritically relying on two other district court cases, both of which denied the request for a stay,[200] and thus provided no analogous issues. *Adelphia* then conflated the loss of value of specific property (as might be the subject of adequate protection of collateral) with the loss of the debtor's entire reorganization value. This not only ignored, for example, the liquidation value of the debtor, but also made the puzzling assumption that the plan the bankruptcy court approved was the only and best possible plan—a proposition rebutted entirely if the appellant's appeal had any merit. In short, *Adelphia* assumed the lost opportunity costs for the entire bankruptcy estate to be equal to the entire value of the estate, and assumed that an appeal would wipe out the entire amount of value.

Tribune then uncritically adopted *Adelphia*'s view, and took extensive evidence as to the costs to be incurred by the debtor during the period of an appeal. But what was not considered was the cost to the appellant: the forfeiture of its rights to have its appeal heard, a concern arguably required by a faithful application of the balancing process of Rule 8007.[201]

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[197] *In re* Tribune Co., 477 B.R. 465, 478 (Bankr. D. Del. 2012) (quoting ACC Bondholder Group v. Adelphia Commc'ns Corp. (*In re* Adelphia Commc'ns Corp.), 361 B.R. 337, 350 (S.D.N.Y.2007)).

[198] 361 B.R. 337 (S.D.N.Y. 2007).

[199] *In re* Adelphia Commc'ns Corp., 361 B.R. 337, 350 (S.D.N.Y. 2007) (quoting *In re* Sphere Holding Corp., 162 B.R. 639, 644 (E.D.N.Y. 1994) and *In re* Suprema Specialties, Inc., 330 B.R. 93, 96 (S.D.N.Y. 2005)).

[200] *In re* Suprema Specialties, Inc., 330 B.R. 93, 96 (S.D.N.Y. 2005) (stating "the Court approves the stay without requiring Movants to post a bond."); *In re* Sphere Holding Corp., 162 B.R. 639, 644 (E.D.N.Y. 1994) ("This case does not require a bond (nor have any interested parties asked for one) because little or no damage will be incurred as a result of the stay.").

[201] At most, the court could request an appeal bond under Rule 7 of the Federal Rules of Appellate Procedure. Under those rules, "courts typically consider (1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay appellee's costs if the appeal is unsuccessful, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct." *In re* Polyurethane Foam Antitrust Litig., 178 F. Supp. 3d 635, 638 (N.D. Ohio 2016) (first quoting Gemelas v.

One untenable consequence of the *Tribune/Adelphia* approach to bonds is that the successful appellant becomes surety for the consequences of an improper plan. If anything, the interest to be protected is the equity interests of the plan proponent under the plan confirmed, including the losses to any other group mismatching the harm.

Without a bond, the court must then critically examine, as would any court, the four factors traditionally associated with stays pending appeal on their own, and without introducing a "damage" element.

2. *Reforms to Type of Review*

Once a reviewing court has jurisdiction of an appeal, and a stay request is made, one of the first issues is the weight, if any, to give to the bankruptcy court's determination. This question is typically presented as either deferring to the bankruptcy court's determination under an abuse of discretion standard or by treating the stay request as a separate action and reviewing it de novo. As noted above, the circuits "are split."[202] The Second, Third, and Tenth Circuits apply an abuse-of-discretion standard,[203] while the Fifth, Sixth, Ninth, and Eleventh Circuits review equitable mootness dismissals de novo.[204]

The reason is simple. An appeal is often the first time a court vested with the Article III judicial power has looked at a case. The duty to decide cases thus compels a thorough and comprehensive review. Deference to a bankruptcy court at this point runs contrary to the supervision responsibilities assumed by Article III courts over the bankruptcy court system.

3. *Reforms Regarding Procedure — Withdrawal of the Reference*

An alternative to having the bankruptcy court sit as a court of first instance would be to establish a presumption that the reference should be withdrawn on the confirmation hearing whenever confirmation turns on a contested issue that can only be finally determined by a court vested with the "judicial power of the United States."[205] As an example, if confirmation

Dannon Co., 2010 WL 3703811, at *1 (N.D. Ohio 2010); then quoting Tri-Star Pictures, Inc. v. Unger, 32 F. Supp.2d 144, 147-50 (S.D.N.Y. 1999)).

[202]Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1334-35 (10th Cir. 2009).

[203]*See* R2 Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc.), 691 F.3d 476, 483 (2d Cir. 2012); Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1335 (10th Cir. 2009); *In re* Continental Airlines, 91 F.3d 553, 560 (3d Cir. 1996) (en banc).

[204]*See* Curreys of Nebraska, Inc. v. United Producers, Inc. (*In re* United Producers), 526 F.3d 942, 946-47 (6th Cir. 2008) (acknowledging conflict with Third Circuit); United States *ex rel.* FCC v. GWI PCS 1, Inc. (*In re* GWI PCS 1 Inc.), 230 F.3d 788, 799-800 (5th Cir. 2000); Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nevada (*In re* Baker & Drake, Inc.), 35 F.3d 1348, 1351 (9th Cir. 1994); First Union Real Estate Equity & Mortg. Invs. v. Club Assocs. (*In re* Club Assocs.), 956 F.2d 1065, 1069 (11th Cir. 1992).

[205]A district court's reference of all matters related to a bankruptcy, and the bankruptcy case itself, is authorized by 28 U.S.C. § 157(a) (2012). Withdrawal of that reference, on a case by case basis, is authorized by 28 U.S.C. §?157(d) (2012).

turns on interpretation of the provisions of common law contracts—such as subordination clauses, make-whole premiums, or upon application of various parts of the Uniform Commercial Code—then an Article III judge will make the initial determination of the proper interpretation of such contracts. Similar concerns can be found in Congress's decision to hive off approval of provisions regarding releases and successor liability in asbestos company plans until passed on by a district court judge.[206]

The concern here is that while confirmation orders are likely core matters within the power of bankruptcy courts generally to enter, plans of reorganization that require factual findings to establish the non-bankruptcy rights may not be. The source of this issue is *Crowell v. Benson*.[207] *Crowell* dealt with a congressional scheme to provide compensation to sailors injured on the job. The task assigned required determination of the fact and extent of injury, as well as other factual matters that were essential to the award of compensation.

The system was attacked on the basis that it allowed non-Article III bodies to make factual determinations which, if preclusive, would dictate the result of disputes not within the compentecy of the non-Article III body's independent powers. The bankruptcy analogy would be using issue preclusive rules to require a court invested with judicial power to reach a result consistent with the bankrutpcy court's ruling. This might occur, for example, if a bankruptcy court found an intent to deceive while determining the nondischargeability of a claim, and then the creditor sought to preclude the debtor from introducing contrary evidence in a later case before a state court involving the same facts.

Crowell dealt with this issue by permitting a non-Article III body to make factual determinations affecting common-law claims only if Article III courts retained "complete authority to insure the proper application of the law;"[208] that is, that the ultimate award was subject to review, in an appeal or otherwise, by an Article III court. As stated in *Northern Pipeline*, "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers."[209]

Stern v. Marshall[210] picked up on *Crowell*'s concerns, but confined them to the specific scheme at issue in *Crowell*, and then only in a footnote:

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[206] 28 U.S.C. § 524(g)(3)(A).

[207] 285 U.S. 22, 49 (1932) ("'[W]e do not consider [C]ongress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855))).

[208] Crowell v. Benson, 285 U.S. 22, 54 (1932).

[209] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 115 (1982) (White, J., dissenting).

[210] Stern v. Marshall, 564 U.S. 462 (2011).

> Although the Court in *Crowell* went on to decide that the facts of the private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court.[211]

Crowell's likely legacy is that Congress can generally delegate final factfinding to an Article I legislative tribunal with respect to those matters within the purview of the statutory scheme unless the facts are "fundamental" or "jurisdictional" as to the authority of the tribunal.[212] A further argument, however, could be made that facts essential to determining the existence and extent of creditors' common-law, nonbankruptcy claims are fundamental in *Crowell's* sense, or that they are at least made outside the "specialized, narrowly confined factual determinations" to which *Stern* refers.

Many of these concerns were thought to be addressed by the degree of control and supervision Article III tribunals exercise over bankruptcy courts. In *Executive Benefits Insurance Agency v. Arkison*,[213] the Court held that the possibility of de novo review—in which the Article III district court gives the bankruptcy judge's factual determinations no deference—answered questions regarding a court not possessed of the judicial power making determinations involving common-law claims.[214] This concern was echoed the next year in *Wellness Int'l Network, Ltd. v. Sharif*,[215] in which the Court authorized consent to confer the power to enter final judgments based in part on the

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[211]*Id.* at 489 n.6.

[212]*See id.* The issue arises when the bankruptcy court reaches issues beyond those required to resolve the debtor-creditor status of the parties. In *Katchen v. Landy*, 382 U.S. 323 (1966), for example, the Court permitted a bankruptcy referee to exercise jurisdiction over a trustee's voidable preference claim against a creditor only where there was no question that the referee was required to decide whether there had been a voidable preference in determining whether and to what extent to allow the creditor's claim. As *Stern* pointed out, *Katchen* "intimate[d] no opinion concerning whether" the bankruptcy referee would have had "summary jurisdiction to adjudicate a demand by the [bankruptcy] trustee for affirmative relief, all of the substantial factual and legal bases for which ha[d] not been disposed of in passing on objections to the [creditor's proof of] claim." *Stern*, 564 U.S. at 496-97 (quoting *Katchen*, 282 U.S. at 333 n.9).

There was also a consent element to *Katchen*, linked to the creditor's filing of a proof of claim. "If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not "become[ ] part of the claims-allowance process" subject to resolution by the bankruptcy court. *Stern*, 564 U.S. at 497 (quoting Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (per curiam)).

The issue will arise not only in cases in which the estate seeks to increase its size through prosecution of avoiding powers actions, but also if the bankruptcy court makes findings regarding the validity and extent of any exemptions governed by state law. *See* 11 U.S.C. § 522(c).

[213]573 U.S. 25 (2014).

[214]*Id.* at 31.

[215]135 S. Ct. 1932 (2015).

fact that "Article III courts retain supervisory authority over the process."[216]

As Professor Troy McKenzie has succinctly pointed out, however, Article III courts do not have a "realistic ability to review and control the functions" of bankruptcy courts.[217] Moreover, as detractors of this suggestion will immediately point out, confirmation hearings are clearly within the power of the bankruptcy court, as recognized by Congress. But here I would draw distinctions between a bankruptcy court interpreting any of the many paragraphs of section 1129 from making decisions about the satisfaction of those provisions which require determination of non-bankruptcy law. Whether a plan is feasible may turn on whether common-law claims against the debtor— think of the current cases regarding make-whole premiums— are valid or can be liquidated and set at an amount the debtor can afford. Or a feasibility determination may require estimation of non-claims, such as antitrust concerns, that could affect the future viability of the debtor. In individual cases, issues may arise after discharge regarding the bankruptcy courts interpretation and application of exemption statutes. At a very deep and dark level, these issues call into question the bankruptcy court's ability to make findings under non-bankruptcy law that merit clearly erroneous—as opposed to abuse of discretion—appellate review.

These constitutional concerns can be reduced by simply having the confirmation hearing in such cases be part of a report and recommendation made by the bankruptcy court to the district court.[218] As part of this review, the bankruptcy court's determinations would be subject to de novo review.[219] The convoluted nature of having a matter heard by one judge but decided by another is mitigated to some extent by the fact that the district court can accept, without rehearing, matters involving witness credibility.[220]

This suggestion would also shortcut the appeal process; the district

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[216]*Id.* at 1944.

[217]Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 772 (2010).

[218]This procedure is provided for in Fed. R. Bankr. P. 9033. Although determination of whether to hear the matter fully or make a report and recommendation is mandatory in adversary proceedings under Rule 7016(b), that rule is not automatically incorporated by Rule 9014(a). Rule 9014(a), of course, would permit the bankruptcy court to apply Rule 7016 if it thought it advisable. FED. R. BANKR. P. 9014(a) ("The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.").

[219]Reliance Ins. Co. v. Colonial Penn Franklin Ins. Co. (*In re* Montgomery Ward & Co.), 344 B.R. 256, 258 (D. Del. 2006). Thus the "clearly erroneous" standard of Rule 8013, applicable to appeals from bankruptcy court orders, does not apply under Rule 9033. *In re* Carrico, 214 B.R. 842, 845 (B.A.P. 6th Cir. 1997).

[220]In United States v. Raddatz, 447 U.S. 667 (1980), a criminal case, a magistrate heard a suppression motion, and found the government witness more credible, which the District Court adopted without rehearing the matter. The Supreme Court approved this process. *Collier* indicates that, "Because the policy considerations specific to criminal matters are absent in the civil context, a fortiori credibility assessments may be made by the bankruptcy judge, and the district judge need not rehear the evidence in order

court's adoption or modification of the bankruptcy court's report and recommendation would be the initial order, appealable to the court of appeals. As stated in *Collier*, "The availability *vel non* of such an appeal is independent of the fact that a bankruptcy judge has performed some functions in connection with the case."[221] If an appeal were taken, the court of appeals would decide the issues in the first instance, without any *Stern* considerations. And if the other suggestions made in this article were adopted, equitable mootness would preserve appellants' rights consistent with the debtor's need to reorganize.

4. *Even More Radical Reforms*

The current system encourages wasteful and uneconomic behavior. To deprive an appellant of her day in court, plan proponents often seek immediate effectiveness of a plan,[222] after which they strive to transfer as much as they can as fast as they can in order to moot any appeal. To echo a tired metaphor, they try to squeeze as much toothpaste out of the tube as they can, for the sole reason that it is impossible to put it back.

The reforms above seek to reduce these disincentives. Further efforts could be made but would involve more than the judiciary can do on its own. For example, Congress could impose a fee-shifting process on appeals of confirmation orders, to the end that the prevailing party could collect its attorneys' fees as well as its costs from the losing party.[223] Alternatively, Congress could impose a reverse presumption that an order subject to a good faith appeal is not effective unless the prevailing party in the trial court posts a bond or other security. This would mirror practice in the European Union.[224] German civil procedure, for example, provides that a trial court money judgment is enforceable only if the winning plaintiff provides security.[225]

Finally, the procedural confusion respecting how to contest a bankruptcy court's initial denial of a stay or setting of an appeal bond amount—by ap-

to accept the outcome." 10 COLLIER ON BANKRUPTCY ¶ 9033.11 (Richard Levin & Henry Sommer, eds., 16th ed., 2019).

[221]10 COLLIER ON BANKRUPTCY ¶ 9033.14 (Richard Levin & Henry Sommer, eds., 16th ed., 2019).

[222]Under Fed. R. Bankr. P. 3020(e), an order confirming a plan is stayed for 14 days from the date of its entry, unless the court orders otherwise.

[223]A form of fee shifting can be found in 11 U.S.C. § 523(d), under which an unsuccessful attempt to declare a consumer debt nondischargeable results in the creditor paying the consumer's attorney fees if the creditor's position "was not substantially justified."

[224]A chart comparing the requirements to obtain provisional enforcement in the European Union can be found at: http://ec.europa.eu/civiljustice/publications/docs/prov_measures_2_en.pdf.

[225]Section 709 German Code of Civil Procedure: *Zivilprozeßordnung* (ZPO). Exceptions exist for situations in which the creditor cannot, or cannot without great difficulty, provide the necessary security. *Id.* § 710. Other exceptions exist. *Id.* §§ 707-08, 712, 719.

A translation of the German Code of Civil Procedure can be found at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

peal, separate application to the district court, or otherwise—could be clarified. The rules regarding the applicable time for appeal could be changed to extend the time to appeal a trial court's denial of a stay until a stay application had been made and denied by the reviewing court.

V. CONCLUSION

Equitable mootness arose as a response to the desire for finality in corporate reorganizations. The cost of going back and "doing it right" was perceived to exceed the cost of tolerating the loss of dissenters' rights. In some cases that calculation might prove true. But in other cases, it may not, and the nature of the beast is that we cannot truly know if and when the needs of the many justify eviscerating the rights of the few.

In this article, I have tried to show that the doctrine of equitable mootness tramples meritorious actions of the few simply to protect the needs of the many. It is thus a perverse form of utilitarianism that has long-term costs which courts have not considered.[226] For too long, we have unwittingly engaged in an experiment in which a reorganization result is given decisive weight to the detriment of holders of meritorious legal claims. Moreover, by not considering or weighing the long-term costs to the legal system, we may have incurred unknown costs to the stability of contracts, and ultimately, a legal system based on contracts.

The reaction may be to say that courts should consider reducing or eliminating equitable mootness from their reorganization tool kits. The Third and Ninth Circuits have recently made moves in this direction. The result of reducing or eliminating equitable mootness may be that some businesses do not reorganize, and that reorganization value may be lost. Some may recoil in horror at that thought. My response: so be it.

My cynical side suspects that the result of eliminating or reducing equitable mootness in most chapter 11 cases will not be the immediate liquidation of debtors or the loss of substantial reorganization value. Rather, the likely consequence will be different deals, deals made with less emphasis on expediency and more deference to dissenters' legal claims. And if that is not the consequence, the option is always open for Congress to exercise its bankruptcy powers to add confirmation orders to the list of orders statutorily immune from appeal. Until then, however, we are left with a system infested with a pernicious doctrine that, in the long run, costs more than it saves.

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[226] To repeat the "harm principle" of utilitarianism: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant." JOHN STUART MILL, ON LIBERTY 21-22 (2d ed. 1859).

NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 15 SUMMER 2019 NUMBER 3

PRAGMATISM VS. PRINCIPLE: BANKRUPTCY APPEALS AND EQUITABLE MOOTNESS

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Bankruptcy reorganizations are often thought to present unique problems requiring specialized doctrines. Equitable mootness is one such doctrine. This judge-made prudential limitation on appeal rights permits reviewing courts to dismiss otherwise justiciable appeals of bankruptcy court confirmations of reorganization plans. It applies where granting relief would disrupt the implementation of the plan or would harm reliance interests of parties affected by the plan.

Chapter 11 reorganizations present complex multilateral negotiation problems. The bankruptcy represents a general default, pitting stakeholder against stakeholder in conflicts that require a global settlement. The plan of reorganization provides that global settlement through an interconnected web of compromises. Equitable mootness is justified by a need to protect those compromises against appellate challenge and, for most bankruptcy practitioners, the doctrine is viewed as necessary to protect the reorganization bargain.

This Article challenges that notion. Although equitable mootness has considerable utility, it also has a dark side. Rather than simply protect reliance of innocent parties on completed transactions, equitable mootness has become a feature of the reorganization process. It is a tool that can be wielded by powerful parties to force a reorganization bargain over the dissent of weaker parties. Seen in this light, the utility of the doctrine is likely outweighed by its ill effects.

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INTRODUCTION

Equitable mootness is a prudential limitation on appeal rights that presently exists only in bankruptcy cases. Under the doctrine, appellate courts may dismiss appeals of orders confirming a plan of reorganization where transactions contemplated under the plan have been so far consummated that the relief requested of the appellate court threatens to "significantly and irrevocably disrupt the implementation of the plan or disproportionately harm the reliance interests of other parties not before the court."[1] The loss of appeal rights under the doctrine is complete where it applies.[2] Courts applying the

1. *In re* City of Detroit, Michigan, 838 F.3d 792, 798 (6th Cir. 2016).
2. *See In re* Cont'l Airlines, 91 F.3d 553, 571 (3d Cir. 1996) (Alito, J., dissenting) (noting that the decision that the claim was equitably moot "slam[med] the courthouse door on the [plaintiffs] before they are even heard on the merits").

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doctrine usually do not even consider the merits of the underlying appeal, the amount in dispute, or the parties involved.[3]

Despite its name, the doctrine bears no relationship to constitutional mootness[4]—it operates where a case or controversy is very much alive and where granting relief would have a significant effect on the rights and obligations of the parties.[5] In some sense, the problem addressed by equitable mootness is the opposite of that addressed by constitutional mootness—equitable mootness applies when overturning a decision would do too much rather than too little.[6] The doctrine is prompted by the concern that a successful appeal regarding one aspect of a plan would "knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court."[7]

It is true that bankruptcy reorganizations present complex and unusual issues and the negotiations regarding reorganization plans are unusually interdependent. Chapter 11 of the bankruptcy code (the "Code")[8] provides a forum for all

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3. *See id.* at 558–59; *In re* One2One Commc'ns, LLC, 805 F.3d 428, 434–35 (3d Cir. 2015).

4. *See In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994):

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

5. *See, e.g.*, *In re* Manges, 29 F.3d 1034, 1038–39 (5th Cir. 1994).

6. *See Cont'l Airlines*, 91 F.3d at 569 (Alito, J., dissenting) ("Here it is clear that a determination of the merits of the issues raised by the [Appellants] and the entry of a remedial order on the basis of such a determination would have 'some effect'—and potentially quite a substantial effect—in the real world. (That is precisely why [Appellee] does not want to entertain the appeal.")).

7. *In re* Roberts Farms, Inc., 652 F.2d 793, 797 (9th Cir. 1981).

8. 11 U.S.C. §§ 1101–1174 (2012). Courts have also begun to apply equitable mootness to cases involving municipalities under Chapter 9. *See In re* City of Stockton, Cal., 909 F.3d 1256 (9th Cir. 2018); Bennett v. Jefferson Cty., Ala., 899 F.3d 1240 (11th Cir. 2018); City of Detroit, Mich., 838 F.3d 792 (6th Cir. 2016). With the exception of arguments that specifically relate to the applicability of the doctrine to Chapter 9, those cases are similar to the cases under Chapter 11. For convenience, this article will refer to Chapter 11, but the analysis herein also applies to Chapter 9 cases.

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the creditors, shareholders, and other stakeholders in a business to negotiate over the terms of the financial restructuring of distressed business entities. The process hopes to achieve a consensual resolution of the diverse claims held by these stakeholders with an overarching goal of preserving the business as a going concern. Typically, the plan of reorganization fundamentally changes the nature and amount of obligations the debtor owes to various constituencies. Pre-bankruptcy debt claims are discharged, reduced, converted to equity, extended, or subject to some combination of these changes. Equity claims are reduced or eliminated. Contracts are terminated, extended, or renegotiated. The plan often contemplates the sale or liquidation of business units or individual assets. Normally, the plan contemplates new post-bankruptcy borrowing by the debtor from institutional lenders.[9] In sum, the entire business is remade, and the debtor emerges with an entirely different set of legal relationships than it had before bankruptcy.

Although the Chapter 11 process relies heavily on negotiated solutions, there are a number of provisions that bind dissenting stakeholders to the deal negotiated by the majority. These provisions are a unique feature of the Chapter 11 process and are designed to solve the hold-out problems that often derail nonbankruptcy reorganizations. For these dissenting creditors, the Code provides baseline protections that respect nonbankruptcy property interests and priority rights. Simply put, there are limits to the ways in which even a majority supported plan can impair individual claimants' rights. Evaluating the treatment of dissenting creditors under a plan requires a typical judicial process that applies standards of treatment to complex facts and issues a judgment regarding the plan's legality in light of all objections. It is this judicial process that results in appeals from otherwise consensual plan confirmation orders.

Thus, no matter how much one may like to view bankruptcy reorganization through a deal-making frame, ultimately Chapter 11 bankruptcy is a judicial process—with all the protections we come to expect from such a process. In this light, equitable mootness seems not only highly unusual, but it also violates the long-standing principle that federal courts have a

9. *See generally*, 11 U.S.C. § 1141 (2010) (effect of confirmation).

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"'virtually unflagging obligation' to exercise the jurisdiction [they] have been given."[10] Although the doctrine has been adopted by every circuit,[11] the constitutional and statutory ba-

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10. *In re Continental Airlines*, 91 F.3d at 568 (Alito, J., dissenting) (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976)).

11. Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1330 (10th Cir. 2009) ("[W]e formally adopt the doctrine commonly known as 'equitable mootness'"); Briggs v. LaBarge (*In re* McGregory), 223 Fed. Appx. 530, 531 (8th Cir. 2007) ("We noted that mootness in the bankruptcy setting 'involves equitable considerations' and a case may be deemed moot if relief is conceivable but would be inequitable to the debtor."); *In re* Cont'l Airlines, 91 F.3d 553, 559 (3d Cir. 1996) (en banc) (The court decided to follow other circuits in stating that "[w]hether termed 'equitable mootness' or a prudence doctrine, we see no reason why the Third Circuit should part company with our sister circuits in their adoption of this doctrine."); City of Covington v. Covington Landing Ltd. Partnership, 71 F.3d 1221, 1225–26 (6th Cir. 1995) (The court evaluated whether the claim was "equitably estopped" by looking at the three factor test adopted by the Fifth Circuit and considerations regarding the requirements of seeking a stay from the Seventh Circuit); Manges v. Seattle-First Nat'l Bank, 29 F.3d 1034, 1038 (5th Cir. 1994) ("Many courts, including our own, however, have employed the concept of 'mootness' to address equitable concerns unique to bankruptcy proceedings."); *In re* UNR Indus., 20 F.3d 766 (7th Cir. 1994) (In adopting the doctrine, the court "banish[ed] 'equitable mootness' from the (local) lexicon" because "the name is misleading," however, still carried the same general analysis of the doctrine, determining "whether it is prudent to upset the plan of reorganization at this late date."); *In re* Chateaugay Corp., 988 F.2d 322, 325 (2d Cir. 1993) (The court determined that "[a]n appeal should also be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." (citing *In re* AOV Indus., 792 F.2d 1140, 1147 (D.C. Cir 1986); *In re* Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981))); *In re* Public Serv. Co., 963 F.2d 469, 471–72 (1st Cir. 1992) (The court acknowledged that the mootness "is premised on jurisdictional and equitable considerations stemming from the impracticability of fashioning fair and effective judicial relief." Along with a Seventh Circuit case, the court based this reasoning on *In re Stadium Management Corp.*, a case in which the court decided the case was moot because there was "no remedy it could fashion," the court wanted to protect a good faith purchaser, and there was a finality of bankruptcy proceedings. *In re* Stadium Management Corp., 895 F.2d 845, 847–48 (1st Cir. 1990)); *In re* Onouli-Kona Land Co., 846 F.2d 1170, 1172 (9th Cir. 1988) (First termed as "Bankruptcy's mootness rule," the court acknowledged that the rule exists and was developed from the need for finality in bankruptcy cases); Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 841 F.2d 92, 96 (4th Cir. 1988) (Without naming it, the Fourth Circuit acknowledged that the "dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modi-

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ses of equitable mootness have recently been under increasing scrutiny.[12]

One hardly needs to defend the notion that appeals are an important feature of our judicial process, albeit one that is not constitutionally guaranteed in civil cases.[13] Beyond the obvious function of error correction, appeals serve important systemic functions: development and refinement of law, promotion of uniformity in law, and assuring legitimacy of, and respect for, the law.[14] Litigants have come to expect at least a right to a first level appeal of most issues—a right which serves as an important limit on the power of any one judge.[15]

This, perhaps, is especially important in bankruptcy cases. Bankruptcy judges' lack of Article III status has long created constitutional issues that, thus far, have been mostly resolved through fragile compromises that rely on the supervision of bankruptcy judges by Article III judges.[16] In addition, bankruptcy judges are quite specialized and are immersed in both bankruptcy law and practice. Review by generalist judges may therefore serve an important role in providing an objective view on matters that seem routine for bankruptcy specialists.

On the other hand, bankruptcy reorganizations present unique problems that arguably require a somewhat truncated judicial process. Most of the cases applying equitable mootness point to the need for finality in the bankruptcy process so as

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fied rights, particularly of persons not before the court, to such an extent that effective judicial relief is no longer practically available."); Miami Ct. Ltd. Partnership v. Bank of N.Y., 820 F.2d 376, 379 (11th Cir. 1987) (Departing from past precedent, which held appeals automatically moot upon failure to obtain a stay, the court followed *In re AOV Industries* in stating that "[t]he proper standard to apply in this case is whether the reorganization plan has been so substantially consummated that effective relief is no longer available." *In re* AOV Indus., 792 F.2d 1140, 1147–49 (D.C. Cir. 1986) (The court determined that it would narrowly apply *In re Roberts Farms,* stating that the court could render moot all cases that were "substantially consummated" but would allow it after an individual analysis of a case "where the plan of arrangement has been so far implemented *that it is impossible to fashion effective relief for all concerned.*" (quoting *In re* Roberts Farm, 652 F.2d 793, 797 (9th Cir. 1981)))).

12. *See infra* Section I.B.

13. Cassandra Burke Robertson, *The Right to Appeal,* 91 N.C. L. Rev. 1219 (2013).

14. *See id.* at 1225.

15. *See id.* at 1221.

16. *See infra* notes 53–83 and accompanying text.

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not to defeat the expectations that the numerous parties affected by the bankruptcy develop based on a confirmed plan. Once the plan is consummated, overturning the plan or any aspect of it might unravel the entire web of transactions set out in the plan—even transactions that do not relate directly to the dispute that forms the basis for the appeal. Bankruptcy usually is a zero-sum game with a final endpoint. An increase in legal entitlements of one claimant usually results in a reduction of entitlements for the others and the system is designed to finally resolve all the claims against the debtor and its assets. Thus, each of the agreements constituting the plan are dependent on, and intertwined with, all the other agreements and overturning any aspect of the plan often disrupts all other aspects. This complexity is exacerbated by the fact that immediately after confirmation, the reorganized company will begin interacting with others who may not have been involved with the bankruptcy case. All of this is usually described as the problem of "unscrambling an egg."[17]

Add to all those issues the fact that the business itself may not survive the time necessary for appeals. One might think that the unscrambling problem might be resolved simply by imposing a delay in the scrambling. Like general appellate practice, imposing a stay on the consummation of a plan of reorganization would permit appeals to run their course and thus might preserve both the pre-bankruptcy positions of the parties and the rights of dissenters to have their claims fully adjudicated. Bankruptcy practitioners raise their pragmatic objections to such a stay with another metaphor. A distressed business, it is often said, is a "melting ice cube."[18] Delay in bankruptcy resulting from such niceties as traditional judicial process might result in there being nothing left to reorganize.[19] Thus, stays of confirmation orders are rarely granted,[20] leaving appellate courts with a choice between overturning the order and throwing the business into disarray or turning a

17. *See, e.g.*, *In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) ("[T]he reasons underlying §§ 363(m) and 1127(b)—preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg—are so plain and so compelling that courts fill the interstices of the Code with the same approach.").

18. *In re* ICL Holding Co., Inc., 802 F.3d 547, 551 (3d Cir. 2015).

19. *See id.*

20. *See generally In re* Manges, 29 F.3d 1034, 1039–40 (5th Cir. 1994).

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blind eye to meritorious legal and factual arguments raised by disappointed litigants.[21]

For many in the bankruptcy community, equitable mootness provides an appropriate trade-off by protecting the bankruptcy deal even where the plan violates the rights of a few claimants.[22] Most of the justifications for this view, however, do not adequately consider the effect that the doctrine may have on the process of reaching the deal in the first place. The threat of an appeal provides an important measure of leverage in negotiations surrounding any legal controversy. Parties negotiating in an uncertain legal or factual climate do so with an eye toward the likelihood that they will prevail if the negotiations break down and they are forced to litigate. That view necessarily takes account not only of the prospect of winning at the trial level, but also the likelihood of that decision being overturned or affirmed on appeal. By cutting off that prospect, equitable mootness reduces that leverage.

Of course, if bankruptcy court decisions are correct, or if the errors are unbiased, the loss of appeal rights would affect all parties equally. They would all understand that they had one shot at their arguments and would negotiate with that reality in mind. There may, however, be some reason to believe that the loss of appeal rights might create a more systematic bias against economically weaker parties or parties who have dissented from a deal reached by the most powerful players. The bankruptcy process relies on deals to resolve financial crises so, naturally, the incentive to protect the deal is strong—even if it has been negotiated without adequate consideration of minority claimants. But the notion that cutting off appeal rights is the only or even the best way to accomplish and preserve such deals should be approached with a healthy degree of skepticism. Perhaps it is easier to truncate judicial process and perhaps the right to appeal may create its own opportunities for strategic behavior, but it is far from clear that equitable mootness, as the courts have developed the doctrine, provides the right balance between principle and pragmatism.

This Article reviews the doctrine of equitable mootness with a particular focus on its role in bankruptcy negotiations.

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21. *See id.*

22. *See* Tribune Media Co. v. Aurelius Capital Mgmt., L.P., 799 F.3d 272, 288 (3d Cir. 2015).

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Although discussions of equitable mootness often focus on the difficulty of unwinding the complex and interwoven transactions contemplated by a reorganization plan, an equally important consideration is the role of equitable mootness on the reorganization process itself. An examination of that aspect of the doctrine reveals a dark side that makes the doctrine substantially less appealing. Part I sets out the basic doctrinal factors courts typically recite when applying the doctrine and reviews the judicial debate over the foundations of the doctrine. Part II takes a closer look at the effect of equitable mootness on the plan negotiation process—particularly the role of the doctrine in encouraging reliance and accelerating finality. Part III examines the dark side of the doctrine and the potential for plan proponents to use the doctrine to overcome review of bankruptcy court decisions on controversial issues. Part IV discusses the importance of appeal rights in bankruptcy in providing review by judges who are not so immersed in the case or bankruptcy, generally. Part V considers the necessity of the doctrine, concluding that the problems posed by appellate review of bankruptcy cases are likely misunderstood and that equitable mootness is an overbroad way of dealing with those problems.

I.
DETERMINING EQUITABLE MOOTNESS – THE BASIC CONSIDERATIONS

Courts employ some form of a factor test to determine whether to apply equitable mootness. The tests used differ slightly, but, whether the courts employ a three, four, or five factor test, most emphasize common themes. Most courts make clear that the doctrine is a limited one—employed in rare cases in which the appellate court cannot fashion a remedy that will not disappoint the expectations of some of the stakeholders of the debtor. Reliance is the most prevalent theme in the cases. Naturally, a plan of reorganization is intended to settle numerous controversies and upsetting that settlement has effects on both the parties to the compromise and on other parties who, though not directly involved in the dispute, have nevertheless taken actions in reliance on the settlement. This Part sets out the basic doctrinal factors courts use in determining whether to apply equitable mootness. Here,

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with a few exceptions, we find consistency. Next, this Part discusses the controversy over the foundations of the doctrine.

A. *Doctrinal Factors*

Although the analysis of equitable mootness by the various circuits follows slightly varying formulations, many courts recite the factors set out by the Third Circuit in *In re Continental Airlines*:

> (1) whether the reorganization plan has been substantially consummated,
> (2) whether a stay has been obtained,
> (3) whether the relief requested would affect the rights of parties not before the court,
> (4) whether the relief requested would affect the success of the plan, and
> (5) the public policy of affording finality to bankruptcy judgments.[23]

As the Third Circuit later recognized, however, some of these factors are repetitive. For example, a stay of the confirmation order would normally prevent the substantial consummation of a plan.[24] Also, the policy of affording finality to bankruptcy judgments is linked to the desire for successful plans of reorganization because finality "encourages investors and others to rely on confirmation orders, thereby facilitating successful reorganizations by fostering confidence in the finality of confirmed plans."[25] These observations led the Third Circuit to a more compact formulation:

> 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)

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23. *In re* Cont'l Airlines, 91 F.3d 553, 560 (3d Cir. 1996).

24. *In re* Semcrude, L.P., 728 F.3d 314, 322 (3d Cir. 2013).

25. *In re* Philadelphia Newspapers, LLC, 690 F.3d 161, 169 (3d Cir. 2012), as corrected (Oct. 25, 2012) (citations omitted). *Cf. In re* U.S. Airways Grp., Inc., 369 F.3d 806, 809 (4th Cir. 2004) (omitting a consideration of the public policy in favor of finality, but including the factor relating to the success of the plan).

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significantly harm third parties who have justifiably relied on plan confirmation.[26]

This formulation narrows the focus of the inquiry to non-appealing parties' reliance on the plan either in undertaking the transactions contemplated in the plan or in transacting business with the debtor following the confirmation of the plan. This reliance is at the core of the courts' expressed concerns that overturning such a complex arrangement as that contemplated by a plan would "knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court."[27]

Although most of the focus is on the reliance of third parties and participants in the reorganization, courts do pay some attention to the diligence of the appealing party in obtaining, or at least seeking, a stay of the confirmation order. The effect of the stay is an important factor, insofar as a stay would normally prevent the consummation of a plan.[28] Thus, equitable mootness really only applies in circumstances in which a stay has not been granted.[29] Where there has been no stay, the effect of the appealing party's unsuccessful efforts to obtain a stay is difficult to generalize. One might imagine that an appellant that pursues a stay with vigor, but who is ultimately denied the relief, would be treated appreciably better than an appellant who does not seek a stay. A number of courts count the

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26. *Semcrude*, 728 F.3d at 321. *See also In re* Manges, 29 F.3d 1034 at 1039 ("This court has historically examined three factors in making this assessment—(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan.").

27. *In re* Roberts Farms, Inc., 652 F.2d 793, 797 (9th Cir. 1981) (early case that is widely considered as the genesis of the doctrine).

28. *See Semcrude*, 728 F.3d at 322. Substantial consummation is not a difficult hurdle to overcome in the cases in which equitable mootness is a factor. 11 U.S.C.A. § 1101(2) (1978) defines "substantial consummation" as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

29. *See Semcrude*, 728 F.3d at 323.

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failure to seek a stay strongly against the appellant,[30] but do not necessarily find that such a failure is fatal to the application of equitable mootness.[31]

On the other hand, an unsuccessful effort to obtain a stay does not insulate the appeal from the doctrine. As the Seventh Circuit noted:

> The significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance on the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal.[32]

Thus, wise counsel would at least seek a stay, but would understand that an unsuccessful motion to stay consummation would not insulate the appellant from claims of equitable mootness.[33]

The standard of review by appellate courts of a district court's application of equitable mootness varies among the circuits. The Second, Third, and Tenth Circuits have adopted an

30. *See In re* U.S. Airways Group, Inc., 369 F.3d 806, 809–10 (4th Cir. 2004) (failure to seek a stay weighs strongly against appellant); Matter of Specialty Equip. Companies, Inc., 3 F.3d 1043, 1047 (7th Cir. 1993) ("[A] party that elects not to pursue a stay subsequent to confirmation risks that a speedy implementation of the reorganization will moot an appeal.").

31. *Semcrude*, 728 F.3d at 323 ("Though Appellants would have been wise to seek a stay to stop the prospect of equitable mootness in its tracks, their statutory right to appeal . . . is not premised on their doing so.").

32. *In re* UNR Indus., 20 F.3d 766, 769–70 (7th Cir. 1994); *see also, In re* Manges, 29 F.3d 1034, 1040 (5th Cir. 1994).

33. Even where a stay is sought, the cost of posting a bond substantial enough to cover the costs of delaying a reorganization plan can be an impediment to the appellants efforts to stay the consummation of the plan. In these cases, courts are somewhat unsympathetic. *See In re* Cont'l Airlines, 91 F.3d 553, 562 (3d Cir. 1996) (unwillingness of appellants to post a bond weighs heavily against them); Tribune Media Co. v. Aurelius Capital Mgmt., L.P., 799 F.3d 272, 282 (3d Cir. 2015) ($1.5 billion bonding requirement not met by appellant, which never challenged the amount of the bond, led court to conclude that finding of mootness was not unfair).

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abuse of discretion standard,[34] while the Fifth, Sixth, Ninth, and Eleventh Circuits review the facts for clear error but the legal conclusions on a de novo standard.[35] The Second Circuit adds a unique twist, stating that substantial consummation of the plan creates a presumption of equitable mootness unless the appellant can establish that each of five factors are met:

(1) "the court can still order some effective relief";
(2) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity";
(3) "such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court";
(4) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings"; and
(5) "the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from."[36]

Most courts that have considered the Second Circuit's approach have rejected it, reasoning that although substantial consummation is an important factor, the court must further consider whether effective relief can be granted,[37] and that the party seeking to invoke equitable mootness should bear the burden of showing that such extraordinary relief is warranted.[38]

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34. *Tribune Media Co.*, 799 F.3d at 277; *In re* Charter Commc'ns, Inc., 691 F.3d 476, 483 (2d Cir. 2012); *In re* Paige, 584 F.3d 1327, 1335 (10th Cir. 2009).

35. *In re* City of Detroit, 838 F.3d 792, 798 (6th Cir. 2016); *In re* Nica Holdings, Inc., 810 F.3d 781, 786 (11th Cir. 2015); *In re* Transwest Resort Properties, Inc., 801 F.3d 1161, 1168 (9th Cir. 2015); *In re* GWI PCS 1, Inc., 230 F.3d 788, 799 (5th Cir. 2000).

36. *Charter Commc'ns, Inc.*, 691 F.3d at 482 (quoting *In re* Chateaugay Corp., 10 F.3d 944, 952–53 (2d Cir. 1993)).

37. *See Transwest*, 801 F.3d at 1169.

38. We have never explicitly addressed which party bears the burden to prove that, weighing these factors, dismissal is warranted. 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

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Finally, there is some limited authority among the circuits for considering the type of issues raised by appellants and the potential merits of the appeal. In *In re Pacific Lumber*,[39] the Fifth Circuit specifically noted that the issues raised on appeal concerned the valuation of collateral securing the appellants' claims and the secured creditors' right to credit bid.[40] The fact that the appeal involved the property rights of the secured creditor was part of the court's rationale for hearing the appeal:

> We hold these issues justiciable notwithstanding the tug of equitable mootness. Secured credit represents property rights that ultimately find a minimum level of protection in the takings and due process clauses of the Constitution. The Bankruptcy Code's reorganization provisions in fact "preserve the essence" of the boundaries of secured creditors' rights laid out in constitutional cases. Federal courts should proceed with caution before declining appellate review of the adjudication of these rights under a judge-created abstention doctrine. Moreover, while we have found no case that applied equitable mootness to decline review of the treatment of a secured creditor's claim, at least two cases in this court have ruled on such appeals despite plan proponents' pleas for equitable mootness.[41]

Similarly, the court held that a consideration of the legality of non-debtor releases granted by the plan and objected to by the appellants could not be barred by equitable mootness.[42] Quoting an earlier decision by the Fifth Circuit, the court stated, "'[E]quity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter

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> an evidentiary record, and not speculation. To encourage this, we join other Courts of Appeals in placing the burden on the party seeking dismissal.

In re Semcrude, L.P., 728 F.3d 314, 321 (3d Cir. 2013) (citing *In re* Lett, 632 F.3d 1216, 1226 (11th Cir. 2011)); *In re* Paige, 584 F.3d 1327, 1339–40 (10th Cir. 2009); *In re* Focus Media, Inc., 378 F.3d 916, 923 (9th Cir. 2004).

39. *In re* Pac. Lumber Co., 584 F.3d 229 (5th Cir. 2009).

40. *Id.* at 248.

41. *Id.* at 243 (citations omitted).

42. *See id.* at 252.

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11 process.[43] On the other hand, the court had little difficulty applying the doctrine to impairment and classification issues and to unfair discrimination claims by the appellants.[44] These claims all related to claimed violations of the general standards for confirmation and not to issues that went to the secured creditor's property claims or the jurisdiction of the court to approve a non-debtor release.[45] Sometimes, then, the nature of the claim raised may impact the court's view of the doctrine. The more fundamental the issue, the more likely a court will hear an appeal.

At least one circuit specifically looks at the merits of the claims presented on appeal in determining whether an appeal is equitably moot. In *In re Paige*,[46] the Tenth Circuit adopted a six-factor test for equitable mootness. In addition to the standard factors focusing on substantial consummation, whether the appellant sought a stay, and the general reliance factors (third parties, success of reorganization, and public policy), the court asked "[B]ased on a quick look at the merits of appellant's challenge to the plan, is appellant's challenge legally meritorious or equitably compelling?"[47] The case involved competing plans of reorganization by two claim buyers who sought control over the debtor's only valuable asset.[48] The losing party claimed that the Chapter 11 trustee had conflicts of interest while favoring the winning bidder and had engaged in inappropriate negotiations.[49] The court concluded that the appellants claims had some merit and constituted "serious matters that will not lightly be swept under the rug in the name of equitable mootness"[50] The court stated further, "[i]n many ways, the claims raised go to the very integrity of the bankruptcy process in this case."[51] Having found the remain-

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43. *Id.* at 251 (quoting In re Hilal, 534 F.3d 498, 500 (5th Cir. 2008)).
44. *Id.* at 250–51.
45. *See id.* at 250–51.
46. *In re* Paige, 584 F.3d 1327, 1339 (10th Cir. 2009).
47. *Id.*
48. *Id.* at 1331–32 (the asset was the debtor's rights in the domain name "FreeCreditScore.com").
49. *Id.* at 1333.
50. *Id.* at 1348.
51. *Id.*

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ing factors inconclusive, the court let the quick look decide against the application of equitable mootness.[52]

With these few exceptions, there is remarkable consistency between the language the courts use in determining whether to invoke equitable mootness. Substantial consummation and the absence of a stay on the bankruptcy court's confirmation order are universal requirements. The efforts of the appellant to obtain a stay are important, but not conclusive. Most of the effort is employed in analyzing the nature of the remedy sought and the effect that that remedy will have on the plan itself, or third parties who might have their reliance interests in the plan disappointed.

B. *The Fragile Foundations of Equitable Mootness – the Third Circuit Debate*

Although every circuit has approved the use of equitable mootness to dismiss bankruptcy appeals, there have been a few dissenting voices. The earliest of these was then-Judge Samuel Alito's dissent, joined by five other judges, in *In re Continental Airlines*.[53] This en banc review of a panel decision considered the appeal by trustees for secured creditors over the bankruptcy court's treatment of adequate protection claims and raised an issue of first impression in the Circuit.[54] The Third Circuit declined to consider the questions, finding that the appeal was equitably moot.[55]

Judge Alito's dissent directly challenged the notion that the doctrine was necessary to facilitate reorganizations or protect those who have reasonably relied on reorganization plans.[56] The doctrine, he noted, is not based on Article III or

52. The court cited a Second Circuit decision, *In re* Metromedia Fiber Network, 416 F.3d 136, 144 (2d Cir. 2005), for the proposition that the court may consider the merits of the case before considering equitable mootness. *Paige*, 584 F.3d at 1348. Although the *Metromedia* court did state that it was proper to consider the merits, the decision did not do so as a component of its equitable mootness analysis. In fact, the opinion is clear that the court applied equitable mootness in spite of the merit of the appellant's claims. *Metromedia*, 426 F.3d at 143–44.

53. *In re* Cont'l Airlines, 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting).

54. *Id.* at 557 (The issue was whether "a creditor must file a motion to lift the automatic stay as a prerequisite to seeking adequate protection.").

55. *Id.* at 557–58.

56. *Id.* at 572 (Alito, J., dissenting).

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non-Article III mootness, and therefore is not jurisdictional, precluding a ruling on the merits.[57] Instead, he noted, that even if it were true that granting the appellants full relief would imperil the reorganization plan—an outcome that was not self-evident—the doctrine would not preclude the court from hearing the merits and awarding some limited relief.[58] Further, Judge Alito dismissed concerns that the doctrine was necessary to protect the reasonable reliance of investors in the reorganized company. After detailing the plan provisions that made clear that an appeal would result in the allowance of additional administrative claims (the chief complaint of the investors) the dissent stated:

> Under these circumstances, any prudent investor, in deciding whether to invest in NewCal on particular terms, would have taken into account the range and likelihood of possible outcomes in the Trustees' appeal, including the possibility that some or all of the amount sought by the Trustees would have to be paid as an administrative claim pursuant to Section 10.1 of the plan. No reasonable investor would have proceeded on the assumption that the Trustees would definitely recover nothing. And the same is true of the other parties that relied on the plan.[59]

Even if there were reliance interests that deserved protection, the dissent continued, those interests could be taken into account at the remedy stage, as could the effect of the failure of the appellant to obtain a stay.[60]

Ultimately, Judge Alito's dissent admitted that while there may be something to the notion that reliance interests based on the plan or on post-bankruptcy investments may preclude full recovery, there is no justification for dismissing the appeal outright, before even hearing the merits. The dissent concluded:

> The mere act of entertaining that claim would not imperil Continental's reorganization or impair any legitimate reliance interests. If the Trustees' claim were considered and they won on the merits, any

57. *Id.* at 571.
58. *Id.*
59. *Id.* at 572.
60. *Id.*

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threat to the reorganization or to legitimate reliance interests could be taken into account in framing the Trustees' relief. What the district court and the majority have done—throwing the Trustees out of court before the merits of their claim are even heard—is unjustified and unjust.[61]

A more recent and more thorough critique of the doctrine was penned by Third Circuit Judge Krause in her concurring opinion in *In re One2One Communications, LLC.*[62] There the Third Circuit overturned the district court's finding that an appeal of a confirmation order was equitably moot. Judge Krause agreed with the ruling but wrote separately to urge the court to reconsider this "legally ungrounded and practically unadministrable 'judge-made abstention doctrine.'"[63] This concurring opinion sparked a debate in the Third Circuit as Judge Ambro penned his own concurring opinion in *In re Tribune Media Co.*[64] in response to Judge Krause's views.

Much of Judge Krause's concurring opinion was devoted to considering the statutory and constitutional arguments against the use of the doctrine. She began by establishing the baseline rule that requires federal courts to hear cases within their statutory jurisdiction.[65] Although federal courts have a few narrowly tailored abstention doctrines, she noted that each of these doctrines only postpone the exercise of jurisdiction. "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."[66] Judge Krause also noted that the Supreme Court had recently decided *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,[67] in which the Court expressed its disapproval of the doctrine of

61. *Id.* at 572–73.

62. *In re* One2One Commc'ns, LLC, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring).

63. *Id.*

64. Tribune Media Co. v. Aurelius Capital Mgmt., L.P., 799 F.3d 272, 284 (3d Cir. 2015) (Ambro, J., concurring). The *Tribune* case was filed about one month after the *One2One* case.

65. *One2One*, 805 F.3d at 439 ("The mandate that federal courts hear cases within their statutory jurisdiction is a bedrock principle of our judiciary.").

66. *Id.* at 440.

67. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

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"prudential standing." That doctrine was thought to permit federal courts to decline to decide claims based on the courts' sense that Congress should have denied a cause of action to the plaintiff, rather than on a statutory analysis to determine whether a right of action was available. The Court, the concurrence noted, reaffirmed the virtually unflagging obligation of a federal court to hear and decide cases within its jurisdiction.[68]

Against this backdrop of principles, the concurrence turned to explore potential statutory bases for the doctrine. This has proven to be a difficult task for every court that examines the doctrine. The closest the Code comes to equitable mootness are two provisions designed to protect good faith purchasers of assets from the estate and lenders to the estate.[69] The Code also protects finality in section 1127(b), which prohibits the modification of a plan by its proponent following its substantial consummation.[70] These provisions are dealt with in one of two ways by the courts. Courts seeking to justify equitable mootness see in them a policy toward finality and protection of third parties. The fact that the Code does not directly incorporate the doctrine is of no consequence, the failure is a mere interstice, a gap, that courts can bridge to fulfill the intent of Congress to protect the finality of reorganization plans.[71] Critics of the doctrine, including Judge Krause, take a differing approach. "Because Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel us to presume that Congress did not intend for other orders to be immune from appeal."[72] Because Judge Krause could not find a statutory basis for the doctrine, the baseline rule—requiring the courts to

68. *One2One*, 805 F.3d at 441.

69. 11 U.S.C. § 363(m) (2019) provides that the reversal or modification of an un-stayed sale order does not affect the rights of the purchaser even though the purchaser knows of the pendency of an appeal. 11 U.S.C. § 364(e) (2019) provides the same protection to lenders under an order permitting the debtor to obtain credit.

70. 11 U.S.C. § 1127(b) (2019).

71. *See, e.g.*, *In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) ("[T]he reasons underlying §§ 363(m) and 1127(b)—preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg—are so plain and so compelling that courts fill the interstices of the Code with the same approach.").

72. *One2One*, 805 F.3d at 444.

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fulfill their obligation to decide cases over which Congress has granted them jurisdiction—controls.

But even if a statutory basis could be found, Judge Krause believed the doctrine would raise constitutional problems that would compel its rejection. The status of bankruptcy judges as non-Article III officers creates constitutional concerns regarding the right of litigants to have their cases heard by an Article III judge, while also raising structural concerns regarding the institutional integrity of the judicial branch. These problems animate the decisions of the Supreme Court in *Stern v. Marshall*,[73] and, most recently, in *Wellness Int'l Network, Ltd. v. Sharif*.[74] In *Wellness*, Judge Krause observed, the Court approved bankruptcy judges' adjudication of *Stern* claims where parties consent to such adjudication. The *Wellness* court premised its holding on the fact that the supervision Article III courts exercise over the bankruptcy courts alleviates the structural concerns raised in *Stern*.[75] Judge Krause stated:

> Equitable mootness drastically weakens that supervisory authority, and therefore threatens a far greater "impermissibl[e] intru[sion] on the province of the judiciary," than the Court confronted in *Northern Pipeline*, *Stern*, or *Wellness International*. The doctrine not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue. Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new entities (in which third parties may invest) are formed, and whether distributions (including to third parties) under the plan begin—all before plan challengers reach an Article III court.[76]

73. Stern v. Marshall, 564 U.S. 462 (2011).
74. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).
75. *One2One*, 805 F.3d at 445 (citing *Wellness*, 135 S. Ct. at 1944).
76. *Id.* (citation omitted).

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Ultimately, Judge Krause concluded, the doctrine, "places far too much power in the hands of bankruptcy judges,"[77] leading her to conclude that equitable mootness raises serious constitutional problems.[78]

Judge Ambro responded to the constitutional concerns Judge Krause raised, arguing that the doctrine does not violate the personal rights and separation of powers guaranteed by Article III. His reading of the *Stern* and *Wellness* line of cases led him to conclude that those cases were principally concerned with congressional aggrandizement inherent in the redirection of adjudication from state courts to Article I tribunals.[79] In his view, as equitable mootness is determined by Article III courts, it does not pose the same issue as those constitutional decisions. As such, the personal right of a litigant to an adjudication by an Article III judge is preserved because the decision is made by an Article III judge. Similarly, because Article III judges control the doctrine, it does not create separation of powers issues.[80]

Judge Ambro also addressed Judge Krause's view that the Code does not provide a statutory basis for the doctrine. Rather than search for such a basis, however, Judge Ambro found that the inquiry was unnecessary. Instead he began his discussion by noting that the Code does not bar the doctrine—a starting point that foreshadowed his decision.[81] His starting perspective was that equitable mootness was simply an application of the general equitable power of the bankruptcy court to limit relief where the balance of harms favors such actions. Citing cases involving injunctive relief, Judge Ambro noted that even where the party seeking relief has a justifiable

77. *Id.* at 446 (quoting Nordhoff Investments, Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring)).

78. *See also* Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 Ky. L.J. (forthcoming 2019) ("A prudential doctrine without a statutory basis where a judge can eliminate an appeal without even considering the merits simply does not comport with the Supreme Court precedent or the historical nature of bankruptcy court authority and appellate review.").

79. Tribune Media Co. v. Aurelius Capital Mgmt., L.P., 799 F.3d 272, 285 (3d Cir. 2015) (Ambro, J., concurring).

80. *Id.*

81. *Id.* at 286.

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claim, the courts may withhold relief based on the equities of the case.[82] He concluded:

> [W]e believe that the *One2One* concurrence's formal challenge that equitable mootness lacks a basis in law misses the point that it is in the *equitable* toolbox of judges for that scarce case where the relief sought on appeal from an implemented plan, if granted would leave the plan in tatters and/or bankruptcy battlefield strewn with too many injured bodies.[83]

Thus, despite thoughtful dissent, equitable mootness remains an available tool in the Third Circuit and all the others.

C. *The Doctrinal State of Equitable Mootness*

What emerges from this review of equitable mootness cases is a doctrine that is fairly stable in application but one that may have some serious problems with its foundation. Most of the cases hew to well-accepted factor tests and the application of the doctrine is, within reasonable bounds, fairly predictable—at least within particular circuits. Without the foundational concerns, these factors would augur against Supreme Court review because the doctrine appears to function relatively well. The lack of firm statutory support for the doctrine, and, more importantly, the emerging constitutional concerns about the structure of the bankruptcy courts and supervision by the judiciary might, however, lead the Court to take up the doctrine.

This article takes no predictive position on these questions. The arguments have been well developed by Judge Krause and amplified in Judge Moore's dissent in the Sixth Circuit's decision in *In re City of Detroit, Michigan.*[84] Instead, this article will focus more closely on the role of the doctrine in the bankruptcy process. For most bankruptcy practitioners, and, likely for many bankruptcy judges, the utility and need for the doctrine is a matter of faith. Chapter 11 reorganization, one often hears, is a unique process that cannot necessarily be subject to judicial rules that apply to two-party disputes. The fragile negotiations that characterize a Chapter 11 plan

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82. *Id.* at 287–88.

83. *Id.* at 288.

84. *See In re* City of Detroit, Michigan, 838 F.3d 792, 805–12 (6th Cir. 2016) (Moore, J., dissenting).

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and the need to resolve financial distress quickly make such an extraordinary doctrine as equitable mootness necessary. The remainder of this article challenges that conclusion.

II.
THE ROLE OF EQUITABLE MOOTNESS IN BANKRUPTCY NEGOTIATIONS

As noted above, equitable mootness is most often viewed as a necessary device to protect reliance by establishing the finality of plan confirmations. Courts applying the doctrine often view the facts supporting the application through a rear-view mirror. Because the plan of reorganization has been consummated and transactions have occurred that would be difficult to unwind without upsetting reliance interests or creating chaos, the court is forced to dismiss the appeal. In fact, however, the consequences of the doctrine are not limited to its ex-post effect, but extend to the negotiation process itself. This Part frames the doctrine not so much as a prudential limitation on appeals but instead as a negotiating tool that can be expertly wielded to help forge (or force) a reorganization bargain.

A. *Negotiation, Legal Guardrails, and the Effect of Appellate Review*

Reorganization presents a uniquely complex negotiation problem. Uncertainty surrounding the value of the business and its assets, the entitlements of specific claimants, the value added by some participants, and any number of case specific contingencies characterizes the process. Representation of far-flung constituencies, such as small vendors, employees, tort claimants, and others often is less than perfect. The negotiations normally take place in a crisis atmosphere as the participants not only must organize and conduct the negotiations, but must also stabilize the business and make hard decisions regarding its proper scope and operation going forward. Add the fact that pre-bankruptcy claimants and shareholders have no choice but to bargain with each other. For most participants, walking away is not an option. Finally, the disparate entitlements create opportunities for strategic behavior and shifting alliances throughout the negotiation process.

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Chapter 11 sets out a process and provides a forum that is intended to promote and manage these negotiations. Most of the rules are procedural. The Code sets out voting rights,[85] disclosure requirements,[86] a representational structure,[87] and provides notice and opportunity to be heard for significant decisions throughout the case.[88] Some of the rules are substantive, however. Central to the promotion of negotiated solutions are the provisions of the Code that bind dissenting claimants to the deals reached by others subject to default rules that set out minimum distributional requirements. The absolute priority rule assures that dissenting classes of creditors will receive distributions that generally align with non-bankruptcy priorities.[89] The best interests test requires distributions under a Chapter 11 plan to provide objecting individual creditors at least as much as they would have received in a Chapter 7 case.[90]

Although Chapter 11 is generally viewed as a negotiating process, these procedural and substantive rules provide guardrails to assure that the strongest claimants do not run roughshod over the other participants in the case. Thus, Chapter 11 carves out a substantial space for the judge in interpreting, applying, and enforcing the rules, and uncertainty regarding the content and scope of the rules has a significant impact on the negotiations.

Even though the Code has been in place for forty years, there is a substantial amount of uncertainty regarding critical Chapter 11 rules that directly impact the substantive rights and negotiating leverage of the participants. For example, only recently has the Supreme Court found it necessary to reaffirm the basic priority structure underlying the Code,[91] and the right of secured creditors to credit bid their claims.[92] Circuit

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85. 11 U.S.C. § 1126 (right of claimants to accept or reject plan).

86. 11 U.S.C. § 1125 (postpetition disclosure and solicitation of votes)

87. 11 U.S.C. § 1102 (creditors' and equity security holders' committees).

88. 11 U.S.C. § 1109 (right to be heard).

89. 11 U.S.C. § 1129(b) (requirement that plan comply with priority structure).

90. 11 U.S.C. § 1129(a)(7) (codifying the best interest test).

91. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).

92. *See* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012).

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courts continue to struggle with such fundamental issues as the ability to circumvent priority through class skipping gift distributions[93] and to release participants and others from third-party claims.[94] This legal uncertainty combines with factual uncertainty to form the negotiating positions and leverage of the participants in the process.

Legal and/or factual uncertainty is a feature of negotiations conducted in the shadow of the judicial system. The difference in Chapter 11 is that equitable mootness provides a potential way for plan proponents and pivotal parties to limit debate over legal entitlements to a single decision-maker—the bankruptcy judge. By cutting off the potential appeal rights of the objecting party, equitable mootness puts in place a potential imbalance in the legal risk faced by proponents and objecting parties. A court's decision not to confirm a plan often simply sends the parties back to the negotiating table. Thus, plan proponents may develop reorganization plans that push the boundaries of the legal rules knowing that they will either convince the bankruptcy court to accept their interpretation or will renegotiate under the court's stricter interpretation. Objecting parties who lose in the bankruptcy court, on the other hand, only have the right to appeal left to their disposal, a right which may never be realized if the reviewing court is convinced that correcting such errors would lead to chaos and disappointed expectations.

Thus, one might suspect that the prospect of equitable mootness applying to cut off appeal rights is very much on the

93. *Compare* Dish Network Corp. v. DBSD N. Am., Inc. (*In re* DBSD N. Am., Inc.), 634 F.3d 79, 93–101 (2d Cir. 2011) (overturning a plan of reorganization where the plan contemplated a priority skipping "gift" distribution), *with In re* ICL Holding Co., Inc., 802 F.3d 547, 555–58 (3d Cir. 2015) (permitting such a distribution). For a discussion of the issue, see Ralph Brubaker, *Taking Chapter 11's Distribution Rules Seriously: "Inter-Class Gifting Is Dead! Long Live Inter-Class Gifting!"*, 31 BANKR L. LETTER No. 4 (2011).

94. *Compare* Resorts Int'l v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401–02 (9th Cir. 1995) (holding that the bankruptcy court may not confirm a plan that releases third-party claims), *with* Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 656–62 (6th Cir. 2002) (holding that such releases are possible, but finding that the releases at issue were not properly structured).

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minds of participants in a bankruptcy reorganization.[95] As the following discussion demonstrates, the doctrine is an important feature of bankruptcy negotiations. Rather than simply protecting the finality of the case and the reliance of third parties doing business with the post-confirmation debtor, equitable mootness is often viewed prospectively as a method to encourage reliance and accelerate finality.

B. *Does Equitable Mootness Protect or Encourage Reliance?*

As stated above, most courts point to the reliance parties place on the corporate structure and entitlements contained in the plan as the main reason for overcoming the appeal rights set out in the judicial code. The circuits' views of what types of reliance will support a claim of equitable mootness vary significantly, however. This Part sets out two separate types of reliance that might provide the justification for the application of equitable mootness and discusses the views of the courts regarding such types of reliance.

A decision overturning a plan of reorganization may affect two separate categories of parties. Perhaps most compelling are parties who have extended credit or otherwise contracted with the debtor following the confirmation of the plan. The overturning of a plan of reorganization may impair the debtor's ability to fulfill these post-confirmation obligations, thus disappointing these parties' reasonably developed expectations. Every court would likely agree that the standards for equitable mootness are satisfied by such third-party reliance.

The pre-bankruptcy claimants whose claims are compromised or otherwise dealt with in the plan also develop a reliance interest in the plan's provisions, as do some third parties who invest in the debtor as part of the plan. Chapter 11 reorganizations create a global settlement in which each parties' treatment is dependent upon all the other parties' treatment. The very nature of bankruptcy is that there is a fixed pie and multiple claimants with differing views of their entitlements to a slice of the pie. Thus, pre-bankruptcy stakeholders negotiate with each other and their negotiating positions and agreements are often dependent upon the complex web of all the

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95. As Professor Kuney observed in the context of mootness arguments, "Give any good lawyer a tool like that and she will use it." George W. Kuney, *Slipping into Mootness*, 2007 ANN. SURV. OF BANKR. L. 9.

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agreements. An order overturning one aspect of a plan may, therefore, affect other unrelated deals that parties have made. Some courts view this type of "deal reliance," as enough to justify equitable mootness.

These two types of reliance and the courts' reactions to them can be illustrated by comparing two cases—one from the Ninth Circuit, which limits equitable mootness to cases of third-party reliance; and one from the Second Circuit, in which deal reliance was sufficient for equitable mootness.

The view that third-party reliance is necessary for equitable mootness is represented by the Ninth Circuit case, *In re Transwest Resort Properties, Inc.*[96] There, the secured creditor objected to a plan of reorganization that limited the post-bankruptcy effect of a due-on-sale clause in the years following plan confirmation.[97] In addition, the secured creditor also argued that the plan violated one of the requirements for confirmation contained in Code section 1129(a).[98] The bankruptcy court confirmed the plan and denied the secured creditor's motion for a stay, holding that the possibility that the consummation of the plan would render a potential appeal moot was "speculative, at best."[99] The district court, on appeal, held that, although the secured creditor was diligent in seeking a stay, the plan had been substantially consummated and that third parties had relied on the plan.[100]

The party that had most obviously relied on the plan was a new investor ("SWVP") in the debtor. The plan provided that SWVP would invest $30 million and would become the sole

96. *See In re* Transwest Resort Properties, Inc., 801 F.3d 1161, 1169 (9th Cir. 2015).

97. The secured creditor had made an 1111(b) election to treat the entirety of its claim as secured. Although the mechanics of 1111(b) are complex, the purpose of the election is to protect the secured creditor against an undervaluation of its collateral by requiring full payment in the event the collateral is sold soon after bankruptcy. *Id.* at 1165. The secured creditor claimed that the limitation on the due on sale clause eliminated that protection. *Id.* at 1166.

98. Specifically, the creditor argued that the court misapplied the section 1129(a)(10) requirement that at least one impaired class vote in favor of the plan. The bankruptcy court followed a line of decisions holding that the requirement only applies to a plan, and not to each individual debtor covered by the plan. *Id.* at 1166–67.

99. *Id.* at 1167.

100. *Id.*

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owner of a group of the debtors.[101] The Ninth Circuit rejected the debtors' claim that SWVP was the type of innocent third party that deserved the protection of equitable mootness. The court noted that SWVP participated in the confirmation hearings and in the initial stages of the appeal, and concluded that that involvement meant that SWVP was not an innocent third party.[102] The court held, "[W]hen a sophisticated investor such as SWVP helps craft a reorganization plan that 'presses the limits' of the bankruptcy laws, appellate consequences are a foreseeable result."[103]

The court went on to note that relief could be fashioned without unwinding the plan, stating that the court could adjust the duration of the exception to the due on sale clause or fashion some other sort of monetary relief and could grant monetary relief for the confirmation violation.[104] The reorganized debtor claimed that any adjustment would be inequitable, presumably because it would interfere with the expectations of the other parties to the plan. The court rejected that contention and held that although the plan had been consummated, it would be possible to fashion an "equitable remedy for each objection that would not bear unduly on innocent third parties."[105]

The Ninth Circuit's view stands in sharp contrast with those of the Second Circuit in *In re Charter Communications, Inc.*[106] There the debtor, a group of bondholders, and Paul G. Allen, the debtor's controlling investor, engaged in pre-petition negotiations that culminated in a settlement that formed the basis for a prepackaged plan. The pre-bankruptcy settlement required Allen to retain ownership and take other actions necessary to preserve net operating losses and to avoid a default in the debtor's senior debt. Allen received substantial cash and a release of liability for himself and the management

101. *Id.* at 1164–65.

102. *Id.* at 1169.

103. *Id.* at 1170 (quoting *In re* Pacific Lumber, 584 F.3d 229, 244 (5th Cir. 2009)); *see also In re* Sunnyslope Housing, Ltd. P'ship, 818 F.3d 937, 945 (9th Cir. 2016) (equity investor in debtor who participated in development of plan was not the type of innocent third party who is protected by equitable mootness).

104. *Transwest,* 801 F.3d at 1171–73.

105. *Id.* at 1173.

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

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of the debtor. The settlement discussions did not include certain holders of convertible notes, other equity owners of the debtor or the senior lender.[107] During the bankruptcy, these excluded shareholders and creditors objected to the settlement at every turn, and objected to the bankruptcy court's valuation of the debtor and the plan's compliance with the Code. Included within those objections was a claim that the third-party release was unjustifiable.

Following a nineteen-day hearing the bankruptcy court confirmed the plan and later denied the objecting creditor's motions for an emergency stay. The district court also denied a stay and the plan took effect a mere 13 days after confirmation. On appeal, the district court held that the case was equitably moot, relying heavily on a nonseverablity clause in the plan.[108] The confirmation order included a provision that the terms of the plan—terms that expressly included the settlement—were "nonseverable and mutually dependent," and could not be "deleted or modified" absent the consent of the parties to the settlement.[109] This clause placed the settlement at the heart of the plan, leading the district court to conclude that it could not grant any remedy. In addition, the court noted that the contractual arrangements contained in the settlement had been performed and that Allen had detrimentally relied on the confirmation.[110]

The Second Circuit affirmed, applying the presumption analysis unique to that circuit.[111] Under that analysis, the substantial consummation of the plan creates a presumption in favor of equitable mootness unless the appellant can demonstrate each of five factors is met. The Second Circuit found that the claims were not constitutionally moot (factor 1); that the adversely affected party, Allen, had an opportunity to participate in the appeal (factor 4); and that the appellant had diligently sought a stay (factor 5).[112] The Second Circuit's application of equitable mootness turned on the fact that the settlement at issue was a critical aspect of the plan itself and that

107. *Id.* at 480.
108. *In re* Charter Commc'ns, Inc., 449 B.R. 14, 24 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 476 (2d Cir. 2012).
109. *Id.*
110. *Id.* at 25–26.
111. *See Charter*, 691 F.3d at 482.
112. *Id.* at 484–85.

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unwinding the settlement would "cut the heart out of the reorganization" in a way that would affect Charter's ability to emerge as a reorganized entity (factor 2) and would require the unwinding of complex transactions undertaken after consummation (factor 3).[113] Thus, even though Allen was a participant in the plan, and was not an "innocent third party" under the views of the Ninth Circuit in *Transwest*, the *Charter* court held that the threat to the success of a plan precluded review—even if the settlement agreement and releases were not legally supportable.[114]

Charter rests on the notion that equitable mootness is necessary to protect the deal itself. The court went to some length to explain the ways in which the Allen settlement was necessary to the reorganization effort and the ways in which upsetting that settlement—even if it violated the rights of the parties excluded from the settlement discussions—would create a situation in which a new compromise would be difficult.[115] Allen and the other settling parties were all sophisticated investors and could not be said to have reasonably relied on its legality when the parties excluded from the settlement objected throughout the process. That is, unless they were also relying on the doctrine of equitable mootness to shield their plan from review.

On this view, the doctrine of equitable mootness does not so much protect reliance as it does create the conditions for reliance to exist. This point was made by the dissenting judge in *Transwest*, the Ninth Circuit case that refused to protect the claimed reliance of the third-party investor under the plan.[116]

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113. *Id.* at 485–86. (The court warned against placing too much reliance on the nonseverability clause in this analysis, noting that such clauses are ubiquitous and would result in mooting virtually every appeal in which a stay was not granted.).

114. *Id.* at 486.

115. *Id.* at 486 n.5.

116. *See In re* Transwest Resort Properties, Inc., 801 F.3d 1161, 1174 (9th Cir. 2015) (Smith, J. dissenting) ("I strongly disagree with the majority's conclusion that the equitable mootness doctrine is not meant to protect the interests of a third-party investor in SWVP's position. The majority concludes that we should not consider how the proposed remedies will affect SWVP's interests because SWVP participated in the bankruptcy proceedings, and, to some extent, in this appeal. But we have never held that we may ignore a third-party investor's interests merely because the third party participated in the proceedings.").

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The dissent made clear its view that the purpose of equitable mootness is not to protect reliance, but to encourage reliance:

> The majority suggests that SWVP was not entitled to rely on the finality of the confirmation order because it could reasonably foresee that the order would be appealed. This argument unduly focuses on the reasonableness of SWVP's reliance, rather than on the compelling reasons why investors should be affirmatively encouraged to rely on the finality of confirmation orders.[117]

The *Transwest* dissent found substantial support for its broad view of reliance in cases from the Third, Fifth, and Ninth Circuits. In *In re GWI PCS 1, Inc.*,[118] the Fifth Circuit rejected the argument that "insiders" lack the reliance interests necessary to invoke the doctrine, stating that "it would be natural for many, if not a majority, of the transactions set forth in a reorganization plan to involve the participants of the chapter 11 proceedings."[119] Similarly, the Third Circuit has held, "Our inquiry should not be about the 'reasonableness' of the Investors' reliance or the probability of either party succeeding on appeal. Rather we should ask whether we want to encourage or discourage reliance by investors and others on the finality of bankruptcy confirmation orders."[120] Finding that reliance should be encouraged, the Third Circuit applied the doctrine and dismissed the appeal.[121] The Seventh Circuit justified granting broad protection to deal reliance on economic terms, stating that "Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. . . . By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate."[122]

Thus, equitable mootness is justified by the desire to maximize the overall value of the estate by cutting off rights to

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117. *Id.*
118. *In re* GWI PCS 1 Inc., 230 F.3d 788 (5th Cir. 2000).
119. *Id.* at 802.
120. *In re* Cont'l Airlines, 91 F.3d 553, 565 (3d Cir. 1996).
121. *Id.*
122. *In re* UNR Indus., Inc., 20 F.3d 766, 770 (7th Cir. 1994).

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appeal and thereby encouraging participants in the process to invest new dollars and compromise claims. The need to achieve a deal trumps fussy concerns about the need to adhere to normal judicial process. Bankruptcy is viewed as an exceptional process producing unique problems that cannot necessarily be resolved by conventional judicial means. The justifications for the doctrine are based on pure pragmatism, and not more traditional and limited equitable principals.

Charter is a uniquely apt demonstration of this brand of short-sighted pragmatism. There, several of the principal parties engaged in negotiations over a significant deal that would affect not only their own claims, but also claims of other creditors against parties besides the debtor. The terms of the settlement included releases of parties to the settlement from claims held by these excluded creditors—raising a controversial issue that has been the subject of considerable debate among the courts. Once agreement among these negotiating creditors was secured, the plan was presented in a package to the bankruptcy court as a done deal. Once approved, the parties moved quickly to implement the plan, presenting the appellate courts a *fait accompli* that could not be undone without significant pain. While it is undoubtedly true that the doctrine of equitable mootness made this particular deal possible because the parties to the deal could rely on its finality, one has to wonder what type of deal might have been struck if the included parties had been forced to take account of the possibility that the excluded parties might have a right to appeal.

C. *Does Equitable Mootness Protect or Accelerate Finality?*

Inextricably tied to the reliance theory of equitable mootness is the notion that it protects the finality of the court's confirmation order. A moment's reflection, however, reveals that the doctrine is not is necessary to protect finality. Finality will come whether or not the confirmation is appealed—appeals run their course and ultimately the controversy will be over. Thus, rather that protecting finality, the point of equitable mootness is that the doctrine accelerates finality to the earliest possible point in time—the consummation of the transactions contemplated by the plan.

This point can be best illustrated by examining cases in which the court considers a stay of a plan confirmation. The easiest way to avoid the difficulties of unscrambling an egg is,

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of course, to avoid scrambling it in the first place. A stay of confirmation might permit the parties to maintain the status quo while securing an appellate determination regarding the fundamental legal issues that might affect the plan. Doing so, however, may delay finality beyond the time at which the business will fail, or at least will lose substantial value. The analogy to a "melting ice cube" is common.[123]

The Bankruptcy Rules provide for an automatic stay of confirmation orders for fourteen days and plan proponents may, and sometimes do, seek a reduction of that time.[124] Beyond that period, the Rules provide that parties may seek a further stay pending appeal.[125] Generally, the motion for a stay must be filed in the bankruptcy court and is reviewable by the court in which the appeal is filed, however, there the rules provide that the movant may bypass the bankruptcy court upon a showing that filing a motion in the bankruptcy court would be impracticable.[126] The rules also provide that the court may impose a bonding requirement as a condition of the relief.[127]

Although courts differ regarding the application of the standards for a stay, most agree that a stay motion should be analyzed under a four-part test in which the movant must show some combination of (1) a likelihood of substantial injury to the moving parties if the stay were denied; (2) a likelihood (or a possibility) of success on appeal; (3) lack of a substantial injury by non-moving parties if the stay were granted; and (4) the public interest in favoring (or denying) a stay.[128] There is a split regarding whether the movant must show that all of the

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123. *See In re* ICL Holding Co., Inc., 802 F.3d 547, 551 (3d Cir. 2015); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 884–89 (2014). Although the melting ice cube reference is most often found in cases considering asset sales under 11 U.S.C. § 363, the analogy is apt in the stay context as well.

124. Fed. R. Bankr. Proc. 3020(e).

125. Fed. R. Bankr. Proc. 8007.

126. Fed. R. Bankr. Proc. 8007(b)(2).

127. Fed. R. Bankr. Proc. 8007(c).

128. *See In re* A & F Enterprises, Inc. II, 742 F.3d 763, 766 (7th Cir. 2014); *In re* First S. Sav. Ass'n, 820 F.2d 700, 709 (5th Cir. 1987); *In re* Gen. Motors Corp., 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009); Richard S. Kanowitz & Michael A. Klein, *The Divergent Interpretations of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders*, 17 J. BANKR. L. & PRACT. 3 (2008).

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factors point toward granting a stay or if they are to be thought of as a balancing test.[129]

In the context of equitable mootness, the relative balance of harms to the moving and non-moving parties is particularly relevant. Some courts hold that equitable mootness, standing alone, is not sufficient to show irreparable injury.[130] Others find that the prospect that a plan may be substantially consummated, and so difficult to unwind that equitable mootness would apply, is enough to show that the movant would be irreparably injured.[131] That harm to the movant, however, is often offset by the corresponding harm to the non-moving parties—delay in finality of the plan, finality that would ultimately be protected by the equitable mootness doctrine.

The bankruptcy case of General Motors provides a case in point. The stay decision there involved the sales order under which the assets of GM were sold to "new GM" free and clear of certain claims held by the movants. The litigants sought both a direct appeal of the sale order and a stay of the order, basing their stay motion on the fact that if the sale closed, there would be a high probability that the appeal would be dismissed as moot. The bankruptcy court agreed with this probability and with the argument that such dismissal would cause irreparable injury to the movants.[132] Tipping the scales against the stay, however, was the court's view that granting the stay would "result in extraordinary prejudice to all of the other

129. *See* Kanowitz & Klein, *supra* note 128; *Gen. Motors*, 409 B.R. at 30.

130. *See In re* W.R. Grace & Co., 475 B.R. 34, 206 (D. Del. 2012), *aff'd*, 729 F.3d 332 (3d Cir. 2013) ("The Third Circuit and courts within its appellate jurisdiction have previously recognized, however, that the risk of equitable mootness by itself is insufficient to demonstrate irreparable injury for purposes of a stay."); Kanowitz & Klein, *supra* note 128, at 4.

131. See *In re* Tribune Co., 477 B.R. 465, 477 (Bankr. D. Del. 2012), in which the Delaware Bankruptcy Court, contrary to the District Court in W.R. Grace, held that the likelihood that an appeal will be dismissed based on equitable mootness is sufficient to constitute irreparable harm. *See also In re* Adelphia Commc'ns Corp., 361 B.R. 337, 349 (S.D.N.Y. 2007) (holding that potential equitable mootness constitutes irreparable injury and stating, "The strong possibility of mootness based on substantial consummation of a bankruptcy plan means that absent a stay of an order confirming a plan of reorganization pending appeal, many bankruptcy court confirmation orders will be immunized from appellate review even if the remaining stay factors are satisfied.").

132. *Gen. Motors*, 409 B.R. at 31.

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parties in [the] case, in both direct monetary terms and terms of irreparable injury."[133]

The court was motivated by the fact that the U.S. Government, the principal funder of the sale transaction, was willing to extend financing only if the sale transaction was consummated within a matter of days of the stay decision. The consequences of a loss by GM of that funding would, the court found, be a liquidation,[134] imposing a "staggering" injury on the public interest. This prospect led the court to conclude that the balancing of the factors was not even close to favoring a stay. Even if the government's financing offer could be extended, the court opined that GM might nevertheless fail because customers would be reluctant to buy cars from a manufacturer "whose future was uncertain and that was entangled in the bankruptcy process."[135] The court stated, "Causing all of those interests to be sacrificed for these litigants' ability to avoid mootness arguments is an intolerable result."[136] Underscoring that conclusion, the court found that even if all of the other irreparable injuries to the employees, retirees, suppliers, and dealers could be addressed, the minimum bonding requirement would be $7.4 billion—an amount the movants were unwilling to post.[137]

Obviously, the GM case presents an extreme example of the costs of delaying finality. It does, however, illustrate one important point about the role of equitable mootness. The doctrine works alongside the stay analysis in complex cases to force early finality to the plan confirmation. The court there was convinced that the effect of the stay denial would be a loss by the objecting parties of appeal rights on an issue that, while fairly settled in the Second Circuit, was controversial when viewed on a national level.[138] Nevertheless, the deal the court

133. *Id.* at 32.
134. *Id.*
135. *Id.* at 32.
136. *Id.* at 33.
137. *Id.* at 34
138. In the sale order opinion, the court stated, "Viewed nationally, the caselaw is split in this area, both at the Circuit Court level and in the bankruptcy Courts. Some courts have held that section 363(f) provides a basis for selling free and clear of successor liability claims, and others have held that it does not. But the case law is *not* split in this Circuit and District." *In re* GMC, 407 B.R. 463, 503–04 (Bankr. S.D.N.Y. 2009).

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was presented was the only one available and the court was convinced that it truly was a onetime offer to save an enormous melting ice cube. Given the stakes involved and the complexity of the problem, the entire case was an exercise in pragmatism trumping the normally principled judicial process.

Not every case is so complicated, however. The court in *General Motors* distinguished the facts of that case from those of *In re St. Johnsbury Trucking Co., Inc.*,[139] in which the U.S. government objected to a release of the post-bankruptcy responsible officer from potential future CERCLA liability. The plan there was simple and contemplated the liquidation of the debtor. All that was at stake was a potential two-week delay in creditor distributions while the court considered an expedited appeal.[140] These factors justified the court's decision to grant a stay.[141]

Nevertheless, the financial distress giving rise to bankruptcy often creates a sense of crisis and impending doom that makes melting ice cube arguments powerful. This seems particularly likely in contemporary reorganizations that are marked by a critical need for continued financing and early sale motions. In some cases, everything seems like an emergency[142] and credible threats by the major players to withdraw from financing or sale transactions, such as the government's threat in GM, would be hard for a bankruptcy judge to resist.

III.
THE DARK SIDE OF EQUITABLE MOOTNESS

There is considerable force to the idea that bankruptcy presents a set of unique problems that require unique solutions. The efficiency of the bankruptcy process has long been a subject of intense interest among its practitioners and commentators. On this criteria, equitable mootness seems a logical

139. *In re* St. Johnsbury Trucking Co., 185 B.R. 687, 689 (S.D.N.Y. 1995).

140. *Id.* at 690.

141. *Id.* at 691.

142. *See* Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375, 1407 (2010) ("[T]the very 'nature of Chapter 11 practice,' where the stock in trade is akin to that of the hospital emergency room, 'tends to quickly transform [even] so-called extraordinary and exceptional relief—to be granted only when absolutely necessary for a successful reorganization—into the ordinary routine.'").

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way to bring cases to a swift and certain conclusion while still providing objecting parties an opportunity to be heard. The result might be justified as providing a balance between pursuing the rehabilitative goals of Chapter 11 (or at least the maximization of the value of the business for all of the stakeholders) on one side and the protection of dissenting creditors on the other. The notion that everyone should have the right to pursue every possible legal argument in every possible venue is unrealistic and some compromises to principal are necessary. Minority claimants should not be able to wield appeal rights as a strategic device to leverage a better payout at the expense of the rest of the claimants.

On the other hand, equitable mootness presents its own opportunities for strategic behavior. The doctrine might itself be wielded in an effort by the most powerful claimants in the case to force through a plan that violates the entitlements of the less powerful by presenting the plan as a *fait accompli*—a plan that represents the absolute best that can be negotiated, and one that, if delayed, will result in the collapse of the business and losses for all. Such a presentation would be a gamble but with enough pressure on the bankruptcy judge, it might accomplish the goal. As Judge Krause noted, "Under these circumstances, equitable mootness merely serves as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges."[143]

Charter Communications might be cynically viewed as just such an effort. *Charter* involved a prepackaged bankruptcy case that the bankruptcy court described as "perhaps the largest and most complex prearranged bankruptcy ever attempted."[144] The case involved several contested issues involving controversial and unsettled bankruptcy questions: among them, the authority of the court and desirability of granting a third party release[145] and the ability to confirm a joint plan of reorganization—a plan that reorganizes multiple corporate entities—based on the affirmative vote of a single class of cred-

143. One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 448 (3d Cir. 2015) (Krause, J. concurring).
144. *In re* Charter Commc'ns, 419 B.R. 221, 230 (Bankr. S.D.N.Y. 2009).
145. *Id.* at 257–59.

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itors from only one of the reorganized entities.[146] The bankruptcy court confirmed the plan, overruling the well-articulated objections of a group of equity holders and a group of bond holders who were not even participants in the pre-bankruptcy negotiations. Following that decision, the bankruptcy court denied a motion for an emergency stay. The plan took effect 13 days after the bankruptcy court's decision whereupon the debtor moved immediately to take actions to implement the plan.[147] The Second Circuit's holding that the plan was equitably moot forestalled any further consideration of the dissenters' objections.

If that characterization is true, *Charter* came to a dismal result, but not because the bankruptcy court necessarily got the law wrong or because the dissenters did not have an opportunity to present their objection. By all accounts, the confirmation hearing was a hard fought[148] and the issues were thoroughly aired. The real problem with the decision is that it enabled the plan proponents to construct a single plan that simply bypassed the easily articulable objections of the dissenting creditors, present it to the bankruptcy court as a done deal that was the only hope for the salvation of this enormous and complex entity, implement it immediately and insulate it against further question.[149] The only protection available to the dissenters was that provided by a lone judge under immense pressure to approve the only reorganization plan presented. The bankruptcy court recognized the approach taken by the plan proponents:

> Viewed simplistically, the litigation over confirmation amounts to an inter-creditor dispute over which class of creditors should receive enhanced returns. Viewed more theoretically, the litigation is a test of the chap-

146. *Id.* at 266.

147. *In re* Charter Commc'ns., Inc., 691 F.3d 476, 481 (2d Cir. 2012).

148. *Id.* (noting that the confirmation hearing spanned nineteen days and that the objectors had objected at every stage of the proceedings).

149. *See* Ross E. Elgart, Note, *Bankruptcy Appeals and Equitable Mootness*, 19 CARDOZO L. REV. 2311, 2313–14 (1998) (commenting on a similar result in *Continental* that "The act of investing becomes the estoppel grounds on which an appeal will not be entertained, regardless of its merit. Such a holding grants extraordinary judicial power to sophisticated investment bankers who know how to exploit this invitation extended to them by the Third Circuit.").

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> ter 11 process itself. The parties who negotiated the Plan did so knowing that this major struggle with the lenders would follow. Accordingly, this contest is the culmination of calculated pre-bankruptcy planning (that might even be called a gamble) designed to obtain significant restructuring benefits over the foreseeable strenuous objections of formidable adversaries.[150]

Of course, maybe the plan was the best deal the participants could have hoped for, or even the only deal. But, as Professor Brubaker has aptly pointed out, in these situations often the only evidence the bankruptcy court has regarding the need for such plan provisions is the self-serving statements of the participants themselves.[151] This lack of evidence, coupled with the desire of judges to "avoid 'upsetting the applecart'" creates a tendency to protect the deal[152]—a tendency that likely carries over to the equitable mootness decision. The point here is that we cannot know what deal might have been worked out through a process that gave the dissenters the leverage to force a seat at the table.

IV.
Equitable Mootness and the Quality of Bankruptcy Court Adjudication

None of this matters much if bankruptcy courts can be trusted to get most decisions right in the first place. Naturally one would expect some errors in bankruptcy court decision-making, but it may be that the overall error rate of bankruptcy judges is in fact lower than that of their Article III reviewers. If that is true, the losses from limiting appeal rights may not be significant compared to value of reaching a quick and final deal. Good data on error or reversal rates is somewhat hard to come by,[153] but there is no reason to believe that bankruptcy

150. *Charter Commc'ns*, 419 B.R. at 234.

151. See Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. Ill. L. Rev. 959, 1027.

152. *Id.* at 1028.

153. The Administrative Office of the Courts publishes statistics on Circuit Court of Appeals reversal rates, which generally show that with the exception of 2015, Circuit Courts do not generally reverse bankruptcy decisions at a greater rate than other decisions. *See* Admin. Office of the U.S. Courts,

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courts are reversed at a rate that is substantially higher than other courts. Even reversal rates may not provide good information on the relative quality of bankruptcy court decisions—bankruptcy courts may in fact be coming to the correct decisions and having those decisions reversed by reviewing courts.[154] In the absence of statistical data on the quality of bankruptcy judgments, this Part discusses some of the qualitative considerations that might bear on the need for appellate review of bankruptcy court decisions.

As noted above, one such consideration is that bankruptcy judges' non-Article III status requires supervision by Article III judges and that appellate review is a fundamental component of that supervision. The arguments for and against this position are well stated in the various concurring and dissenting opinions set out above as well as by some commentators. This discussion, instead, focuses on prudential considerations—primarily the concerns relating to bankruptcy judges' specialization and role in Chapter 11 cases.

What is most notable about bankruptcy judges is their specialization. Substantial academic literature has explored the effect of specialization on the quality of judicial decision-making,[155] and some of that literature has specifically considered

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JUST THE FACTS: U.S. COURTS OF APPEALS (Dec. 20, 2016), https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals. The 2015 data is aberrational, most likely due to a number of appeals of an issue that had been erroneously decided by the Eleventh Circuit. *See* Jason Kilborn, *What's Wrong with the Bankruptcy Courts?* CREDIT SLIPS (Jan. 27, 2017), https://www.creditslips.org/creditslips/2017/01/whats-wrong-with-the-bankruptcy-courts.html. The problem with this statistic is that it does not show whether the Circuit Court is reversing the holding of the bankruptcy court or the interim ruling of the District Court or Bankruptcy Appellate Panel. Dispositions of appeals in those intermediate courts are not provided. It bears noting, however, that a painstaking review of reported bankruptcy cases can and has provided information on relative reversal rates of various courts in bankruptcy cases. *See* Jonathan R. Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745 (2008) (reporting results of such a review). Expanding such an inquiry is a potentially fruitful avenue of inquiry.

154. Nash & Pardo, *supra* note 153, at 1769–70 (noting the difficulties involved in determining the "correctness" of a particular judicial decision).

155. *See generally* Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667 (2009) [hereinafter Baum, *Probing the Effects*]; Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010) [hereinafter Baum, *Judicial Specialization and the Adjudica-*

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the bankruptcy courts.[156] The benefits of judicial specialization, particularly in the bankruptcy context, are many. Bankruptcy judges are drawn from the ranks of experienced bankruptcy practitioners bringing substantial expertise to what can often seem a murky and difficult area of the law.[157] By focusing on only one area of law, bankruptcy judges, can continue to develop expertise and can develop better decision-making heuristics.[158]

Bankruptcy judges' immersion in bankruptcy cases may not only lead them to develop subject matter and decision-making skill, it also likely contributes to the efficiency of the bankruptcy process. This is particularly important in complex Chapter 11 cases. Such cases have been increasingly transactional as asset sales and dominant creditor control have become the norm.[159] Practices developed by judges immersed in large complex reorganizations (the cases that are most susceptible to limited appellate review) have evolved to accommodate this development.[160] Judges likely also develop a reputation for their decision-making approaches that provides some

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tion]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice,* 59 DUKE L.J. 1477 (2010); Jeffrey W. Stempel, *Two Cheers for Specialization,* 61 BROOK. L. REV. 67 (1995).

156. *See* Robert M. Howard & Shenita Brazelton, *Specialization in Judicial Decision Making: Comparing Bankruptcy Panels and Federal District Judge Panels,* 22 AM. BANKR. INST. L. REV. 407 (2014); Nash & Pardo, *supra* note 153, at 1806; Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judges Mind,* 86 B.U. L. Rev. 1227 (2006).

157. Baum, *Probing the Effects, supra* note 155, at 1675–80 (discussing the effect of specialization on expertise); Nash & Pardo, *supra* note 153, at 1806 (concluding, in the context of appellate review, that "[i]t would seem desirable for policymakers to introduce more multimember appellate tribunals staffed by judges with particular expertise in the subject matter of the appeals."); Rachlinski, Guthrie & Wistrich, *supra* note 156, at 1229 (discussing the knowledge of bankruptcy judges).

158. Baum, *Probing the Effects, supra* note 155, at 1676; Rachlinski, Guthrie & Wistrich, *supra* note 156, at 1229.

159. *See* Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?,* 54 BUFF. L. REV. 401, 427–33 (2006) (discussing the transactional nature of Chapter 11).

160. *See* Douglas G. Baird, *The New Face of Chapter 11,* 12 AM. BANKR. INST. L. REV. 69, 92 (2004) ("Modern bankruptcy judges have become effective and highly competent professionals. In the large case, the bankruptcy judge is the Delaware Chancellor, the superbly professional magistrate who oversees a market for corporate control and ensures that it works effectively.").

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information to the lawyers, as well as third-party bidders and financers regarding the standards that will be applied to transactions or issues that require court involvement. Of course, that probably accounts for some of the growth in the caseloads in Delaware.[161]

One other benefit of both specialization and the method of selection of bankruptcy judges has been raised by Professor Troy McKenzie in an article examining the fit of bankruptcy judges with Article III values.[162] McKenzie notes that the judicial appointment process not only selects judges from the ranks of bankruptcy lawyers, it is also responsive to the bankruptcy bar's recommendations. Bankruptcy judges therefore see the bankruptcy bar as their chief audience and they usually share common views about the operation of the system.[163] This relationship includes a recognition of bankruptcy judges' "creative and energetic management of cases."[164] Perhaps most importantly, he notes that such judges "share the outlook of the bar from which they were selected and to which they remain responsive – that of skilled professionals who place a high value on pragmatic solutions to financial distress."[165] According to McKenzie, the bankruptcy bar is typically "unified and public-minded in its views about the core aims and operations of the bankruptcy process" and that this attribute alleviates some of the countervailing concerns about capture that such a close relationship might raise.[166]

Specialization and the relationship between bankruptcy bar and bankruptcy judges also has some negative consequences. Lynn LoPucki has raised concerns about the potential for judicial competition for the biggest Chapter 11 cases—

161. Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1382 (2000) ("The current evidence suggests that, in general, the 'race' to Delaware produces some efficiency gains."); David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. CIN. L. REV. 1243, 1276 (2000) (noting that Delaware "developed a reputation for fast and efficient case administration").

162. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 797–805 (2010).

163. *Id.* at 797.

164. *Id.* at 798.

165. *Id.*

166. *Id.* at 799–805.

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competition that has largely favored Delaware.[167] According to LoPucki, competition has been corrosive to the bankruptcy process because it leads judges to adjust their decisions to be more favorable to debtor interests.[168] His suggested remedy is a change in the venue rules to eliminate the competition that results from forum shopping. LoPucki's conclusions are controversial—the debate has been substantial and full-throated,[169] and will not be replicated here. It does bear noting however that the potential for capture is at least one of the attributes of judicial specialization that might give rise to some concern over lack of robust appellate review.

A more subtle, but equally significant problem with specialization and the close relationship between the bench and bar is the potential for insularity—the natural tendency of people to view issues from the perspective of the world in which they live.[170] This tendency—to see everything through the bankruptcy lens—may make it difficult for bankruptcy judges to assess whether bankruptcy doctrine has fallen out of step with the Code, or broader legal doctrines and statutory interpretation methods that have continued to evolve.[171] The concern may be particularly relevant in complex bankruptcy reorganizations where certain practices have come to be accepted as a given despite the lack of firm grounding in the Code.[172]

Financial distress of businesses presents problems that are difficult, high stakes, intensely fact-driven, and immediate.

167. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 40–48 (2005).

168. *Id.* at 41.

169. For a sampling of critiques of LoPucki's work, see Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 438–53 (2006), Jacoby, *supra* note 159, at 423–37, and Charles J. Tabb, *Courting Controversy*, 54 BUFF. L. REV. 467, 489–92 (2006).

170. *See* Baum, *Probing the Effects*, *supra* note 155, at 1678; Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 858 (2012).

171. *See* Baum, *Probing the Effects*, *supra* note 155, at 1678; Oldfather, *supra* note 170, at 858.

172. Baird, *supra* note 160, at 92–99 (discussing common practices that have a weak, or non-existent basis in the Code, and noting, "They evolve and remain largely unchecked until a district or appellate court is asked to square the practice with the Bankruptcy Code.").

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One can expect bankruptcy judges, as skilled professionals operating in a transactional setting, to work toward resolving issues in a flexible and creative way. We want that. Nevertheless, there is likely to be some value in review of that creativity by judges who are less immersed in the process.

Admittedly, this will be unconvincing to bankruptcy experts who view the process as so specialized that generalist judges are unable to appreciate the unique problems confronted on the ground.[173] There are at least two responses to this view. First, at least first level appeals are not necessarily decided by generalist judges. Bankruptcy appellate panels where available can provide an alternative path for review and while the judges on the panels are specialized, they lack immersion in the particular case. Second, over the past four decades or so since the enactment of the Code, there have been several watershed moments in which emerging practices in bankruptcy cases have been rejected by the Supreme Court and despite occasional claims that the rejected practice is essential to the reorganization process, Chapter 11 has continued to find considerable success.[174] Equitable mootness stands in the way of those types of checks on insularity that may cause the bankruptcy process to lose sight of the core principles that undergird the doctrine—both in the individual case and on a system-wide basis.

173. Nash and Pardo in their 2008 study of bankruptcy appeals find support for the fact that bankruptcy appellate panels offer higher quality appellate review than do district court and that other judicial actors perceive the BAPs to provide a higher quality review. Nash & Pardo, *supra* note 153, at 1805–06. They further conclude that that result makes it "seem desirable for policymakers to introduce more multimember appellate tribunals staffed by judges with particular expertise in the subject matter of the appeals." *Id.* at 1806.

174. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017) (overturning structured dismissal that failed to comply with the Code's priority scheme); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) (rejecting cramdown plan that did not permit the secured creditor to credit-bid); Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 458 (1999) (new value plan cannot be confirmed without allowing others to compete for the equity in the reorganized debtor); Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 199 (1988) (rejecting claim that sweat equity can serve as new value for purposes of the absolute priority rule); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1988) (undersecured creditors are not entitled to interest during the pendency of a bankruptcy case).

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V. CAN THE BANKRUPTCY PROCESS SURVIVE WITHOUT EQUITABLE MOOTNESS?

Although equitable mootness has become a regular feature of the bankruptcy landscape, there are reasons to believe that its future is not completely assured. The doctrine rests on a somewhat fragile statutory structure and dissenting voices on the Third and Sixth Circuits, including now Justice Alito, have raised compelling statutory and constitutional arguments against it.[175] The doctrine may be headed for a *Stern v. Marshall* moment in which the Supreme Court throws settled belief out the window. For many, this would be a tragic loss of a necessary reorganization tool. But, could the bankruptcy process survive the loss?

It is undoubtedly true that there are real costs to granting full appeal rights in bankruptcy cases, although it is possible that those costs are overstated by advocates of equitable mootness. Perhaps more importantly, most advocates of the doctrine mischaracterize the true source of the costs of appeal rights in bankruptcy. That misunderstanding has affected the cases and set the doctrine on the wrong path.

The real cost in allowing full appeal rights in bankruptcy is not the upsetting of reliance interests. Those reliance interests are a function of the regime that is in place. In other words, without equitable mootness, parties would understand that engaging in transactions with the debtor carries the risk that their interests would be adversely affected by an appellate court order reversing a plan confirmation. For example, a claim that an adverse outcome on appeal would affect the value of stock issued under the plan proves entirely too much. The risk of adverse litigation is ever-present and should be priced into any reorganization deal that the parties have struck. Similarly, the argument that quick resolution of the distress is critical lest the business (ice cube) melt away ignores the possibility that the drafters of a plan can incorporate legal contingencies into the plan's provisions. The risk of an appeal is a fact that is well known to the parties before the plan confirmation given the rules requiring objection and claim preservation. While drafting contingencies into a plan of reorganiza-

175. *See supra* Section I.B.

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tion might not be possible in every instance, forcing parties to confront the possibility that some contested issue might be the subject of an appeal and reversal is likely to result in better, more thoughtful, resolutions.

Indeed, equitable mootness may not be all that effective in accelerating the finality of cases given the number of appeals of equitable mootness findings themselves. Judge Krause addressed this problem in her *One2One* concurrence, observing that the appeal in that case had lasted two years. She stated, "Even if we were affirming the District Court's finding of equitable mootness, there would not have been finality until this point, as the possibility of reversal has loomed all along."[176] Equitable mootness litigation may simply be a substitute for merits litigation and therefore the benefits of the doctrine in promoting early finality may well be overstated.

Rather than the conventional reliance arguments, the cost of full appeal rights in bankruptcy is more likely to be creditors' ability to use the threat of an appeal as a hold-out device that might make consensual bankruptcy resolutions more difficult to achieve. One of the central features of the bankruptcy process is the ability to bind dissenting parties. This feature is necessary to prevent a situation in which all claimants have an incentive to delay agreement in a way that will increase their negotiating leverage. Everyone understands that the last person to agree to a deal will be the person who can obtain the best deal, thus no one agrees to a deal. On this theory, the threat of an appeal, even by a small claimant whose legal claims are tenuous or de minimis might grant that claimant more negotiating leverage than the claim merits. This leverage might create a situation in which multiple claimants routinely seek to create nuisance leverage making a global settlement impossible, or at least costly.

If the problem is the threat of frivolous, or at least tenuously grounded, appeals made strategically to increase negotiating leverage, then equitable mootness as it is currently applied is a poorly suited remedy. The doctrine cuts too widely—eliminating well-grounded appeals involving important and divisive questions and involving high stakes, as well as tenuous

176. One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 447 (3d Cir. 2015) (Krause, J., concurring).

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claims by small creditors that challenge the weight of bankruptcy authority.

Other tools are available. As then-Judge Alito and Judge Krause observed appellate courts have the power, after a ruling on the merits, to limit the relief granted on equitable grounds.[177] The ability to grant at least monetary relief, even if what is sought is a complete reversal of the plan confirmation, should enable most appeals to proceed. Concerns about the abuse of the appellate process to interpose delay or eleventh-hour objections intended for purely strategic purposes can be handled under the doctrine of laches or based on the power of the court to dismiss appeals based upon delay.[178]

Once the merits are reached, tenuous claims should be easily uncovered and dealt with as such. If the claim is meritorious, the fact that monetary relief will reduce the value of rights granted under the plan should not be viewed as upsetting the reliance interests of those parties any more than a substantial mass tort or antitrust verdict is thought to upset the reliance interests of the shareholders of the company against whom the claim is rendered. In any judicial process, the merits of the claim, rather than the difficulties of litigating the claim, should drive the outcome.

Conclusion

Although it is a regular feature of the bankruptcy landscape and is accepted doctrine by most Chapter 11 practitioners, most non-bankruptcy lawyers would likely agree that equitable mootness is, in the words of Justice Alito, a "curious doctrine."[179] It is a doctrine that invokes the language of judicial restraint, with judges sometimes expressing frustration with fact that the circumstances confronting them prohibit judicial intervention. It is a doctrine that judges invoke to tell to disappointed appellants, "We would like to help you, but, you know, it's complicated."

But equitable mootness is more than that. The very existence of the doctrine creates the circumstances that make it necessary. The doctrine is intended to encourage the reliance

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177. *One2One*, 805 F.3d at 449–50 (Krause, J., concurring); *In re* Cont'l Airlines, 91 F.3d 553, 571–72 (3d Cir. 1996) (Alito, J., dissenting).

178. *One2One*, 805 F.3d at 449 (Krause, J., concurring).

179. *Cont'l Airlines*, 91 F.3d at 567 (Alito, J., dissenting).

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that it claims to protect. It does not create finality, instead it accelerates finality. Perhaps these things are necessary in some cases. Bankruptcy negotiations are difficult undertakings and often take place in a crisis atmosphere. Bankruptcy judges understand this, reviewing judges may not. Doctrines that finally dispense with small conflicts may be necessary in the interest of the global deal. The problem is determining which conflicts are small. This may be particularly true when the reviewing court does not even take a look at the merits of a case decided by a specialist judge who may be thoroughly immersed in bankruptcy law and its transactional character, and weighed down by the real consequences of failure to achieve a deal. In that environment, likely many disputes will seem small.

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EQUITABLE MOOTNESS: IGNORANCE IS BLISS AND UNCONSTITUTIONAL

Robert Miller[1]

ABSTRACT

Even as other prudential limitations lose favor, equitable mootness continues to thrive. Its popularity derives from practical considerations: it protects third parties who have relied upon transactions approved by the bankruptcy court from the perceived unfairness wrought by reversal on appeal. In spite of its merit, equitable mootness lacks not only a statutory foundation but it also unconstitutionally extinguishes an appellant's right to an adjudication on the merits by an Article III judge. Recent Supreme Court opinions have tied the constitutionality of today's bankruptcy judge adjudications and appeals to the traditional boundaries of such matters at common law and under the 1800 Bankruptcy Act. Because bankruptcy judgments were historically subject to appellate review, eliminating the modern analog based solely upon prudence violates an appellant's constitutional rights. Rather than continue to apply equitable mootness, courts should retreat to its origins, the stay of a judgment pending appeal. Expanding the stay pending appeal test to consider the raison d'etre for equitable mootness, the unfairness to third parties wrought by reversal, weighs this concern in a constitutional package.

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[1] Partner at Manier & Herod, P.C. All the views expressed, and mistakes made herein are the author's own. Many thanks to Professors Steven Lubben and Christopher Frost, as well as Charlie Shelton, for their thoughtful comments. This Article is dedicated to my son, Everett P. Miller.

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INTRODUCTION

To safeguard the balance created by the separation of powers among the three branches of government, courts should exercise their statutory jurisdiction to the furthest extent.[2] Paradoxically, judges have self-imposed limitations on their authority. These prudential limitations[3] allow unelected tribunals to punt on matters that the elected branches have expressly given them a duty to decide.[4] Recent Supreme Court jurisprudence has rightly condemned prudential limitations.[5] Nonetheless, prudential limitations peculiar to bankruptcy frequently limit parties' appellate rights.[6] One of these limitations is equitable mootness.

Equitable mootness eliminates a litigant's appellate rights without any consideration of the merits of its appeal, if reversing complex court-approved transactions[7] is inequitable.[8] Supporters of the doctrine cite a number of policy bases as support for the doctrine including the difficulty of undoing complex transactions, the promotion of finality in order for debtors to consummate transactions necessary for reorganizations, and the importance of protecting third parties' reliance interests in such transactions.[9] Without equitable mootness, courts have questioned whether "any complex plan would be consummated until all appeals are terminated."[10] Although such statements may be hyperbolic, eliminating equitable mootness would alter the parties' relative strengths and leverage points. Certainly, debtors' bargaining power would be weakened because third parties would price-in a greater risk of a successful appeal into the cost of the transaction. Third parties might also be less willing to conduct business with the debtor if the specter of a reversal looms larger.[11]

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[2] *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 821 (1976); and then citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

[3] *See generally* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017) (discussing democratic concerns raised by prudential limitations).

[4] *See* Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 800 (6th Cir. 2016). *See generally*, Smith, Jr., *supra* note 3.

[5] *See, e.g., Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014).

[6] These limitations include the doctrine of equitable mootness discussed in this Article as well as the person aggrieved standard for standing to appeal. Although both doctrines originated in bankruptcy, the obvious parallels between bankruptcy and receivership proceedings have led to their application to receivership appeals. *See, e.g.*, SEC v. Capital Consultants, LLC, 397 F.3d 733, 746 (9th Cir. 2005) (applying equitable mootness to receivership appeal of receiver's plan); Fid. Bank, Nat'l Ass'n v. M.M. Grp., Inc., 77 F.3d 880, 882 (6th Cir. 1996) (applying person aggrieved doctrine to appellate standing in receivership proceeding).

[7] Although the doctrine of equitable mootness is most commonly applied in the context of appeals of the confirmation of plans of reorganization, it has also been applied regarding appeals of the confirmation of liquidating plans, "settlements, injunctive relief, leave to file untimely proofs of claim, class certification, property rights, asset sales, [] payment of prepetition wages[,] . . . [and] financing orders." *In re* Arcapita Bank B.S.C.(C), Nos. 13 Civ. 5755(SAS), 13 Civ. 5756(SAS), 2014 WL 46552, at *5 (S.D.N.Y. Jan. 6, 2014). The Article uses the terms plan and transaction interchangeably.

[8] *In re* Transwest Resort Props., Inc., 801 F.3d 1161, 1167 (9th Cir. 2015).

[9] *In re* Tribune Media Co., 799 F.3d 272, 279 (3d Cir. 2015).

[10] *Id.* at 288.

[11] *See* Burchinal v. Cent. Wash. Bank (*In re* Adams Apple, Inc.), 829 F.2d 1484, 1488 (9th Cir. 1987).

Meanwhile, appellants' holdup power would be amplified as a party with a plausible appeal could cloud a debtor's emergence from bankruptcy for many years until either all appeals are exhausted or an extortionate settlement is extracted.[12] To be sure, the complexity inherent in many bankruptcy transactions combined with the impact on third parties and debtors can make the effects of reversal appear inequitable.

For a number of reasons, the popularity of equitable mootness appears poised to increase. First, as the size of corporate groups grows, so does the complexity of the accompanying restructurings and the number of third parties relying upon the restructuring. Courts will be ever more cognizant of the difficulty to equitably unscramble these transactions. Second, there are minimal downside risks for requesting a dismissal based on equitable mootness. In the context of a mega bankruptcy case, the cost of asserting equitable mootness is miniscule compared to the benefits if the appeal is dismissed. Third, the Supreme Court has refused to grant certiorari to evaluate the doctrine[13] while the Courts of Appeals have unanimously applied it.[14] Fourth, it has been expanded outside of its original application in chapter 11 cases to chapter 7,[15] chapter 9,[16] chapter 13,[17] 11 U.S.C. § 304 (the predecessor to chapter 15) cases[18] and receivership cases.[19] Further expansion is possible as parties are now requesting the equitable mootness be applied outside of the insolvency cases.[20]

Although the merits and popularity of equitable mootness are obvious, problems beset the doctrine. In spite of Courts of Appeals' admonitions that the doctrine should only be applied cautiously, "district courts have continued to invoke the doctrine in modest, non-complex bankruptcies and where appellants have sought limited

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[12] *In re Tribune Media*, 799 F.3d at 288–89 (Ambro, J., concurring).

[13] *See, e.g.*, Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1584 (2017), *cert. denied sub nom*, Quinn v. City of Detroit, 137 S. Ct. 2270 (2017); *In re Tribune Media*, 799 F.3d 272, *cert. denied sub nom*, Aurelius Capital Mgmt., L.P. v. Tribune Media Co., 136 S. Ct. 1459 (2016).

[14] *See In re Tribune Media*, 799 F.3d at 285. All the circuits except the Federal Circuit (which does not hear bankruptcy appeals) have at least recognized equitable mootness in some form, while of these, the Eighth Circuit is the only one that has yet to recognize it in a published opinion. *See* Briggs v. LaBarge (*In re* McGregory), 223 F. App'x. 530, 531 (8th Cir. 2007); Briggs v. LaBarge (*In re* Smith), 209 F. App'x. 607, 607–08 (8th Cir. 2006).

[15] Stokes v. Gardner, 483 F. App'x. 345, 346 (9th Cir. 2012); *see also In re* Nica Holdings, Inc., 810 F.3d 781, 786 n.4 (11th Cir. 2015) ("assum[ing] without deciding" that equitable mootness is applicable in chapter 7).

[16] Bennett v. Jefferson Cty., 899 F.3d 1240, 1251 (11th Cir. 2018); *In re City of Detroit*, 838 F.3d at 804–05; *In re* City of Vallejo, 551 F. App'x 339, 339 (9th Cir. 2013); *In re* City of Stockton, 542 B.R. 261, 274 (BAP 9th Cir. 2015); Alexander v. Barnwell Cty. Hosp., 498 B.R. 550, 560 (D.S.C. 2013).

[17] Walker v. Grigsby, Civil Action No. AW–06–62, 2006 WL 4877450, at *5 (Bankr. D. Md. Apr. 11, 2006).

[18] Allstate Ins. Co. v. Hughes, 174 B.R. 884, 885–86, 890–91 (S.D.N.Y. 1994).

[19] S.E.C. v. Capital Consultants, LLC, 397 F.3d 733, 746 (9th Cir. 2005); *see* S.E.C. v. Wealth Mgmt. LLC, 628 F.3d 323, 332 (7th Cir. 2010) (recognizing the possibility of applying equitable mootness but determining the appeal on the merits).

[20] *See* United States v. Par. Chem. Co., No. 17-4192, 2019 WL 81978, at *5 (10th Cir. Jan. 3, 2019) (appellees requested the court apply equitable mootness to sale of property pursuant Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) lien but Court of Appeals determined appeal on the merits).

relief."[21] Just as troubling, the frequent appeals of equitable mootness determinations, often followed by remands to the district courts for merits determinations,[22] undermine its promise of finality.[23] Seeking to buttress their authority, some courts have attempted to tether equitable mootness to the provisions of the Bankruptcy Code,[24] but none exist.[25] This lack of statutory basis is not just an academic problem; it leaves courts without an anchor for the inquiry itself. Lacking express guidance, courts apply different factors with different weights—leading to different results depending upon the venue. In spite of these problems, courts almost unanimously uphold it against challenges. Only recently have judges questioned its current formulation as arbitrary, unconstitutional, and inefficient.[26]

Courts applying equitable mootness substitute their own views on the relative importance of the appellant's rights compared to third parties'—a prudential decision. This decision is made without considering the merits.[27] The separation of powers concerns are obvious. In recently limiting the application of prudential standing, the Supreme Court explained that "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[28] Substitute "appellate right" for "cause of action" and the problems created by the doctrine of equitable mootness crystalize.

This Article explores the newest critique of equitable mootness: its violation of Article III of the Constitution. Equitable mootness is constitutionally questionable because it denies appellants' right to an appeal on the merits by an Article III judge. The Supreme Court has repeatedly suggested that the constitutionality of bankruptcy adjudications depends upon the historical treatment of such matters at common law

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[21] *In re* One2One Commc'ns, LLC, 805 F.3d 428, 438–39 (3d Cir. 2015) (Krause, J., concurring); *see also id.* at 439 ("Since *Continental Airlines*, we have reversed findings of equitable mootness or declined to dismiss appeals as equitably moot no less than seven times."). Some may posit that the willingness of district court judges to apply equitable mootness stems from their desire to dispose of bankruptcy appeals as quickly as possible. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 791–92 (2010) (examining disinclination of Article III judges to adjudicate bankruptcy matters).

[22] This Article will assume that the appeal from the bankruptcy court was made to a district court rather than a bankruptcy appellate panel.

[23] *In re One2One*, 805 F.3d at 446–47 (Krause, J., concurring).

[24] *See In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994).

[25] Although few provisions of the Bankruptcy Code concern appeals, 11 U.S.C. § 363(m) and 11 U.S.C. § 364(e) limit the effect of appellate reversals in certain situations. As explained in Part III of this Article, the enactment of these provisions but not a similar provision providing for equitable mootness suggests Congress did not intend for equitable mootness to exist.

[26] *See, e.g.*, Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 805–06 (6th Cir. 2016) (Moore, J., dissenting); *In re One2One*, 805 F.3d at 443–46 (Krause, J., concurring).

[27] *See In re* Cont'l Airlines, 91 F.3d 553, 567 (3d. Cir. 1996) (Alito, J., dissenting) ("The majority adopts the curious doctrine of 'equitable mootness,' which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief.").

[28] Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388 (2014).

and federal law contemporaneous with the Framing of the Constitution.[29] In the case of a bankruptcy appeal, Congress would need to provide appellate rights at least as extensive as the rights to appeal the bankruptcy commissioners' orders to the Chancellor and the district courts under the 1800 Act.[30] Based upon this strong historical precedent, the right to appeal from a final order by a bankruptcy judge to an Article III judge is a constitutionally protected right. Equitable mootness eliminates this right and leaves appellants without their constitutionally required determination by an Article III judge.[31]

In spite of these critiques, the policy underlying equitable mootness—the inequity of reversal on third parties who relied upon a restructuring transaction—is a fundamental concern for a functioning corporate bankruptcy regime.[32] A better option for supporting this policy is to add it to the analysis of the stay pending appeal. The link between equitable mootness and stay pending appeal is already strong. Whether a stay pending appeal was sought is the historical genesis of equitable mootness.[33] More recently, courts have gravitated back to this original focus.[34] Adoption of an expanded stay pending appeal test would complete this transition.

The momentum in favor of an expanded stay pending appeal test is deserved. By considering the interests of non-parties affected by a reversal, the policy concerns supporting equitable mootness are addressed while the critiques of equitable mootness are inapplicable. Granted, the stay pending appeal does not provide the same protection to appellees as equitable mootness. Lesser protection constitutionally applied is normatively preferable to greater protection available from an unconstitutional doctrine.

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[29] *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting); *id.* at 1970 (Thomas, J., dissenting); Stern v. Marshall, 564 U.S. 462, 483–84 (2011); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 43–46 (1989); N. Pipeline Constr. Co v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).

[30] *See Wellness Int'l*, 135 S. Ct. at 1970 (Thomas, J., dissenting); James E. Pfander, *Article I Tribunals, Article III Courts and The Judicial Power of the United States*, 118 HARV. L. REV. 643, 721, 729 (2004); John A. E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in the Bankruptcy Courts*, 91 AM. BANKR. L.J. 311, 323 (2017) (arguing that decisions of commissioners were subject to confirmation by Chancellor or the law courts).

[31] *See In re City of Detroit*, 838 F.3d 79 at 811–12 (Moore, J., dissenting); *In re One2One*, 805 F.3d at 444 & n.10 (Krause, J., concurring).

[32] In this way, equitable mootness is quite similar to third party releases. Just like equitable mootness, third party releases are viewed as necessary to facilitate complex bankruptcy cases, SEC v. Drexel Burnham Lambert Grp., Inc. (*In re* Drexel Burnham Lambert Grp., Inc.), 960 F.2d 285, 293 (2d Cir. 1992), while they lack statutory support, *In re* SunEdison, Inc., 576 B.R. 453, 462 (Bankr. S.D.N.Y. 2017); *In re* Transit Grp., Inc., 286 B.R. 811, 815–16 (Bankr. M.D. Fla. 2002) and are constitutionally questionable based on Article III, *see In re* Millennium Lab Holdings II, LLC, 242 F. Supp. 3d 322, 339 (D. Del. 2017) (asserting that third party releases covering common law claims likely abridge right to a final judgment by an Article III judge because they tantamount to final judgments entered by a bankruptcy judge).

[33] *See infra* Part II.

[34] *See e.g.*, Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012); Carrega v. Grubb & Ellis Co. (*In re* Grubb & Ellis Co.), 523 B.R. 423, 441 (S.D.N.Y. 2014); RM 18 Corp. v. Aztex Assocs., L.P. (*In re* Malese 18 Corp.), 426 B.R. 44, 49 (E.D.N.Y. 2010)

This solution is not pie in the sky. The four-factor test for a stay pending appeal under Federal Rule of Bankruptcy Procedure 8007[35] is a product of traditional judicial gloss.[36] Although the Supreme Court has confirmed the four factors, it has not delineated the exact boundaries of the factors because they "contemplate individualized judgments in each case."[37] This flexibility leaves room for the modified test for bankruptcy appeals. The third factor in the traditional test is "whether issuance of the stay will substantially injure the other parties interested in the proceeding."[38] When a stay pending appeal is sought in a bankruptcy case, this factor should consider non-parties to the appeal who could be injured by reversal. Some courts have already considered the effect on non-appellee creditors as part of the stay pending appeal inquiry.[39]

This Article will proceed by first canvassing the various justiciability doctrines and their intersection with stays pending appeal. Next, it summarizes history of equitable mootness starting with its pre-Bankruptcy Code origins and then overviews the current status of equitable mootness across the courts of appeal. It then analyzes the various critiques of equitable mootness while focusing on its violation of Article III, which has not been evaluated prior to this Article. To conclude, this Article will argue for altering the stay pending appeal standard to include the concerns central to equitable mootness. This solution incorporates the concerns supporting equitable mootness but repackages them in a form that is fairer, unquestionably constitutional, and supported by the relevant statute.

I. CONSTITUTIONAL MOOTNESS AND STAY PENDING APPEAL

Before there was equitable mootness, there was constitutional mootness and an appellant's right to seek a stay pending appeal. Surveying the latter two is necessary to understanding the first. Article III of the Constitution limits federal courts to adjudicating only live cases and controversies.[40] This is true at not only the trial court level but at all stages of appellate review.[41] Constitutional mootness is among the prudential doctrines created by judges to ensure the live case and controversy requirement is met.[42] A court inquires whether further proceedings can affect the

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[35] FED. R. BANKR. P. 8007.

[36] *See* Nken v. Holder, 556 U.S. 418, 434 (2009) (discussing the traditional principles involved in a decision to grant a stay pending appeal).

[37] *Id.* at 433–34 (quoting Hilton v. Braunskill, 481 U.S. 770, 777 (1987)).

[38] *Id.* at 434 (quoting *Hilton*, 481 U.S. at 776). Other courts compared the injury to the appellant if the order is not stayed to the injury to the appellee if the stay is granted, a "balance of the hardships." *E.g. In re* Gardens Reg'l Hosp. and Med. Cntr., Inc., 567 B.R. 820, 832 (Bankr. C.D. Cal. 2017).

[39] *See, e.g.*, *In re* Alpha Nat. Res., Inc., 556 B.R. 249, 264 (Bankr. E.D. Va. 2016); *In re* W.R. Grace & Co., 475 B.R. 34, 208 (D. Del. 2012); *In re* Williamson, 414 B.R. 892, 895 (Bankr. S.D. Ga. 2009); *In re* Lykes Bros. S.S. Co., 221 B.R. 881, 885 (Bankr. M.D. Fla. 1997).

[40] *See* U.S. CONST., art. III, § 2, cl. 1; U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 20–21 (1994); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990).

[41] *U.S. Bancorp*, 513 U.S. at 21; *Lewis*, 494 U.S. at 477.

[42] The other best-known limitations are ripeness, standing, the political question doctrine and the prohibition on advisory opinions. Keitel v. Mazurkiewicz, 729 F.3d 278, 280 (3d Cir. 2013).

subject matter of the proceeding.[43] When an event occurs rendering it impossible for a court to grant any effective relief, the case becomes moot and it must be dismissed without the merits being heard.[44] No controversy exists when no effective relief can be granted.[45] This is true no matter the stakes. To wit, the Supreme Court dismissed the appeal of the Section 363 sale of Chrysler's assets because the appeal was moot.[46] While justice imposed by Constitutional mootness may seem rough, it is mitigated by the narrowness of its application. It only arises when no effective relief can be fashioned.[47] If some effective relief is possible, the appeal is not moot, and it should proceed.[48]

Constitutional mootness often arises when actions approved by a trial court are consummated and the remedy sought by the appellant becomes either impossible or impracticable to obtain.[49] One way for an appellant to forestall this fate is to obtain a stay pending appeal.[50] If an appellant successfully obtains a stay, the status quo will be preserved along with the appellant's opportunity to obtain a remedy.[51] Rule 8 of the Federal Rules of Appellate Procedure and its analog, Rule 8007 of the Federal Rules of Bankruptcy Procedure, govern the process of obtaining a stay of a judgment or order.[52] Ordinarily, both require the initial motion to be brought at the trial court level—district court for Rule 8[53] and bankruptcy court for the Rule 8007.[54] Upon the trial court's determination on a stay motion, the appellant may petition the appellate court to modify or vacate the trial court's order[55] or even petition the circuit justice for a stay.[56]

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[43] Mills v. Green, 159 U.S. 651, 653 (1895).

[44] Church of Scientology v. United States, 506 U.S. 9, 12 (1992) (citing *Mills*, 159 U.S. at 653). Constitutional mootness may be raised *sua sponte*. Medberry v. Crosby, 351 F.3d 1049, 1053–54 & n.3 (11th Cir. 2003) (holding that, because mootness "strik[es] at the heart of federal subject matter jurisdiction" it may be raised sua sponte) (quoting Sannon v. United States, 631 F.2d 1247, 1250 (5th Cir. 1980)).

[45] *See Mills*, 159 U.S. at 653.

[46] *See* Ind. State Police Pension Tr. v. Chrysler LLC, 558 U.S. 1087 (2009) (per curiam) (granting cert. but ordering lower court to dismiss appeal regarding sale of substantially all the assets of automaker Chrysler LLC); Ind. State Police Pension Tr. v. Chrysler LLC (*In re* Chyrsler LLC), 576 F.3d 108, 112 (2d Cir. 2009).

[47] *Church of Scientology*, 506 U.S. at 12–13.

[48] *Id.* at 12–14; *see also* Golfland Ent. Ctrs., Inc. v. Peak Inv., Inc. (*In re* BCD Corp.), 119 F.3d 852, 856 (10th Cir. 1997); Resolution Tr. Corp. v. Swedeland Dev. Grp., Inc. (*In re* Swedeland Dev. Grp., Inc.), 16 F.3d 552, 560 (3d Cir. 1994) (en banc).

[49] *See* Sullivan Cent. Plaza, I, Ltd. V. BancBoston Real Estate Capital Corp. (*In re* Sullivan Cent. Plaza, I, Ltd.), 914 F.2d 731, 733 (5th Cir. 1990).

[50] *Id.*

[51] *See* Veasey v. Abbott, 870 F.3d 387, 392 (5th Cir. 2017).

[52] FED. R. APP. P. 8; FED. R. BANKR. P. 8007.

[53] FED. R. APP. P. 8.

[54] FED. R. BANKR. P. 8007.

[55] This is the Court of the Appeals in the case of an appeal from the district court sitting as a trial court. FED. R. APP. P. 8. In a bankruptcy case, it could be the district court, bankruptcy appellate panel or even the court of appeals if a direct appeal is sought. *See* Fed. R. Bankr. P. 8007(b).

[56] *See* Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (*In re Thorpe Insulation Co.*), 677 F.3d 869, 881 (9th Cir. 2012); *In re* Highway Truck Drivers & Helpers Local Union # 107, 888 F.2d 293, 297 (3d Cir. 1989) (citing *In re* Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981)). Supreme Court Rule 23

Because a proponent often seeks to quickly consummate a restructuring transaction following bankruptcy court approval,[57] it may be imperative to obtain a stay pending appeal to protect against constitutional mootness.[58] A paradigm example is the sale of securities following confirmation of a plan of reorganization.[59] The debtor-issuer will attempt to sell its securities as soon as possible after confirmation in order to raise cash to make payments under the plan.[60] If a stay is not obtained, the prevailing party may treat the bankruptcy court's order as final and consummate the transactions contemplated by the confirmed plan.[61] Without a stay, there may be no possible relief available to appellant (i.e. constitutional mootness) due to an inability to undo consummated transactions.[62]

Given the severity of constitutional mootness, the opportunity for an appellant to obtain a stay is a foundational component of the federal appellate system. Indeed, "[i]t has always been held . . . that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal."[63] An appellant's request for a stay pending appeal requires a balancing of interests. On the one hand, the power to grant a stay pending appeal can protect against irreparable harm resulting from the enforcement of a judgment prior to its reversal (such as constitutional mootness).[64] On the other hand, any stay must also provide sufficient protection to the appellee against losses resulting from the stay if the appellate court confirms the lower court's judgment.[65]

Federal Rule of Bankruptcy Procedure 8007, the rule governing the process of obtaining a stay pending appeal from a bankruptcy court order, reflects this

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governs requests for stay from a circuit justice. *See* Frommert v. Conkright, 639 F. Supp. 2d 305, 312–13 (W.D.N.Y. 2009) (citing Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brenan, J., in chambers)). On at least one occasion, a circuit justice has stayed the implementation of a plan of reorganization. *In re* Equitable Office Bldg. Corp., 72 S. Ct. 1086, 1087, 1090 (1946) (Reed, J., in chambers).

[57] Federal Rule of Bankruptcy Procedure 6004(h) provides that an order allowing a debtor to use, sell or lease property is stayed for 14 days, which provides an opportunity to seek a longer stay or an expedited appeal. *See* Mission Prod. Holdings, Inc. v. Old Cold LLC, (*In re* Old Cold LLC), 879 F.3d 376, 387 (1st Cir. 2018). It also expressly allows a court to waive the stay when there is a sufficient business necessity to close the transaction. *Id.*; *In re* Boscov's, Inc., No. 08–11637(KG), 2008 WL 4975882, at *2 (Bankr. D. Del. Nov. 21, 2008).

[58] *See In re Highway Truck Drivers Local Union*, 888 F.2d at 298 ("[I]n addition to those situations covered under 11 U.S.C. § 363(m) and § 364(e), a myriad of circumstances can occur that would necessitate the grant of a stay pending appeal in order to preserve a party's position"); Lawrence v. Revere Copper and Brass Inc. (*In re* Revere Cooper & Brass Inc.), 78 B.R. 17, 23 (S.D.N.Y. 1987) ("[I]t is '"obligatory" upon an appellant from a confirmation order to "pursue with diligence all available remedies to obtain a stay" of the implementation of that order prior to the occurrence of comprehensive changes made in reliance on the unstayed order.'") (quoting *In re Roberts Farms*, 652 F.2d at 798).

[59] *See, e.g.*, *In re* Peabody Energy Corp., 582 B.R. 771, 775–76 (E.D. Mo. 2017).

[60] *See id.*

[61] *In re* Toc Assocs., L.P., Civ A. Nos. 92-6788, 92-6772, 92-6773, 92-6775, Bankruptcy No. 91–23375T, 1993 WL 276993, at *1 (E.D. Pa. July 13, 1993).

[62] *See In re* St. Johnsbury Trucking Co., Inc., 185 B.R. 687, 689–90 (S.D.N.Y. 1995).

[63] Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9–10 (1942) (footnote omitted). Indeed, the first Judiciary Act of 1789 contemplated an appellant's ability to obtain a writ of supersedeas and stay of execution. *Id.* at 10 n.4; *see also* Slaughter-house Cases, 77 U.S. 273, 275 (1869).

[64] *Scripps-Howard Radio*, 316 U.S. at 9; *see also* Nken v. Holder, 556 U.S. 418, 427 (2009).

[65] Athridge v. Iglesias, 464 F. Supp. 2d 19, 23 (D.D.C. 2006).

balance.[66] This rule gives an appellant the option of either posting a *supersedeas* bond or moving for a stay pending appeal.[67] The first option ensures the appellant obtains a stay. A *supersedeas* bond is a bond that it is issued in an amount set by the court as sufficient to guarantee an appellee full recovery on its judgment if the appellant is unsuccessful on appeal.[68] Because the appellee is protected from harm when a *supersedeas* bond is posted, it effectuates a stay as a matter of right.[69] Many appellants either cannot post or choose not to post a *supersedeas* bond and try to obtain a stay without posting a bond.[70] Indeed, a complex bankruptcy plan can involve transactions with assets or equity value in the billions, without even considering the administrative expenses accruing every month. As a result, the associated *supersedeas* bond could also be in the billions.[71] Faced with such an onerous burden, appellants often argue a bond is unnecessary.[72]

Another way to conceptualize a motion for a stay pending appeal is by comparing it to its brethren, the motion for a preliminary injunction. The parallels are strong as "[b]oth can have the practical effect of preventing some action before the legality of that action has been conclusively determined."[73] A preliminary injunction directs a party's course of conduct prior to a determination on the merits related to the conduct.[74] A stay pending appeal halts the effect of an entry of an order while an appeal is heard on the merits of the order.[75] Given these similarities, it is unsurprising that the test for stay pending appeal and the test for a preliminary injunction are substantially similar.[76] Both also place the burden of persuasion on the party seeking the keep the status quo;[77] these burdens are heavy because they seek extraordinary

[66] Federal Rule of Bankruptcy Procedure 8007 is the analog to Rule 8 of the Federal Rules of Appellate Procedure. Credit One Bank, N.A. v. Anderson (*In re* Anderson), 560 B.R. 84, 88 n.4 (S.D.N.Y. 2016).

[67] FED. R. BANKR. P. 8007.

[68] N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co., 895 F. Supp. 83, 84 (E.D. Pa. 1995).

[69] Frommert v. Conkright, 639 F. Supp. 2d 305, 308 (W.D.N.Y. 2009).

[70] *See, e.g.*, *id* at 307.

[71] *See, e.g.*, *In re* Tribune Co., 477 B.R. 465, 478–80 (Bankr. D. Del. 2012). This is particularly true when the value of the estate could be diminished by the stay. *See* ACC Bondholder Corp. v. Adelphia Commc'ns Corp. (*In re* Adelphia Commc'ns Corp.), 361 B.R. 337, 368 (S.D.N.Y. 2007). A party could appeal the amount of the bond as unreasonably high, however, an argument that the bond is prohibitively high without asserting a lower amount is still reasonable is unlikely to be successful. *See In re* Tribune Media Co., 799 F.3d 272, 276 (3d Cir. 2015).

[72] *See, e.g.*, *id.*

[73] Nken v. Holder, 556 U.S. 418, 428 (2009); *see also In re* Convenience USA, Inc., 290 B.R. 558, 561 (Bankr. M.D.N.C. 2003) ("A motion for a stay pending appeal in a sense seeks injunctive relief because the movant is asking that an event be halted, i.e., that the court order that a judgment or order not go into effect.").

[74] *Nken*, 556 U.S. at 428.

[75] *Id.* at 428–29 (2009). The Supreme Court distinguished between an injunction that is a "judicial process or mandate operating *in personam*" compared to a stay that "operates upon the judicial proceeding itself." *Id.* at 428.

[76] *In re Convenience USA*, 290 B.R. at 561.

[77] *Nken*, 556 U.S. at 427.

relief "intru[ding] into the ordinary processes of administration and judicial review."[78]

The test for stay pending appeal in a bankruptcy case does not differ from a typical civil case. Both apply a four-factor test:

> (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[79]

Tradition, as confirmed by the Supreme Court's opinion in *Nken v. Holder*, classifies the first two factors as the most important.[80] Moreover, an appellant must show more than a "possibility of relief" to satisfy the first factor and more than a possibility of irreparable injury to satisfy the second factor.[81] Beyond this guidance, the Supreme Court encouraged judicial discretion to make individualized determinations based upon each case's factual circumstance.[82]

II. EVOLUTION OF EQUITABLE MOOTNESS

Equitable mootness is a prudential limitation applied by appellate judges to dismiss an underlying appeal without even considering the merits.[83] This section explores the policy underpinnings and origins of this powerful doctrine.

Although prudential limitations are often applied in bankruptcy appeals, such limitations undermine the obligation of federal courts to exercise their jurisdiction fully. As Chief Justice Marshall admonished, a court has "no more right to decline

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[78] *Id.* at 433–34.

[79] *Compare Id.* at 422, 433–34, 436 (discussing a stay of an alien removal appeal), *with* United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc., No. 2:16–CV–00064–RDP, 2016 WL 470815, at *1 (N.D. Ala. Feb. 8, 2016), *appeal dismissed* (Apr. 4, 2016) (discussing a stay of a bankruptcy appeal).

[80] *Nken*, 556 U.S. at 434.

[81] *Id.* at 434–35.

[82] *Id.* at 433–34. Among the unresolved issues concerning the test is whether a movant must satisfy all four factors or if a strong showing on one or both of the first two is sufficient. The Third Circuit, in the context of a bankruptcy appeal, adopted a sliding scale approach whereby a sufficient showing on the merits and irreparable harm triggers a balancing among the four factors. *In re* Revel AC, Inc., 802 F.3d 558, 569–71 (3d Cir. 2015). This sliding scale approach has been rejected by other courts. *See id.* at 576–77 & n.3 (Schwartz, J., dissenting).

[83] Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 798 (6th Cir. 2016). There are rare situations when a bankruptcy court will apply equitable mootness in a situation outside of an appeal such as a motion to dismiss an adversary proceeding seeking to revoke a chapter 11 plan confirmation. *See, e.g.*, Almeroth v. Innovative Clinical Solutions, Ltd. (*In re* Innovative Clinical Solutions, Ltd.), 302 B.R. 136, 140–41 (Bankr. D. Del. 2003). In any event, unlike constitutional mootness, which may be found *sua sponte*, a motion to dismiss is necessary for the application of equitable mootness. *See* Minerals Techs., Inc. v. Novinda Corp. (*In re* Novinda Corp.), 585 B.R. 145, 152 (B.A.P 10th Cir. 2018) (stating that the court declined to rule on the equitable mootness claim due to the lack of a motion to dismiss).

the exercise of jurisdiction which is given, than to usurp that which is not given."[84] If a federal court possesses jurisdiction, its "obligation" to hear and decide a case is "virtually unflagging."[85] In spite of this guidance, prudential limitations often foreclose parties' rights to appeal the merits of a judgment by a bankruptcy court.[86] One may correctly assume the policy foundations of equitable mootness are strong.

The paramount policy concern reflected by equitable mootness is the protection of third parties' interests who are not participating in the bankruptcy appeal.[87] Prejudice to third-parties from a reversal on appeal can always arise, but the multiplicity of parties affected by an appeal in a bankruptcy case amplifies this issue.[88] Unlike the principal parties to a bankruptcy case, who will be aware of the appeal and can ascertain its potential effects, a less sophisticated vendor or customer may suffer from an information asymmetry and simply learn that the transaction was approved without understanding the risks associated with an appeal. Equitable mootness can mitigate the unfairness to third parties who may not even know that a debtor's very existence hinges upon the fate of appeal.[89]

Equitable mootness is also derived from the importance of finality to bankruptcy proceedings. Finality is vital to restoring third parties' confidence in a debtor and allowing it to successfully emerge from bankruptcy.[90] The greater the chance the transactions will be undone, the less money parties may be willing to pay for the debtor's securities or assets—a knock-on effect with the potential to endanger the viability of the debtor's reorganization.[91] In contrast, when third parties are confident transactions will not be overturned, they will offer the debtor better commercial terms (less risk to price in) and be generally more interested in transacting with the debtor. Writ large, this can improve debtor's prospects to reorganize and emerge from bankruptcy.[92] Even though this Article is critical of the doctrine of equitable mootness and argues for its elimination, these policy concerns are worthy of

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[84] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

[85] Sprint Commc'ns, Inc. v. Jacobs, 571 U.S., 69, 77 (2013) (quoting Colo. River Water Conservation Dist. V. United States, 424 U.S. 800, 817 (1976)).

[86] Non-coincidentally, many of the same criticisms of equitable mootness listed in this Article also apply to the person aggrieved doctrine and, just like equitable mootness, the person aggrieved doctrine has not been confirmed by the Supreme Court. For a summary of the person aggrieved doctrine, consider, S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569 (2007).

[87] *See In re* UNR Indust. Inc., 20 F.3d 766, 769–70 (7th Cir. 1994).

[88] *See In re Tri-State Bldg. Materials Co.*, 279 F. Supp. 1020, 1022 (D.S.D. 1968) (noting multiplicity of ill-informed parties often exist in a bankruptcy case).

[89] *See* Grimes v. Genesis Health Ventures, Inc. (*In re* Genesis Health Ventures, Inc.), 280 B.R. 339, 345–46 (D. Del. 2002) (explaining that a notice of appeal may not be sufficient notice to investors of the possibility of reversal).

[90] Rochman v. Ne. Utils. Serv. Grp. (*In re* Pub. Serv. Co.), 963 F.2d 469, 471–72 (1st Cir. 1992).

[91] *See In re UNR Indust.*, 20 F.3d at 770; *see also In re City of Detroit*, 838 F.3d at 798. In a similar law and economics vein, the allocation of the debtor's assets may also be distorted in favor of parties who are less sensitive to risk of reversal and against those parties who can make the highest and best use of such assets. *See In re UNR Indust.*, 20 F.3d at 770.

[92] *See In re UNR Indust.*, 20 F.3d at 770; R. Jake Jumbeck, Comment, *"Complexity" as the Gatekeeper for Equitable Mootness*, 33 EMORY BANKR. DEV. J. 171, 172–73 (2016).

protection. The expanded stay pending appeal test suggested by this Article incorporates these concerns.

Equitable mootness evolved from the application of the constitutional mootness doctrine caused by failures to obtain stays pending appeals. As early as the 1898 Bankruptcy Act, courts recognized the potential for constitutional mootness arising from the unstayed issuance of public securities to third parties or sales of property to good faith purchasers.[93] In 1976, Federal Rule of Bankruptcy 805 was amended to codify existing law whereby "the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal."[94] An appellant could avoid the statutory mootness arising from Rule 805 by obtaining a stay pending appeal.[95]

Two Ninth Circuit decisions form the foundation of equitable mootness by moving beyond the traditional notions of mootness in order to rectify the inequity of reversal on third parties. In *Valley National Bank of Arizona v. Trustee of Westgate-California Corp.*, the appellants sought to reverse a merger between a public subsidiary of the debtor and another subsidiary.[96] The entities had consummated the merger following approval by the bankruptcy court and all of the public entities' shares were either redeemed or exchanged for shares in the new surviving entity.[97] Instead of following the well-worn path of asserting the impossibility of undoing the merger, the court detoured and stressed the inequities of reversal. Namely, the current shareholders were not party to the appeal while the surviving company had been operating for two years since the merger.[98] Confirming its divergence from constitutional mootness, the court found "it difficult, if not impossible, to fashion an equitable remedy that would restore appellants to their former positions."[99] Recall, a case is not constitutionally moot if the any effective relief can be granted, regardless of difficulty. The court retained a link with the traditional mootness analysis by requiring the appellants to have sought a stay pending appeal in order to avoid equitable mootness.[100]

Building on *Valley*, the Ninth Circuit applied equitable mootness for a second time in *In re Roberts Farms, Inc.*[101] The appellants, ironically two of the same parties from the *Valley* case, sought to reverse a bankruptcy court's orders disallowing claims, approving a settlement, and confirming a plan.[102] The appellants failed miserably to follow proper appellate procedure. They not only attempted to obtain a stay from the district court rather than first properly applying for a stay from the

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[93] *See* A & H Holding Corp. v. O'Donnell (*In re* Abingdon Realty Corp.), 530 F.2d 588, 590 (4th Cir. 1976); Taylor v. Austrian, 154 F.2d 107, 108 (4th Cir. 1946) (per curiam).

[94] *See id.*

[95] *See id.*

[96] Valley Nat'l Bank of Ariz. v. Tr. of Westgate-Cal. Corp. 609 F.2d 1274, 1276 (9th Cir. 1979).

[97] *Id.* at 1276.

[98] *Id.* at 1283.

[99] *Id.*

[100] *Id.*

[101] 652 F.3d 793, 798 (9th Cir. 1981).

[102] *Id.* at 794.

bankruptcy judge, but they also filed a writ of mandamus with the district court in lieu of a direct appeal.[103] The stay and the writ were both denied by the district court.[104] Meanwhile, the plan was consummated and transactions contemplated by the plan were implemented.[105] The court's analysis confirmed the break from constitutional mootness and equitable mootness' relationship to the appellant seeking a stay pending appeal. First, the court categorized the appeal as moot because no stay had been obtained and the implementation of the plan could not be undone.[106] Second, the court relied upon the equitable mootness doctrine espoused in *Valley*.[107] The court described the doctrine as arising when "the failure to seek stays coupled with a substantial change of circumstances would justify dismissal of the appeal for lack of equity."[108] The appellant's poor efforts to seek a stay allowed the implementation of the plan and made it inequitable to reverse the transactions made in reliance upon the plan.[109] Immediately following the *Roberts Farm* opinion, adoption of the equitable mootness was slow, but it steadily accelerated in the 1990s.[110] Analyses in these early cases typically parroted *Roberts Farms* without adding any further rationales for the doctrine.[111]

III. CURRENT STATUS OF EQUITABLE MOOTNESS

Judge Easterbrook's *In re UNR Industries, Inc.*, opinion diverged from the early articulations of equitable mootness as he highlighted why the term mootness poorly describes the doctrine of equitable mootness and articulated a textual defense of the doctrine.[112] Although certainly founded upon equity, mootness is an ill–chosen term to include in the doctrine's name.[113] Recall, mootness refers to a court's inability to grant relief rather than a court's unwillingness to grant relief.[114] Judge Easterbrook

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[103] *Id.* at 794–95.

[104] *Id.* at 796.

[105] *See id.* at 796–97.

[106] *Id.* at 796–98.

[107] *Id.* at 798.

[108] *Id.* at 798. The Ninth Circuit would later reaffirm this test. Salomon v. Logan (*In re* Int'l Envtl. Dynamics, Inc.), 718 F.2d 322, 325–26 (9th Cir. 1983).

[109] *In re Roberts Farms*, 652 F.3d at 798.

[110] The District of Columbia Circuit adopted the doctrine in 1986, *see In re* AOV Indus., Inc., 792 F.2d 1140, 1147–50 (D.C. Cir. 1986), while the Eleventh Circuit adopted the doctrine in 1988, *see* Miami Cntr. Ltd. P'ship v. Bank of New York, 838 F.2d 1547, 1554–55 (11th Cir. 1988). The First, Second, Fifth and Seventh Circuits all adopted the doctrine in the early 1990s. *See* Manges v. Seattle-First Nat'l Bank (*In re* Manges), 29 F.3d 1034, 1039 (5th Cir. 1994); *In re* Chateaugay Corp., 988 F.2d 322, 325–26 (2d Cir. 1993); *In re* Andreuccetti, 975 F.2d 413, 417–19 (7th Cir. 1992); Rochman v. Ne. Utils. Serv. Grp. (*In re* Public Serv. Co.), 963 F.2d 469, 471–72 (1st Cir. 1992).

[111] *See, e.g.*, *Miami Cntr.*, 838 F.2d at 1554–57; *In re AOV Indus.*, 792 F.2d at 1146–50.

[112] *In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994).

[113] Bennett v. Jefferson Cty., Alabama, 899 F.3d 1240, 1247 (11th Cir. 2018) ("The doctrine, then, does not reference actual mootness at all.").

[114] *See id.* ("There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness').").

does not suffer fools.[115] He bluntly charged the term equitable mootness as "misleading" and "banished" it from the Seventh Circuit.[116] Other courts have subsequently admitted mootness may be an inapt term but have retained it due to the frequency of its use.[117]

Turning to the text of the Bankruptcy Code for support of the doctrine, Judge Easterbrook listed a number of provisions "provid[ing] that courts should keep their hands off consummated transactions."[118] Two sections, 11 U.S.C. §§ 363(m) and 364(e), "restrict the results of a reversal or modification of a bankruptcy court's order authorizing a sale or lease" or extension of credit,[119] while another, 11 U.S.C. § 1127(b), more generally supports the finality of plan confirmation. Section 363(m) (the successor to Rule 805) precludes the reversal of an order authorizing the sale or lease of estate property from affecting a transaction with a good faith purchaser or lessor, unless the appellant obtains a stay pending appeal.[120] The merits of the appeal are immaterial if the purchaser or lessor acted in good faith and the appellant failed to obtain a stay.[121] Section 364(e), provides the same treatment for post-petition credit extended or liens granted.[122] Section 1127(b) is based upon the same concerns as it limits a bankruptcy court's authority to modify a confirmed plan of reorganization after it has been substantially consummated.[123] Judge Easterbrook summarized the policy basis for these provisions as "preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg."[124] Given the importance of this policy and the examples of it in the Code, Judge Easterbrook found it obvious that equitable mootness filled an interstice, a gap, in the Code by allowing an appellate court to determine whether it was "prudent"—the appropriate term given it is judge-made—to upset a plan of reorganization or other complex transaction on appeal.[125]

Following *UNR*, many courts copied its analysis but still struggled to coalesce around a single test or a group of factors to evaluate equitable mootness. The Third

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[115] *See, e.g.*, *In re* Kmart Corp., 359 F.3d 866, 868 (7th Cir. 2004) (skewering bankruptcy court's entry of critical vendor order without legal or factual analysis with the exception of "some sketchy representations by counsel plus unhelpful testimony by Kmart's CEO").

[116] *In re UNR Indus.*, 20 F.3d at 769.

[117] *See, e.g.*, *In re* Cont'l Airlines, 91 F.3d 553, 559 (3d Cir. 1996).

[118] *In re UNR Indus.*, 20 F.3d at 769.

[119] Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc., 141 F.3d 490, 499 (3d Cir. 1998).

[120] *See In re UNR Indus.*, 20 F.3d at 769; Mission Prod. Holdings, Inc., v Old Cold LLC (*In re* Old Cold LLC), 879 F.3d 376, 383 (1st Cir. 2018) ("The effect of this provision is to render statutorily moot any appellate challenge to a sale that is both to a good faith purchaser, and not stayed.").

[121] *See In re Old Cold*, 879 F.3d at 388 ("We need not—and do not—consider this challenge to the propriety of the sale. As we have explained, section 363(m) applies even if the bankruptcy court's approval of the sale was not proper, as long as the bankruptcy court was acting under section 363(b).").

[122] *See* Shapiro v. Saybrook Mfg. Co. (*In re* Saybrook Mfg. Co.), 963 F.2d 1490, 1492–93 (11th Cir. 1992) ("The purpose of this provision is to encourage the extension of credit to debtors in bankruptcy by eliminating the risk that any lien securing the loan will be modified on appeal.").

[123] *See In re UNR Indus.*, 20 F.3d at 769.

[124] *Id.*

[125] *Id.*

Circuit exemplifies the uncertainty surrounding the exact composition of the test.[126] It originally adopted a five factor test for equitable mootness in *In re Continental Airlines*: "(1) [W]hether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments."[127] The Third Circuit subsequently recognized that these factors are too interconnected and overlapping.[128] The first and second overlap because substantial consummation cannot occur if a stay is successfully obtained.[129] Similarly, the fourth factor duplicates the first because "it considers whether granting the appellant the requested relief would unravel the plan," a result that could not be obtained absent substantial consummation.[130] Given these shortcomings, the Third Circuit synthesized a new test: "(1) [W]hether 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."[131] Other circuits have embraced different tests ranging from the three factors of the Fifth Circuit to the five factors of the Second Circuit to the six factors of the Tenth Circuit.[132]

In spite of the divergence among the circuits' tests, they generally focus on four considerations: (i) whether the appellant sought a stay pending appeal; (ii) whether the plan or transaction has been substantially consummated; (iii) third parties' reliance upon the transaction or plan; and (iv) whether equitable and effective relief can be granted to the appellant.[133] Each factor is worthy of further examination.

A. Stay Pending Appeal

Although seeking a stay pending appeal is neither strictly necessary nor sufficient to preclude equitable mootness,[134] diligently seeking a stay makes the appellate court much less likely to conclude a matter is equitably moot.[135] The importance of this

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[126] The Third Circuit enjoys preeminence as the appellate court for appeals from the District of Delaware where an outsized number of large and complex (read candidates for equitable mootness) bankruptcy cases are filed and, as a result courts outside of the circuit will often rely on its rulings.

[127] *In re* Cont'l Airlines, 91 F.3d 553, 560 (3d Cir. 1996).

[128] *See In re* Phila. Newspapers, LLC, 690 F.3d 161, 168–69 (3d Cir. 2012).

[129] *Id.* at 169.

[130] *Id.*

[131] Samson Energy Res., Co. v Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 321 (3d Cir. 2013).

[132] *Compare* Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1339 (10th Cir. 2009) *with* Wooley v. Faulkner (*In re* SI Restructuring, Inc.), 542 F.3d 131, 136 (5th Cir. 2008), *and In re* BGI, Inc., 772 F.3d 102, 108 (2d Cir. 2005).

[133] *See, e.g.*, Mac Panel Co. v. Va. Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002); Olympic Coast Inv., Inc. v. Crum (*In re* Wright), Nos. MT–08–1164–MoDH, 05–61714, 2008 WL 8462954, at *4 (B.A.P. 9th Cir. Nov. 3, 2008).

[134] Ochadleus v Detroit (*In re* City of Detroit), 838 F.3d 792, 798–99 (6th Cir. 2016).

[135] *See* JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props., Inc.), 801 F.3d 1161, 1168 (9th Cir. 2015).

factor dates back to the *Roberts Farm* case and the origins of equitable mootness.[136] A failure to seek a stay pending appeal from each available court, including the Circuit Justice, increases the likelihood of equitable mootness.[137] Even though a failure to request a stay and a denied request have the same result,[138] failure to diligently attempt to obtain a stay weighs more heavily in favor of equitable mootness.[139]

B. Substantial Consummation

Unlike the other factors, substantial consummation is defined by the Bankruptcy Code. It occurs when a three part test is satisfied:

> (A) [T]ransfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.[140]

The importance of this factor can be paramount. For instance, in the Second Circuit, when a plan is substantially consummated, it is presumed that the appeal is equitably moot.[141] Unfortunately for the appellant, the plan proponent, not the appellant, controls the timing of substantial consummation.[142] This authority may allow a proponent "'stack the deck' in its favor to expedite implementation of its plan."[143] Among the cards a plan proponent may play include not only the possibility of an accelerated closing, but also the waiver of the requirement of a final order as a

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[136] *See supra* notes 101–109 and accompanying text.

[137] Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 186–87 (3d Cir. 2001) ("it 'is obligatory upon appellant . . . to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief . . .), if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.'" (quoting *In re* Highway Truck Drivers & Helpers Local Union # 107, 888 F.2d 293, 297 (3d Cir. 1989)); *see also* Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012) ("[T]his is not a case where Appellants sat on their rights; they sought a stay and were refused both by us and by the Circuit Justice.").

[138] *See* Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (*In re* Zenith Elecs. Corp.), 250 B.R. 207, 215 (D. Del. 2000).

[139] *Id.* Diligence can also be manifested in the context of the bond requirement for stay pending appeal. Although a party may disagree with the required bond amount, a failure to contest its reasonableness may also be viewed as a lack of diligence. *In re* Tribune Media Co., 799 F.3d 272, 282 (3d Cir. 2015).

[140] 11 U.S.C. § 1101(2) (2012).

[141] Momentive Performance Materials Inc. v. BOKF, NA (*In re* MPM Silicones, LLC), 874 F.3d 787, 804 (2d Cir. 2017); Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005).

[142] Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRAC. 33 (2010).

[143] *Id.*

precondition for the plan effective date.[144] Although closing without a final order prevents the closing party from knowing whether the order will be appealed, proponents will weigh this risk against the greater chances of equitable mootness based on the substantial consummation of the plan.[145] Naturally, the more heavily weighted this factor, the more willing a party will be to "close over" the appeal or otherwise attempt to accelerate substantial consummation.[146]

C. Third Party Reliance

Although all courts anchor equitable mootness to third parties' reliance, they disagree on which parties' reliance interests should be protected.[147] On the one hand, the doctrine's protections can apply to any entities who are not named parties to the pending appeal.[148] Proponents of this broad view suggest that it does not value one category of entities above others while it still limits gamesmanship, a frequent criticism of equitable mootness.[149] The possibility of evading appellate review will incentivize the parties to a potential appeal to press more aggressive provisions knowing they may only need to pass one crucible—the bankruptcy court—rather than two, three or even four, if the plan is appealed to the Supreme Court.[150] In other words, when plan proponents and their allies can use equitable mootness as a sword, it alters parties' ability to use an appeal as shield to obtain negotiating leverage.[151] On the other hand, some courts have only protected the reliance interests of parties who have a sufficient impact on the success of the transaction or the debtor's reorganization.[152] This view categorizes vendors, customers, and lenders as among the appropriate beneficiaries, but the most befitting class is investors.[153] Absent the inflows from investors to recapitalize the debtor, the windup of the estate and

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[144] *See* Official Comm. of Unsecured Creditors v. SGPA, Inc. (*In re* SGPA, Inc.), 34 F. App'x 49, 53 (3d Cir. 2002); Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), No. 2:07–CV–822 TS, 2008 WL 2064628, at *5 (D. Utah May 13, 2008), *rev'd*, 584 F.3d 1327 (10th Cir. 2009).

[145] Dennis J. Connolly & Sage M. Sigler, *The Issue is Moot. Or is it? Rethinking the Application of Equitable Mootness in Bankruptcy Appeals*, 2016 ANN. SURV. BANKR.LAW (2016).

[146] *Id.*

[147] *See generally* David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine*, 25 NORTON J. BANKR. L. & PRAC. (2016) (discussing how courts disagree on whose reliance interests should be protected).

[148] *See* JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props., Inc.), 801 F.3d 1161, 1170 (9th Cir. 2015).

[149] Indeed, if a sophisticated party "helps craft a reorganization plan that 'press[es] the limits' of the bankruptcy laws, appellate consequences are a foreseeable result." *Id.* (quoting Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 244 (5th Cir. 2009)).

[150] *See In re* One2One Commc'ns., LLC, 805 F.3d 428, 447–48 (3d Cir. 2015) (Krause, J., concurring) ("[E]quitable mootness merely serves as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges.").

[151] Some cases have worried that the doctrine disincentivizes bargaining. *See Transwest Resort*, 801 F.3d at 1170 n.11. But, it actually just shifts the fulcrum point of leverage for negotiations, which may encourage or discourage negotiations depending on the factual circumstances.

[152] *See In re* Tribune Media Co., 799 F.3d 272, 279 (3d Cir. 2015).

[153] *See id.*

emergence of the debtor may be impossible.[154] Thus, some courts are particularly sensitive to the potential hardship caused by reversal to this group.[155]

D. *Availability of Equitable and Effective Relief*

Although equitable mootness is not equivalent to constitutional mootness, it still evaluates whether effective and equitable relief can be fashioned for the benefit of the appellant.[156] As part of the equitable mootness inquiry, this factor considers the limitations on the appellant's available relief and the impact of such relief on the transaction.[157] The easier it is for the court to compartmentalize the effect of reversal and the more significant the relief available, the more this factor will support the appellant.[158] Restructuring transactions may involve the issuance of public securities, mergers, debt for equity swaps, and other industry-specific complexities.[159] Each of these permutations may be extremely difficult, if not impossible, to undo completely when approval of the transaction is reversed. The issuance of publicly traded securities provides a clear illustration. Undoing the issuance of publicly traded securities issued as consideration for claims against the debtor would require not only cancellation of the equity consideration and the reinstatement of the debts but also the undoing of thousands of trades involving the securities.[160] Even in this situation, partial relief may still be available. The court could require sellers of the securities to turn over the sales proceeds to the successful appellants; the appeal would not be constitutionally moot.[161] Having summarized the doctrine's origins, pragmatic value, and its current state, this Article now turns to the laundry list of infirmities.

IV. STATUTORY CRITIQUES

One of the most frequent criticisms of equitable mootness is its omission from the Bankruptcy Code even though Congress enacted other appellate mootness provisions. One well-known canon of statutory interpretation is *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others").[162] Applying this canon, "where Congress includes particular language in one section of

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[154] *Id.* at 279–80.

[155] *See id.* at 279.

[156] *See* Schaefer v. Superior Offshore Int'l, Inc. (*In re* Superior Offshore Int'l Inc.), 591 F.3d 350, 353–54 (5th Cir. 2009).

[157] *See id.* at 353.

[158] *See id.* at 353–54 ("Remedies can be crafted for these deficiencies without completely undoing the Plan.").

[159] *See* Jumbeck, *supra* note 92, at 194–99.

[160] *See* Alsohaibi v. Arcapita Bank B.S.C.(c) (*In re* Arcapita Bank B.S.C.(c)), Nos. 13 Civ. 5755(SAS), 13 Civ. 5756(SAS), 2014 WL 46552, at *7 (S.D.N.Y. Jan. 6, 2014).

[161] *See, e.g.*, *In re* Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.) ("Some of the 14% noteholders, it is true, have already sold their stock, but they could be ordered to surrender some or all of the proceeds to the appellants.").

[162] *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014).

a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[163] In other words, "where Congress knows how to say something but chooses not to, its silence is controlling."[164] The enactment of other statutory mootness provisions in the Code suggests Congress did not intend courts to recognize prudential or equitable-based mootness.[165]

Congress enacted appellate mootness provisions in the Code to limit the effect of a reversal of orders granting a section 363 sale and the issuance of post-petition debt pursuant to section 364.[166] When good faith parties purchase assets free and clear from a debtor or issue post-petition credit to a debtor, sections 363(m) and 364(e) respectively shield them from a reversed appeal, if the relevant order is not stayed pending appeal.[167] Only by obtaining a stay pending appeal can an appellant reverse the transaction without fear of statutory mootness.[168] The policy supporting these statutory mootness provisions mirrors equitable mootness: promotion of the finality of bankruptcy courts and protection of the reliance interests of third parties.[169] Other transactions are simply not protected by an analog to sections 363(m) and 364(e).[170] Given that Congress clearly understands how to draft such provisions and the policy they support, "it is not for courts to alter the balance struck by the statute."[171] Equitable mootness ignores this maxim. Courts should question the existence of equitable mootness given Congress' decision to enact only certain specific statutory mootness provisions rather than enact a broader provision akin to equitable mootness.

The failure to enact equitable mootness is not an interstice in the Bankruptcy Code. Gap filling is only appropriate when "Congress 'ambiguously addresses' an issue in general terms" and purposely leaves gaps to be filled through judicial

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[163] INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (quoting Russello v. United States 464 U.S. 16, 23 (1983)).

[164] Rogers v. Freeman (*In re* Freeman), 527 B.R. 780, 793 (Bankr. N.D. Ga. 2015) (quoting Lindley v. FDIC, 733 F.3d 1043, 1056–57 (11th Cir. 2013).

[165] *See* Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 809–10 (6th Cir. 2016) (Moore, J., dissenting).

[166] 11 U.S.C. §§ 363(m), 364(e) (2012); *see also In re* One2One Commc'ns., LLC, 805 F.3d 428, 443 (3d Cir. 2015) (Krause, J., concurring).

[167] *See, e.g., In re* Revel AC, Inc., 802 F.3d 558, 566 (3d Cir. 2015) (discussing section 363(m)); Burchinal v. Cen. Wash. Bank (*In re* Adams Apple, Inc.), 829 F.2d 1484, 1488 (9th Cir. 1987) (discussing section 364(e)). The policy justification of these sections is that they help overcome parties' reluctance to transact with a debtor by "permitting reliance on a bankruptcy judge's authorization." *Id.*

[168] The majority view automatically moots an unstayed appeal. Parker v. Goodman (*In re* Parker), 499 F.3d 616, 621 (6th Cir. 2007) (citing cases). Even the minority view espoused by the Third, Sixth and Tenth Circuits protects counterparties by granting mootness when effective relief will impact the validity of the transaction. *See* Schepis v. Burtch (*In re* Pursuit Capital Mgmt., LLC), 874 F.3d 124, 135 (3d Cir. 2017); Brown v. Ellmann (*In re* Brown), 851 F.3d 619, 622 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 328 (2017); C.O.P. Coal Dev. Co. v. C.W. Mining Co. (*In re* C.W. Mining Co.), 641 F.3d 1235, 1239 (10th Cir. 2011).

[169] *See Schepis*, 874 F.3d at 133–34.

[170] *In re* Toc Assocs., L.P., Civ A. Nos. 92-6788, 92-6772, 92-6773, 92-6775, Bankruptcy No. 91–23375T, 1993 WL 276993, at *1 (E.D. Pa. July 13, 1993).

[171] Law v. Siegel, 571 U.S. 415, 427 (2014).

discretion.[172] Otherwise, judges are usurping Congress' authority and upsetting the balance of the separation of powers.[173] Simply put, when no intentional gaps exist, "[a court] may not stretch a statute to create such gaps."[174] There is no evidence that Congress enacted sections 363(m) and 364(e), while also leaving a gap for equitable mootness to fill.[175]

Indeed, the overlap between the statutory mootness provisions and equitable mootness makes the existence of an interstice even more unlikely. Although equitable mootness will not shield every transaction protected by sections 363(m) or 364(e), many transactions will be covered by both.[176] This overlap violates another canon of statutory construction: the avoidance of interpretations that render statutory language superfluous.[177] Why would Congress ever have enacted section 363(m) or 364(e) when they are swallowed whole by equitable mootness?

V. IT'S NOT REALLY MOOTNESS, IT'S JUST PRUDENCE AND EQUITY

Judge Posner suggested that equitable mootness "is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."[178] Although undoubtedly true, equity is by its nature fact-intensive and the full development of parties' positions is a prerequisite for equitable determinations.[179] Trial courts are properly tasked with fact-intensive equitable determinations; "determining equities in the first instance is seldom fit grist for the appellate mill."[180] Even though it is sitting in appellate jurisdiction, the district court is without the benefit of the

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[172] Indian Motocycle Assocs. III Ltd. P'ship v. Mass. Hous. Fin. Agency, 66 F.3d 1246, 1251 n.8 (1st Cir. 1995) (quoting Conille v. Sec'y of HUD, 840 F.2d 105, 110 n.6 (1st Cir. 1988)); *see also* Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 810 (6th Cir. 2016) (Moore, J., dissenting).

[173] *Cf.* Ga. Power Co. v. Sanders, 617 F.2d 1112, 1127–28 (5th Cir. 1980) (Fay, J., concurring) (stating that there are no separation of powers concern where federal common law rules properly existed).

[174] *In re* One2One Commc'ns, LLC, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring).

[175] *See Ochadleus*, 838 F.3d at 810 (Moore, J., dissenting).

[176] *See, e.g.*, Campbell v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43, 60 (S.D.N.Y. 2010) (providing that appeal was moot under both section 363(m) and equitable mootness). Moreover, instances of this overlap are likely underreported because when statutory mootness applies, courts will often fail to analyze an alternative argument of equitable mootness even though it may apply. *See, e.g.*, Contrarian Funds LLC v. Aretex LLC (*In re* Westpoint Stevens, Inc.), 600 F.3d 231, 253–54 (2d Cir. 2010).

[177] *In re* Sundale, Ltd., 471 B.R. 300, 303 (Bankr. S.D. Fla. 2012) (citing Nunnally v. Equifax Info. Servs., LLC, 451 F.3d 768, 773 (11th Cir. 2006)); *In re* Fairfield Sentry Ltd., 452 B.R. 52, 59 (Bankr. S.D.N.Y. 2011) (citing United States v. Novak, 476 F.3d 1041, 1048 (9th Cir. 2007)).

[178] *In re* Envirodyne Indus., Inc., 29 F.3d 301, 304 (7th Cir. 1994) (Posner, C.J.); *see also In re* Tribune Media Co., 799 F.3d 272, 287 (3d Cir. 2015) (Ambro, J., concurring) ("Our take is that, in the equitable mootness context, courts may consider whether it is fair in stark circumstances to grant relief that will scramble a consummated plan or will upset third parties' legitimate reliance on the finality of such a plan."); *In re* AOV Indus., Inc., 792 F.2d 1140, 1147 (D.C. Cir. 1986) ("Even when the moving party is not entitled to dismissal on article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits.").

[179] Quenzer v. United States (*In re* Quenzer), 19 F.3d 163, 165 (5th Cir. 1993).

[180] *Id.*

bankruptcy court's decision, let alone its fact-finding. It must make the equitable mootness determination in the first instance.[181] Given the district court's unfamiliarity with the case and a limited record on appeal, it is perhaps understandable if the district court is prone to believing the appellee's "parade of horribles" that will result from the possibility of reversal and remand.[182] To make matters worse, it is well-established that many district court judges lack interest in bankruptcy.[183] To summarize, equitable mootness requires an equitable determination by an appellate court, on a limited record, without the benefit of a trial court decision, who would rather not have the case.

Equitable mootness' continued popularity is surprising given that it is swimming against the current of anti-prudential Supreme Court opinions. A strong tension exists between doctrines based upon judicial discretion and the duty of federal courts to fully exercise their jurisdiction under statute and the Constitution.[184] Indeed, if subject matter jurisdiction exists, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"[185] This conclusion is natural, given bankruptcy jurisdiction, like all other species of federal jurisdiction, is limited to the bases prescribed by statute or the Constitution and otherwise does not exist.[186]

The Supreme Court has recently refused to confirm the continued vitality of ripeness[187] or standing[188] when they are based on prudence rather than a statute. The Court's discomfort likely stems from its unwillingness to undermine the balance of powers and defy the elected branches. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[189] Recognizing the problems inherent in prudential limitations, the Supreme Court has sought to reallocate standing limitations like the zone of interests and the prohibition against generalized grievances into statutory or constitutional

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[181] This issue has also created uncertainty regarding the appropriate level of appellate review for a Circuit Court to apply. *See generally* Matthew D. Pechous, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness Determinations*, 28 EMORY BANKR. DEV. J. 547 (2012) (canvasing circuit courts' appellate review standards and asserting abuse of discretion is the appropriate standard).

[182] *But see* Selene Fin. LP v. Brown (*In re* Brown), 563 B.R. 451, 455 (D. Mass. 2017) ("Although Brown argues that remand would portend a 'nightmarish' scenario in the Bankruptcy Court, there is little or nothing to support a parade of horribles.").

[183] McKenzie, *supra* note 21, at 791–92.

[184] *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013).

[185] *Id.* ("Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'") (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

[186] *See* Wasserman v. Immormino (*In re* Granger Garage, Inc.), 921 F.2d 74, 77 (6th Cir. 1990) ("The subject matter jurisdiction of the bankruptcy court is limited to that which Congress specifically grants.").

[187] Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014).

[188] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014); *see also* Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat. Ass'n, 758 F.3d 592, 603 n.34 (5th Cir. 2014) (interpreting *Lexmark*).

[189] *Lexmark*, 572 U.S. at 128 (citation omitted).

boxes rather than leave them as prudential limitations.[190] In the case of equitable mootness, neither of these options apply. Congress failed to incorporate it into the Bankruptcy Code.[191] Equitable mootness' very existence is predicated on its broader scope compared to constitutional mootness.[192] Nonetheless, equitable mootness has bucked this recent trend through a combination of inertia and its strong policy underpinnings.[193]

Attempts to characterize equitable mootness as a branch of mootness, abstention, waiver, or forfeiture fare no better. "There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness')."[194] Other courts have characterized it as a species of delayed adjudication like abstention and the common law *forum non conveniens*.[195] Equitable mootness, however, does not delay adjudication for another day in another court, it ends the matter by abdicating jurisdiction.[196] Still others have categorized the doctrine as a species of waiver or forfeiture.[197] These rationales are also flawed. Waiver and forfeiture are based upon the litigant's actions; waiver arises from a litigant's intentional relinquishment of a known right,[198] while forfeiture arises from a litigant's failure to timely assert a right.[199] The only equitable mootness factor under the appellant's control is whether they seek a stay pending appeal.[200] Given the existence of the other factors, waiver and forfeiture provide insufficient support for the doctrine.

The strategic value of equitable mootness promotes gamesmanship and encourages any party to invoke it no matter the chance of success. The failure to consider the merits may be normatively attractive at first glance; if the harm caused by a reversal is sufficient, the merits are immaterial.[201] This rationale must be

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[190] Smith, Jr., *supra* note 3, at 875–76 (analyzing *Lexmark*). Professor Smith persuasively asserts that that the reallocation of prudential doctrines into new boxes—either statutory or constitutional—is both immaterial (the doctrines are still get applied) and dangerous (the doctrines have firmer support). *See id.* at 915 ("[T]here are significant reasons to doubt that recategorizing prudential rules will do much to facilitate representative democracy.").

[191] *See generally supra* Part IV.

[192] *See In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994).

[193] *See* Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 800 (6th Cir. 2016).

[194] *In re UNR Indus.*, 20 F.3d at 769.

[195] *See, e.g.*, Samson Energy Res. Co. v. Semcrude, L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 317 (3d Cir. 2013).

[196] *In re* One2One Commc'ns, LLC, 805 F.3d 428, 440–41 (3d Cir. 2015) (Krause, J., concurring). The abstention provision in 28 U.S.C. § 1334(c)(1) allows a district court to abstain from hearing a bankruptcy proceeding pursuant to comity or the interest of justice. *Id.* at 442. This provision, however, only applies to district court's original jurisdiction under Title 11, rather than their appellate jurisdiction (which is implicated by equitable mootness). *Id.*

[197] *See, e.g.*, *Ochadleus*, 838 F.3d at 798.

[198] Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Journe v. Journe, 911 F. Supp. 43, 47 (D.P.R. 1995).

[199] Yakus v. United States, 321 U.S. 414, 444 (1944). For a discussion of waiver and forfeiture and its intersection with the constitutional and statutory jurisdiction of bankruptcy courts, consider, Robert Miller, *Nothing New: Consent, Forfeiture, and Bankruptcy Court Final Judgments*, 65 DRAKE L. REV. 89 (2017).

[200] *See In re One2One*, 805 F.3d at 444 (Krause, J., concurring).

[201] *See id.* at 434 (majority opinion).

weighed against the unfairness to appellants whose appeals will never be determined on the merits[202] and use of equitable mootness as a sword by proponents of the complex transaction.[203] While appellants may have colorable or even winning arguments that will never be considered,[204] the proponents of the transaction will rationally rush to implement it and equitably moot any appeal.[205] This is particularly true when the proponents advocate legally questionable provisions.[206] Indeed, such tactics are now so commonplace that "a motion to dismiss an appeal as equitably moot has become 'part of the Plan.'"[207] Appellees are only rationally reacting to the incentives provided by equitable mootness. Besides the cost of briefing the motion to dismiss, no other barrier exists to preclude an appellee from invoking the doctrine. Even when the chances of successfully dismissing the appeal are small, the benefit is so large compared to the cost that an appellee will rationally move for dismissal.

The problems inherent in the prudential nature of equitable mootness are perhaps best illustrated by its application to transactions involving complex settlements. Complex plans and transactions usually include a global settlement among all the main constituencies, which together with releases, injunctions, and exculpation provisions, facilitate finality among the parties and limit related third party claims.[208] Because they are often contentious, the global settlement or the associated protective provisions are frequently appealed if they are approved.[209] What naturally follows is the familiar refrain in motions to dismiss based upon equitable mootness—a reversal will throw the case into chaos and potentially make the debtor's current path to emergence unviable.[210] This may be true, and the cost of a reversal may be high in terms of administrative expense and even endanger the viability of a reorganization.[211] Regardless, confirmation should never be granted if the appellant is correct on the merits and the settlement does not satisfy the applicable legal

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[202] *See id.*

[203] *See id.* at 446 (Krause, J., concurring); Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 185 (3d Cir. 2001); *id.* at 191 (Alito, J., concurring) ("It is disturbing that Zenith, in a seeming attempt to moot any appeal prior to filing, succeeded in implementing most of the plan before the appellants even received notice that the plan had been confirmed.").

[204] *See, e.g.*, *In re* Cont'l Airlines, 91 F.3d 553, 567–68 (3d Cir. 1996) (Alito, J., dissenting).

[205] *See, e.g.*, Bennett v. Jefferson Cty., 518 B.R. 613, 639 (N.D. Ala. 2014) ("This court is not inclined to dismiss Ratepayers' appeal as 'equitably moot' based on the rush to consummation.") (citing Search Market Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1343 (10th Cir. 2009)).

[206] *In re One2One*, 805 F.3d at 453 (Krause, J., concurring).

[207] *Id.* at 446. The problem of gamesmanship cannot be blamed on the litigants. Zealous representation requires appellees' counsel to employ equitable mootness as efficiently as possible. A counsel should bake provisions into a plan that will increase the likelihood of a dismissal based on equitable mootness.

[208] *See* Jumbeck, *supra* note 92, at 214–16 (discussing *In re* Tribune Media Co., 799 F.3d 272 (3d Cir. 2015), and R[2] Invs., LDC v. Charter Commc'ns, Inc. (*In re* Charter Commc'n, Inc.), 691 F.3d 476 (2d Cir. 2012)).

[209] *See, e.g.*, *Charter Commc'ns*, 691 F.3d at 479; Coll. Props., II, Ltd. v. Mullen (*In re* Coll. Props., Ltd.), Nos. AZ–07–1075–PaAK, 05–10095, 05–15155 2007 WL 7540957, at *1, *4 (B.A.P. 9th Cir. Aug. 14, 2007).

[210] *See, e.g.*, *In re Tribune Media*, 799 F.3d at 280–81; *Charter Commc'ns*, 691 F.3d at 485.

[211] *See* Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 730 n.6 ("The direct costs of bankruptcy, primarily professional fees, are enormous.").

standards.[212] Going back to the drawing board is the appropriate result even if the consequences for the debtor are dire.[213]

The costs of equitable mootness to the bankruptcy system itself are high. The lack of appeals in bankruptcy cases is well documented.[214] Whether due to dwindling resources, preference for negotiation over litigation, or the need for finality, few bankruptcy matters are appealed.[215] The importance of the few first-level appeals that do occur is further diminished because in some jurisdictions, first-level appeals may not even bind trial courts.[216] Equitable mootness further pares the amount of appellate precedent by dismissing potentially precedent-making appeals without determinations on the merits.[217]

Nonetheless, judges often find that the facilitation of reorganization trumps the appellants' rights on the merits.[218] On the one hand, weighing the prejudice wrought by reversal of a complex settlement as part of the equitable mootness inquiry will lead to more reorganizations. Certainly, settlements and reorganizations are favored generally in the bankruptcy context.[219] On the other hand, if parties believe they have limited rights to appeal, they may decide to exit the distressed debt space entirely rather than risk being left without appellate rights.[220] Moreover, the possibility of equitable mootness alters parties' leverage on appeal by limiting the ability to threaten to appeal. Congress has not prescribed how to balance these interests even though it clearly knows how to protect parties from appellate reversal. It has done exactly that in two separate places in the Bankruptcy Code, sections 363(m) and 364(e). Allowing a judge to balance these concerns as part of a potential dismissal of an appeal without even considering the merits effectively lets the judge substitute

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[212] *See* Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson, 390 U.S. 414, 435 (1968) ("[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it.").

[213] *See In re* Cont'l Airlines, 91 F.3d 553, 567–68 (3d Cir. 1996) (Alito, J., dissenting) (emphasizing the tension between the district court's decision to dismiss the appeal as equitably moot while also noting that the appellants were likely to win on the merits of their appeal).

[214] *See* McKenzie, *supra* note 21, at 783 (explaining that "almost no bankruptcy litigation goes farther than the bankruptcy court").

[215] *See id.* at 783–84, 787–89.

[216] There is no consensus on this issue. No definitive case law exists and in a survey, just over half of bankruptcy judges felt bound by district court precedent from their district. *See* George W. Kuney, *Where We Are and Where We Think We Are: An Empirical Examination of Bankruptcy Precedent*, 28 CAL. BANKR. J. 71, 84 (2005) (discussing whether or not bankruptcy judges in a poll felt bound by the decisions of their circuit's district courts).

[217] *See* Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 244 (5th Cir. 2009) (asserting that complex cramdown issues "cry out" for appellate review); Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627–28 (2002) (noting the lack of circuit-level bankruptcy precedent).

[218] *See In re Cont'l Airlines*, 91 F.3d at 571 (Alito, J., dissenting) (noting that equitable mootness reflects a tension between the imperative of an appellate court to adjudicate the merits of an appeal and adherence to a policy that promotes "facilitation of reorganizations and the protection of those who reasonably rely on reorganization plans").

[219] *See* Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson, 390 U.S. 414, 424 (1968).

[220] *See In re Pac. Lumber Co.*, 584 F.3d at 244 & n.19.

him or herself for Congress. This is exactly the concern supporting the Supreme Court's retreat from other prudential justiciability doctrines.[221] Returning to the relationship between the limited nature of bankruptcy jurisdiction and the duty to fully exercise it, courts cannot use prudence as a basis to extend bankruptcy jurisdiction to facilitate a particular plan because it is in the public's interest.[222] How can they accomplish the same result by cutting off an appeal without hearing the merits? They can't.

A. Constitutional Concerns

Although little unites the Supreme Court's jurisprudence concerning the separation of powers, one tie is the necessity of Article III supervision and review of bankruptcy judges' final determinations of private rights.[223] Equitable mootness broadly eliminates Article III supervision because parties lose the right to appeal to an Article III judge, regardless of the taxonomy (public, private or otherwise) of the rights at issue.[224] Only recently have cases analyzed the constitutionality of this issue and their treatment has been brief.[225] This article delves deeper and concludes that equitable mootness is unconstitutional because it disregards the appellate rights historically provided in bankruptcy matters at common law and under the 1800 Bankruptcy Act.[226]

Although bankruptcy judges are authorized by statute to enter final judgments on certain claims, their status as non-Article III judges further circumscribes this authority.[227] Ever since Congress attempted to expand the authority of bankruptcy

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[221] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014) ("We do not ask whether in our judgment Congress *should* have authorized Static Control's suit, but whether Congress in fact did so.").

[222] *In re* Combustion Eng'g, Inc., 391 F.3d 190, 228–29 (3d Cir. 2004) (citing Binder v. Price Waterhouse & Co., LLP (*In re* Resorts Int'l., Inc.), 372 F.3d 154, 161 (3d Cir. 2004).

[223] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944-45 (2015) (discussing the importance of Article III supervision); Stern v. Marshall, 564 U.S. 462, 482–83 (2011) (discussing constitutional principles of Article III adjudication and separation of powers); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

[224] *See* Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 811–12 (6th Cir. 2016) (Moore, J., dissenting); *In re* One2One Commc'ns, LLC, 805 F.3d 428, 443–46 (3d Cir. 2015) (Krause, J., concurring); Nordhoff Invs., Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 185, 192 (3d Cir. 2001) (Alito, J., concurring).

[225] *See Ochadleus*, 838 F.3d at 811–12 (Moore, J., dissenting); *In re* Tribune Media Co., 799 F.3d 272, 285–86 (3d Cir. 2015) (discussing, but rejecting the concern that equitable mootness "insulates the judgments of Article I bankruptcy judges' from review by an Article III tribunal" and thus violates personal constitutional rights); *In re One2One*, 805 F.3d at 443–46 (Krause, J., concurring) (asserting that Congressional intent for the creation of bankruptcy courts was to "authorize [those courts] to abstain from hearing state law claims in certain circumstances—not to allow district courts to abdicate their appellate jurisdiction").

[226] Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 ("An act to establish an uniform System of Bankruptcy throughout the United States").

[227] *See* Sher v. JP Morgan Chase Funding, Inc. (*In re* TMST, Inc.), Nos. 09–17787 (NVA), 11–00340(NVA), 2015 WL 4080077, at *4 (D. Md. July 6, 2015) (discussing that claims must be both statutorily and constitutionally core for a bankruptcy court to possess final adjudicatory authority).

judges to enter final judgments by enacting the Bankruptcy Reform Act of 1978 (the "Reform Act"),[228] it has been unable to balance its statutory grant of final adjudicatory authority to Article I bankruptcy courts with the demands of Article III of the Constitution. Twice has the Supreme Court rejected statutes granting bankruptcy judges authority to enter final judgments when adjudicating traditional private rights.[229] The constitutional issue posed by equitable mootness is a different side of the same coin. It concerns the elimination of Article III appellate review of an Article I tribunal's final judgment rather than the authority of Article I judges to enter an initial final judgment.

Even when the Supreme Court outlined a test for determining whether actions can be finally determined by bankruptcy judges,[230] it has failed to confirm the source of this authority.[231] As a result, lower courts and academics have fashioned theories to flesh out the Supreme Court's test. The three most popular theories are the appellate review theory, the public rights theory, and the historical theory. This Article draws from the pools of ink spilled reviewing these three theories and recent Supreme Court jurisprudence to evaluate each theory and apply them to equitable mootness.

For years, courts and commentators have grappled with litigants' right to appellate review from a final determination by a non-Article III court.[232] Many have suggested "sufficiently searching [appellate] review" is required to allow initial

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[228] Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. (2012), in scattered sections of 28 U.S.C. (2012), and in scattered sections of other titles of U.S.C. (2012)).

[229] *See* Stern v. Marshall, 564 U.S. 462, 469 (2011) (discussing the fact that while bankruptcy court has statutory authority to enter final judgment, it does not have constitutional authority); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (holding that the "broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. §1471 is unconstitutional"). The Supreme Court has subsequently narrowed the effect of these opinions by allowing litigant consent and forfeiture to grant a bankruptcy judge adjudicatory authority it would otherwise find unconstitutional under Article III. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015) (holding that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent").

[230] Although the Supreme Court stated that "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process," it failed to cite to any source of authority in establishing this test. *Stern*, 564 U.S. at 499.

[231] *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEV. J. 11, 39 (2016) (explaining that a majority of the Court has "never agreed on a constitutional theory that would validate final-judgment adjudications by non-Article III bankruptcy judges without consent of the litigants" (emphasis removed)).

[232] *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918, 924–26 (1988) (discussing the theory that "adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of Article III"); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 992-95 (2011) (distinguishing various contrasting court opinions on this issue); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 605–13 (2007) (providing a general overview of modern commentary on this issue); Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 767 (1986) (discussing the Supreme Court's "increasingly broad exceptions to the Constitution's requirement that federal judicial cases be tried by an equal and independent federal judicial branch of government").

non-Article III adjudication.[233] Originating from statements in the Supreme Court's opinion in *Crowell v. Benson*,[234] adherents to this "appellate review theory" rely upon Article III appellate review as both a necessary and sufficient basis to allow an Article I court to make a final adjudication. Although there is no agreed-upon definition for the level of appellate review required, Article III *de novo* review of questions of law is the minimum suggested standard.[235] Of course, equitable mootness precludes any appellate review on the merits, let alone *de novo* review.[236] Although equitable mootness fails the appellate review model, the impact of this conclusion is merely academic because, as will subsequently be explained, the appellate review theory does not explain the constitutional authority of bankruptcy judges.

The Supreme Court has suggested but not confirmed two other possibilities for why bankruptcy judges can issue final judgments without being Article III judges: (i) they have the same authority as bankruptcy commissioners at common law who could issue certain final judgments or (ii) certain bankruptcy matters are public rights that do not require Article III supervision at all.[237] On the one hand, if the historical view of bankruptcy judges' authority bounds the right to appeal from their judgments, then the same appellate rights that attached to a commissioner's final judgment currently attach to a modern bankruptcy judge's final judgment. On the other hand, if the public rights theory governs, appellate review is not necessary at all because no Article III intervention is required.

The Supreme Court's jurisprudence strongly supports the historical perspective. The Court has failed to confirm the public rights doctrine as the font for bankruptcy judges' ability to enter final judgments despite multiple opportunities.[238] In stark contrast, the Supreme Court has often embraced bankruptcy judges' historical roots as the foundation for its separation of powers teachings.[239] Based on these teachings, bankruptcy judges' authority to enter final judgments maps onto the jurisdiction of

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[233] *See, e.g.*, McKenzie, *supra* note 21, at 771; Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 267–68 (1990) (arguing for Article III review to "control the legality and constitutionality of the powers asserted and exercised [by the Article I court in the first instance]").

[234] 285 U.S. 22 (1932).

[235] *See* Fallon, Jr., *supra* 232, at 983 n.367 (discussing a reviewing court's deference to the lower courts decision, while focusing on a "reasonable basis in law" standard).

[236] *See* Samson Energy Res. Co. v. Semcrude L.P. (*In re* Semcrude, L.P.), 728 F.3d 314, 324–25 (3d Cir. 2013) (discussing the consequences of a successful appeal that are often "more appropriately dealt with by fashioning limited relief at the remedial stage than by refusing to hear the merits . . . at its outset").

[237] *See infra* Section VI.C and VI.D.

[238] *See* Stern v. Marshall, 564 U.S. 462, 492 n.7 (2011); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 n.11 (1989)..

[239] *See Stern*, 564 U.S. at 484; *Granfinanciera*, 492 U.S. at 56–57; N. Pipeline Constr. Co v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring); Schoenthal v. Irving Tr. Co., 287 U.S. 92, 94–95 (1932). For scholarly articles discussing the Supreme Court's reliance on history in the context of bankruptcy, see Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261 (1999), and Robert W. Miller, *Everything Old is New Again: Why the In rem Summary Jurisdiction of the 1898 Bankruptcy Act Still Limits the Constitutional Authority of Bankruptcy Judges*, 89 AM. BANKR. L.J. 1, 8–17 (2015).

bankruptcy commissioners at common law and under the 1800 Bankruptcy Act.[240] The appellate jurisdiction of courts of the Chancellor at common law and the district court under the 1800 Bankruptcy Act is similarly concomitant to the appellate jurisdiction of district courts.[241] Just as litigants in bankruptcy court today have the same right to a final adjudication by an Article III judge as common law litigants had from the court of equity or law, they have the same right to appellate review. Equitable mootness limits this right to an appeal in a way that was not recognized at common law or under the 1800 Bankruptcy Act. Just like the bankruptcy court final adjudication of the claims in *Stern* and *Marathon*, equitable mootness is similarly unconstitutional.

This section will briefly recap the issues presented by bankruptcy judges' lack of Article III status. It will then summarize the preeminent theories regarding Article I adjudications and Article III appellate review: appellate review theory, public rights, and historic rights. It will explain why historic rights establish the right of appeal from a bankruptcy judge's final judgement and then finally describe how equitable mootness violates these historic rights.

i. Bankruptcy Judges and Article III

Congress may establish courts under both Article III and Article I of the Constitution,[242] however, the constitutional authority and required attributes of Article III and Article I courts differ. The distinctions between Article III courts and Article I courts reflect the separation of powers among the three branches of government. The greater protection provided by their independence and their commensurately greater constitutional authority distinguish Article III courts from their Article I counterparts.[243]

Issuing a final judgment in a federal case at law, equity, or admiralty applies Article III judicial power—authority reserved for an Article III judge by Article III, section 2 of the Constitution.[244] Congress cannot grant authority to enter such final judgments to a non-Article III court.[245] In other words, "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'"[246] This is the heart of judicial power and must be exercised by an Article III judge.[247]

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[240] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, J., dissenting); *id.* at 1965 (Thomas, J., dissenting); Brubaker, *supra* note 231, at 48.

[241] *See Wellness Int'l*, 135 S. Ct. at 1940, 1946, 1957–58 (Roberts, J., dissenting).

[242] *See* Palmore v. United States, 411 U.S. 389, 406–407 (1973).

[243] *See Stern*, 564 U.S. at 482–84 ("Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch.") (internal citations and quotations omitted).

[244] *Id.* at 482–83, 488 (defining the power and how it protects the independence of the Judicial Branch).

[245] *Id.* at 484.

[246] *Id.* (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)).

[247] *See In re* Todd Shipyards Corp., 92 B.R. 600, 604 (Bankr. D.N.J. 1988) (citing N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69–70 (1982)).

Playing its part in the separation of powers among the three governmental branches, Article III of the Constitution insulates judges appointed to the Supreme Court and the inferior courts created by Congress from political pressures by the other branches.[248] Article III, section 1, "establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation."[249] These protections have come to mean that Article III judges may only be removed through impeachment by the senate and that their compensation is irreducible.[250] In contrast, Article I judges' benefits and protections are not enshrined in the Constitution; they are a matter of legislative grace.[251] Absent the requirement that judicial power be exercised by Article III judges, the separation of powers would be illusory. Congress could simply vest all judicial power in the Article I courts and pressure them through manipulation of their pay or retention.[252]

The Supreme Court has famously rejected Congressional attempts to allow bankruptcy judges to adjudicate private rights in *Stern v. Marshall* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* The genesis of these cases is the distinction between Article III district court judges and their Article I bankruptcy judge counterparts. Although a bankruptcy court is a unit of the district court,[253] a bankruptcy judge is an Article I judge, not an Article III judge.[254] Because Congress established bankruptcy courts pursuant to its Article I powers, they can be (and are) staffed with bankruptcy judges who do not receive the same benefits of life tenure and salary protection afforded to Article III judges.[255] As Justice Rehnquist asserted in *Marathon* and Justice Roberts confirmed in *Stern*, Article I bankruptcy judges cannot exercise the judicial power of the United States by making final determinations of private rights, which are actions that are "the stuff of the traditional actions at common law tried by the courts of Westminster in 1789."[256] If it were only that simple. The Supreme Court's jurisprudence concerning the role of non-Article III courts in general, and bankruptcy courts in particular, parallels the mythical

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[248] *N. Pipeline*, 458 U.S. at 59; *see also* Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc) ("A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas.").

[249] Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 582 (1985); *see also* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

[250] *N. Pipeline*, 458 U.S. at 59.

[251] *See Stern*, 564 U.S. at 484, 494; Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional*, 5 FLA. TAX REV. 357, 360 (2001).

[252] *See Stern*, 564 U.S. at 484.

[253] 28 U.S.C. § 151 (2012).

[254] *See N. Pipeline*, 458 U.S. at 60–61.

[255] Bankruptcy judges under the Reform Act and BAFJA serve 14-year terms, can be removed for misconduct, neglect of duty or physical/mental disability by the judicial council of the circuit in which the judge's official duty station is located and their salaries could be reduced by Congress. *Id.* at 61; *Stern*, 564 U.S. at 514–15 (Breyer, J., dissenting).

[256] *Stern*, 564 U.S. at 484 (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring)).

hydra; in answering one question, three others immediately appear.[257] The analysis of the constitutionality of equitable mootness exacerbates this uncertainty by moving beyond the muddled waters of bankruptcy courts' initial ability to enter final judgments into the truly uncharted depths of the appellate rights stemming from a bankruptcy court final judgment.

ii. Appellate Review Theory

Until recently, the constitutional issues arising from bankruptcy judges' Article I status were cabined to the entry of final judgments, rather than appellate review. Circuit judges (albeit in dissents and concurrences) have questioned the constitutionality of equitable mootness due to its elimination of appellate review of the bankruptcy judge's final order. In support of their criticisms, these judges have relied upon the appellate review theory.[258]

"The core claim of [appellate review theory] is that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III."[259] The genesis of this theory is *Crowell v. Benson*.[260] In *Crowell*, a government agency adjudicated a workers' compensation claim even though the claim would have been a private right subject to federal admiralty jurisdiction.[261] The Court held that Congress could constitutionally vest the agency with the authority to adjudicate factual questions inherent in the compensation claim, given that Article III courts retained "complete authority to insure the proper application of the law" —i.e. appellate review.[262] In other words, "the presence of appellate review by an Art. III court will go a long way toward ensuring a proper separation of powers."[263] The *Crowell* majority characterized the scope of "the judicial power of the United States," as a question of ultimate judicial control rather than initial adjudication.[264] In essence, "[t]he

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[257] *See, e.g.*, Tyson A. Crist, Stern v. Marshall*: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 Am. Bankr. L.J. 627, 671–79 (2012); Miller, *supra* note 239, at 1 (2015) (profiling some of the many issues created by *Stern*).

[258] *See, e.g.*, Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 811–12 (6th Cir. 2016) (Moore, J., dissenting); *In re* One2One Commc'ns, LLC, 805 F.3d 428, 444 & n.10 (3d Cir. 2015) (Krause, J., concurring).

[259] Fallon, Jr., *supra* note 232, at 933.

[260] 285 U.S. 22 (1932).

[261] *Id.* at 39.

[262] *Id.* at 54. The appellate review theory arose from concern that petty administrative functions would swamp Article III courts' dockets. Merrill, *supra* note 232, at 990 (describing the federal judiciary's reluctance to be dragged into administrative adjudications).

[263] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 115 (1982) (White, J., dissenting) (stating that this is suggested in *Crowell*).

[264] McKenzie, supra 21, at 772; Bator, *supra* note 233, at 267. As Professor McKenzie explained, from a pragmatic perspective, Article III courts do not have a "realistic ability to review and control the functions" of bankruptcy courts. McKenzie, *supra* note 21, at 772. The reasons for the lack of true control are numerous including the lack of appeals in bankruptcy cases, the limited precedential value of first level bankruptcy appeals, and even equitable mootness. *Id.* at 277–92. Although Professor McKenzie recognizes pragmatic shortcomings, the Supreme Court's jurisprudence regarding bankruptcy cases remains rooted in formalism and history.

available appellate review by article III courts offer[s] sufficient protection for article III values."[265] In their opinions in *City of Detroit* and *One2One Communications, Inc.*, Judges Moore and Krause respectively, cited the appellate review theory in support of their respective criticisms of equitable mootness.[266] Neither deeply analyzed the theory. This limited treatment may have been intentional. The Supreme Court's bankruptcy precedents embarrass the appellate review model.[267]

Appellate review has been central to the constitutionality of bankruptcy court adjudications,[268] just not in the way the appellate review theory posits. Starting in *Northern Pipeline*, the Supreme Court stressed the importance of *de novo* of adjudications of private rights by bankruptcy courts.[269] It contrasted the *de novo* review of magistrate judges upheld by *United States v. Raddatz*,[270] with the deferential appellate review of bankruptcy judges' final judgments under the Reform Act.[271] The Court reiterated this point in *Stern* when criticizing the deferential appellate review of bankruptcy judges' final judgments of *Stern* claims under BAFJA.[272] Even more recently, in *Executive Benefits Insurance Agency v. Arkison*, the Court echoed *Raddatz* when it held that the presence of *de novo* review (not to be confused with appellate review) by a district court eliminated constitutional concerns posed by the bankruptcy judge's initial adjudication of a *Stern* claim.[273]

Northern Pipeline and *Stern* say little about non-private rights, the type of rights usually affected by equitable mootness. With the notable exception of third party releases,[274] the adjudications subject to equitable mootness are usually not private

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[265] Fallon, *supra* note 232, at 991.

[266] Ochadleus v. City of Detroit (*In re* City of Detroit), 838 F.3d 792, 811–12 (6th Cir. 2016) (Moore, J., dissenting); *In re* One2One Commc'ns, LLC, 805 F.3d 428, 444 & n.10 (3d Cir. 2015) (Krause, J., concurring).

[267] *Compare supra* notes 258–260 and accompanying text *with* Fallon, *supra* note 259, at 991 (asserting that *Northern Pipeline* was incorrectly decided because the Article III review was sufficient to allow bankruptcy court adjudication of private rights).

[268] *See Ochadleus*, 838 F.3d at 811 (Moore, J., dissenting).

[269] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78–79, 82 n.33 (1982).

[270] 447 U.S. 664, 683–84 (1980).

[271] *N. Pipeline*, 458 U.S. at 82–83.

[272] Stern v. Marshall, 564 U.S. 462, 487 (2011); *see also In re* One2One Commc'ns, LLC, 805 F.3d 428, 433 (3d Cir. 2015) ("[T]he Court in *Stern* made clear that non-Article III bankruptcy judges do not have the constitutional authority to adjudicate a claim that is exclusively based upon a legal right grounded in state law despite appellate review of the bankruptcy judge's decision by an Article III judge.").

[273] Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2170 (2014). In the same vein, the majority in *Wellness* confirmed litigants' ability to consent to the final determination of *Stern* claims by a bankruptcy judge, in part, because "Article III courts retain supervisory authority over the process." Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944–45 (2015).

[274] *See* Opt-Out Lenders v. Millennium Lab Holdings II, LLC (*In re* Millennium Lab Holdings II, LLC), 242 F.3d 322, 339–40 (D. Del. 2017) (explaining that third-party releases are equivalent to adjudications on the merits, including when private rights are released). *Contra In re* Millennium Lab Holdings II, LLC, 575 B.R. 252, 273, 277–78, 282, 291, 294, 296 (Bankr. D. Del. 2017) (finding that third party releases can be finally determined by a bankruptcy judge for a number of reasons including that they are federal claims, they are necessarily resolved as part of claims allowance process, and they stem from the bankruptcy itself as part of confirmation); *In re* Charles St. African Methodist Episcopal Church, 499 B.R. 66, 99 (Bankr. D. Mass. 2013) (asserting that third-party releases granted as part of

rights—the type of rights at issue in *Northern Pipeline* and *Stern*—and they are not subject to *de novo* review—the standard of review in *Executive Benefits* and *Raddatz*.[275]

Taken together, *Northern Pipeline* and *Stern* teach that appellate review is not sufficient to allow a bankruptcy judge to issue a final judgment on a private right without litigant consent. This conclusion undermines the appellate review theory's core premise and its explanatory power. Shorn of its central proposition, the appellate review theory's apparent promise as the key to unlock equitable mootness is only imagined.

iii. Public Rights Theory

The public rights exception is a more popular explanation for bankruptcy courts' ability to enter final judgements.[276] Adherents argue that Congress established specific bankruptcy matters pursuant to the Code that only exist by Congress' will and benefit the public collectively.[277] As a result, Congress can set any level of appellate review by an Article III judge, including none at all.[278] In the context of equitable mootness, if confirmation and the approval of transactions are public rights, then a loss of appellate review does not pose any constitutional concerns; it is unnecessary.[279]

Commentators continue to debate the origins of the public rights exception but the most popular views derive the doctrine from the federal government's sovereign immunity and the distinction between individual (private) rights and collective (public) rights.[280] When the federal government is a defendant, the default result is dismissal of the action based on the sovereign immunity of the federal government.[281] The action will only proceed to the merits if the federal government waives its sovereign immunity.[282] Allowing Congress to select the adjudicator over

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confirmation of a plan of reorganization are public rights even if the underlying claims released are private rights).

[275] *Wellness Int'l*, 135 S. Ct. at 1939, 1958 ("No one here challenges the constitutionality of magistrate judges or disputes that they, like bankruptcy judges, may issue reports and recommendations that are reviewed de novo by Article III judges.") (Roberts, C.J., dissenting); United States v. Raddatz, 447 U.S. 664, 674, 676, 682 (1980).

[276] *See, e.g.*, *In re* Linear Elec. Co., 852 F.3d 313, 319–20 (3d Cir. 2017); Scott v. Am. Sec. Ins. Co. (*In re* Scott), 572 B.R. 492, 518 (Bankr. S.D.N.Y. 2017); West v. Freedom Med., Inc. (*In re* Apex Long Term Acute Care–Katy, L.P.), 465 B.R. 452, 458–60 (Bankr. S.D. Tex. 2011); David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 452 (1983).

[277] *See supra* notes 270–273 and accompanying text (discussing Congress' power to create tribunals).

[278] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984).

[279] *See In re Charles St. Church*, 499 B.R. at 99.

[280] *See, e.g.*, Atlas Roofing Co. v. OSHA Review Comm'n, 430 U.S. 442, 455 n.13 (1977); Loveridge v. Hall (*In re* Renewable Energy Dev. Corp.), 792 F.3d 1274, 1278–79 (10th Cir. 2015).

[281] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67–68 (1989) (Scalia, J., concurring in part).

[282] *Id.* at 68. Unlike the states' Eleventh Amendment sovereign immunity, federal sovereign immunity cannot be impliedly waived. *See* Bilger v. United States, No. CIV F 00-6486 OWWJLO, 2001 WL 169568, at *4 (E.D. Cal. Jan. 10, 2001).

such an action does not create separation of powers concerns because the very existence of the action is contingent upon Congressional grace.[283] Another possible genesis of the public rights exception is that life, liberty and property "belong to individuals inalienably" and can only be taken by an order issued by an Article III judge.[284] In contrast, "additional legal interests may be generated by positive law and belong to the people as a civic community and disputes about their scope and application may be resolved through other means, including legislation or executive decision."[285] Irrespective of its origins, the initial interpretation of the public rights exception was narrow—it only encompassed actions where the federal government was a party,[286] including agency adjudications.[287]

Bankruptcy is usually a contest between private parties, and even when the government is a creditor, it competes on the same playing field as other similarly situated creditors.[288] It does not naturally fit within the public rights exception. *Northern Pipeline* confirmed this conclusion as "a matter of public rights must at a minimum arise 'between the government and others.'"[289] Yet, later in the opinion, the Court appeared to reconsider this definitive statement and left open the possibility that the restructuring of debtor-creditor relations is a public right (presumably, even when only private parties are involved).[290]

In enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"),[291] Congress attempted to categorize some bankruptcy matters—core proceedings—as public rights.[292] The link between core claims and public rights is a syllogism based upon language found in the *Northern Pipeline* plurality opinion. Recall, the restructuring of debtor-creditor relations "may well be a public right."[293] The Court also categorized it as the "core of the federal bankruptcy power."[294] Based on this language, Congress tried to establish fundamental bankruptcy matters—core proceedings—and signal that they are public rights. Section 157(b)(2) of Title 28 of the U.S. Code provides a non-exhaustive list of core proceedings, including many

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[283] Stern v. Marshall, 564 U.S. 462, 488–89 (2011); *Granfinanciera*, 492 U.S. at 52; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853–54 (1986).

[284] *Loveridge*, 792 F.3d at 1278; *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting).

[285] *Loveridge*, 792 F.3d at 1278.

[286] *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 n.23 (noting that the presence of the United States as a party was necessary but not sufficient for an action to be a public right).

[287] *See, e.g.*, Atlas Roofing Co. v. OSHA Review Comm'n, 430 U.S. 442, 450 n.7 (1977); Crowell v. Benson, 285 U.S. 22, 50–51 (1932).

[288] Currie, *supra* note 276, at 452; *see also* Gardner v. New Jersey, 329 U.S. 565, 571–74 (1947) (holding that the filing of a proof of claim constitutes a waiver of sovereign immunity putting the federal government on the same footing as other litigants), *superseded by statute*, An Act to Establish a Uniform law on the Subject of Bankruptcies, Pub. L. No. 95–598, Title I, § 101, 92 Stat. 2549 (1978).

[289] *N. Pipeline*, 458 U.S. at 69 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929)).

[290] *See id.* at 71.

[291] Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

[292] *See In re* Rheuban, 128 B.R. 551, 563–64 (Bankr. C.D. Cal. 1991); Earle Indus., Inc. v. Bond Gen. Contracting, Inc. (*In re* Earle Indus., Inc.), 71 B.R. 919, 921 n.4, 924–25 (Bankr. E.D. Pa. 1987).

[293] *N. Pipeline*, 458 U.S. at 71.

[294] *Id.* at 71.

bedrock bankruptcy matters such as the claims allowance process, determinations of discharge, and turnover of property.[295] Core proceedings are reviewable under usual appellate rules,[296] not the *de novo* review required by *Northern Pipeline* for private rights.[297] Consequently, they must fit within an exception to Article III to allow their final determination by a bankruptcy judge.[298] In contrast, if a matter is only "related to" the bankruptcy case, it is a non-core claim. The matter is subject to *de novo* review on appeal, following a report and recommendation issued by a bankruptcy judge.[299]

Shortly following the enactment of BAFJA, a pair of Supreme Court opinions provided further support for categorizing core proceedings were public rights. In *Thomas* v. *Union Carbide Agricultural Products Co.*, the Court shifted from the course plotted by its opinion in *Northern Pipeline* and expanded the public rights exception to a cause of action between two private parties created by a federal statue.[300] Building on *Thomas*, the majority in *Commodities Futures Trading Commission v. Schor,* made the next natural expansion of the public rights doctrine: a common law action between two parties incorporated into a regulatory framework.[301] Following *Thomas* and *Schor*, many courts believed that core proceedings under BAFJA were public rights.[302]

The Supreme Court reversed course again in its opinions in *Granfinanciera S.A. v. Nordberg* and *Stern v. Marshall* by embracing a historical formalism echoing *Northern Pipeline*. In both cases, the Court held that even though certain actions are core proceedings, this Congressional delineation does not make them public rights.[303] Notwithstanding Congress' classification of fraudulent transfers as public

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[295] 28 U.S.C. § 157(b) (2012).

[296] Stern v. Marshall, 564 U.S. 462, 474–75 (2011).

[297] *See N. Pipeline*, 458 U.S. at 71–72, 79.

[298] *C.f.* Brubaker, *supra* note 231, at 39 (2016) (explaining that the Supreme Court has yet to uphold a final judgment by a bankruptcy judge without litigant consent as a recognized exception to Article III adjudication).

[299] 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033; *see also* Chi. Bank of Commerce v. Amalgamated Tr. & Sav. Bank (*In re* Mem'l Estates, Inc.), 90 B.R. 886, 894 (Bankr. N.D. Ill. 1988).

[300] Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 588–90 (1985).

[301] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844, 852–55 (1986); *see also Stern*, 564 U.S. at 491–92 (analyzing the *Schor* decision).

[302] *See, e.g.*, Associated Grocers of Neb. Coop., Inc. v. Am. Home Prods. Corp. (*In re* Associated Grocers of Neb. Coop., Inc.), 62 B.R. 439, 445 (D. Neb. 1986); England v. Fortune Sys. Corp. (*In re* Visidata Corp.), 84 B.R. 673, 680 (Bankr. N.D. Cal. 1988).

[303] *See* Stern v. Marshall, 564 U.S. 462, 487, 493 (2011); Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 61 (1989). In *Granfinanciera*, the Chapter 11 Trustee's fraudulent transfer claim was brought against a non-creditor who demanded a jury trial under the Seventh Amendment to the Constitution. As core proceedings, fraudulent transfers not only can be finally determined by a bankruptcy judge but no Seventh Amendment right to a jury trial exists. However, "the right to a jury trial is narrower than the right to Article III adjudication because the right to a jury trial does not attach to a core equitable action, but a core equitable action will still require Article III adjudication if it does not satisfy either prong of the *Stern* test." Robert Miller, *Fleshing Out the Skeleton: Defining the Prongs of* Stern v. Marshall, 11 DEPAUL BUS. & COM. L.J. 1, 17, 19 (2012). Even though they are not exactly the same inquiry, if a matter is a public right, it can be adjudicated by a non-article III judge and the Seventh Amendment jury trial right need not attach. G. Ray Warner, *Rotten to the "Core": An Essay on Juries, Jurisdiction and* Granfinanciera, 59 UMKC L. REV. 991, 1021 (1991).

rights (via their categorization as core proceedings by 28 U.S.C. § 157(b)), the *Granfinanciera* majority employed a historical analysis to examine the roots of fraudulent transfers.[304] Fraudulent transfers have long been cognizable outside of bankruptcy cases as a creditors' remedy. Indeed, an actual fraudulent transfer does not require insolvency, the usual precondition for a bankruptcy filing.[305] Due to their roots independent of bankruptcy cases and their goal of augmenting the estate when brought in a bankruptcy case, fraudulent transfers are private rights comparable to the breach of contract action in *Northern Pipeline*.[306] Justice Brennan, the author of the plurality opinion in *Northern Pipeline* and the majority in *Granfinanciera*, retreated from his comments *in Northern Pipeline* and not only failed to confirm that any bankruptcy matters are public rights but noted significant criticism of such classification.[307]

In *Stern v. Marshall*, the Supreme Court similarly failed to label a core proceeding, this time a counterclaim against a creditor, as a public right. The Court considered the proceeding not just analogous but equivalent to those in *Northern Pipeline* and *Granfinanciera*.[308] Although *Granfinanciera* had already clarified that classifying an action as a core proceeding was not sufficient to make the action a public right, the filing of defendant's proof of claim represented a distinction from *Northern Pipeline* and *Granfinanciera*. Previous cases had allowed bankruptcy judges to finally determine private right claims against defendants who had filed proofs of claim.[309] Neither of those cases, however, even mentioned the public rights exception, much less made the filing of a proof of claim sufficient to trigger it. Both rested on the private rights being determined as part of the claims allowance process.[310] Consistent with this precedent, the *Stern* majority explained that a bankruptcy court can finally determine an action if it "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."[311] No mention of the public rights doctrine there, and no confirmation anywhere in the opinion that any bankruptcy matter is a matter of public rights.[312] Following *Stern*,

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[304] *Granfinanciera*, 492 U.S. at 42–43.

[305] *See, e.g.*, Anderson v. Michaelson, 127 F. Appx. 253, 256 (9th Cir. 2005); Scottsdale Ins. Co. v. Tolliver, No. 04–CV–0227–CVE–FHM, 2012 WL 1581605, at *4 (N.D. Okla. Mar. 4, 2012); Liberty Mut. Ins. Co. v. Hoge, No. C 03–02502 WHA, 2005 WL 756568, at *4 (N.D. Cal. April 1, 2005); Miller v. Dutil (*In re* Total Containment, Inc.), No. 04-13144F, 2005 WL 6522761, at *16 (Bankr. E.D. Pa. Oct. 18, 2005).

[306] *Granfinanciera*, 492 U.S. at 56.

[307] *Id.* at 56 n.11.

[308] Stern v. Marshall, 564 U.S. 462, 487 (2011).

[309] Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (per curiam); Katchen v. Landy, 382 U.S. 323, 325, 340 (1966).

[310] *See Langenkamp*, 498 U.S. at 44–45; *Katchen*, 382 U.S. at 333–35 . Indeed, *Katchen* expressly stated that it was not determining if a common law cause of action could be decided absent the claims allowance process. *Id.* at 332–33 n.9 ("As this is the basis of our decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.").

[311] *Stern*, 564 U.S. at 499.

[312] *See id.* at 492 n.7.

core proceedings that could not be finally determined by bankruptcy judges became known as *Stern* claims.[313] In spite of these repeated failures to classify bankruptcy matters as public rights,[314] some courts and commentators have continued to rely upon *Thomas* and *Schor* for support when characterizing various bankruptcy matters as public rights, including disputes resolved pursuant to the confirmation of plans of reorganization that could be subject to equitable mootness.[315]

If these courts are correct and no Article III involvement is required for the adjudication of public rights, the lack of Article III review resulting from equitable mootness is immaterial. "[T]he whole point of the 'public rights' analysis was that no judicial involvement at all was required—executive determination alone would suffice."[316] Although this conclusion is seemingly obvious, the Supreme Court has not confirmed it. Instead, in *Northern Pipeline* it "suggested that [Congress] may be required to provide[] for Art. III judicial review."[317] As a result, even if certain bankruptcy matters are categorized as public rights, equitable mootness still violates appellants' constitutional rights by foreclosing Article III appellate review.[318]

B. Historic Rights

The historic boundaries of bankruptcy commissioners bound modern bankruptcy judges' ability to enter final judgments and designate the required scope of appellate review. Bankruptcy courts existed at common law and were established under federal law shortly after the Framing of the Constitution.[319] The authority of these courts is not simply an artifact of history. As recognized by *Northern Pipeline*, *Granfinanciera*, and *Stern*,[320] the authority of the bankruptcy commissioners at common has established the frontier for the constitutional authority of bankruptcy courts to enter final judgments.[321] Rather than rely upon the questionable public rights exception to delineate the amount of appellate review, this historical inquiry

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[313] *See* Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168 (2014).

[314] Loveridge v. Hall (*In re* Renewable Energy Dev. Corp.), 792 F.3d 1274, 1282 (10th Cir. 2015) ("[D]espite suggesting some aspects of bankruptcy implicate only public rights, precisely none of the Court's Article III bankruptcy cases has yet upheld a bankruptcy court's decision on this basis.").

[315] *See, e.g.*, JPMCC 2007–CIBC 19 East Greenway, LLC v. Bataa/Kierland LLC (*In re* Bataa/Kierland LLC), 496 B.R. 183, 188–189 (D. Ariz. 2013) (explaining that the bankruptcy court has authority to decide contractual dispute in the context of plan confirmation under the "public rights" exception).

[316] Strauss, *supra* note 278, at 632 (emphasis removed).

[317] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 n.23 (1982) (citing Atlas Roofing Co. v. OSHA Review Comm'n, 430 U.S. 442, 455 n.13 (1977)).

[318] This conclusion is particularly important in the Third Circuit, where many high-profile bankruptcy appeals are brought (due to it including the District of Delaware), which has recognized claims that arise under federal bankruptcy laws as public rights. *See, e.g.*, *In re* Linear Elec. Co., 852 F.3d 313, 320 (3d Cir. 2017).

[319] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951–52 (2015) (Roberts, C.J., dissenting).

[320] *See supra* note 239 and accompanying text.

[321] *Wellness Int'l*, 135 S. Ct. at 1970 (Thomas, J., dissenting). One of the newer members of the Supreme Court, Justice Gorsuch, has at least recognized this perspective. *See* Loveridge v. Hall (*In re* Renewable Energy Dev. Corp.), 792 F.3d 1274, 1282 (10th Cir. 2015).

follows a worn path. Indeed, Justice Thomas took this path to its logical end: the appellate review provided to litigants must match that provided contemporaneously with the Framing.[322] At that time, determinations by bankruptcy commissioners (the predecessors to today's bankruptcy judges) were subject to appellate review by the Chancellor in England and by the district court under the 1800 Bankruptcy Act. This subpart discusses this history and its impact on the constitutionality of equitable mootness.

From *Marathon*, to *Stern*, to the dissents of Chief Justice Roberts and Thomas in *Wellness*, the historic theory of bankruptcy court authority emerges. The constitutional authority of bankruptcy judges is predicated upon the authority of English and American bankruptcy commissioners at the time of the Framing of the Constitution. In *Northern Pipeline*, Justice Rehnquist's majority-making concurrence explained that a bankruptcy judge could not adjudicate an action "for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."[323] This statement rephrases the famous dicta of *Murray's Lessee*: Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[324] The majority in *Stern* confirmed this historical limitation was not altered by the enactment of BAFJA to replace the Reform Act.[325] Meanwhile, in his concurrence, Justice Scalia began fleshing out the historic limitation by linking it to the historical practices applied under the 1800 Bankruptcy Act,[326] which had copied the contemporary English substance and procedure.[327]

In *Wellness International Ltd. v. Sharif*, the dissenting opinions of Chief Justice Roberts and Justice Thomas continued the trajectory of *Marathon* and *Stern*. While the majority in *Wellness* held that litigant consent and forfeiture could be sufficient to allow a bankruptcy judge to issue final judgments on *Stern* claims,[328] the dissents analyzed the boundaries of *Stern* claims. Both dissents adopted the historical jurisdiction of bankruptcy commissioners at common law and under early United States bankruptcy legislation as the boundary for the constitutional authority of contemporary bankruptcy judges. According to the Chief Justice: "This historical practice, combined with Congress's constitutional authority to enact bankruptcy laws, confirms that Congress may assign to non-Article III courts adjudications involving 'the restructuring of debtor-creditor relations, which is at the core of the

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[322] *See Wellness Int'l*, 135 S. Ct. at 1970 (Thomas, J., dissenting).

[323] N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 at 90 (1982) (Rehnquist, J., concurring).

[324] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

[325] Stern v. Marshall, 564 U.S. 462, 484 (2011).

[326] *See Id.* at 505 (Scalia, J., concurring) (citing Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 607–609 (1998)).

[327] Plank, *supra* note 326, at 607–09.

[328] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942 n.7 (2015). The majority did not analyze whether the relevant claim was a *Stern* claim or provide any guidance for making such a determination. *See id.*

federal bankruptcy power.'"[329] Justice Thomas echoed the Chief Justice's analysis and extended it to its natural conclusion: as a historical exception to Article III, Congress may "establish bankruptcy courts that exercise jurisdiction akin to that of bankruptcy commissioners in England, subject to review traditionally had in England."[330] This is the terminus of the route charted by *Marathon, Stern,* and *Murray's Lessee*. We must survey the right to appeal the commissioners' decisions at common law and under the 1800 Bankruptcy Act to provide a reference for comparison to modern practices.

At common law, the Lord Chancellor appointed bankruptcy commissioners[331] who exercised *in rem* jurisdiction over the debtor's property.[332] As a precondition for distributing the liquidated proceeds of the debtor's property, the commissioners adjudicated the validity of creditors' claims.[333] The commissioners' jurisdiction was limited to *in rem* determinations concerning property properly in the custody of the commissioner or his representative, the assignee.[334] This authority was not advisory; final judgments entered by the commissioners were subject to appellate review.[335] The commissioners' jurisdiction did not extend to all bankruptcy matters. The assignees brought actions in the courts of law and equity to recover debts owed to the debtor or recover the debtor's property.[336] The Commissioners could not adjudicate these actions because they invoked *in personam* jurisdiction by imposing liability on third parties.[337]

Appellate review of commissioners' decisions was available as a right at common law. An unsatisfied bankrupt or creditor could obtain direct review of the

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[329] *Id.* at 1951 (Roberts, C.J., dissenting) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. at 71, 102 (1982)). The Chief Justice further relied upon the 1898 Bankruptcy Act because of its similarities to the jurisdiction of commissioners at common law. The summary jurisdiction of bankruptcy referees under the 1898 Act was predicated upon property being in *customia legis* of the court based upon the debtor's actual or constructive possession, just like the commissioner's jurisdiction at common law. *See Id.* at 1952–54.

[330] *Id.* at 1970 (Thomas, J., dissenting).

[331] Five commissioners were selected to conduct the proceedings and a quorum of three was necessary to determine almost all issues. Plank, *supra* note 327, at 576.

[332] Brubaker, *supra* note 239, at 263–64.

[333] *Id.*

[334] *Id.*

[335] Clarke v. Capron (1795) 30 Eng. Rep. 832; 2 Ves. Jun. 667. In *Clarke*, the assignees (equivalent of a modern bankruptcy trustee) appealed an allowance of a creditor's claim after the commissioner had awarded a dividend. The award of a dividend functioned as a default judgment against the assignees. The assignees attempted to appeal by filing a bill of equity rather than petition. *Id.* at 832–33. The Chancellor refused to entertain the appeal because the use of the bill was improper. The assignees should have timely filed a petition. Due to their procedural failure, the appeal was dismissed. Although at first blush *Clarke* may appear to support equitable mootness based on the discretionary dismissal by the Chancellor, the case is properly read as requiring an appropriate mode of appeal. *See id.* at 833 (noting that timely appeal via petition should have been easily accomplished); *see also* Plank, *supra* note 327, at 595 (evaluating *Clarke*).

[336] Ezra H. Cohen, *The Effect of Stern v. Marshall on Avoidance Actions*, 22 NORTON J. BANKR. L. & PRAC. (2013).

[337] *See* Brubaker, *supra* note 239, at 263–64; *See* John C. McCoid, II, *Right to Jury Trial in Bankruptcy:* Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 30–31 (1991).

commissioners' decision by filing a petition for review by the Lord Chancellor.[338] No second level right to an appeal existed for a petition.[339] If the matter was particularly difficult, a bill in equity or an action at law could be brought to collaterally attack the commissioners' decision prior to a dividend being declared for creditors.[340] Not only would such a strategy allow a more formal mode of adjudication, it would also preserve a right to appeal the Chancellor's decision.[341] Regardless of the chosen mode of appeal, the direct authority of the Chancellor over the commissioners warranted a right to appeal.[342] "An appeal lies to [the Chancellor] from all [the commissioners'] decisions, and all their proceedings are subject to his revision."[343]

The first Federal bankruptcy statute, the Bankruptcy Act of 1800,[344] copied the contemporary English system of appeal for bankruptcy matters.[345] Among the many elements it retained was the initial adjudication by commissioners, however, it provided for a simpler single right of appeal to an Article III district court judge.[346] Just like in England, the district court judges' authority over the commissioners

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[338] *Ex parte* Bowes (1798) 31 Eng. Rep. 86, 87, 90–91; 4 Ves. Jun. 168, 170, 176–77; *see also* Plank, *supra* note 326, at 576–77; *Ex parte* Bryant (1812) 35 Eng. Rep. 83, 83; 1 V & B 211, 211 (stating no second level right to an appeal existed from the decision of the Chancellor on a petition.).

[339] *See Ex parte Bryant*, 35 Eng. Rep. at 83; Murphy v. Felice (*In re* Felice), 480 B.R. 401, 420 (Bankr. D. Mass. 2012) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *821).

[340] *Ex parte* Linthwaite (1809) 33 Eng. Rep. 973; 16 Ves. Jun. 234; *see also In re Sand*, 21 F. Cas. 333, 335–36 (S.D.N.Y. 1822) (No. 12,302) (analyzing jurisdiction of Chancellor).

[341] *See Ex parte* Cawkwell (1812) 34 Eng. Rep. 505; 19 Ves. Jun. 234; *In re Sand*, 21 F. Cas. at 336. In any case, the mode of appeal did not impact the breadth or type of relief available. *Id.* ("In every case [the Chancellor] can give the same relief upon a petition as upon a bill filed"). The more formal alternatives to review by petition, however, carried some risk. If the difficulties were not sufficient or the filing was made after a dividend was declared, the bill or action might be dismissed as a waste of time and estate resources. *See* Clarke v. Capron (1795) 30 Eng. Rep. 832; 2 Ves. Jun. 667.

[342] *In re Sand*, 21 F. Cas. at 336.

[343] *Id.*

[344] The Bankruptcy Act of 1800 was enacted in response to the national depression of 1798. Vincent L. Leibell, Jr., *The Chandler Act—Its Effect Upon the Law of Bankruptcy*, 9 FORDHAM L. REV. 380, 382 (1940). Certainly, the most famous debtor under the act was Robert Morris, a founding father and signer of both the Constitution and the Declaration of Independence. His case provided one of the few reported opinions analyzing the 1800 Bankruptcy Act. *See In re* Morris, 17 F. Cas. 785, 786 (W.D. Pa. 1837) (No. 9,825).

[345] *See* Plank, *supra* note 327, at 573. Indeed, the 1800 Act was so similar that contemporary English bankruptcy precedents were viewed as precedential. *See* Roosevelt v. Mark, 6 Johns. Ch. 266, 285 (N.Y. Ch. 1822) ("The bankrupt act of the United States, of April, 1800, was a consolidation of the previous provisions in the English statutes of bankruptcy; and the English decisions on their statutes prior to that date, properly apply as rules of construction to this act of Congress."). 5 Geo. 2, c. 30, § 1 (1732) was the English bankruptcy statute in effect during the American Revolution, through the passage of 1800 Bankruptcy Act. Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 337 n.85 (2013).

[346] *See In re Morris*, 17 F. Cas. at 788; Plank, *supra* note 327, at 609. Courts disagreed over whether a further right to appeal from a district court existed. *Compare In re Sand*, 21 F. Cas. at 336, 339 (noting no right to appeal from district court review of commissioners' determination and noting existence of opinion of Justice Livingston, riding the circuit, coming to same conclusion) *with* Lucas v. Morris, 15 F. Cas. 1063, 1065 (C.C.S.D.N.Y. 1825) (No. 8,587) (stating circuit court possessed some jurisdiction to hear appeals from district court).

formed the basis for the right to appeal.[347] More fundamentally, if this right did not exist, one district court questioned: "Who is to recall the commission?—the authority which is thus abused, which every one[sic] must agree ought to be recalled by somebody?"[348]

The parallels to today's system of bankruptcy adjudication are telling. The constitutional bounds of bankruptcy adjudication are established by the limitations on the commissioners at common law and under the 1800 Bankruptcy Act, including the associated right of appeal.[349] Modernly, this is the right to appeal to an Article III judge. BAFJA satisfies this historical requirement by providing Article III appellate review of bankruptcy court judgments as a matter of right.[350] It is initially available as a first level appeal to the district court[351] but further review as a matter of right is available to the Court of Appeals.[352] Discretionary review by the Supreme Court via a writ of certiorari is possible.[353]

Equitable mootness unconstitutionally abridges the right to Article III appellate review. It prevents an Article III judge from reviewing an Article I bankruptcy judge's final determination.[354] Even though the Article III Judge is making the prudential decision to not hear the merits of the appeal, the right to appellate review was recognized at common law and it must be provided.[355] No evidence exists that the English legislature at common law or Congress, at the time of the Framing, has ever sanctioned equitable mootness. Indeed, the evidence suggests the opposite. The right to review and supersede the commissioners was necessary to uphold the bankruptcy laws.[356] "[I]f he has no authority to supersede his commission, the

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[347] *In re Morris*, 17 F. Cas. at 794.

[348] *Id.*

[349] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1970 (2015) (Thomas, J., dissenting); *In re* One2One Commc'ns, LLC, 805 F.3d 428, 446 (3d Cir. 2015) (Krause, J., concurring) ("[T]he decisions of bankruptcy commissioners, referees, and, most recently, judges have always been subject to review in courts of law or equity."). "From the nature of preconstitutional bankruptcy adjudication emerges a general principle: The details of bankruptcy adjudication are a matter of legislative discretion requiring only a right of appeal to a court of law or equity." Plank, *supra* note 327, at 574. Although Professor Plank employed this conclusion as evidence of the appellate review theory and a critique of the conclusions first reached in *Northern Pipeline* and later reiterated in *Stern*, it also illustrates the necessity of appellate review based on historical practice.

[350] *See In re* Machne Menachem, Inc., 371 B.R. 63, 75 (Bankr. M.D. Pa. 2006) (Deciding not to apply equitable mootness to a motion for reconsideration, explaining that "[a]ppellate review by an Article III Judge is a fundamental pillar of our jurisdictional grant.").

[351] The appellant can always choose to appeal to the district court rather than a bankruptcy appellate panel, even when one is available. *See* 28 U.S.C. § 158 (2012).

[352] 28 U.S.C. § 158(c)(2)(A) (2012).

[353] 28 U.S.C. § 1254 (2012).

[354] *In re One2One*, 805 F.3d at 445 (Krause, J., concurring).

[355] The Supreme Court has provided contrary guidance. *See id.* at 446. Indeed, equitable mootness has never been confirmed by the Supreme Court and it might be on shaky ground if it is reviewed by the current Court. Then-Judge Alito heavily criticized the doctrine when he sat on the Third Circuit. *In re* Cont'l Airlines, 91 F.3d 553, 567–73 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

[356] *In re* Morris, 17 F. Cas. 785, 788 (W.D. Pa. 1837) (No. 9,825). When petitioned to review the determination of the commissioners, the Chancellor at common law and each district court judge under the 1800 Bankruptcy Act "takes care that the true intentions of the legislature in making the statutes, as he understands them, shall be carried into effect, and shall not be perverted." *See id.* at 793.

mischief will go on; and I know of no remedy for it."[357] If an appeal is dismissed pursuant to equitable mootness, the mischief will continue because the merits have not been adjudicated and the appellant is left without a remedy.

The constitutional concerns presented by equitable mootness are further exacerbated by the bankruptcy judge's control over many of the factors comprising the equitable mootness inquiry.[358] Returning to the time of the Framing, the Chancellor's and district court's control over the commissioners was comprehensive.[359] Although it was rooted in the right to appeal, the control extended to the right to supersede the commission.[360] BAFJA modernly reflects this spirit of control through the district court's authority to withdraw the reference from the bankruptcy court over any case or proceeding, and the district court's ability to limit the bankruptcy court's authority by order.[361] Indeed, these provisions were enacted in response to *Northern Pipeline* and more limited supervisory authority under the unconstitutional Reform Act.[362] Equitable mootness turns the tables and "effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue."[363]

> Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new entities (in which third parties may invest) are formed, and whether distributions (including to third parties) under the plan begin—all before plan challengers reach an Article III court.[364]

This virtual role reversal with the bankruptcy court controlling the adjudication by the district court violates the separation of powers and independently supports the unconstitutionality of equitable mootness.[365]

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[357] *Id.* at 795.

[358] *In re One2One*, 805 F.3d at 445 (Krause, J., concurring).

[359] *In re Morris*, 17 F. Cas. at 794–95; *In re* Sand, 21 F. Cas. 333, 335–36 (S.D.N.Y. 1822) (No. 12,302) ("[I]n virtue of his power to appoint and to remove, to create and to annihilate these officers, [the Chancellor] possesses the authority to control and direct them in all their acts, and thus effectually to exercise the whole jurisdiction. It would be very difficult, and not necessary, to enumerate the very various instances in which his jurisdiction is said to be derived from his superintending authority over the commissioners.").

[360] *In re* Morris, 17 F. Cas. at 794–95; *In re* Sand, 21 F. Cas. at 335.

[361] Land-O-Sun Dairies, Inc. v. Fla. Supermarkets, Inc. (*In re* Finevest Foods, Inc.), 143 B.R. 964, 968 (Bankr. M.D. Fla. 1992) (citing 28 U.S.C. §§ 151, 157 (2012)); *see also* Brief for Petitioner at 42, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 1365 (2018) (No. 16-712) (citing withdrawal of the reference as a mechanism for district courts to exercise control over bankruptcy courts). This was also true under the 1898 Act. *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79–80 n.31 (1982).

[362] *See Land-O-Sun*, 143 B.R. at 968.

[363] *One2One*, 805 F.3d at 445 (Krause, J., concurring).

[364] *Id.*

[365] *See* Brubaker, *supra* note 231, at 33 n.86.

The necessity of appellate review brings the constitutionality of sections 363(m) and 364(e) into question.[366] Although sections 363(m) and 364(e) have the added imprimatur of Congressional enactment, they both accomplish the same ends as equitable mootness.[367] *Stern*, *Granfinanciera*, and *Northern Pipeline* all teach that legislative enactment is not sufficient to overcome constitutional infirmities.[368] No parallel enactments were present contemporaneous with the Framing. As a result, the constitutionality of these sections, like that of equitable mootness, is also doubtful.[369]

VI. EXPANDED STAY PENDING APPEAL TEST

Equitable mootness' popularity compared to other prudential doctrines illustrates the importance of the policy concerns supporting the doctrine. Although the principles bounding the constitutional authority of bankruptcy courts and appellate rights arising from their judgments are tethered to the standards of 1789 and 1800, the economic realities of modern bankruptcy differ markedly from that earlier era. The perceived need for equitable mootness reflects these immense changes.

Expanding the stay pending appeal test constitutionally effectuates the policies supporting equitable mootness. The appropriate reaction to equitable mootness' unconstitutionality is not to shun the policy supporting equitable mootness; it is to repackage these concerns in a constitutional form that does not ignore the merits of the appeal. Equitable mootness is the outgrowth of the stay pending appeal test[370] resulting from bankruptcy's unique impact on non-party interests.[371] By altering the test for stay pending appeal to include consideration of non-parties' interests, it assesses equitable mootness's *raison d'etre* without its unconstitutional infirmities, while still preliminarily evaluating the merits. Momentum is already building toward this conclusion.[372] Modifying the test will also have the ancillary benefit of evaluating these concerns in other bankruptcy contexts, such as appeals of orders under sections 363(m) and 364(e).

The test for stay pending appeal leaves room for evaluating the impact of staying the appeal on third parties. Although the Supreme Court has blessed the test for stay pending appeal, it has not rigidly defined the test's factors.[373] This flexibility leaves

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[366] *See supra* Part IV (discussing 11 U.S.C. §§ 363(m) and 364(e) (2012)).

[367] *See* Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F.3d 737, 742–44 (6th Cir. 2005) ("Though reflective of the general prohibition against advisory opinions undergirding the constitutional mootness doctrine, bankruptcy mootness under § 363(m) is broader. Even if the appeal is not moot as a constitutional matter because a court could provide a remedy, the policy favoring finality in bankruptcy sales reflected in § 363(m) requires that certain appeals nonetheless be treated as moot absent a stay.").

[368] *See supra* Section VI.C.

[369] Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 134 (2012) (questioning whether § 363(m) is unconstitutional based on its elimination of the opportunity to be heard on appeal).

[370] As we saw in Part I, the historical lineage of equitable mootness evolved from the traditional stay pending appeal framework.

[371] *See supra* note 9 and accompanying text.

[372] *See supra* note 39 and accompanying text.

[373] *See* Nken v. Holder, 556 U.S. 418, 433–436 (2009).

room for individualized applications.[374] Courts commonly describe the test's third factor as the balance of the harms.[375] It evaluates "whether issuance of the stay will substantially injure the other parties interested in the proceeding" and compares this harm to the potential harm to the appellant arising from a failure to establish a stay.[376] Traditionally, courts have restricted the evaluation of the harm caused by the stay to the debtor, *i.e.* the debtor is a melting ice cube and a stay will destroy its chance to reorganize.[377] Non-parties, however, are often impacted by a bankruptcy appeal; this is the reason equitable mootness exists.[378] It is therefore particularly proper for a court analyzing the stay pending appeal in a bankruptcy matter to consider non-party interests as part of the third prong of the stay pending appeal test.[379] Their interests may even carry sufficient weight to deny a stay and allow plan or transaction to be consummated.

Unlike equitable mootness, the test for stay pending appeal also evaluates the likelihood of the appellant prevailing on the merits. An appellant must show that it has a substantial chance of success on the merits in order to obtain a stay.[380] Equitable mootness, in contrast, traditionally lacks any analysis of the merits. This omission can create an awkward situation where the appellate court may believe that the appellants have a reasonable chance of success on the merits but they refuse to even consider them.[381] In response, recent decisions have (i) briefly considered the merits

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[374] *See id.*

[375] *See, e.g.*, Beeman v. BGI Creditors' Liquidating Tr. (*In re* BGI, Inc.), 504 B.R. 754, 764 (S.D.N.Y. 2014).

[376] *Nken* 556 U.S. at 426. Courts have also generally considered the "consequences beyond the immediate parties." *In re* Revel AC, Inc., 802 F.3d 558, 569 (3d Cir. 2015) (citing and quoting Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 388 (7th Cir. 1984)). However, this inquiry focuses on the public in general rather than on interested parties in the bankruptcy appeal. *See In re Revel*, 802 F.3d at 573.

[377] *See In re* Sabine Oil & Gas Corp., 548 B.R. 674, 683 (Bankr. S.D.N.Y. 2016) (potential harms include "(i) lost strategic opportunities; (ii) difficulty in recruiting and retaining talent for the Debtor; (iii) incurrence of administrative and professional expenses; (iv) placing plan settlements in jeopardy; and (v) exposing the equity to be granted to non-moving creditors to market volatility and other risks.").

[378] *See* Search Market Direct, Inc. v. Jubber (*In re* Paige), 584 F.3d 1327, 1339 (10th Cir. 2009); Wooley v. Faulkner (*In re* SI Restructuring, Inc.), 542 F.3d 131, 136 (5th Cir. 2008) ("The ultimate question to be decided is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties.").

[379] *See In re Revel*, 802 F.3d at 569 (quoting *Roland*, 749 F.2d at 388); Freeman v. Ow, No. 16–cv–04817–JST, 2016 WL 6778667, at *8 (N.D. Cal. Nov. 16, 2016); United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc., No. 2:16–CV–00064–RDP, 2016 WL 470815, at *7 (N.D. Ala. Feb. 8, 2016); BDC Capital., Inc. v. Thoburn L.P., 508 B.R. 633, 640–41 (E.D. Va. 2014).

[380] Leiva-Perez v. Holder, 640 F.3d 962, 968 (9th Cir. 2011).

[381] *See In re* Cont'l Airlines, 91 F.3d 553, 557, 567 (3d Cir. 1996) (describing issues presented by the appeal as "interesting and challenging" but still finding equitable mootness precludes evaluation of the merits). Some courts have found this failing so troubling that they have considered the merits prior to applying equitable mootness. *See* Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005). However, even in the Second Circuit, courts are not required to follow this path and consider the merits prior to equitable mootness. *In re* Sabine Oil & Gas Corp., No. 16 Civ. 6054 (LAP), 2017 WL 477780, at *4 (S.D.N.Y. Feb. 3, 2017).

as part of the equitable mootness inquiry[382] or (ii) made an equitable mootness determination contemporaneously with a determination on the merits.[383] These are half-measures that only highlight this shortcoming.

As an ancillary benefit, the expanded stay pending appeal test would also improve the application of statutory mootness provisions of the Code by evaluating bankruptcy-specific concerns. Bankruptcy appeals, especially those involving a sale or financing by the debtor, often affect third parties who are not actively involved in an appeal.[384] Recognizing this, some courts evaluating whether to grant a stay pending appeal of an order where either section 363(m) or 364(e) may moot an appeal, consider the impact of the stay on non-parties.[385] Many courts, however, often only consider the interests of the parties to the appeal.[386] The expanded stay pending appeal test would ensure that third parties' interests are evaluated.

The expanded stay pending appeal test brings the evolution of equitable mootness full circle. It reflects the concerns that originally birthed the equitable mootness doctrine but returns the doctrine to constitutionality. Equitable mootness is rooted in the unfairness of reversal for the third-parties and importance of facilitating reorganizations. By evaluating this issue in the context of a stay pending appeal, it will make stays more difficult to obtain and the reorganization of the debtor will be more likely to continue uninterrupted.[387] Meanwhile, the appellant's constitutionally protected right to appellate review on the merits is not eliminated by judicial discretion.

CONCLUSION

In an ideal world, Congress would enact a statutory provision establishing equitable mootness and outline the types of proceedings where it would apply. Unfortunately, Congressional action does not appear likely. It is especially unlikely when Congress can rely upon the prudential version as a substitute for its own action.

The continued application of equitable mootness in spite of its many failings—statutory, equitable, prudential, and constitutional—simply because it is efficient and useful is improper. A prudential doctrine without a statutory basis where a judge can eliminate an appeal without even considering the merits simply does not comport with Supreme Court precedent or the historical nature of bankruptcy court authority and appellate review. It is time to discard equitable mootness in its current

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[382] *Paige*, at 1339 (advocating for a "quick look at the merits"); *Deutsche Bank*, 416 F.3d at 144 ("[A]n appraisal of the merits is essential to the framing of an equitable remedy."); *see also In re* One2One Commc'ns, LLC, 805 F.3d 428, 454 (3d Cir. 2015) (Krause, J., concurring) (arguing against the vitality of equitable mootness but suggesting that the Third Circuit adopt this element if equitable mootness is retained).

[383] *See In re* Peabody Energy Corp., 582 B.R. 771, 779–81, 784 (E.D. Mo. 2017).

[384] The unraveling of a sale or financing could easily sabotage a debtor's chances for reorganizing, thereby injuring all its creditors as well as third-parties who relied upon the sale or financing when transacting with the debtor.

[385] *See In re* Minor, Case No. 13–18227, 2016 WL 3462068, at *3 (Bankr. N.D. Ohio June 17, 2016).

[386] *See supra* note 377 and accompanying text.

[387] An unstayed appeal also makes constitutional mootness and more limited relief more likely.

form.[388] Nothing else will spur Congress. Only by coming full circle and abandoning equitable mootness as a prudential doctrine will Congress enact a constitutional substitute. In the interim, expanding the stay pending appeal test to weigh the impact on non-parties of staying a bankruptcy appeal will constitutionally manifest the concerns at the core of equitable mootness.

[388] It will take a Supreme Court decision to provide clarity, let alone to eliminate the doctrine. *See* Paul A. Avron, *Equitable Mootness: Is it Time for the Supreme Court to Weigh in?*, Am. Bankr. Inst. J., Mar. 2017, at 36.

No. 21-17

In the Supreme Court of the United States

DAVID HARGREAVES, PETITIONER

v.

NUVERRA ENVIRONMENTAL SOLUTIONS, INC., ET AL.,
RESPONDENTS

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**BRIEF FOR PROFESSORS OF BANKRUPTCY LAW
AS AMICI CURIAE SUPPORTING PETITIONER**

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INTEREST OF AMICI CURIAE

Amici curiae, whose names and affiliations are set forth in the attached Appendix, are 21 professors of law who have expertise bearing directly on the question presented in this case. They regularly teach courses in bankruptcy law and principles, and have authored numerous articles, treatises, and textbooks on bankruptcy law. Amici have an interest in the orderly development of bankruptcy law and practice, including through the robust and thoughtful appellate review of hard questions posed by complex cases.[1]

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici curiae or their counsel, has made a monetary contribution to this brief's preparation or submission. The institutional affiliations of the amici are for identification only.

ARGUMENT

The judge-made doctrine of equitable mootness has the extraordinary effect of causing Article III courts to refuse to review meritorious, live appeals from bankruptcy court orders. It does so even though there is nothing genuinely "moot" about cases in which effective relief is indisputably available, nor anything genuinely "equitable" about immunizing erroneous bankruptcy court decisions from appellate scrutiny.

As Judge Krause explained in this case, equitable mootness is a "problematic doctrine" that "lure[s]" appellate courts into "abdicating [their] jurisdiction when [they] should be exercising it, and stunting the development of * * * bankruptcy jurisprudence when it's [their] duty to promote it." Pet. App. 18 (quotation and alteration marks omitted). Indeed, the lower courts' application of this purported doctrine has left vexing questions of bankruptcy law persistently unresolved by those courts that have the authority—and responsibility—to decide them. The ultimate effect of the impoverished record in the courts of appeals is that important ambiguities and controversies in bankruptcy law never percolate up to this Court for review and definitive decision.

The consequence is bankruptcy law that varies from bankruptcy courtroom to bankruptcy courtroom, depending on the presiding judge. Legal analysis of consequential questions is concentrated in the handful of bankruptcy courts that regularly handle the country's most complex corporate bankruptcies. What is more, sophisticated parties in those high-stakes cases know how to wield equitable mootness to their advantage, by advocating aggressive legal

positions to receptive bankruptcy judges and then rushing to consummate confirmed reorganization plans before appeals have run their course. The resulting uncertainty ripples through the capital markets.

None of this is consistent with Congress's carefully tailored scheme of appellate review in bankruptcy cases, nor with the federal courts' duty to decide cases that are within their jurisdiction and properly before them. This Court should grant the petition to rein in the lower courts' abdication of their jurisdictional obligations, promote the development of bankruptcy law, and level the playing field in bankruptcy cases.

I. Equitable Mootness Upends Statutory Appellate Rights Enacted To Ensure Meaningful Review Of Bankruptcy Court Decisions By Article III Courts

Congress has explicitly provided for Article III courts' appellate review of final orders and judgments entered by non-Article III bankruptcy judges. That review equips district courts to oversee the bankruptcy judges to whom they refer cases, and facilitates the courts of appeals' issuance of binding, precedential rulings on important legal questions under the Bankruptcy Code.

The equitable-mootness doctrine thwarts that scheme of appellate review, however, by excusing courts from exercising those responsibilities. It is a judge-made doctrine of abstention from hearing and deciding appeals over which Congress has indisputably vested courts with jurisdiction. Bankruptcy court decisions—no matter how unlawful—thereby evade the Article III scrutiny that Congress intended. The equitable-mootness doctrine has no basis in the

statutes governing bankruptcy appeals, or in the abstention principles strictly limited by this Court's decisions.

1. Bankruptcy judges are authorized to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11" that are referred to them by the district courts vested with original jurisdiction over those matters. 28 U.S.C. § 157(b)(1); see also *id.* § 1334. Bankruptcy courts "may enter appropriate orders and judgments" in such cases and core proceedings, including ordering the "confirmation of plans" of reorganization. *Id.* § 157(b)(1), (b)(2)(L).

Not surprisingly, Congress made bankruptcy judges' orders and judgments "subject to review" by Article III courts. 28 U.S.C. § 157(b)(1). To that end, Congress enacted a robust scheme of appellate oversight of bankruptcy judges' decisions. District courts have "jurisdiction to hear appeals" from, among other things, bankruptcy judges' "final judgments, orders, and decrees." *Id.* § 158(a)(1). Parties thus have the statutory right to "appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards." *Stern* v. *Marshall*, 564 U.S. 462, 474-75 (2011).

The courts of appeals, in turn, "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by the district courts. 28 U.S.C. § 158(d)(1). They review the bankruptcy or district courts' legal conclusions de novo. See *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018). This tiered scheme of appellate review empowers district courts

to supervise the bankruptcy judges in their districts, and authorizes the courts of appeals to address the legal issues presented in bankruptcy cases and establish binding circuit precedent on them.

2. Congress has authorized only limited exceptions to the appellate review of bankruptcy court orders required by statute. The Bankruptcy Code states that *certain* orders entered by a bankruptcy judge, in *specific* situations, are not subject to reversal on appeal because that would be unfair to the settled expectations of innocent third parties. Specifically, sections 363(m) and 364(e) of the Bankruptcy Code, 11 U.S.C. §§ 363(m), 364(e), "provide that certain components of sales and loans cannot be attacked on appeal if undertaken in good faith." Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 403 (2019); see also 28 U.S.C. § 1334 (expressly providing for permissive and mandatory abstention by district courts in certain specified bankruptcy cases within their original jurisdiction).

But Congress did not enact any similar carve-out from statutory appellate rights for the confirmation of Chapter 11 reorganization plans. As Professor Bruce Markell, a former bankruptcy judge, has explained, "this lacuna means that confirmation orders should not have the presumptions of finality without review that sale orders and lending orders enjoy." *Needs of the Many*, 93 Am. Bankr. L.J. at 404. The equitable-mootness doctrine nevertheless inserts a judge-made rule against disturbing confirmed, consummated reorganization plans that is untethered to anything in the Bankruptcy Code.

3. As petitioner correctly observes (Pet. 20), the lower courts' creation of a doctrine of appellate abstention in bankruptcy cases is irreconcilable with those courts' "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); see also *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 72 (2013) ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction."). This Court has made clear that federal courts may abstain from hearing cases that are properly brought before them "only [in] exceptional circumstances." *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 368 (1989). Accordingly, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813.

The limited circumstances in which the federal courts may permissibly abstain from exercising the jurisdiction granted to them are those in which some "deference to the States" favors "the withholding of authorized equitable relief because of undue interference with state proceedings." *New Orleans*, 491 U.S. at 359, 368. Such withholding is justified "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813.

But equitable mootness does nothing of the sort. Bankruptcy appeals dismissed as equitably moot are not then heard and resolved somewhere else. Rather, they are never heard and resolved *at all*. There is, therefore, "no analogue for equitable mootness among the abstention doctrines." *In re One2One Commc'ns,*

LLC, 805 F.3d 428, 440 (3d Cir. 2015) (Krause, J., concurring). Because equitable mootness involves "no other forum and no later exercise of jurisdiction * * * relinquishing jurisdiction is not abstention; it's abdication." *Ibid.;* see also Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 Ky. L.J. 269, 290 (2018) (identifying the "strong tension" between equitable-mootness dismissals and the "duty of federal courts to fully exercise their jurisdiction under statute and the Constitution").

II. Equitable Mootness Precludes The Development And Predictability Of Bankruptcy Law

The all-too-routine invocation of equitable mootness to dismiss appeals deprives bankruptcy law of the thoughtful analysis and predictable precedent that appellate review provides. In so doing, it leaves the development of that jurisprudence to a relatively small number of non-Article III bankruptcy judges who sit in the jurisdictions where the most complex bankruptcy cases are concentrated.

1. Although bankruptcy courts publish many pages of rulings analyzing and applying the Bankruptcy Code, those decisions lack any binding effect in future cases. Even a given bankruptcy judge is not bound to adhere to his or her own prior decisions in other cases. See, *e.g.*, *In re AM Int'l, Inc.*, 203 B.R. 898, 905 (D. Del. 1996) ("[T]he Bankruptcy Court is not bound by its previous decisions."). The binding force of district courts' decisions in bankruptcy appeals, too, is generally limited to "the immediate parties to a case."

Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States,* 12 Nev. L.J. 787, 827 (2012).[2]

The development of bankruptcy law thus depends on appeals reaching the courts of appeals for decision on their merits. And for that to happen, parties must have meaningful access to the full scope of appellate review that Congress provides to them.

Equitable mootness stunts that normal process of jurisprudential development by blocking appellants' ability to exercise their statutory appellate rights. See Pet. App. 17 (Krause, J., concurring) (equitable mootness "precludes the development of bankruptcy law"). This case is a prime example: The Bankruptcy Code prohibits judicial confirmation of Chapter 11 reorganization plans that "discriminate unfairly" among creditors. 11 U.S.C. § 1129(b). Respondents' reorganization plan affords petitioner only 5 cents on the dollar of his unsecured claims, while other unsecured creditors receive 100 cents on the dollar of their claims. Pet. 12-13. Over petitioner's objection, the bankruptcy court held that this is not unfair discrimination because the favored unsecured

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[2] Bankruptcy courts regularly view themselves as being "free to disagree with and disregard district court precedent." Mead, *Stare Decisis*, 12 Nev. L.J. at 827; see also *In re Jones*, 538 B.R. 844, 848 (Bankr. W.D. Okla. 2015) ("Under principles of *stare decisis*, a decision of a federal district court judge or bankruptcy court is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *In re Ford*, 415 B.R. 51, 60 (Bankr. N.D.N.Y. 2009), aff'd *sub nom. Community Bank N.A.* v. *Ford*, No. 5:09-cv-633 (GLS), 2009 WL 9540679 (N.D.N.Y. Dec. 8, 2009) ("[J]ust as there is no 'law of the district' mandated for district judges to follow, bankruptcy judges are likewise not bound by decisions of a single district court judge.").

creditors' additional recovery was "gift[ed]" to them by the debtors' senior creditors out of estate property that otherwise would have gone to those senior creditors. Pet. App. 5.

Amici take no position—and likely disagree among themselves—on whether the bankruptcy court correctly held that there is a "horizontal gifting" exception to the Bankruptcy Code's confirmation requirements. But amici each agree with Judge Krause that this is among a "series of open issues" presented by petitioner's case that deserve authoritative resolution by the court of appeals. Pet. App. 17. By dismissing petitioner's appeal without ruling on its merits, the decision below contributed to a troublesome deficit of binding precedent on these and other disputed questions of bankruptcy law.

This case is hardly an aberration in that respect. Indeed, "[t]he larger and more complicated the case, the more likely the appeal will be equitably moot." Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. 1715, 1734 (2018). The equitable-mootness doctrine thus especially precludes appellate review of the "central disputes in the largest business bankruptcies," as "courts commonly use the doctrine to sidestep" those questions. Timothy K. Lewis & Ronald Mann, *Courts Should Review Bankruptcy Equitable Mootness Doctrine*, Legal Intelligencer (June 8, 2016); see also Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 789-791 (2010) (observing that equitable mootness "can be dispositive in even the most important bankruptcy matters").

Some of those questions go to the heart of the bankruptcy process itself. The Fifth Circuit, for

example, felt "constrain[ed]" by the "judicial anomaly" of equitable mootness not to resolve the merits of an appeal from a confirmed plan that appeared to divide unsecured claims arbitrarily into separate classes "in order to gerrymander an affirmative vote on reorganization." *In re Pacific Lumber Co.*, 584 F.3d 229, 240, 251 (5th Cir. 2009). Likewise, the Second Circuit declined to review challenges to a confirmed plan's embedded settlement of billions of dollars of claims against a powerful insider for fear that any modification of that settlement on appeal—even to remove any illegal terms—would have "seriously threaten[ed]" the parties' ability to compromise on a new plan. *R^2 Invs.* v. *Charter Commc'ns, Inc.* (*In re Charter Commc'ns, Inc.*), 691 F.3d 476, 486 (2d Cir. 2012). In these and other cases, "equitable mootness merely serve[d] as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges." *One2One Commc'ns*, 805 F.3d at 448 (Krause, J., concurring).

Indeed, and since the petition was filed, the Eighth Circuit expressly recognized the incongruity of the equitable-mootness doctrine and a litigant's right to appellate review of bankruptcy-court decisions on their merits. *FishDish, LLP* v. *VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880, 888-891 (8th Cir. 2021). "Writing on a clean Eighth Circuit slate," and distinguishing the en banc Third Circuit's approach in *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) that was applied in this case, the court of appeals held that at least some inquiry into whether a "confirmed plan must be set aside on the merits" is "required before equitable mootness

may be invoked." *Id.* at 890. It reached that conclusion in express agreement with Judge Krause that "'[m]erits review is particularly important for complex questions, like whether a plan comports with the Bankruptcy Code's cram down provisions, an issue that often cries out for appellate review . . . or claims involving conflicts of interest or preferential treatment that go to the very integrity of the bankruptcy process.'" *Ibid.* (quoting *One2One Commc'ns*, 805 F.3d at 454 (Krause, J., concurring)). The Eighth Circuit also explained that such merits review is necessary to provide "supervisory review of the merits of [a] plan by an Article III court that has an 'unflagging obligation' to exercise its appellate jurisdiction." *Ibid.*

Nevertheless, the growing frequency with which many other courts continue to invoke equitable mootness obstructs Congress's efforts to encourage appellate precedent in bankruptcy cases. See *One2One Commc'ns*, 805 F.3d at 438 (Krause, J., concurring) (bemoaning that courts are regularly "dismiss[ing] appeals in the simplest of bankruptcies"). In fact, Congress responded to "widespread unhappiness at the paucity of settled bankruptcy-law precedent" by trying to encourage *more*, not *less*, binding appellate precedent in bankruptcy cases. *Weber* v. *United States Trustee*, 484 F.3d 154, 158 (2d Cir. 2007). As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Congress authorized courts of appeals to hear direct appeals from certain consequential bankruptcy court decisions, including ones involving "a question of law as to which there is no controlling decision" or "a

question of law requiring resolution of conflicting decisions." 28 U.S.C. § 158(d)(2). The purpose of fast-tracking certain bankruptcy appeals for direct review by the courts of appeals was "to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level." H.R. Rep. No. 31, Pt. 1, 109th Cong., 1st Sess. 148 (2005). Equitable mootness, however, has the countervailing effect of leaving many such questions unsettled—in both the standard, two-tier appeals and the newer, direct ones. See, *e.g.*, *In re City of Stockton*, 909 F.3d 1256 (9th Cir. 2018) (claims raised on direct appeal were equitably moot); *In re Pacific Lumber Co.*, 584 F.3d 229 (same).

2. The absence of robust appellate review of reorganization-plan confirmation orders gives bankruptcy judges outsized influence on the interpretation of the Bankruptcy Code. And that influence is not spread evenly. A relatively narrow band of bankruptcy judges concentrated in the Southern District of New York, the District of Delaware, and, more recently, the Eastern District of Virginia and the Southern District of Texas hear a large proportion of the "mega" Chapter 11 cases. See Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. Legal Stud. 119 (2018); Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. (forthcoming 2021). Accordingly, a relatively narrow group of judges is interpreting the bankruptcy laws in big cases—with relatively few decisions subject to review and reversal as a result of equitable mootness. See Markell, *Needs of the Many*, 93 Am. Bankr. L.J. at 408.

3. Equitable-mootness dismissals not only stifle the development of the bankruptcy law, but also weaken public perception of the system's legitimacy. Aggrieved parties who believe that they did not get a fair shake in the bankruptcy court then come to find out that no appellate court will address the merits of their appeals. When such appeals are dismissed without a hearing, "even fewer people get to tell their stories to a court of higher authority, or to observe an appellate court considering the matter." Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. at 1735.

III. Equitable Mootness Invites Gamesmanship And Distorts Bankruptcy Outcomes

Equitable mootness gives parties powerful incentives to advocate aggressive legal positions against their adversaries in bankruptcy court free from concern that an appellate court will look unkindly on their sharp tactics. The government has acknowledged that equitable mootness is therefore "open to substantial abuse, and invites manipulation of the bankruptcy process." U.S. Pet. 22-23, *United States* v. *GWI PCS 1, Inc.*, No. 00-1621 (Apr. 23, 2001).

Chapter 11 reorganization plan proponents are keenly aware that equitable mootness will make disputed plan terms effectively unreviewable once the plan has been confirmed and implemented. Debtors and other plan proponents thus have every incentive to push the envelope of legality under the Bankruptcy Code, which affects bargaining power and skews outcomes in bankruptcy court. Moreover, these parties often strategically resist the adjudication of contentious issues *until* plan confirmation, and then

"rush to consummate a restructuring plan to insulate the deal from further judicial scrutiny." Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. at 1734. Parties have followed this playbook for giving bankruptcy judges the last word on contested legal issues in numerous large bankruptcies in recent years.

The success of these strategies follows from plan proponents' control over equitable mootness's key levers when they decide how quickly to implement their confirmed plan. First, they can make it less likely that courts will stay plan confirmation pending appeal by including aggressive deadlines in a plan that effectively require its speedy implementation. Moreover, unless the plan is stayed—and it almost never is[3]—debtors and other plan proponents can push ahead with consummating plan transactions, issuing new securities, and paying allowed claims even while appeals are still pending. The effect—and often the *intent*—of doing so is to make the dismissal of those appeals on equitable-mootness grounds more likely. See *In re Pacific Lumber Co.*, 584 F.3d at 242 (confirmation appeal presented "a *fait accompli*, a

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[3] Among other reasons: courts typically require appellants to post large financial bonds to insure debtors against any losses they might sustain during the pendency of a stay. Equitable mootness thus "reduces the leverage of parties financially unable to post the bond required to obtain a stay pending appeal," further skewing the balance between bankruptcy parties. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. at 1734-1735; *see also* Markell, *Needs of the Many*, 93 Am. Bankr. L.J. at 402 (describing the bond requirements imposed in bankruptcy cases as often being "ruinous to the point of significantly burdening—if not crushing—the ability to appeal an erroneous ruling").

plan that was substantially consummated within weeks of confirmation").

Equitable mootness thus "can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans." *Nordhoff Invs., Inc.* v. *Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring in the judgment). As Professor Adam Levitin recently told a congressional subcommittee, "debtors have * * * weaponized the equitable mootness doctrine, taking care that plans go effective—and money starts changing hands—as soon as possible after confirmation." Adam J. Levitin, Written Testimony Before the H. Comm. on the Judiciary Subcomm. on Antitrust, Commercial, and Administrative Law 14 (July 28, 2021); see also Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 Calif. L. Rev. 745 (2020). This Court should review the entirely judge-made doctrine under which this unsettling state of affairs has developed.

IV. Equitable Mootness Is Applied Inconsistently

Equitable mootness, lacking any real grounding in bankruptcy statutes, is applied inconsistently among the courts of appeals. For starters, the circuits have "fashioned many different routes" for invoking equitable mootness. *In re VeroBlue Farms USA, Inc.*, 2021 WL 3411834, at *6; see also Markell, *Needs of the Many*, 93 Am. Bankr. L.J. at 393, 397 (describing "confusion in the development of a consistent and coherent doctrine" and "variances in each circuit's expression of the doctrine"). The Second Circuit, for instance, considers five factors as bearing on the equitable-mootness inquiry. See *In re Charter*

Commc'ns, Inc., 691 F.3d at 482. The Third Circuit, by contrast, has distilled the doctrine down to "two analytical steps." *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015). Other circuits utilize still other tests, with the First and Fifth Circuits each applying a different three-factor analysis, see *In re Financial Oversight & Mgmt. Bd. for Puerto Rico*, 989 F.3d 123, 129 (1st Cir. 2021); *In re Pacific Lumber Co.*, 584 F.3d at 240 (5th Cir. 2009), and the Tenth Circuit adhering to a six-factor analysis, see *In re Paige*, 584 F.3d 1327, 1339 (10th Cir. 2009).

Moreover, some circuits put the burden of establishing equitable mootness on the party that is seeking dismissal of an appeal, whereas others presume that appeals from consummated reorganization plans are moot and put the burden on the appellant to rebut that presumption. Compare *In re Charter Commc'ns, Inc.*, 691 F.3d at 482 (2d Cir. 2012) (presumption of equitable mootness), with *In re Paige*, 584 F.3d at 1340 (10th Cir. 2009) (no presumption). The circuits are also divided over whether equitable mootness is available to protect the reliance interests only of innocent third parties, or also those of creditors who were active combatants in the bankruptcy process. Compare *In re Tribune Media Co.*, 799 F.3d at 278 (3d Cir. 2015) (equitable mootness protects all stakeholders), with *JPMCC 2007-C1 Grasslawn Lodging, LLC* v. *Transwest Resort Props., Inc.* (*In re Transwest Resort Props., Inc.*), 801 F.3d 1161, 1169-70 (9th Cir. 2015) (equitable mootness protects only "innocent third parties"). The circuits also disagree on the standard of review that a court of appeals should apply to a district court's equitable-mootness

determination, with some circuits reviewing dismissals de novo and others reviewing only for abuse of discretion. Compare *In re Charter Commc'ns, Inc.*, 691 F.3d at 483 (2d Cir. 2012) (abuse of discretion), with *Curreys of Nebraska, Inc.* v. *United Producers, Inc.* (*In re United Producers, Inc.*), 526 F.3d 942, 946-947 (6th Cir. 2008) (de novo).

The fractured state of the lower courts' equitable-mootness doctrine is hardly surprising. It illustrates the pitfalls of a judge-made abstention doctrine that has no statutory foothold. Courts can hardly be expected to apply equitable mootness "with a scalpel" when they are still designing the rules as they go along. *In re Pacific Lumber Co.*, 584 F.3d at 240. Statutory appellate rights—and the fate of many millions of dollars of debtors' estate property—should not depend on such an unsettled, unsupported rule of jurisdictional abdication.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2021

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IN RE: VEROBLUE FARMS USA, INC., Debtor

FishDish, LLP, Appellant/Cross-Appellee

v.

VeroBlue Farms USA, Inc.; Alder Aqua, LTD., Appellees

Broadmoor Financial, L.P., Appellee/Cross-Appellant

No. 19-3413, No. 19-3487

United States Court of Appeals, Eighth Circuit.

Submitted: January 12, 2021

Filed: August 5, 2021

Background: Preferred shareholder of corporate debtor appealed certain pre-confirmation orders as well as order entered by the United States Bankruptcy Court for the Northern District of Iowa, Thad J. Collins, Chief Judge, confirming, over shareholder's objections, debtors' Chapter 11 plan of reorganization. Plan sponsor moved to dismiss appeal based on, inter alia, the doctrine of "equitable mootness," and senior secured creditor filed partial motion to dismiss appeal of claim objection order. The District Court, C.J. Williams, J., 2019 WL 4918758, granted motions and dismissed appeal as "equitably moot," ruling in the alternative that it had jurisdiction over the untimely appeal from the bankruptcy court's pre-confirmation claim objection order. Shareholder appealed, and creditor cross-appealed.

Holdings: Addressing issues of apparent first impression for the court, the Court of Appeals, Loken, Circuit Judge, held that:

(1) pursuant to the so-called equitable mootness doctrine, "equitable," "prudential," or "pragmatic" considerations may render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot;

(2) the 14-day deadline for filing appeals from bankruptcy court decisions set forth in the bankruptcy rule governing time for filing notice of appeal is mandatory but not jurisdictional;

(3) the 14-day deadline for filing appeals from bankruptcy court decisions set forth in the bankruptcy rule governing time for filing notice of appeal is not limited to final orders of the bankruptcy court, but also applies to interlocutory orders and decrees; and

(4) the district court did not apply a sufficiently rigorous test to determine when, pursuant to the so-called equitable mootness doctrine, bankruptcy equities and pragmatics justify foregoing Article III judicial review of a bankruptcy court order confirming a Chapter 11 plan.

Affirmed in part, reversed in part, and remanded.

1. Bankruptcy ⚷3781

Pursuant to the so-called equitable mootness doctrine, "equitable," "prudential," or "pragmatic" considerations may render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot, though district courts must apply rigorous test in determining whether to invoke doctrine. U.S. Const. art. 3, § 2, cl. 1.

2. Federal Courts ⚷2571

Article III appellate court has a virtually unflagging obligation to exercise its subject matter jurisdiction. U.S. Const. art. 3.

3. Bankruptcy ⚷2129

Bankruptcy rules prescribed by the Supreme Court for the practice and procedure in cases under title 11 do not create or withdraw federal jurisdiction.

4. Bankruptcy ⚷2129

Bankruptcy rule is jurisdictional if the legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.

5. Bankruptcy ⚷3774.1

Fourteen-day deadline for filing appeals from bankruptcy court decisions set forth in the bankruptcy rule governing time for filing notice of appeal is mandatory but not jurisdictional; subsection of statute governing bankruptcy appeals, by merely referring to any appeal deadlines created by the bankruptcy rules, did not indicate, much less "clearly" indicate, that Congress meant to attach subject-matter jurisdiction consequences to deadlines established by those rules. 28 U.S.C.A. § 158(c)(2); Fed. R. Bankr. P. 8002, 8002(a)(1).

6. Federal Courts ⚷2026

A court cannot issue a ruling on the merits when it has no jurisdiction because to do so is, by very definition, for a court to act ultra vires.

7. Bankruptcy ⚷3774.1

Fourteen-day deadline for filing appeals from bankruptcy court decisions set forth in the bankruptcy rule governing time for filing notice of appeal is not limited to final orders of the bankruptcy court, but also applies to interlocutory orders and decrees. 28 U.S.C.A. §§ 158(a)(1), 158(a)(3); Fed. R. Bankr. P. 8002(a)(1).

8. Federal Courts ⚷2111

Case is "moot," that is, beyond federal court's Article III jurisdiction, only if it is impossible for court to grant any effectual relief whatsoever. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

9. Federal Courts ⚷2111, 2116

"Real" mootness, or constitutional mootness, refers to court's inability to alter the outcome, whereas so-called "equitable mootness" refers to court's unwillingness to alter the outcome. U.S. Const. art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Courts ⚷2116

Equitable mootness doctrine is based on recognition that even when moving party is not entitled to dismissal on Article III grounds, common sense or equitable considerations may justify decision not to decide case on merits. U.S. Const. art. 3, § 2, cl. 1.

11. Federal Courts ⚷2116

If limited in scope and cautiously applied, so-called equitable mootness doctrine provides a vehicle whereby the court can prevent substantial harm to numerous parties.

12. Bankruptcy ⚷3781

With respect to the so-called equitable mootness doctrine, as with any equitable determination, a variety of factors may be relevant in a particular case in determining whether appeal has been rendered "equitably moot" by substantial consummation of confirmed Chapter 11 plan; the most important factors are whether the plan has been substantially consummated and, if so, what effects reversal of the plan would likely have on third parties.

13. Bankruptcy ⚷3781

Ultimate question to be decided on appeal from bankruptcy court order con-

firming Chapter 11 plan, in determining whether appeal has been rendered "equitably moot" by substantial consummation of confirmed plan, is whether the bankruptcy court can grant relief without undermining the plan and, thereby, affecting third parties.

14. Bankruptcy ⚷3776.5(5), 3781

On appeal from bankruptcy court order confirming Chapter 11 plan, in determining whether appeal has been rendered "equitably moot" by substantial consummation of confirmed plan, whether appellant sought or obtained a stay pending appeal is relevant but not determinative.

15. Bankruptcy ⚷3781, 3790

On appeal of bankruptcy court order confirming, over preferred shareholder's objection, debtors' Chapter 11 plan of reorganization, the district court did not apply a sufficiently rigorous test to determine when, pursuant to the so-called equitable mootness doctrine, bankruptcy equities and pragmatics justify foregoing Article III judicial review of a bankruptcy court order confirming a Chapter 11 plan; accordingly, on remand, the district court would be required to make at least a preliminary review of the merits of shareholder's appeal to determine the strength of its claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available, including possible dismissal, to avoid undermining the plan and thereby harming third parties. U.S. Const. art. 3, § 2, cl. 1.

16. Federal Courts ⚷2116

So-called equitable mootness doctrine is intended to protect third parties.

17. Bankruptcy ⚷3781

When a district court, or a Court of Appeals reviewing a Bankruptcy Appellate Panel (BAP) decision, is asked to invoke so-called equitable mootness to preclude a party whose rights have been impaired by a Chapter 11 confirmation order from obtaining supervisory review of the merits of the plan by an Article III court that has an unflagging obligation to exercise its appellate jurisdiction, the request should be granted only in extremely rare circumstances. U.S. Const. art. 3, § 2, cl. 1.

18. Federal Courts ⚷2690

Presumptive position remains that federal courts should hear and decide on the merits cases properly before them.

Appeals from United States District Court for the Northern District of Iowa - Ft. Dodge

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Dan Childers, ELDERKIN & PIRNIE, Cedar Rapids, IA, Robert H. Lang, THOMPSON & COBURN, Chicago, IL, Joseph A. Peiffer, AG & BUSINESS LEGAL STRATEGIES, Hiawatha, IA, for Appellee VeroBlue Farms USA, Inc.

Kelsey Nicole Frobisher, Shannon D. Wead, FOULSTON & SIEFKIN, Wichita, KS, Jeffrey P. Taylor, KLINGER & ROBINSON, Cedar Rapids, IA, for Appellee/Cross-Appellant Broadmoor Financial, L.P.

Abram V. Carls, Eric W. Lam, SIMMONS & PERRINE, Cedar Rapids, IA, Eric J. Langston, MOYE & WHITE, Denver, CO, for Appellee Alder Aqua, LTD.

Before LOKEN, GRASZ, and KOBES, Circuit Judges.

LOKEN, Circuit Judge.

Debtors in this Chapter 11 bankruptcy proceeding are VeroBlue Farms USA, Inc., and affiliated entities ("Debtors"). A VeroBlue preferred shareholder, FishDish, LLP ("FishDish"), appeals the district court's order granting appellees' motions to dismiss FishDish's appeal of the bankruptcy court order confirming Debtors' Chapter 11 plan of reorganization over FishDish's objections, and certain pre-confirmation orders. Appellees are VeroBlue Farms, the reorganized debtor; Alder Aqua, Ltd. ("Alder Aqua"), Debtors' plan of reorganization sponsor; and senior secured creditor Broadmoor Financial, L.P. ("Broadmoor"). In dismissing the appeal, the district court invoked equitable mootness, a bankruptcy doctrine adopted by our sister circuits (though not uniformly), and by the Eighth Circuit Bankruptcy Appellate Panel and Eighth Circuit district courts. We have never expressly adopted the doctrine,[1] nor has the Supreme Court. Alternatively, the court considered appellees' jurisdictional defenses, including timeliness, and concluded it did have subject matter jurisdiction. Broadmoor cross appeals the district court's ruling that FishDish's appeal from one order, the "Claim Objection Order," though untimely under Rule 8002(a)(1) of the Federal Rules of Bankruptcy Procedure, was not subject to dismissal under 28 U.S.C. § 158(c)(2) because the statute only applies to appeals from the "final judgments, orders, and decrees" referred to in § 158(a)(1).

We agree that the district court and this court have statutory subject matter jurisdiction. However, we conclude the district court erred in limiting *the mandatory but non-jurisdictional* timeliness requirements of Rule 8002 to appeals from final bankruptcy court orders. As FishDish has conceded its appeal from the pre-confirmation Claim Objection Order was untimely under Rule 8002, we affirm the grant of appellees' Partial Motion to Dismiss Appeal on this alternative ground.

[1, 2] Regarding the central issue on appeal, what has misleadingly come to be known as "equitable mootness," like the Tenth Circuit we agree with "[e]very other circuit to consider the issue ... that 'equitable,' 'prudential,' or 'pragmatic' considerations can render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot." In re Paige, 584 F.3d 1327, 1337 (10th Cir. 2009). However, invoking this doctrine often results in "the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded." In re Cont'l Airlines, 91 F.3d 553, 571 (3d Cir. 1996) (Alito, J., dissenting), cert. denied sub nom. Bank of N.Y. v. Cont'l Airlines, Inc., 519 U.S. 1057, 117 S.Ct. 686, 136 L.Ed.2d 610 (1997). An Article III appellate court has a "virtually unflagging obligation" to exercise its subject matter jurisdiction. In re Semcrude, L.P., 728 F.3d 314, 320 (3d Cir. 2013) (quotation omitted). Therefore, as in Paige, Semcrude, and numerous other circuit court decisions, we conclude that the district court did not apply a sufficiently rigorous test to determine when bankruptcy equities and pragmatics justify foregoing Article III judicial review of a bankruptcy court order confirming a Chapter

1. We upheld the district court's invocation of "equitable mootness" without discussion in In re President Casinos, Inc., 409 F. App'x. 31, 31-32 (8th Cir. 2010), an unpublished, non-precedential opinion. In In re Nevel Props. Corp., 765 F.3d 846 (8th Cir. 2014), we affirmed on the merits and denied as moot a motion to dismiss the appeal under the equitable mootness doctrine. As we will explain, this should almost always be the preferred disposition.

11 plan. Accordingly, we remand for further district court proceedings.

I. Background.

Founded in 2014, Debtors were in the aquaculture business -- farming fish and selling those fish through wholesalers to restaurants and grocery chains. Kenneth Lockard, an Iowa businessman, formed FishDish to invest in the Debtors. In the summer of 2016, Debtors sold $6 million in preferred shares to FishDish and $28 million to Alder Aqua, a British Virgin Islands entity allegedly owned and controlled by Dr. Otto Happel and his family. In addition, certain Debtors borrowed $29 million from Amstar Group, LLC (the "Credit Facility"), also allegedly owned and controlled by Dr. Happel, a loan secured by substantially all of Debtors' assets. As a result, Lockard and Alder Aqua representatives sat on the Debtors' board. Lockard often voted en bloc with the founders. In December 2017, Amstar transferred its rights under the Credit Facility to Broadmoor. Alder Aqua loaned Debtors additional funds in 2018 and acquired a participation interest in the Credit Facility. By early 2018, Alder Aqua had taken control of the Debtors, terminating the founders and installing their appointees to the board and causing Lockard to resign from the board.

The Debtors filed a voluntary Chapter 11 bankruptcy petition on September 21, 2018, listing an undisputed obligation to the Credit Facility as approximately $54 million -- well in excess of Debtors' assets. On motion of the Debtors, the bankruptcy court promptly entered an interim post-petition financing order authorizing Debtors to borrow $2 million from Alder Aqua as Lender to finance post-petition obligations and to grant Lender a "first priority priming lien" under 11 U.S.C. § 364(d) on its business assets, and granting Broadmoor an Adequate Protection Lien equal to the diminution in value of any valid pre-petition lien.

No interested party objected to the interim order. On October 17, the bankruptcy court entered a final debtor-in-possession financing order (the "DIP Order"). The DIP Order provided that "the Broadmoor Secured Debt and Broadmoor Lien shall be deemed to be allowed for all purposes in the Chapter 11 Cases . . . and shall not be subject to challenge by any party in interest as to extent, validity, priority, or otherwise" unless "(i) the Debtors receive notice of a potential Challenge during the Investigation Period from the Committee and (ii) the Court rules in favor of the plaintiff in any timely and properly filed Challenge resulting therefrom." The DIP Order defined "Committee" as an "official committee in the Chapter 11 case." See 11 U.S.C. § 1102. Section 8(a) defined the Challenge Procedure. Section 8(b) provided that if "a Challenge is not timely commenced," the Broadmoor Secured Debt and Lien "shall be deemed to be allowed for all purposes . . . and shall not be subject to challenge by any party in interest." No party appealed the DIP Order.

On October 24, the United States Trustee appointed the Official Committee of Unsecured Creditors ("Creditors Committee") under 11 U.S.C. § 1102. The Creditors Committee investigated the Broadmoor claim and on December 19 sent Debtors a lengthy and timely challenge notice under Section 8(a) of the DIP Order demanding that Debtors initiate an adversary proceeding against Broadmoor, Aqua Alder, Amstar, and others, or consent to the Creditors Committee's standing to prosecute an adversary proceeding, for breaches of fiduciary duty, corporate waste and usurpation of corporate opportunities, equitable subor-

dination or recharacterization of Broadmoor's claim under the Credit Facility, and fraud (the "Challenge Notice"). The next day, an unofficial Ad Hoc Committee of Equity Security Holders ("AHC") -- consisting of FishDish and certain common shareholders of the Debtors -- sent Debtors a letter joining the Creditors Committee Challenge Notice. The AHC also filed an Objection to approval of Debtors' Disclosure Statement for the plan. See 11 U.S.C. § 1125(b).

On January 14, 2019, the bankruptcy court held a hearing limited to the Debtors' disclosures. Debtors filed a Modified Chapter 11 Plan and Modified Disclosure Statement on February 16. The bankruptcy court approved the amended disclosure statement and scheduled a preliminary confirmation hearing on March 20 (the "Disclosure Order").

On January 13, the AHC moved for an order "extending the procedural protections of paragraph 8 of the Final DIP Order" to the AHC. In early February, the AHC moved for an order "confirming" its derivative standing to pursue the claims demanded in the Challenge Notice (the "Standing Motion"). See generally In re Racing Servs., Inc., 540 F.3d 892, 904-05 (8th Cir. 2008). After a hearing on February 4, the bankruptcy court entered an order deferring ruling on AHC's Standing Motion pending plan confirmation proceedings.

On March 5, the Creditors Committee notified the bankruptcy court it had settled its claims against Debtors in return for proposed plan amendment providing relief for the unsecured creditors. Broadmoor moved to enforce the DIP Order's Section 8 claim bar against the AHC, and Debtors moved to bar AHC from further participation under Bankruptcy Rule 2019. After hearings, the bankruptcy court issued an order on April 3, 2019 (the "AHC Standing Order") stating in relevant part:

> IT IS FURTHER ORDERED THAT, for all parties in interest, objections to the Broadmoor Secured Debt . . . as well as any and all claims held by debtor, or derivative of Debtor's rights, for the recharacterization or equitable subordination of the Broadmoor Secured Debt, are barred, because no timely challenge was made pursuant to the DIP Order and for other reasons set forth on the record.
>
> IT IS FURTHER ORDERED THAT, for all parties in interest, any objections relating to the allegations and claims set forth in the Challenge Notice attached as an exhibit to the Motion are barred, as those claims are not colorable and for other reasons set forth on the record.[2]

FishDish then 1) objected to Broadmoor's claim, 2) moved for leave to initiate discovery, and 3) objected to the amended disclosure statement. After a pre-confirmation hearing, the bankruptcy court denied FishDish's motion for discovery. (the "Discovery Order"). It clarified at the April 17 confirmation hearing that FishDish's objections to the Broadmoor claim were barred but offered FishDish an opportunity to make an offer of proof to bolster the record on appeal. After the confirmation hearing concluded on April 18, the court entered a text order denying the FishDish's claim objection (the "Claim Objection Order"). On April 22 the bankruptcy court approved the Plan of reorganization ("Plan Confirmation Order").

2. The order also granted the Debtors' motion under Rule 2019. The AHC's separate appeal of that order is pending in the United States District Court for the Northern District of Iowa.

On May 6, FishDish filed a notice of appeal identifying as the matters being appealed the Plan Confirmation Order, the Disclosure Order, the AHC Standing Order, the Discovery Order, and the Claim Objection Order. FishDish elected an appeal to the Bankruptcy Appellate Panel, but Alder Aqua timely transferred the appeal to the District Court for the Northern District of Iowa. See 28 U.S.C. § 158(c)(1)(B); Bankruptcy Rule 8005. The bankruptcy court entered an order confirming the Plan, as amended, on May 7, 2019.

The limited record on appeal reveals that, after confirmation of the Plan: (1) Alder Aqua funded the Plan with $13.5 million; (2) Debtors cancelled all the outstanding common and preferred stock and re-issued stock to Alder Aqua; (3) the Class 3 claimants received $294,700; (4) the Class 5 creditor trust received $620,000, which has since paid or settled claims in the amount of $272,000; (5) Broadmoor received $6,000,000; and (6) Alder Aqua released its $5,025,000 claim under the credit facility, as well as its $2,000,000 claim for the DIP bridge financing. Alder Aqua, as plan sponsor and sole shareholder of the reorganized Debtors, assumed management, and deferred its commitment to invest $21,400,000 "for capital investments for the Debtors retrofit and additional working capital." The bankruptcy court closed the case. See Fed. R. Bankr. P. 3022; 11 U.S.C. § 350.[3]

In its appeal of the Plan Confirmation Order, FishDish argued the Plan (1) unfairly discriminates between members of the same class of shareholders; (2) violates the absolute priority rule; (3) was proposed in bad faith; (4) is not in the best interests of the creditors for failure to investigate and value the Challenge Notice claims; and (5) is not feasible for want of funding. Alder Aqua moved to dismiss based on the "doctrine of equitable mootness," bankruptcy standing, and waiver. Broadmoor filed a partial motion to dismiss the appeal of the Claim Objection Order as untimely. Without reaching the merits, the district court dismissed FishDish's appeal as "equitably moot." It further ruled FishDish as a "person aggrieved" has standing to appeal the Plan's confirmation, and that FishDish's appeal of the Claim Objection Order is timely because it was not a final order. FishDish appeals the equitable mootness dismissal; Broadmoor cross-appeals the timeliness issue.

II. Timeliness, a Potential Jurisdictional Issue.

[3, 4] Bankruptcy Rule 8002(a)(1) provides: "Except as provided in subdivisions (b) and (c) [which are not at issue], a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed." "Bankruptcy Rules prescribed by [the Supreme Court] for the practice and procedure in cases under title 11 . . . do not create or withdraw federal jurisdiction." Kontrick v. Ryan, 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). But "a rule is jurisdictional if the legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." Gonzalez v. Thaler, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012).

[5, 6] The appellate jurisdiction of a district court, a court of appeals, or a bankruptcy appellate panel ("BAP") to review a bankruptcy court order is governed by 28 U.S.C. § 158. Subsection § 158(a) provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals

3. We grant the motion to supplement the record with the closure order.

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 . . .; and

(3) with leave of court, from other interlocutory orders and decrees;

of bankruptcy judges . . . .

Subsection § 158(c)(2) provides: "An appeal under subsection[ ] (a) . . . shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts, and in the time provided by Rule 8002 of the Bankruptcy Rules." The jurisdictional issue is whether the incorporation of Rule 8002(a)(1)'s time-limit in 28 U.S.C. § 158(c)(2) creates a statutory limitation on federal district courts' subject-matter jurisdiction. See Kontrick, 540 U.S. at 453, 124 S.Ct. 906. If it does, then the district court should have addressed this issue before the non-jurisdictional issue of equitable mootness because "a court cannot issue a ruling on the merits when it has no jurisdiction because to do so is, by very definition, for a court to act ultra vires." Brownback v. King, ––– U.S. ––––, 141 S. Ct. 740, 749, 209 L.Ed.2d 33 (2021) (cleaned up); see In re AFY, 734 F.3d 810, 816 (8th Cir. 2013), cert. denied sub. nom Sears v. Badami, 572 U.S. 1117, 134 S.Ct. 2315, 189 L.Ed.2d 177 (2014). Therefore, we address this issue -- the crux of Broadmoor's cross appeal regarding the Claim Objection Order -- before addressing equitable mootness.

We upheld the dismissal of a bankruptcy appeal for failure to comply with Rule 8002 in In re Delta Engineering Intern., Inc., 270 F.3d 584, 586 (8th Cir. 2001). But we have not held that Rule 8002's 14-day deadline for filing appeals from bankruptcy court decisions is jurisdictional. (The Eighth Circuit BAP has, but its rulings are not controlling on this Article III issue.) A number of our sister circuits have concluded that Rule 8002 is jurisdictional, like Rule 4(a)(6) of the Federal Rules of Appellate Procedure. See the cases cited in In re Tennial, 978 F.3d 1022, 1026-27 (6th Cir. 2020). But after careful consideration of these contrary cases, we agree with the careful analysis in Tennial and conclude that Rule 8002's 14-day deadline is *mandatory but not jurisdictional.* Judge Sutton explained in Tennial, 978 F.3d at 1025-26, 1028:

> In [28 U.S.C. § 158(c)(2)], Congress merely referred to any appeal deadlines created by the Bankruptcy Rules. Nothing about that reference indicates that Congress meant to attach subject matter jurisdiction consequences to deadlines established by the Bankruptcy Rules. Much less did it do so "clearly" with that modest reference.
>
> * * * * *
>
> [I]f deadlines established by the rules process alone created jurisdictional limits, that would mean the rules committee could change the scope of federal court subject matter jurisdiction on its own. . . . But the Constitution gives that power to Congress alone. . . . The rules committees, as it happens, have changed the bankruptcy appeal deadline since 28 U.S.C. § 158 was enacted -- from 10 to 14 days. . . . How, then, can we say that Congress "specified" [that] deadline . . . .?
>
> * * * * *
>
> Bankruptcy Rule 8002(a)(1)-s 14-day time limit for filing a notice of appeal does not create a jurisdictional imperative.
>
> Even so, the deadline remains mandatory. . . .
>
> Because the appeal deadline is mandatory, because Tennial missed it, and be-

cause REI raised the issue in its motion to dismiss, the appeal must be dismissed as dilatory.

[7] As in Tennial, FishDish missed the mandatory 14-day time limit in appealing the Claim Objection Order, and appellees' Partial Motion to Dismiss raised the issue. The district court denied that motion because " 'An appeal [from final judgments, orders, and decrees] shall be taken ... in the time provided by Rule 8002,' " and the Claim Objection Order was not a final order. The bracketed limitation inserted by the court in quoting § 158(c)(2) was an error of law. The statute applies to appeals "under subsections (a) and (b)." Those appeals include appeals to district courts "from other interlocutory orders and decrees." § 158(a)(3). Rule 8002(a)(1) mandates filing a notice of appeal "within 14 days after entry of the judgment, order, or decree being appealed." Thus, it is not limited to *final* orders, and rightly so, because the need for expedited appellate processing in bankruptcy applies to appeals of interlocutory orders to the district court or to the BAP, as well as to final orders that can then be appealed to the court of appeals under § 158(d). Cf. In re Farmland Indus., Inc., 397 F.3d 647, 649-50 (8th Cir. 2005).

For this reason, we need not decide whether the Claim Objection Order was a "final judgment, order, [or] decree[ ]" under § 158(a)(1). See generally Ritzen Grp., Inc., v. Jackson Masonry, LLC, ––– U.S. ––––, 140 S. Ct. 582, 205 L.Ed.2d 419 (2020); Bullard v. Blue Hills Bank 575 U.S. 496, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015). As it is undisputed that FishDish missed the mandatory 14-day time limit, the district court's order dismissing the appeal of the Claim Objection Order is affirmed.

III. Equitable Dismissal Issues.

[8, 9] The district court declined to address the merits of FishDish's appeal, invoking the "doctrine of equitable mootness." The doctrine's name is misleading. A case is moot, that is, beyond a federal court's Article III jurisdiction, only if "it is impossible for a court to grant any effectual relief whatsoever." Mission Prod. Holdings, Inc. v. Tempnology, LLC, ––– U.S. ––––, 139 S. Ct. 1652, 1660, 203 L.Ed.2d 876 (2019) (quotation omitted). "There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion. Accordingly, we banish 'equitable mootness' from the (local) lexicon." In re UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir.) (emphasis in original), cert. denied sub nom. UNARCO Bloomington Factory Workers v. UNR Indus., Inc., 513 U.S. 999, 115 S.Ct. 509, 130 L.Ed.2d 416 (1994). But the name lives on elsewhere.[4]

[10, 11] The equitable mootness doctrine is based on a recognition that "even when the moving party is not entitled to dismissal on Article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits." In re Manges, 29 F.3d 1034, 1039 (5th Cir. 1994) (quotation omitted; cleaned up), cert. denied sub nom. Manges v. Seattle-First Nat. Bank, 513 U.S. 1152, 115 S.Ct. 1105, 130 L.Ed.2d 1071 (1995). Numerous Chapter 11 plan confirmation appeals have been dismissed "when, even though effective relief could conceivably be

4. FishDish contends the doctrine is constitutionally infirm, a contention some circuits have addressed but none has adopted. See In re One2One Comm'cns, LLC, 805 F.3d 428, 432-33 (3d Cir. 2015). FishDish did not make this argument to the district court, and we decline to consider it for the first time on appeal.

fashioned, implementation of that relief would be inequitable." In re Chateaugay Corp., 988 F.2d 322, 325 (2d Cir. 1993). "If limited in scope and cautiously applied, this doctrine provides a vehicle whereby the court can prevent substantial harm to numerous parties." Cont'l Airlines, 91 F.3d at 559.

[12–14] As with any equitable determination, a variety of factors may be relevant in a particular case. Our sister circuits have fashioned many different routes to answer the ultimate question.[5] Most have adopted either the two-factor analysis in In re Tribune Media Co., 799 F.3d 272, 277 (3d Cir. 2015), cert. denied sub nom. Aurelius Cap. Mgmt., L.P. v. Tribune Media Co., 577 U.S. 1230, 136 S. Ct. 1459, 194 L.Ed.2d 575 (2016), or a variation of the five-factor analysis adopted by the Eighth Circuit BAP in In re Williams, 256 B.R. 885, 896 n.11 (8th Cir. B.A.P. 2001). We decline the parties' invitation to adopt a specific multi-factor test. "The ultimate question to be decided is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties." In re SI Restructuring, Inc., 542 F.3d 131, 136 (5th Cir. 2008). The most important factors are whether the confirmed plan has been substantially consummated and, if so, what effects reversal of the plan would likely have on third parties." Paige, 584 F.3d at 1339. Whether appellant sought or obtained a stay pending appeal is relevant but not determinative. See, e.g., Manges, 29 F.3d at 1039-40.

The equitable mootness doctrine as frequently applied has been thoughtfully criticized by many circuit judges. Perhaps the most thorough survey of the subject is the concurring opinion of Third Circuit Judge Cheryl Krause in In re One2One, 805 F.3d at 438-54, where the Third Circuit reversed the district court's equitable mootness dismissal and remanded for consideration of a bankruptcy appeal on the merits. After discussing at length issues regarding the judge-made doctrine's legitimacy, Judge Krause turned to the doctrine's efficacy, id. at 446-47:

> The doctrine was intended to promote finality, but it has proven far more likely to promote uncertainty and delay. Ironically . . . a motion to dismiss an appeal as equitably moot has become "part of the Plan." Proponents of reorganization plans now rush to implement them so they may avail themselves of an equitable mootness defense, much like Appellees did here. Rather than litigate the merits of an appeal, parties then litigate equitable mootness. And even if an appeal is dismissed as equitably moot by a district court, that dismissal is appealed to our Court, often resulting, in turn, in a remand and further proceedings.
>
> * * * * *
>
> Even if we were affirming the District Court's finding of equitable mootness, there would not have been finality until this point . . . . Without the equitable mootness doctrine, on the other hand, the District Court would have ruled on the merits long ago.

[15, 16] The record on appeal suggests that the Chapter 11 proceedings in this case may have followed that pattern, yet the district court made no such inquiry. Of the $12 million paid under the Plan to creditors, presumably from the $13.5 million in funding provided by Alder, one half

5. There is a conflict among the circuits whether a district court decision to invoke equitable mootness is reviewed *de novo* or for abuse of discretion, an issue the parties debate on appeal. We apparently applied the *de novo* standard of review in In re President Casinos, 409 F. App'x at 31, a non-binding opinion. Given our decision that a remand is required, we need not decide this issue.

was paid to Broadmoor, and Alder Aqua as plan sponsor assumed management of the reorganized Debtors. These appellees are not third parties that the equitable mootness doctrine is intended to protect. Moreover, the only transfer that did not take place was Alder Aqua's commitment to invest substantial working capital. If that did not take place because the reorganized Debtors were preparing for a quick asset sale instead of resuming operations, the case takes on the look of the type of Chapter 11 plan that Judge Krause defined as one needing review on the merits by an Article III appellate court. And if the confirmed plan must be set aside on the merits, the district court may be able to fashion effective relief for those whose rights were impaired by the plan even if the business assets have been sold to a third party purchaser relying on the confirmed plan, such as disgorgement of the proceeds. We do not assume how these factual inquiries may be resolved. We decide only that the inquiry must be made.

The panel in One2One was bound to apply the equitable mootness doctrine as adopted by the Third Circuit's 7-6 en banc decision in Continental Airlines. Writing on a clean Eighth Circuit slate, we conclude that an inquiry into these issues is required before equitable mootness may be invoked in this case. This means that, on remand, the district court must make at least a preliminary review of the merits of FishDish's appeal to determine the strength of FishDish's claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available -- including possible dismissal -- to avoid undermining the plan and thereby harming *third parties*. See Abengoa Bioenergy Biomass of Kan., LLC, 958 F.3d 949, 960 (10th Cir. 2020); In re Charter Commc'ns Inc., 691 F.3d 476, 482 (2d Cir. 2012), cert. denied sub nom Law Debenture Tr. Co. v. Charter Commc'ns, Inc., 569 U.S. 968, 133 S.Ct. 2021, 185 L.Ed.2d 905 (2013).[6]

"In many cases," Judge Krause observed, "district courts may conclude that all or substantially all of the relief requested is feasible despite the plan's consummation." One2One, 805 F.3d at 450; see Paige, 584 F.3d at 1339; SI Restructuring, 542 F.3d at 136 (appellants "do not seek any return of money . . . from third party creditors"); In re Envirodyne Inds., Inc., 29 F.3d 301, 304 (7th Cir. 1994). A "quick look at the merits of an appellant's challenge" is also important, Judge Krause urged, because "[m]erits review is particularly important for complex questions, like whether a plan comports with the Bankruptcy Code's cram down provisions, an issue that often cries out for appellate review . . . or claims involving conflicts of interest or preferential treatment that go to the very integrity of the bankruptcy process." 805 F.3d at 454 (cleaned up). We agree. Those are precisely the kinds of issues FishDish raises in this appeal.

[17, 18] In resolving a different but somewhat analogous issue, the Supreme Court recently held that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers *so long as Article III*

6. For example, in Manges, a Chapter 11 proceeding where the debtors' principal assets were a large Texas ranch and mineral rights under the ranch, the district court affirmed the bankruptcy court's confirmation of the principal creditors' proposed plan. 29 F.3d at 1036. Debtors appealed, and the Fifth Circuit granted appellees' motion to dismiss based on equitable mootness because the relief sought by debtors was "nothing less than a wholesale annihilation of the Plan," and the ranch had been sold to third party purchasers. Id. at 1043.

courts retain supervisory authority over the process." Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 135 S. Ct. 1932, 1944, 191 L.Ed.2d 911 (2015) (emphasis added). When a district court (or a court of appeals reviewing a BAP decision) is asked to invoke equitable mootness to preclude a party whose rights have been impaired by a Chapter 11 confirmation order from obtaining supervisory review of the merits of the plan by an Article III court that has an "unflagging obligation" to exercise its appellate jurisdiction, the request should be granted only in extremely rare circumstances. "The presumptive position remains that federal courts should hear and decide on the merits cases properly before them." Semcrude, 728 F.3d at 326. If equitable mootness instead becomes the rule of appellate bankruptcy jurisprudence, rather than an exception to the Article III-based rule that jurisdiction should be exercised, we predict the Supreme Court, having up to now denied petitions for certiorari to review the doctrine, will step in and severely curtail -- perhaps even abolish -- its use, just as the Court curtailed lower courts' excessive use of the "Rooker-Feldman doctrine" to avoid difficult claim and issue preclusion analysis in Exxon Mobil Corp. v. Saudi Basic Indus., Corp., 544 U.S. 280, 283-84, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005).

IV. Conclusion.

In summary, we affirm the decision of the district court dismissing FishDish's appeal of the Claim Objection Order. We reverse and remand for reconsideration the district court's dismissal of FishDish's appeal of the Plan Confirmation Order on the ground of equitable mootness. We conclude that appellees' contention that FishDish lacks bankruptcy case standing to appeal because it is not a "person aggrieved," see Opportunity Fin., LLC, v. Kelley, 822 F.3d 451, 457-58 (8th Cir. 2016), should not be decided on this record. Accordingly, we remand the case to the district court for further proceedings not inconsistent with this opinion.

IN RE George MERSHO; Vincent Chau; Stanley Karczynski,

George Mersho; Vincent Chau; Stanley Karczynski, as The Nikola Investor Group II, Petitioners,

v.

United States District Court for the District of Arizona, Phoenix, Respondent,

Nikola Corporation; Steve Girsky; Steve Shindler; Mark Russell; Kim J. Brady; Trevor R. Milton; Angelo Baio; Dennis J. Stacy, Sr.; T3 Trading Group; Mahjabin Dinyarian; Albert Holzmacher; Michael Wood; Tate Wood; Joseph Roe; Patrick Brostowin; Nayankumar Patel; Shahab Sandhu; Nikola Investor Group, Real Parties in Interest.

No. 20-73819

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 18, 2021 San Francisco, California

Filed July 23, 2021

Background: Group of investors petitioned for writ of mandamus to vacate order by United States District Court for the District of Arizona, Steven P. Logan, J., 507 F.Supp.3d 1128, that declined to

2019 WL 4918758
Only the Westlaw citation is currently available.
United States District Court, N.D. Iowa, Central Division.

FISHDISH, LLC, Appellant,
v.
VEROBLUE FARMS USA, INC., Broadmoor Financial, L.P., and, Alder Aqua, Ltd., Appellees.

No. 19-CV-3026 CJW
|
Signed 10/04/2019

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MEMORANDUM OPINION AND ORDER

C.J. Williams, United States District Judge

***1** This matter is before the Court on VeroBlue Farms USA, Inc., Broadmoor Financial L.P., and Alder Aqua, Ltd.'s (collectively "appellees") jointly filed Motion to Dismiss Appeal and Partial Motion to Dismiss Appeal. (Docs. 9 & 10). FishDish, LLC ("appellant") appeals the Bankruptcy Court for the Northern District of Iowa's Order Confirming a Chapter 11 Plan ("Plan Confirmation") and four related Orders. (Doc. 4, at 1). Appellees' Motion to Dismiss Appeal seeks to dismiss appellant's appeal of the Plan Confirmation and the related Orders. (Doc. 9). Appellees' Partial Motion to Dismiss is directed only at one of the four related Orders, namely the Order denying FishDish's Objection to Broadmoor Finance LC's Claims. (Doc. 10). Appellant timely resisted both the Motion to Dismiss and the Partial Motion to Dismiss in an omnibus response. (Doc. 28). Appellees timely filed replies and appellant timely filed an omnibus surreply. (Docs. 34, 36, 37, & 41). For the following reasons, appellees' Motion to Dismiss and Partial Motion to Dismiss are **granted**.

I. BACKGROUND

Appellant alleges VeroBlue Farms USA, Inc. (individually "debtor") is "in the business of farming fish ... and selling those fish through wholesalers to restaurants and grocery chains." (Doc. 28, at 4). Appellant alleges debtor relied on both debt and

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equity financing to develop and grow its business. (*Id.*). Despite securing debt and equity financing, debtor was unable to sufficiently sustain the company and voluntarily filed Chapter 11 Bankruptcy petitions on September 21, 2018. (*Id.*, at 6). Following bankruptcy proceedings in the Northern District of Iowa Bankruptcy Court, appellant alleges a Bankruptcy Plan ("Plan") was confirmed on April 22, 2019, and the final confirmation order was entered on May 7, 2019, with an effective date of May 22, 2019. (*Id.*, at 13). Appellant alleges that on May 30, 2019, debtor reported making payments to several claims under the Plan and that debtor subsequently made additional payments to creditors on June 14, 2019. (*Id.*, at 14). In addition, appellant alleges debtor sent notifications cancelling outstanding shares of preferred stock on June 13, 2019. (*Id.*, at 16).

Alder Aqua, Ltc. (individually "Alder Aqua") and Broadmoor Financial, L.P. (individually "Broadmoor") are also included as appellees in this appeal. Appellant alleges Alder Aqua helped finance debtor by purchasing $28 million of preferred shares. (Doc. 28, at 4). After debtor entered bankruptcy proceedings, Alder Aqua agreed to provide the equity necessary for debtor to make payments in exchange for all equity interests in the reorganized debtor. (*Id.*, at 15). Broadmoor, as a creditor of debtor, submitted a claim during debtor's bankruptcy proceeding. (*Id.*, at 5). Debtor had originally obtained a loan from Amstar Group, LLC. (*Id.*, at 5). "The Amstar loan was guaranteed by the other [debtor] and secured by substantially all [debtor's] assets." (*Id.*). Amstar transferred its rights under the loan agreement to Broadmoor in 2017. (*Id.*). Appellant now challenges Broadmoor's claim as part of this appeal.

***2** Appellant was a preferred shareholder and owned approximately $6 million of equity in the debtor's company. (Doc. 28, at 36). Under the Plan confirmed by the Bankruptcy Court, appellant was unable to recover any of its investment because debtor did not have enough funds to pay equity holders. (*Id.*). The Bankruptcy Court found debtor was so insolvent that even under alternative plans there would likely not be enough funds to pay equity holders. (Doc. 9, at 6). Appellant alleges, however, that it was unable to recover any of its investment during the bankruptcy proceedings because the Plan Confirmation process was not conducted in good faith, lacked adequate discovery, and miscategorized certain categories of claims.

Appellant raises several specific issues on appeal. First, appellant argues the Bankruptcy Court improperly denied discovery requests during the bankruptcy proceeding that would have revealed information essential to resolving its claims. (Doc. 3, at 2). Second, appellant asserts the Bankruptcy Court improperly denied a request to challenge Broadmoor's claim, which may have recharacterized the nature of the claim. (*Id.*). Third, appellant argues the Bankruptcy Court did not provide the requisite notice and opportunity to object to the Disclosure Statement. (*Id.*). Fourth, appellant asserts the Bankruptcy Court erred in entering the Confirmation Order confirming the Plan because the appellees failed to treat equity holders equally and prove the Plan was confirmed in good faith, in the best interest of creditors, and feasible. (*Id.*, at 3-4).

Appellant further alleges that throughout the Bankruptcy proceeding there were several hearings, decisions, and orders issued by the Bankruptcy Court that wrongly contributed to the Plan's confirmation. (*Id.*, at 10-15). These orders include the Order Approving Amended Disclosure Statement, Order Denying Protective Motion of the Ad Hoc Committee, Order Denying Motion of Preferred Equity Shareholder FishDish for Leave to Initiate Limited Discovery, and Order on FishDish's Objection to Broadmoor Finance, LC's Claims. (Doc. 1, at 164-65).

II. DISCUSSION

Title 28, United States Code, Section 158 provides: "The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees ... of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges." An appeal to a district court "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." 28 U.S.C. § 158(a). "To elect to have an appeal heard by a district court, a party must: (1) file a statement of election that conforms substantially to the appropriate Official Form; and (2) do so within the time prescribed

by 28 U.S.C. § 158(c)(1).” FED. R. BANK. P. 8005. Appellant elected to appeal to the district court pursuant to 28 U.S.C. § 158(a)(1) and complied with the requirements for appeal. Thus, jurisdiction in this Court is proper.

“When a bankruptcy court's judgment is appealed to the district court, the district court acts as an appellate court and reviews the bankruptcy court's legal determinations de novo and findings of fact for clear error.” *In re Falcon Prods., Inc.*, 497 F.3d 838, 840 (8th Cir. 2007). In appealing to the district court, appellant challenges the determination made by the Bankruptcy Court and asks the district court to review the Bankruptcy Courts determinations.

Appellees argue the appellant's appeal to this Court should be dismissed for three reasons. First, appellees argue the appeal should be denied as equitably moot. (Doc. 9, at 1-4). Second, appellees assert appellant lacks standing to bring this claim because it does not have a pecuniary interest that has been harmed. (*Id.*, at 4-7). Third, appellees argue appellant did not properly preserve its objection to the Disclosure Statement and cannot raise an objection for the first time on appeal. (*Id.*, at 7). Appellees submit a fourth argument in the Partial Motion to Dismiss directed at the Order denying FishDish's Objection to Broadmoor Finance, LC's Claims. Appellees argue the appeal for the Order was not timely filed and should be denied. (Doc. 10, at 2-5).

A. Equitable Mootness

***3** Appellees first argue appellant's appeal should be dismissed as equitably moot because debtor has already paid substantial claims to creditors and mailed cancellation of share notifications to equity holders. (Doc. 9, at 3-4). Appellees further argue that because debtor has already substantially performed, it may be impossible to grant effective relief even if appellant could prevail on the merits. (Doc. 9, at 1-4).

The doctrine of equitable mootness applies in bankruptcy proceedings to “promote an important policy of bankruptcy law that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained.” *In re Info. Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). In equitable mootness cases, the term “moot” does not apply in the traditional Article III sense involving cases and controversies where a judicial ruling would have no effect. *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009). Instead, “equitable mootness applies when a judicial ruling would have too much effect on the parties to a confirmed reorganization.” *Id.* “[A] mootness concern arises when ... it may be impossible for a court to grant effective relief because the disputed assets have been transferred pursuant to the reorganization plan.” *In re Info. Dialogues, Inc.*, 662 F.2d at 477. The equitable mootness doctrine must be weighed against a strong competing interest of a party “in securing review of a bankruptcy order which adversely affects” the party. *Id.* An appellate court should only apply the doctrine of equitable mootness when “grant[ing] the relief requested will undermine the finality and reliability of consummated plans of reorganization.” *In re Tribune Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015).

Appellees argue that courts within the Eighth Circuit “consider five factors when determining whether an appeal is equitably moot in the context of a bankruptcy plan.” (Doc. 36, at 3) (citing *In re President Casinos, Inc.*, No. 4:08CV1976 CDP, 2010 WL 582794, at *6 (E.D. Mo. Feb. 16, 2010)). The five factors are: “(1) whether the reorganization has been substantially consummated; (2) whether a stay has been obtained; (3) whether the relief requested would affect the rights of parties not before the court; (4) whether the relief requested would affect the success of the plan; and (5) the public policy of affording finality of bankruptcy judgments.” *Id.* (citing *In re Williams*, 256 B.R. 885, 896 n.11 (8th Cir. 2001)).

Appellant, however, argues there is no binding Eighth Circuit precedent and the Court should adopt the Third Circuit's approach to equitable mootness. (Doc. 28, at 19). The Third Circuit uses a two-step analysis which examines: “(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.” (*Id.* (citing *In re Tribune Media Co.*, 799 F.3d at 278)). This two-part analytical test was derived from the five-part test. *In re Tribute Media Co.*, 799 F.3d at 278.

A court should "decid[e] no more than necessary to dispose of the specific case under submission." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755 n.4 (1988). This Court does not need to decide which test is dispositive. Because courts in the Eighth Circuit have previously examined five factors, and because the more concise two-part test advanced by the appellants is derived from the five factors, the Court finds it instructive to consider all five factors to determine whether the appeal is equitably moot.

1. Substantially Consummated

***4** The Bankruptcy Code defines "substantial consummation" as:

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

11 U.S.C. § 1101(2). Appellees support their argument that debtor has substantially consummated the Plan by providing several pieces of information. First, debtor has cancelled all its outstanding stock and paid $300,000 to Class 3 claimants, $620,000 to the Class 5 creditor trust, $6,000,000 to Broadmoor, and $5.025 million to Alder Aqua. (Doc. 36, at 7). Appellees argue that if the Bankruptcy Court's Plan Confirmation is reversed, all the payments will need to be disgorged and the stock cancellation will need to be rescinded. (*Id.*, at 8). Second, appellees argue subsection (B) was satisfied because "upon confirmation [of the Plan,] management of the business was automatically transferred to the reorganized Debtor[.]" (*Id.*, at 7). Third, appellees argue substantially all of the property proposed by the Plan has been transferred because the Plan only established $13.5 million would be transferred and nearly $12 million has already been transferred. (*Id.*, at 4-5).

Appellant argues substantially all of the property proposed by the Plan has not been transferred because $21.4 million in investments to recommence aquaculture operations remains unpaid. (Doc. 28, at 26). Appellees argue that to the extent there was a commitment to reinvest in the operations, those funds were not part of the property to be transferred in the Plan Confirmation. (Doc. 36, at 4-5).

This Court finds the Plan has already been substantially consummated. To determine whether a plan is substantially consummated, courts and parties consider factors such as whether payments have started and whether stock has been cancelled and reissued. *See In re Peabody Energy Corp.*, 582 B.R. 771, 780 (E.D. Mo. 2017). Here, there have already been $12,000,000 in payments made to claimants. (Doc. 36, at 7). Additionally, stock cancellation notifications have been sent and new stock and equity has been issued to the Plan Sponsor. (*Id.*). Thus, the Court finds this factor weighs in favor of concluding the doctrine of equitable mootness applies.

2. Existence of a Stay

Appellant argues the existence of a stay pending appeal is not dispositive as to whether a claim is equitably moot. (Doc. 28, at 23). Although appellant may be correct, a failure to seek a stay "will weigh against the appellant in the equitable mootness calculation." *In re President Casinos, Inc.*, 2010 WL 582794 at *6. A failure to grant a stay will not destroy appellant's claim, but it is a factor to be considered because "reliance interests are created" when a plan is confirmed and no stay is obtained.

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In re United Producers, 526 F.3d 942, 948 (6th Cir. 2008). Thus, this factor also weighs in favor of finding that the doctrine of equitable mootness applies.

3. Affect the Rights of Other Parties and the Success of the Plan

***5** Under the five-factor analysis for equitable mootness, courts consider "whether the relief requested would affect the rights of parties not before the Court" and "whether the relief requested would affect the success of the plan." *In re Williams*, 256 B.R. 885, 896 n.11 (8th Cir. 2001). The second step of the Third Circuit's analysis considers similar factors when it analyzes 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." *In re Tribune Media Co.*, 799 F.3d at 278.

Appellant concedes that any successful appeal will involve some scrambling, but alleges the interest in being able to pursue an appeal weighs more heavily unless the harm done to third parties is significant. (Doc. 28, at 29-30). Appellant alleges the parties who would be subject to the most significant harm are Broadmoor and Alder Aqua. (*Id.*, at 30). Appellant asserts that because Broadmoor and Alder Aqua are parties to this action, they are not "third parties" and therefore should not receive any greater protection. (*Id.*, at 30). Appellant also argues it would be possible to "unscramble the egg" and return the parties to "the pre-confirmation status quo." (*Id.*, at 26). Appellant asserts that "this [Plan Confirmation] is not a product of intense multiparty negotiation" and only four events have occurred since confirmation which could all be easily undone. (*Id.*, at 28).

Appellees argue that if the Confirmation Order is reversed, several events will have to occur, such as requiring creditors to disgorge their funds, rescinding stock cancellation notices, revoking new stock issued to the Plan Sponsor, and changing management decisions. (Doc. 36, at 7-8). Appellees allege reversing each of these items could present challenges both known and unforeseeable and they cannot be undone with the simple "stroke of a pen." (*Id.*, at 8-9). Appellees do not directly address which third-parties will suffer the greatest harm if the appeal is successful but do mention other creditors and shareholders who support the Plan and might benefit from its finality. (*Id.*, at 11).

The Court finds that even if there have only been four events since confirmation, they would require disgorging creditors and would fatally scramble the Plan. For example, the payments made to the County for real estate taxes, the funds paid to the Unsecured Creditors' Trust, and the funds paid to Broadmoor would need to be disgorged. (Doc. 36, at 8). The Court agrees the parties who stand to lose the most from a successful appeal are Broadmoor and Alder Aqua because Broadmoor was awarded a $6,000,000 claim and Alder Aqua became the debtor in possession. (Docs. 36, at 8; Doc. 28, at 6). Broadmoor and Alder Aqua, however, are not third-parties because they are parties to this appeal. *In re Tribune Media*, 799 F.3d at 279-80 (discussing the impact an unraveled plan can have on other parties). The Court does, nevertheless, recognize that there are other creditors and shareholders who are third-parties that may be harmed. For example, Hamilton and Hardin Counties have received payment as class 3 claimants. (Debtors' Status Report Dkt. #608, at 1). The Court also finds the success of the Plan may be undermined by this appeal. The disgorgements and effect of reversal may not be as significant as appellee alleges is possible but undoing what has already occurred will likely require more than just the "stroke of a pen." Thus, this factor, too, weighs in favor of concluding that the doctrine of equitable mootness applies.

4. Public Policy

***6** The doctrine of equitable mootness implicates two contrasting public policy concerns. First, there is an important interest in bankruptcy law to promote finality so court-approved reorganizations are able to go forward in reliance on an approval. *In re Info. Dialogues, Inc.*, 662 F.2d at 477. Second, there is a competing interest in a party's ability to secure review of a bankruptcy

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order which adversely affects the party. *Id.* A reviewing court must carefully balance these two considerations. *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 478 (2d Cir. 2012).

Appellant argues the policy concerning finality of a bankruptcy proceeding should be diminished here because there were discussions throughout significant portions of the bankruptcy proceeding that concerned the likelihood of an appeal. (Doc. 28, at 31-32). Appellant also argues the policy favoring finality is heightened in cases involving numerous, interrelated parties all relying on a final decision. (*Id.*, at 31). Here, appellant alleges there are relatively few parties and the proceedings were less complicated than cases where finality should be given a heightened interest. (*Id.*). In contrast, appellant emphasizes the important protection a party is afforded in being able to appeal an adverse decision. (*Id.*).

Appellee correctly points out this bankruptcy case involves multiple creditors and shareholders and the proceedings "have been winding through the court system for almost a year." (Doc. 36, at 11). After almost a year of proceedings, there is an interest in finality. That interest outweighs the interest in a party's right to appeal an adverse decision. This Court finds the policy of finality to be more important than the public policy of permitting an appeal in this case. Thus, this factor weighs in favor of concluding the doctrine of equitable mootness applies.

5. Equitable Mootness Conclusion

The Court finds that the Plan was substantially consummated because most of the property to be transferred by the Plan has already been transferred to creditors. Although there are still some payments remaining, a plan does not need to be completed for it to be substantially consummated. 11 U.S.C. § 1101 (defining substantial confirmation as "all *or* substantially all") (emphasis added). The Court agrees the parties who would stand to lose the most in an appeal are already before the Court and are not third-parties. The effect of reversal, however, would still have a significant impact on the parties and would affect the success of the Plan. A successful appeal would lead to more uncertainty and delay. Because debtor is completely insolvent, it is unlikely an alternative plan would lead to a different outcome. The right to an appeal is a significant factor and the Court does not discount that interest. The ability of the parties to move forward with a plan they have already started performing and achieving a sense of finality, however, is more compelling in this case when accounting for the other factors considered. Therefore, the Court finds this case is equitably moot in light of the factors considered above.

The Court need not resolve the next three arguments because the Court has already decided this appeal is equitably moot. In the alternative, however, the Court will address the other issues contested by the parties.

B. Standing to Appeal Bankruptcy Decision

Appellees further argue that appellant does not have standing to appeal the Bankruptcy Court's decision because the appellant cannot satisfy the "persons aggrieved standard." (Doc. 9, at 4).

***7** "Standing in a bankruptcy appeal is narrower than Article III standing." *Opportunity Fin., LLC v. Kelly*, 822 F.3d 451, 458 (8th Cir. 2016) (citation omitted). The Eighth Circuit has consistently "applied a person aggrieved standard" to determine appellate standing in Bankruptcy cases. *In re O & S Trucking, Inc. v. Mercedes Benz Fin. Servs. USA*, 811 F.3d 1020, 1023 (8th Cir. 2016). The narrower standing requirement reflects a need to limit collateral appeals and advances the public policy interest of providing finality in bankruptcy proceedings. *See Opportunity Fin., LLC*, 822 F.3d at 458; *Spenlinhauer v. O'Donnell*, 261 F.3d 113, 118 n.4 (1st Cir. 2001).

"An appellant is a party aggrieved if the bankruptcy court order diminishes the person's property, increases the person's burdens, or impairs the person's rights." *Opportunity Fin., LLC*, 822 F.3d at 458. "Under the person aggrieved doctrine, the appellant

has the burden to demonstrate that the challenged order directly and adversely affect[ed] his pecuniary interests." *In re O & S Trucking, Inc.*, 811 F.3d at 1023. Potential pecuniary harm that is several steps removed from the challenged order is not sufficient to satisfy the aggrieved person requirement. *Opportunity Fin., LLC*, 822 F.3d at 458. For standing to exist there must be a "direct pecuniary impact." *Id.*

Appellant argues that it satisfies the standing requirement as a person aggrieved whose pecuniary interests were directly and adversely affected by the bankruptcy court's order confirming the Plan. (Doc. 24, at 35-38). Appellant alleges it was a stockholder and the "Plan confirmation took [appellant's] $6 million investment and reduced it to nothing" because the Plan left no assets to be disbursed to equity shareholders. (*Id.*, at 36). Appellant claims its investment loss was a direct result of the Plan Confirmation. (*Id.*, at 38).

Appellees argue appellant is not an aggrieved person because any pecuniary interest appellant may have lost was not a direct result of the Plan Confirmation. (Docs. 9, at 4-7; 36, at 1-2). Appellees argue that both the Plan approved by the Bankruptcy Court and an alternative plan presented to the Bankruptcy Court required debtor to pay creditors first and left nothing for equity stockholders. (Doc. 36, at 1-2). For appellant to have any possibility of recovery, appellant would need to (1) convince this Court that the Plan should not have been confirmed, (2) convince the Bankruptcy Court to consider the alternate plan, and (3) go through the confirmation process with the alternative plan. (Doc. 9, at 6-7). Because neither plan would result in recovery or even raise the possibility of recovery, appellees argue the aggrieved person requirement has not been met.

If this appeal were not equitably moot, the Court would find that appellant would have standing as an aggrieved person. Appellees are correct that several steps might need to occur before appellant would be able to recover any of its losses, but appellees conflate the possibility of recovery with the possibility of pecuniary harm. The appellant's interest in its investment was harmed by the Plan Confirmation and even though its chance of recovery is several steps removed, the Plan confirmation did diminish appellant's property.

C. Failure to Preserve

Appellees argue appellant should not be permitted to appeal the Disclosure Statement Approval Order because appellant waived such an argument on appeal by not objecting to the Disclosure Statement during the bankruptcy proceeding. (Doc. 9, at 7). Appellees allege the Bankruptcy Court approved the Disclosure Statement on March 20, 2019, but appellant did not object until April 12, 2019. (*Id.*). Because appellant did not object to the Disclosure Statement prior to the Order being approved, appellant did not properly preserve this argument for appeal. (*Id.*).

***8** Appellant argues it was not given sufficient time to object to the Disclosure Statement. (Doc. 28, at 33). The Federal Rules of Bankruptcy ("FRBP") require that all debtors, all creditors, the trustee, and indentured trustees should be given "not less than 28 days' notice ... for filing objections and the hearing to consider approval of a disclosure statement." FED. R. BANK. P. 2002(b). Appellant alleges it was only given five days-notice to respond to the Disclosure Statement, which was not sufficient to file an objection and did not conform the FRBP's requirement. (Doc. 28, at 33). Appellees, however, allege appellant's attorney had notice of the Disclosure Statement, had a previous opportunity to object, and did object. (Doc. 36, at 10).

The Court understand appellees' argument to mean that appellant's attorney had sufficient notice of the Disclosure Statement and "did object to the Disclosure Statement." (*Id.*) (emphasis in original). If appellant's attorney did object to the Disclosure Statement before approval, then the claim was preserved and is not being presented for the first time here on appeal. Thus, if the appeal was not equitably moot, appellees' Motion to Dismiss for failure to preserve an objection would fail.

D. Timeliness

Appellees argue the order denying the Objection to the Broadmoor claim should be dismissed as untimely. (Doc. 10). Both appellant and appellees agree that in bankruptcy proceedings the time to file an appeal of a final order is within 14 days of a final order being issued. 28 U.S.C. § 158(c)(2). The only disagreement between the parties is whether the Broadmoor Claim Objection denial was a final order. (Docs. 10, at 2; 28, at 38-39). Appellant argues the denial was not a final order because the Bankruptcy Court agreed to hear an offer of proof on the claim at a later time and because other parties could challenge the claim until the plan was confirmed. (Doc. 28, 40-46). Appellees, however, argue the denial was a final order because there were no remaining disputes related to the claim and the order left the Bankruptcy Court with nothing else to do but execute the order. (Doc. 32, at 6-7).

Title 28, United States Code, Section 158(c)(2) provides: "An appeal [from final judgments, orders, and decrees] shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules." Rule 8002 of the Bankruptcy Rules states: "[A] notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed." Because the Bankruptcy Rule has been incorporated into the provision granting U.S. district courts jurisdiction, the 14-day requirement is jurisdictional and the district courts lack jurisdiction over anything filed beyond 14 days. *See, e.g.*, *In re Delta Engineering Inter., Inc.*, 270 F.3d 584, 586 (8th Cir. 2001). Whether a bankruptcy court's order is final depends on: "(1) [t]he extent to which the order leaves the bankruptcy court nothing to do but execute the order; (2) [t]he extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) [t]he extent to which reversal would require recommencement of the entire proceeding." *In re Hayes Bankr.*, 220 B.R. 57, 60 (N.D. Iowa 1998).

The Court acknowledges the three-factor analysis used by courts within the Eighth Circuit to determine the finality of an order and considers each factor here. First, the order did not leave the bankruptcy court with nothing to do but execute the order. After the Bankruptcy Court ruled on the challenge, the Court reserved the option to hear an offer of proof from appellant. (Doc. 28, at 40-42). Even if the Bankruptcy Court did not anticipate reversing its ruling, the Court's permission for the appellant to make an offer of proof at a later time meant there was still more to do than just execute the order. Additionally, denying appellant's claim objection did not preclude other parties from objecting to the claim. (Doc. 28, at 48). Other parties may not have objected and may have been unlikely to object, but the possibility that they could meant there was still more to do than execute the order. Second, delaying review of the order until the plan was confirmed does not necessarily prevent the aggrieved party from obtaining effective relief. Here, the Court does find the appeal is equitably moot and the appellant does not receive the relief sought, but factors other than delaying the review, such as the consummation of the Plan, prevented the party from obtaining effective relief. Third, reversing the denial of the claim objection would not require recommencement of the entire proceeding. Even if a reversal was successful, it is only a piece of the overall process and would not require a recommencement of the entire proceeding. Thus, if this appeal was not equitably moot, appellees' Partial Motion to Dismiss the Bankruptcy Court's Order denying appellant's objection to Broadmoor's claim would fail.

III. CONCLUSION

***9** For the foregoing reasons, appellee's Motion to Dismiss Appeal and Partial Motion to Dismiss Appeal are **granted**.

IT IS SO ORDERED this 4th day of October, 2019.

All Citations

Not Reported in Fed. Supp., 2019 WL 4918758

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2022 WL 135398
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia.

JOEL PATTERSON, et al., Appellants,
v.
MAHWAH BERGEN RETAIL GROUP, INC. Appellee.

Civil No. 3:21cv167 (DJN)
|
Filed 01/13/2022

MEMORANDUM OPINION

David J. Novak United States District Judge

***1** This case arises out of the bankruptcy cases commenced by Mahwah Bergen Retail Group, Inc. (f/k/a Ascena Retail Group, Inc.) ("Mahwah" or "Ascena") and sixty-three of its affiliates (collectively, the "Debtors"). The United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court") confirmed the reorganization plan ("the Plan") set forth by the parties in interest, and Joel Patterson and Michaella Corporation ("Securities Litigation Lead Plaintiffs") filed notices of appeal to this Court. Likewise, the United States Trustee ("Trustee") filed a notice of appeal of the confirmation to this Court.[1] The appeals were consolidated into this action.[2] In these appeals, Appellants challenge third-party (non-debtor) releases, as well as an exculpation provision, contained in the Plan.

1 The United States Securities and Exchange Commission (SEC) supported the Trustee's appeal as an amicus.

2 The other appeals consolidated into this action are Case No. 3:21cv166 and Case No. 3:21cv205.

This appeal implicates the most fundamental right guaranteed by the due process clause in our judicial system: the right to be heard before the loss of one's rights. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). "And, the Supreme Court has explained that the particular constitutional protection afforded by access to the courts is 'the right conservative of all other rights, and lies at the foundation of orderly government.' " *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir. 2004) (quoting *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907)). Furthermore, "[t]his right ... has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Relatedly, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement." *Loc. No. 93, Int'l Ass'n of Firefighters AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). This is so, because the general rule provides "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Martin v. Wilks*, 490 U.S. 755, 759 (1989); *see also id.* at 762 ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

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These fundamental principles resonate with force in this appeal from the Bankruptcy Court, as third-party releases strike at the heart of these foundational rights. The United States Trustee — a statutory watchdog over bankruptcy proceedings — and the Securities Litigation Lead Plaintiffs, as designated by a United States District Judge in a putative class action alleging securities fraud, challenge the approval by the Bankruptcy Court [3] of exceedingly broad third-party (non-debtor) releases, as well as an exculpation provision, contained in the Plan submitted by Debtors.

3 The Honorable Kevin R. Huennekens, United States Bankruptcy Judge for the Eastern District of Virginia (Richmond Division).

***2** Third-party releases, such as those at issue here, carry much controversy, for they are a "device that lends itself to abuse." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). Indeed, several Courts of Appeals (the Fifth, Ninth and Tenth Circuits) prohibit the use of third-party releases. *See, e.g., In re Pac. Lumber Co.*, 584 F.3d 229, 251-53 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600-02 (10th Cir. 1990). And a District Judge in the Southern District of New York recently concluded in a thoughtful opinion that no statutory basis exists for their use. *In re Purdue Pharma, L.P.*, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).

The Fourth Circuit has made clear that the use of third-party releases is disfavored, saying that such releases should be "granted cautiously and infrequently." *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 712 (4th Cir. 2011). Other circuits that permit their use likewise reserve their utilization for the rare or exceptional case. *See, e.g., In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (directing that "courts considering such releases do so with caution .... [and] with the utmost care and to thoroughly explain the justification for any such inclusion"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) (permitting releases and bar orders but cautioning that they "ought not to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141-43 (holding that involuntary releases should only be approved if they form an important part in a reorganization plan, and that they are proper "only in rare cases"); *In re Dow Corning Corp.*, 280 F.3d 648, 657-58 (6th Cir. 2002) ("Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances.' ").

Despite these admonitions, the Bankruptcy Court for the Richmond Division of this district regularly approves third-party releases, as acknowledged by Debtors' counsel during oral argument. (Tr. of Dec. 20, 2021 Argument ("Arg. Tr.") at 6:8-14 (ECF No. 75).) This recurrent practice contributes to major companies like Mahwah (a New Jersey company) using the permissive venue provisions of the Bankruptcy Code to file for bankruptcy here. [4] Indeed, according to the Trustee, the Richmond Division (just the division, not the entire Eastern District of Virginia) joins the District of Delaware, the Southern District of New York, and the Houston Division of the Southern District of Texas as the venue choice for 91% of the "mega" bankruptcy cases. (Reply Br. of Appellant John P. Fitzgerald, III, Acting United States Trustee for Region 4 ("Trustee Reply Br.") at 22-23 (ECF No. 45).) The ubiquity of third-party releases in the Richmond Division demands even greater scrutiny of the propriety of such releases. And, their prevalence also undermines assertions that they are integral to the success of this particular reorganization plan. As District Judge Colleen McMahon astutely observed: "When every case is unique, none is unique." *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *3.

4 To be clear, venue properly exists in the Richmond Division, as Debtors latched onto the existing bankruptcy of one of their affiliates, Dress Barn, which is incorporated in Virginia, as the basis for venue. 28 U.S.C. § 1408. Consequently, the question is not whether venue was proper here, but instead why Debtors chose this venue over the many other venue options that it had available to it. During oral argument, counsel for Debtors had no explanation for his client's choice of Richmond to file for bankruptcy. (Arg. Tr. at 78:20-22.)

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***3** The Third-Party Releases at issue in this case represent the worst of this all-too-common practice, as they have no bounds. The sheer breadth of the releases can only be described as shocking. They release the claims of *at least* hundreds of thousands of potential plaintiffs not involved in the bankruptcy, shielding an incalculable number of individuals associated with Debtors in some form, from every conceivable claim — both federal and state claims — for an unspecified time period stretching back to time immemorial. In doing so, the releases close the courthouse doors to an immeasurable number of potential plaintiffs, while protecting corporate insiders who had no role in the reorganization of the company. Yet, the Bankruptcy Court — acting with its limited Article I powers — extinguished these claims with little or no analysis. In doing so, the Bankruptcy Court exceeded the constitutional limits of its authority as delineated by the Supreme Court in *Stern v. Marshall*, 564 U.S. 462 (2011), ignored the mandates of the Fourth Circuit in *Behrmann*, and offended the most fundamental precepts of due process.

Likewise, the Bankruptcy Court erred by approving an overly broad Exculpation Provision that exceeds the bounds of similar provisions approved in other cases. However, unlike the Third-Party Releases that must be voided and severed from the reorganization plan, redrafting can salvage the Exculpation Provision on remand.

Accordingly, this case will be remanded to the Bankruptcy Court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND [5]

5 Unless otherwise cited, the Court takes these facts from the Bankruptcy Court's Opinion ("Bankr. Confirm. Op.") explaining its reasoning for confirming the Plan, found at pages USTAPP 2837-2876 of the Trustee's Appendix (("USTAPP") (ECF Nos. 35-1 through 35-3)). In citing pages contained in the Trustee's Appendix, the Court will cite to the page numbers following "UST" in the Trustee's Appendix.

Ascena provided specialty retail apparel for women and girls, operating approximately 2,800 stores in the United States, Canada and Puerto Rico, which served more than 12.5 million customers and employed nearly 40,000 employees. Debtors held a portfolio of recognizable brands, including Ann Taylor, LOFT, Lane Bryant, Catherines, Justice, Lou & Grey and Cacique.

Beginning in March 2020, Debtors had to temporarily close all of their retail stores due to the COVID-19 pandemic, and in so doing, furloughed nearly all of their store-level workforce as well as a substantial portion of their corporate workforce. At the time, Debtors had approximately $1.6 billion in secured debt and $700 to $800 million in unsecured debt. (USTAPP 1592, 1599.) Before filing for bankruptcy, Debtors negotiated with many of their secured lenders to arrive at a restructuring support agreement, which formed the basis of the original chapter 11 plan. (USTAPP 1591.) Then, on July 23, 2020, Debtors commenced the Bankruptcy Cases that ultimately were consolidated into Case No. 20bk33113 in the Bankruptcy Court. However, rather than reorganize, Debtors ultimately largely liquidated the businesses, selling substantially all of the assets for a total sale price of $651.8 million. (USTAPP 2259-61, 2262-64, 2265-67, 2320.) Thereafter, they filed an amended chapter 11 plan. (Amended Joint Chapter 11 Plan of Reorganization of Mahwah Bergan Retail Group, Inc. and Its Debtor Affiliates (the "Plan") (USTAPP 2410-2529).)

A. The Plan

The Plan provided that some secured lenders would be paid in full, general unsecured creditors would receive pro rata payments from a trust funded by $7.25 million in cash and the remaining class of secured claims would receive the remainder of Debtors' cash. (USTAPP 2621-36.) The shareholders would receive nothing and the Plan would extinguish their equity interest. (USTAPP 2634.)

On February 25, 2021, the Bankruptcy Court conducted an evidentiary hearing to consider the Debtors' Plan in addition to the unresolved objections filed by the SEC and the Trustee, as well as those raised by Joel Patterson and Michaella Corporation, the lead plaintiffs in a securities fraud action against Ascena and two of its former executives pending in the United States District Court for the District of New Jersey (the "Securities Litigation"). The Bankruptcy Court overruled the objections and confirmed the Plan and, on February 25, 2021, entered the Confirmation Order confirming the Plan. Then, on March 9, 2021, the Bankruptcy Court entered its Memorandum Opinion to supplement its findings of facts and conclusions of law in the Confirmation Order.

***4** Before confirming the Plan, the Bankruptcy Court had to first approve a Disclosure Statement that would supply creditors and interest holders with information about the proposed plan as a part of the solicitation process. Accordingly, on September 10, 2020, the Bankruptcy Court held a hearing regarding the Disclosure Statement. In response to objections by the SEC, the Bankruptcy Court required Debtors to amend the Disclosure Statement to include language recommended by the SEC, so that the notice would more clearly convey information to non-voting equity holders about the provisions of the Plan, including the inclusion of Third-Party Releases, the right of each non-voting equity holder to opt out of the Third-Party Releases and the process for doing so. Additionally, in response to objections by the Securities Litigation Lead Plaintiffs, the Bankruptcy Court adopted additional steps to effectuate notice of the Disclosure Statement. However, the Bankruptcy Court overruled the Trustee's objections, which closely resembled the issues that he raises in this appeal.

The sale of Debtors' brands for $651 million allowed their brands to continue under new ownership and brought proceeds into Debtors' estate for the benefit of creditors. Debtors' term lenders and the Creditors' Committee endorsed the Plan. The Plan provided for certain payment structures to Debtors' creditors. The unsecured creditors also received a waiver of any avoidance actions that Debtors' estate could bring against them. The holders of equity interest in Ascena were not projected to receive any distribution and, therefore, were deemed to reject the Plan. The Plan also included broad releases that form the basis of this appeal.

B. The Releases Contained in the Plan

As part of the Plan, the major stakeholders negotiated and included extremely broad and convoluted releases and an exculpation provision. Specifically, the Plan provides for the following Debtors' Releases:

> [E]ach Released Party is conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by each and all of the Debtors, the Reorganized Debtors, and their Estates ... from any and all Causes of Action, including any derivative claims, asserted or assertable on behalf of any of the Debtors ... based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), the purchase, sale, or rescission of any Security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan,... or any other related agreement, or upon any other act, omission, transaction, agreement, event, or other occurrence (in each case, related to any of the foregoing) taking place on or before the Effective Date.

(USTAPP 2460-61.) The Plan further provides for the following Release by holders of Claims or Interests ("Third-Party Releases"):

> Effective as of the Effective Date, each Releasing Party in each case except for Claims arising under, or preserved by, the Plan, Each Releasing Party (other than the Debtors and the Reorganized Debtors), in each case on behalf of itself and its respective successors, assigns, and representatives, and any and all other Entities who may purport to assert any claim, Cause of Action, directly or derivatively, by, through, for, or because of the foregoing entities, is deemed to have released and discharged each Debtor, Reorganized Debtor, and each other Released Party from any and all Causes of Action, whether known or unknown, including any derivative claims, asserted or assertable on behalf of any of the Debtors ... based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership or operation thereof), the purchase, sale, or rescission of any Security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the ABL Credit Agreement, the Term Loan Credit Agreement, the Chapter 11 Cases, the Restructuring Support Agreement and related prepetition transactions, the Backstop Commitment Letter, the Disclosure Statement, the New Corporate Governance Documents, the Exit Facilities, the Plan (including, for the avoidance of doubt, providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Released Party on the Plan or the Confirmation Order in lieu of such legal opinion), the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other act, omission, transaction, agreement, event, or other occurrence (in each case, related to any of the foregoing) taking place on or before the Effective Date.

***5** (USTAPP 2461.)

The Plan defines "Releasing Party" broadly to include:

> [C]ollectively, and in each case in its capacity as such: (a) each of the Debtors; (b) the Reorganized Debtors; (c) each of the Consenting Stakeholders; (d) the ABL Agent; (e) the ABL Lenders; (f) Term Loan Agent; (g) the Term Loan Lenders; (h) each of the lenders and administrative agents under the Exit Facilities; (i) the Backstop Parties; (j) the DIP ABL Agent; (k) the DIP ABL Lenders; (1) the DIP Term Agent; (m) the DIP Lenders; (n) all holders of Impaired Claims who voted to accept the Plan; (o) all holders of Impaired Claims who abstained from voting on the Plan or voted to reject the Plan but did not timely opt out of or object to the applicable release; (p) all holders of Unimpaired Claims who did not timely opt out of or object to the applicable release; (q) all holders of Interests; (r) the Plan Administrator; (s) each current and former Affiliate of each Entity in foregoing clause (a) through the following clause (t); (t) each Related Party of each Entity in the foregoing clause (a) through clause (t); and (u) the Creditors' Committee; *provided* that, in each case, an Entity shall not be a Releasing Party if it: (x) elects to opt of the releases contained in the Plan, or (y) timely objects to the releases contained in

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> the Plan and such objection is not resolved before Confirmation; *provided further* that any such Entity shall not receive the Avoidance Action waiver.

(USTAPP 2427.) Thus, Releasing Parties includes all holders of claims and interests who do not timely opt out of or object to the Third-Party Releases.

Likewise, the Plan defines "Released Party" broadly, to include:

> [C]ollectively, each of the following in their capacity as such: (a) each of the Debtors; (b) the Reorganized Debtors; (c) each of the Consenting Stakeholders; (d) the ABL Agent; (e) the ABL Lenders; (f) the Term Loan Agent; (g) the Term Loan Lenders; (h) each of the lenders and administrative agents under the Exit Facilities; (i) the Backstop Parties; (j) the DIP ABL Agent; (k) the DIP ABL Lenders; (1) the DIP Term Agent; (m) the DIP Term Lenders; (n) the Plan Administrator; (o) each current and former Affiliate of Each Entity in the foregoing clause (a) through this clause (p); (p) each Related Party of each Entity in the foregoing clause (a) through this clause (p); and (q) the Creditors' Committee; *provided* that any holder of a Claim or Interest that opts out of the releases shall not be a "Released Party."

(USTAPP 2427.)

In turn, the Plan then defines the term "Related Party" to include:

> [W]ith respect to any person or Entity, each of, and in each case in its capacity as such, current and former directors, managers, officers, investment committee members, special or other committee members, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors of such person or Entity, and any such Person's or Entity's respective heirs, executors, estates, and nominees.

***6** (USTAPP 2426.)

Finally, the Plan provides for the following Exculpation Provision:

> [N]o Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from any Cause of Action or any claim arising from the Petition Date through the Effective Date related to any act or omission in connection with, relating to or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, or termination of the Restructuring Support Agreement and related prepetition transactions, the Disclosure Statement, the Plan, the Exit Facilities, the Backstop Commitment Letter, the DIP Financing Order, Cash Collateral Order, or any Restructuring

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> Document, contract, instrument, release or other agreement or document (including providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion) created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance of Securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, except for claims related to any act or omissions that is determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have, and upon consummation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of, and distribution of, consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.
>
> (USTAPP 2461-62.)

The Plan defines "Exculpated Parties," in turn, to include:

> (a) each of the Debtors; (b) each of the Reorganized Debtors; (c) each of the Consenting Stakeholders; the Creditors' Committee and its members; (e) the Term Loan Agent; (f) each current and former Affiliate of each Entity in clause (a) through the following clause (g); and (g) each Related Party of each Entity in clause (a) through this clause (g).
>
> (USTAPP 2422.)

C. The Notice

Any reasonable review of the Third-Party Releases leads to a conclusion that the releases cover any type of claim that existed or could have been brought against anyone associated with Debtors as of the effective date of the plan. Yet, the Bankruptcy Court (and now Debtors as well) only focused on one claim against Ascena and two of its former corporate officers: a putative class action alleging securities fraud brought against Ascena, former CEO David Jaffe and former CFO Robert Giammatteo. By doing so, the Bankruptcy Court ignored all of the other potential claims (both federal and state claims) released against others covered by the releases, as well as neglected to address any other potential claims against Jaffe and Giammatteo. This tunnel vision proves fatal to any notions of proper notice (as well as consent) in this case.

***7** With its focus on the securities fraud litigation, the Bankruptcy Court approved a disclosure statement for dissemination to creditors and shareholders after a hearing. (USTAPP 0942, 0980-82.) The Bankruptcy Court required a Notice of Non-Voting Status to be sent to both current and former shareholders of Ascena during the Putative Class Period. The Notice of Non-Voting Status informed the recipients that they could opt out of the Third-Party Releases by returning an enclosed form no later than November 15, 2020. The Notice of Non-Voting Status stated in bold and underlined text that, under Debtors' Plan, **"you will be deemed to have released whatever claims you may have against many other people and entities (including company officers and directors) unless you return the enclosed 'Release Opt-Out Form'."** The recipient could return a hardcopy form in the pre-addressed, pre-paid envelope or electronically through an online portal, which would effectuate the opt-out.

The Bankruptcy Court did not order that any notice or opt-out forms be sent to all of the Releasing Parties, including the current and former employees, consultants, accountants or attorneys of Debtors, their affiliates, lenders, creditors or interest holders. Nor did it even examine other possible causes of action released. Prime Clerk — essentially a middleman in this process — bore responsibility for notifying the equity holders. Prime Clerk sent the notice and opt-out forms by first-class mail to all current and former registered holders identified by Ascena's transfer agent, American Stock Transfer & Trust Company, LLC

("AST"). As to the beneficial holders, Prime Clerk served the notice and opt-out forms on the list of Nominees with instructions to forward the materials to their beneficial holder clients as of the voting record date and their beneficial holder clients who had purchased or otherwise acquired the equity interest during the Putative Class Period. Additionally, the Bankruptcy Court ordered publication of a general notice of the confirmation hearing in *USA Today* and *The New York Times.* (USTAPP 0985-86.) This notice ran for one day and included the day and time of the hearing, the deadline by which to object to the Plan and that the Plan contained a third-party release. (USTAPP 1559.)

Throughout this process, Debtors sent notice of the Third-Party Releases and the opt-out procedure to roughly 300,000 parties believed to be potential members of the putative class action case pending in the New Jersey district court. The record lacks any information about how many of the parties actually received the notice or any mention of efforts to determine the success of the attempts at notice regarding the securities fraud litigation. As of November 18, 2020, Debtors had received approximately 596 Release Opt-Out Forms — approximately 0.2% of those targeted by the notice.

D. The Securities Litigation

Although not directly related to the procedural or factual history of the bankruptcy proceeding, the Third-Party Releases essentially thwart a lawsuit filed in a separate federal court. In June 2019, the Securities Litigation Lead Plaintiffs filed a federal securities putative class action in the United States District Court for the District of New Jersey. [6] On November 21, 2019, the Securities Litigation Lead Plaintiffs filed a Consolidated Amended Complaint against Debtors and the Individual Defendants, which included Debtors' former CEO (Jaffe) and CFO (Giammatteo). The proposed class included all persons, other than the defendants, who purchased or otherwise acquired Debtors' common stock between December 1, 2015 and May 17, 2017. The Amended Complaint asserts claims under the Securities Exchange Act of 1934 and generally alleges that the defendants engaged in a deceptive scheme and made false and misleading statements and omissions that artificially inflated the price of the common stock during the class period.

6 *Newman v. Ascena Retail Group, Inc., et al.*, 2:19cv13529 (D.N.J.).

***8** The Securities Litigation Lead Plaintiffs objected to the Third-Party Releases, but the Bankruptcy Court overruled their objections. Moreover, they attempted to opt out of the Third-Party Releases on behalf of the putative class, but the Bankruptcy Court denied that request. The Securities Litigation Lead Plaintiffs now appeal those decisions, as the Third-Party Releases in this case has halted the New Jersey case before reaching the class certification stage.

II. PROCEDURAL HISTORY

On March 12, 2021, the Securities Litigation Lead Plaintiffs filed two notices of appeal of the Confirmation Order to this Court. [7] In their appeals, the Securities Litigation Lead Plaintiffs argue that the Bankruptcy Court erred in approving the Third-Party Releases to the extent that the Third-Party Releases relate to the claims asserted in the Securities Litigation. (Opening Br. of Appellants Joel Patterson and Michaella Corp. ("Appellants' Br.") at 7 (ECF No. 30).) The Securities Litigation Lead Plaintiffs further argue that the Bankruptcy Court erred in finding that they lack standing to object to the Third-Party Releases and that they could not opt out on behalf of the class that they seek to represent. (Appellants' Br. at 7-8.)

7 The Securities Litigation Lead Plaintiff's other notice of appeal initiated Case No. 3:21cv166, which the Court then consolidated into this action.

On March 26, 2021, the Trustee filed a notice of appeal of the Confirmation Order to this Court. [8] The Court consolidated the Trustee's appeal with the other pending appeals into this case and set a briefing schedule. (ECF Nos. 11, 15.) In his appeal, the

Trustee argues that the Bankruptcy Court erred by approving the Third-Party Releases and Exculpation Provision contained in the Plan and approved by the Confirmation Order. (Br. of Appellee [*sic*] John P. Fitzgerald, III, Acting United States Trustee For Region 4 ("Trustee Br.") at 2 (ECF No. 35).) The Trustee further argues that the Bankruptcy Court erred in the manner in which it conducted the confirmation approval process. (Trustee Br. at 47-50.)

8 The Trustee's notice of appeal initiated Case No. 3:21cv205, which the Court then consolidated into this action.

After filing the appeal, the Trustee filed a motion to stay in the Bankruptcy Court, asking the Bankruptcy Court to stay the application of the Plan's exculpation and release provisions pending the adjudication of this appeal. On May 13, 2021, the Bankruptcy Court conducted a hearing on the stay motion below. Then, on May 28, 2021, the Bankruptcy Court denied the Trustee's stay motion and entered a Memorandum Opinion ("Bankr. Stay. Op." (USTAPP 2877-2904)) setting forth its findings of facts and conclusions of law.

On June 2, 2021, the Trustee filed a Motion to Stay in this Court (ECF No. 18), in which the Securities Litigation Lead Plaintiffs joined. (ECF No. 28.) Debtors opposed the stay. (ECF No. 27.) On June 28, 2021, the Court denied the Motion to Stay, finding that the Trustee had failed to meet the high burden required for a party seeking a stay. (ECF Nos. 33-34.)

On September 10, 2021, Debtors filed their Response Brief for Appellee Mahwah Bergen Retail Group, Inc. (("Appellee Br.") (ECF No. 43).) On October 11, 2021, the Securities Litigation Lead Plaintiffs and the Trustee each filed a reply brief, respectively. (("Trustee Reply Br.") (ECF No. 45); (Reply Br. of Appellants Joel Patterson and Michaela Corp.) ("Appellants' Reply Br.") (ECF No. 46).) On December 20, 2021, the Court held oral argument on this appeal, rendering it ripe for review. For the reasons stated below, the Court finds that the Bankruptcy Court erred in its approval of the Third-Party Releases and the Exculpation Provision.

III. STANDARD OF REVIEW

***9** "When reviewing a decision of the bankruptcy court [rendered in a core proceeding], a district court functions as an appellate court and applies the standards of review in federal courts of appeal." *Paramount Home Ent. Inc. v. Cir. City Stores, Inc.*, 445 B.R. 521, 526-27 (E.D. Va. 2010) (citing *In re Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992)). Specifically, "[t]he district court reviews the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error." *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US, LLC*, 578 B.R. 325, 328 (E.D. Va. 2017) (citing *In re Harford Sands Inc.*, 327 F.3d 637, 639 (4th Cir. 2004)). Clear error exists when the district court " 'is left with the definite and firm conviction that a mistake has been committed.' " *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). In cases involving questions of law and fact, the Court reviews findings of fact under the clearly erroneous standard and reviews *de novo* the legal conclusions derived from those facts. *Gilbane Bldg. Co. v. Fed. Rsv. Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 905 (4th Cir. 1996).

Conversely, if the proceeding before the Bankruptcy Court constitutes a non-core proceeding and the parties did not consent to the Bankruptcy Court's jurisdiction, "the district court ... undertake[s] de novo analysis of both the factual findings to which [the appellant] objected and the law." *In re Apex Express Corp.*, 190 F.3d 624, 630 (4th Cir. 1999). Indeed, 28 U.S.C. § 157(c)(1) directs:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district

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> judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Relatedly, Bankruptcy Rule 8018.1 provides that:

> If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Fed. R. Bankr. P. 8018.1. The district court then reviews such proposed findings of fact and conclusions of law *de novo.* Fed. R. Bankr. P. 9033(d).

IV. ANALYSIS

This appeal requires the Court to first determine whether the Bankruptcy Court exceeded its authority under the Constitution when it released the claims included in the Third-Party Releases. This analysis will encompass whether the Releasing Parties consented to the jurisdiction of the Bankruptcy Court. Next, the Court must determine whether the Bankruptcy Court erred in approving the Third-Party Releases under applicable Fourth Circuit standards. This, again, will require an analysis of whether the parties consented to the Third-Party Releases. Then, the Court will address Appellee's argument that the Court must dismiss this appeal on equitable mootness grounds. Finally, the Court will examine the challenge to the Exculpation Provision. However, before addressing the merits of the appeal, the Court will address whether Appellants have standing to press this appeal.

A. Standing to Appeal

1. The United States Trustee's Standing to Appeal

During oral argument, Debtors' counsel conceded that Debtors have no challenge to the standing of the Trustee to appeal. (Arg. Tr. at 20:10-11.) Debtors make this concession for good reason. The Bankruptcy Code gives the United States Trustee standing, providing that the Trustee "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307. The Trustee serves the role of "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991) (quotations omitted). Given their role, the Fourth Circuit has recognized that a trustee could never satisfy the "person aggrieved standard," discussed below, but still has standing to appeal adverse bankruptcy decisions in its role as a "public watchdog" over bankruptcy proceedings. *See id.* at 796 ("[S]tanding to appeal under the Bankruptcy Act as a 'party aggrieved' may arise from a party's official duty to enforce the bankruptcy law in the public interest."). The Fourth Circuit noted that, "had Congress intended to prohibit U.S. trustees from appealing adverse bankruptcy court rulings, it would have done so explicitly." *Id.* Accordingly, the Trustee has standing to appeal to this Court. And, his appeal of the Third-Party Releases encompasses the appeal advanced by the Securities Litigation Lead Plaintiffs. This leaves the Court with no reservations that it can consider the merits of the appeal regardless of whether the Securities Litigation Lead Plaintiffs have standing.

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2. The Securities Litigation Lead Plaintiffs' Lack of Standing to Appeal

***10** The Debtors do, however, challenge the Securities Litigation Lead Plaintiffs' standing to prosecute this appeal. (Appellee Br. at 48.) Specifically, Debtors argue that by objecting to the Third-Party Releases, the Securities Litigation Lead Plaintiffs opted out of the release and, therefore, it has no impact on them. The Court agrees and finds that the Securities Litigation Lead Plaintiffs lack standing to prosecute this appeal.

"The test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a *person aggrieved* by the bankruptcy order." *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US LLC*, 469 F. Supp. 3d 505, 523 (E.D. Va. 2020) (internal quotations omitted). To satisfy the person aggrieved standard, "the appellant must show that the order diminishes its property, increases its burdens, or impairs its rights." *Id.* (internal quotations omitted).

Here, the Securities Litigation Lead Plaintiffs argue that they were placed in a "death trap" by being forced to choose between either not opting out, and thereby waiving significant rights, or opting out (as they ultimately chose) and risking a challenge to their standing. Although the Court is sympathetic to the conundrum in which they were placed, tough strategic decisions do not confer standing. Moreover, this tough strategic decision resulted in the Third-Party Releases having no binding effect on them as individuals. They may still pursue any and all claims that the Third-Party Releases purport to release. Thus, they cannot complain of any diminution of property, increase in burden or impairment of rights in their individual capacity. Although they claim that the Third-Party Releases inhibit their ability to enlarge their recovery in the Securities Action (Appellants' Reply at 18), they actually seek to enlarge the recovery of the putative class — *i.e.*, more class members obtaining a recovery, leading to a greater overall class recovery — not necessarily their own personal recovery. As such, the Securities Litigation Lead Plaintiffs must pin their hopes of establishing standing on harm suffered in their capacity as putative representatives of the class.

However, the Securities Litigation Lead Plaintiffs' capacity as putative representatives of a class in the District of New Jersey does not confer standing to appeal in this Court. The Securities Litigation Lead Plaintiffs claim that they have standing "because they are fiduciaries for the Class, have rights closely aligned with those of Class members, and are the court-appointed advocate for Class members' rights." (Appellants' Reply at 19.) However, this argument puts too much weight on their role as putative class representatives. As lead plaintiffs in a *putative* class action, the Securities Litigation Lead Plaintiffs have no special status; consequently, they must establish individualized harm. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165 (2016) ("While a class lacks independent status until certified,... a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."). As the Fourth Circuit has noted, "[n]ot every effort to represent a class will succeed; the representative is an agent only if the class is certified." *Gentry v. Siegel*, 668 F.3d 83, 90 (4th Cir. 2012). Accordingly, the Securities Litigation Lead Plaintiffs' argument that their representative capacity confers standing on them relies on the speculation that they will eventually represent a certified class. But, "[s]peculation and conjecture do not give rise to bankruptcy appellate standing." *Mar-Bow*, 469 F. Supp. 3d at 532.

***11** Two appellate decisions support this conclusion. In *Gentry*, the Fourth Circuit concluded that the named plaintiffs in putative classes lacked standing to challenge the notice procedures employed by the bankruptcy court. 668 F.3d at 95. The plaintiffs had received the actual notice, such that they could not challenge the notice on behalf of themselves, and the Fourth Circuit concluded that they did "not have standing to assert the due process rights of others who are not parties." *Id.* Similarly, here, the Securities Plaintiffs cannot challenge on their own behalf the Third-Party Releases that no longer (due to the opt out) release their own individual claims, and they lack standing to challenge the Third-Party Releases on behalf of others who are not parties.

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Likewise, the Second Circuit encountered a nearly identical circumstance to the facts here in *In re Dynegy, Inc.*, 770 F.3d 1064 (2d Cir. 2014). There, a named plaintiff in a putative securities class action sought to challenge the third-party releases in a confirmation plan that would release non-debtor officers. *Id.* at 1067. The Second Circuit agreed with the district court that the named plaintiff lacked standing to personally challenge the plan, because he had opted out of the release. *Id.* Likewise, the Second Circuit found that he lacked standing to opt out of or object to the releases on behalf of the putative class, because the class had not been certified in either the trial court or the bankruptcy court. *Id.* at 1068-70. The same facts exist here, and the Court reaches the same conclusion.

Accordingly, the Court finds that the Securities Litigation Lead Plaintiffs lack standing to prosecute this appeal.[9] Again, however, the Court stresses that the Trustee has standing to raise the same challenges to the Third-Party Releases as the Securities Litigation Lead Plaintiffs have raised.

9 The Securities Litigation Lead Plaintiffs have raised additional issues in this appeal. Specifically, they claim that the Bankruptcy Court erred in finding that they lacked the authority to opt out on behalf of the putative class and in declining to certify the class for the limited purpose of opting out on behalf of the class. (Appellants' Br. at 82-85.) However, the Court's ultimate conclusion that the Third-Party Releases are unenforceable renders moot the question of whether the Bankruptcy Court should have provided some mechanism to opt out of the class from the Third-Party Releases.

B. The Constitutional Implications of the Third-Party Releases

In assessing whether the Bankruptcy Court erred in approving the Third-Party Releases, the Court will begin with a discussion of the jurisdiction of bankruptcy courts generally and whether they have the constitutional power to approve such releases. The Court will then examine whether the Releasing Parties consented to adjudication of their claims by an Article I court. The Court answers both questions in the negative.

1. The Limitations of the Jurisdiction of the Bankruptcy Courts

Federal district courts exercise "original and exclusive jurisdiction of all cases" under the Bankruptcy Code. 28 U.S.C. § 1334(a). District courts may refer all bankruptcy matters to bankruptcy judges, which this District has done as a matter of course since 1984. 28 U.S.C. § 157(a); *see In the Matter of: The Administration of the Bankruptcy Courts and Reference of Bankruptcy Cases and Proceedings to the Bankruptcy Judges of this District* (E.D. Va. Aug. 15, 1984) (Standing Order referring all bankruptcy matters to Bankruptcy Court). District courts retain the authority to withdraw, in whole or in part, any case or proceeding that they had referred. *See Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 481 (4th Cir. 2015) (citing 28 U.S.C. § 157(d)). "In short, while the district courts were given jurisdiction over bankruptcy cases, Congress also delegated to the bankruptcy courts, 'as judicial officers of the district courts,' ... adjudicatory authority, subject to the district courts' supervision as particularized in § 157 and the limits imposed by the Constitution." *Id.* (quoting *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679 (2015)). This case implicates those limits imposed by Article III of the Constitution.

***12** Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress has established 94 District Courts and 13 Courts of Appeals, "composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished." *Wellness Int'l*, 575 U.S. at 668. The Supreme Court has long recognized that "Congress may not withdraw from" the Article III courts "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Stern*, 564 U.S. at 484. This limitation finds its basis in the protections of life tenure and against salary diminution that Article III provides, which "help to ensure the integrity and independence of the Judiciary." *Wellness Int'l*, 575 U.S. at 668. In authorizing the appointment of bankruptcy judges (who do not enjoy the Article III protections), Congress has attempted to align the responsibilities of

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bankruptcy judges with the boundaries set by the Constitution. However, as discussed below, the Supreme Court has found that Congress violated Article III in authorizing bankruptcy judges to decide certain claims for which litigants enjoy an entitlement to an Article III adjudication.

2. *Northern Pipeline* and Congress' Reaction

In *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, the Supreme Court considered the constitutionality of the Bankruptcy Reform Act enacted by Congress in 1978, and specifically whether the bankruptcy court had the judicial authority to adjudicate a state-law contract claim filed by the debtor against a third party. 458 U.S. 50, 54 (1982). The Bankruptcy Reform Act gave the newly created bankruptcy courts power "much broader than that exercised under the former" system and enabled bankruptcy courts to decide "all civil proceedings arising under title 11 or arising in or related to cases under title 11." *Id.* at 55. Thus, Congress vested the bankruptcy judges with most of the "powers of a court of equity, law, and admiralty" without affording them the protections of Article III. *Id.* Because the Bankruptcy Reform Act vested "the essential attributes of the judicial power" in a non-Article III adjunct, the Supreme Court held that "[s]uch a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." *Id.* at 87. Thus, it found the "broad grant of jurisdiction to the bankruptcy courts" unconstitutional and concluded that the bankruptcy court lacked jurisdiction to adjudicate the state-law contract claim against an entity not otherwise part of the bankruptcy proceedings. *Id.* at 69-72, 87.

Following the decision in *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act"), revising the statutes governing bankruptcy judges and their jurisdiction. Pub. L. No. 98-353, 98 Stat. 333. Under the 1984 Act, "[t]he manner in which a bankruptcy judge may act ... depends on the type of proceeding involved." *Stern*, 564 U.S. at 473. "Congress has divided bankruptcy proceedings into three categories: (1) those that arise under title 11, (2) those that arise in a title 11 case, and (3) those that are related to a case under title 11." *Chesapeake Tr. v. Chesapeake Bay Enters., Inc.*, 2014 WL 202028, at *2 (E.D. Va. Jan. 17, 2014) (citing *Stern*, 564 U.S. at 473). The first two categories constitute "core proceedings" such that a bankruptcy judge has the statutory authority to "hear and enter final judgments." *Stern*, 564 U.S. at 474. With respect to the third category, non-core proceedings, a bankruptcy judge may hear a "proceeding that is not a core proceeding but that is otherwise related to a case under title 11," but, unless the parties consent, the bankruptcy judge cannot enter final judgments and instead must submit "proposed findings of fact and conclusions of law to the district court." 28 U.S.C. § 157(c)(1).

Section 157 sets forth a non-exhaustive list of examples of core proceedings. The list includes, for example, "the allowance or disallowance of claims against the estate," and "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(B)-(C). A party may appeal the final judgment of a bankruptcy court to the district court, which reviews it under traditional appellate standards. 28 U.S.C. § 158(a); Fed. R. Bankr. Proc. 8013. However, when a bankruptcy judge determines that a "proceeding ... is not a core proceeding but ... is otherwise related to a case under title 11," the bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court," which then reviews de novo any matter to which a party objects. 28 U.S.C. § 157(c)(1).

3. *Stern v. Marshall*

***13** The Supreme Court took up the constitutionality of the 1984 Act in *Stern v. Marshall.* 564 U.S. at 471. There, the Court faced the issue of whether the bankruptcy court had jurisdiction to enter a final judgment on a counterclaim brought by the debtor against an individual who had filed a proof of claim in the bankruptcy action. *Id.* The Court noted that the debtor's counterclaim plainly constituted a "core" proceeding under the statute, thus giving the bankruptcy judge the *statutory* authority to enter a

final judgment on the claim. *Id.* at 475. However, the Court concluded that Article III of the Constitution did not permit the bankruptcy court to enter final judgment on the counterclaim. *Id.* at 482. The counterclaim "[was] a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id.* at 487. The Supreme Court reaffirmed that "Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case ...." *Id.* at 499. Instead, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* The Court found that the bankruptcy court had gone beyond constitutional limits when it "exercised the 'judicial Power of the United States' in purporting to resolve and enter final judgment on a state common law claim." *Stern*, 564 U.S. at 487. Accordingly, the bankruptcy court lacked the constitutional authority to adjudicate the claim. *Id.* at 503.

In sum, the Supreme Court mandates that bankruptcy courts only have the constitutional authority to adjudicate core claims, even if Congress has granted them the statutory authority to resolve other claims. Naturally, this constitutional limitation applies to a bankruptcy court's authority to grant releases. *See In re Millennium Lab Holdings II, LLC*, 945 F.3d at 137 (holding that an approval of releases by a bankruptcy court is only "permissible if it involves a matter integral to the restructuring of the debtor-creditor relationship"); *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *40 ("Nothing in *Stern* or any other case suggests that a party otherwise entitled to have a matter adjudicated by an Article III court forfeits that constitutional right if the matter is disposed of as part of a plan of reorganization in bankruptcy. Were it otherwise, then parties could manufacture a bankruptcy court's *Stern* authority simply by inserting the resolution of some otherwise non-core matter into a plan.").

Here, by granting the Third-Party Releases, the Bankruptcy Court took jurisdiction over and extinguished the liability of an extraordinarily vast range of claims held by an immeasurable number of individuals against a broad range of potential defendants. However, before doing so, the Bankruptcy Court took no steps to determine if it had the power to extinguish the liability on any particular claim. Indeed, the only extinguished claims that the Bankruptcy Court considered were the securities fraud claims against the Individual Defendants (Jaffe and Giammatteo), and it ignored all of the other potential claims that it terminated by approving the releases. In so doing, the Bankruptcy Court failed to take the proper steps to ensure that it had the authority to grant the releases.

4. Classification of Core v. Non-Core

A bankruptcy court has the responsibility to properly classify the claims before it based on the content of the claims and adjudicate them according to those classifications. "It is the bankruptcy court's responsibility to determine whether each claim before it is core or non-core." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 33 (2014). "A cause of action is constitutionally core when it 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' " *Allied Title Lending, LLC v. Taylor*, 420 F. Supp. 3d 436, 448 (E.D. Va. 2019) (quoting *Stern*, 564 U.S. at 499). A bankruptcy estate's claim against a creditor "would necessarily be resolved in the claims allowance process when it shares common questions of fact and law with the creditor's claims and when it seeks to directly reduce or recoup the amount claimed." *Id.* (internal quotations omitted). A claim can become core when it "become[s] integral to the restructuring of the debtor-creditor relationship." *Stern*, 564 U.S. at 497. Conversely, claims by the bankruptcy estate that seek to "augment the estate" but do not "directly modify the amount claimed" do not qualify as a core claim "to be resolved in ruling on the proof of claim." *Allied Title Lending, LLC*, 420 F. Supp. 3d at 448.

***14** When confronted with a so-called *Stern* claim — "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter," — the bankruptcy court should proceed with the claim as it would for non-core claims. *Exec. Benefits Ins. Agency*, 573 U.S. at 35-36. That requires the bankruptcy court to "determine whether the claim may be adjudicated as a non-core claim — specifically, whether it is 'not a core proceeding'

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but is 'otherwise related to a case under title 11.' " *Id.* at 36. If it satisfies the "otherwise related to a case under title 11" as required by 28 U.S.C. § 157(c)(1), then the bankruptcy court "should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment." *Id.* at 36. Of course, if the claim has no relation to a case under title 11, then the bankruptcy court lacks any authority to act on it.

Stern teaches that courts should focus on the content of the proceeding rather than the category of the proceeding when determining whether a bankruptcy court has acted within its constitutional authority. The *Stern* Court explained that counterclaims that do not "stem[ ] from the bankruptcy itself or would [not] necessarily be resolved in the claims allowance process" must be decided by Article III courts. *Stern*, 564 U.S. at 497. The Court never declared that all counterclaims by a debtor fall outside of a bankruptcy court's jurisdiction. Instead, the Court looked to the content of the debtor's counterclaim and compared the factual and legal determinations necessary to resolve the counterclaim to those necessary to resolve the original claim. *Id.* at 498-99. It did so to assess whether the counterclaim would necessarily be resolved in the claims-allowance process. *Id.* In doing so, the Court focused on the basis for the counterclaim to determine whether it stemmed from the bankruptcy itself. *Id.* Given *Stern's* focus on the content of the claim over its categorization, courts cannot bypass the constitutional limitations simply by categorizing a widely varying swath of claims as "core" and then assuming jurisdiction over them.

a. The Bankruptcy Court Failed to Identify Whether it had Jurisdiction Over the Claims That it Released.

Here, the Bankruptcy Court engaged in none of the content-based analysis demanded by *Stern.* The Bankruptcy Court did not parse the content of the claims that it purported to release to determine if each claim constituted a core claim, a non-core claim or a claim unrelated to the bankruptcy case. The sheer breadth of the Third-Party Releases renders this a herculean undertaking and underscores the constitutional questionability of the Bankruptcy Court's actions. However, the enormity of the task does not absolve the Bankruptcy Court of its responsibility to properly identify the content of the claims before it and ensure that it has jurisdiction to rule on each of them. In fact, because of the constitutional implications of extinguishing these claims, this undertaking carries even greater import. As an appellate court, this Court will not speculate as to the claims released and then parse each purportedly released claim to determine whether the Bankruptcy Court had the power to extinguish that claim — that was the responsibility of the Bankruptcy Court. *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000) ("The hallmarks of permissible non-consensual releases — fairness, necessity to the reorganization, and specific factual findings to support these conclusions — are all absent here."). The sheer breadth of the releases and the lack of findings with respect to each released claim renders appellate review virtually impossible and speaks to the impropriety of the approval of the Third-Party Releases.

b. The Bankruptcy Court Lacks Jurisdiction Over Many Released Claims.

***15** Although the Court cannot determine precisely which Released Claims the Bankruptcy Court could have adjudicated, it takes only a cursory review of the Third-Party Releases and the Releasing Parties to find released claims that the Bankruptcy Court lacked the authority to adjudicate. The universe of released claims includes claims between non-debtors which may have no connection to the property of Mahwah's bankruptcy estate or the administration of the Bankruptcy Proceeding. For example, the Third-Party Release would bar securities claims, such as those brought by the Securities Plaintiffs, against former directors and officers of Mahwah, even if the claims arose before Mahwah filed for bankruptcy and those directors and officers had no involvement in the Bankruptcy Proceeding. And it bears noting that "federal courts disfavor indemnity for federal securities law violations, calling into question the enforceability of these obligations." *In re Continental Airlines*, 203 F.3d at 216 (citing cases). Thus, the only type of released claim that the Bankruptcy Court actually considered finds antipathy in the case law.

The Trustee points out numerous other potential claims that the Bankruptcy Court released. (Trustee Br. at 33.) These include hostile work environment claims by a former Mahwah employee against another Mahwah employee; negligence by a Mahwah employee against a consultant hired by Mahwah to counsel employees on retirement plans; slander by a former employee of Mahwah's term lenders against a current employee of the lender for remarks that the former employee mishandled the lender's deal with Mahwah; a breach of contract action by an accountant of one of Mahwah's loan agents against the agent for failure to pay for the work that the account performed on the agent's transaction with Mahwah; and malpractice by an affiliate of Mahwah against its law firm for the firm's simultaneous representation of both the affiliate and Mahwah when their interests diverged. (Trustee Br. at 33.) None of these claims appear even related — much less integral — to the restructuring of the debtor-creditor relationship, such that the Bankruptcy Court could adjudicate them without running afoul of the Constitution. And, given the breadth of the releases, the above examples likely represent only a fraction of the purportedly released claims that lack an integral connection to the bankruptcy process, such that the Bankruptcy Court lacked the power to release them.

5. The Implication of *Stern's* Constitutional Analysis on the Released Claims

Debtors' argument that the Third-Party Releases do not implicate *Stern's* constitutional limitations fails. Essentially, Debtors ask the Court not to parse the released claims in any way and, instead, find that the Bankruptcy Court had constitutional authority based on the inclusion of the Releases in the Plan. (Appellee Br. at 57-59.) This argument would require the Court to conclude that only the Plan Confirmation Order constitutes a judgment and that jurisdiction over confirmation proceedings cures any jurisdictional defects within those proceedings. The Court concludes neither.

a. The Bankruptcy Court Must Have Jurisdiction Over a Claim to Release it.

First, the releases here implicate the constitutional limits on the Bankruptcy Court's ability to adjudicate claims, even if they do not constitute a judgment following a hearing on the merits of the claim. Once the Plan became final, the provisions therein, including the Third-Party Releases, became *res judicata* for subsequent parties trying to bring the claims. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009); *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *41 ("Nor is there any doubt that the entry of an order releasing a claim has former adjudication effects, which is a key attribute of a final judgment. The Supreme Court has twice held that non-consensual third-party releases confirmed by final order are entitled to *res judicata* claim preclusion barring any subsequent action bringing a released claim ...."). Likewise, when the Bankruptcy Court declared the releases consensual settlements of the claims, they became final judgments on the merits for purposes of further litigation. *See Larken, Inc. v. Wray*, 189 F.3d 729, 732 (8th Cir. 1999) (stating that a voluntary dismissal with prejudice "constitutes a final judgment on the merits"); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) (holding that order confirming plan that released creditor's claims against guarantor was a final judgment on the merits of those claims); *see also In re Digital Impact, Inc.*, 223 B.R. 1, 12, 13 n.6 (Bankr. N.D. Okla. 1998) ("A release, or permanent injunction, contained in a confirmed plan ... has the effect of a judgment — a judgment against the claimant and in favor of the non-debtor, accomplished without due process.").

***16** At bottom, the Bankruptcy Court extinguished the Released Claims, which amounts to adjudication of the claim for *Stern* purposes. *In re Purdue Pharma, L.P.*, 2021 WL 5979108, at *41 ("There really can be no dispute that the release of a claim 'finally determines' that claim. It does so by extinguishing the claim, so that it cannot be adjudicated on the merits. A nonconsensual third-party release is essentially a final judgment against the claimant, in favor of the non-debtor, entered 'without any hearing on the merits.' "). To claim that the Bankruptcy Court can fully extinguish these claims based solely on their inclusion in the Plan — without any hearing on them or any findings about them —amounts to arguing that courts need not have the authority to extinguish claims so long as they provide no procedural safeguards in extinguishing the claims. Obviously, this cannot be.

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Likewise, the argument that the Bankruptcy Court possesses the power to extinguish these claims based only on its jurisdiction over confirmation proceedings misses the mark. True, bankruptcy courts have jurisdiction over Chapter 11 proceedings under 28 U.S.C. § 157(a), and plan confirmation proceedings constitute core proceedings that the bankruptcy court may adjudicate on a final basis. 28 U.S.C. § 157(b)(2)(L). Further, 11 U.S.C. § 105(a) permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." But, this grant of authority has limits.

Although § 105 permits a bankruptcy court to issue orders necessary or appropriate to carry out the provisions of the Bankruptcy Code, that section does not provide an independent source of federal subject matter jurisdiction. *In re Combustion Engineering, Inc.*, 391 F.3d 190, 224-25 (3d Cir. 2004) ("But as the statute makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction."). Thus, independent statutory basis must exist for the bankruptcy court to exercise jurisdiction over the claims. *See In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir. 1986) ("Section 105(a) does not, however, broaden the bankruptcy court's jurisdiction, which must be established separately ....").

Without an independent source of jurisdiction, a bankruptcy court must rely on its own jurisdiction, which comes in the form of *in rem* jurisdiction over the debtor's property and the disposition of that property. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) ("Bankruptcy jurisdiction, at its core, is *in rem.*"). It is certainly true "that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990). Yet, third-party claims belong to third parties, not the debtor's estate. "As a general rule, a bankruptcy court has no power to say what happens to property that belongs to a third party, even if that third party is a creditor or otherwise is a party in interest." *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 723 (Bankr. S.D.N.Y. 2019) (*citing Callaway v. Benton*, 336 U.S. 132, 136-41 (1949)).

Similarly, although a bankruptcy court's *in rem* jurisdiction gives it authority over claims against the estate, it has no *in rem* jurisdiction over third-party claims not against the estate or property of the estate. *See In re Johns-Manville Corp.*, 600 F.3d at 153-54 (holding that a bankruptcy court did not have *in rem* jurisdiction over a third party's direct claims against a non-debtor insurer). Additionally, bankruptcy courts have subject matter jurisdiction over "civil proceedings" that are "related to" a bankruptcy case. 28 U.S.C. §§ 157, 1334. However, the Third-Party Releases here purport to release claims that may not yet constitute any pending civil proceeding.

***17** Additionally, many of the claims lack any relation to the bankruptcy case, even affording "related to" jurisdiction the most liberal reading. Debtors' argument that bankruptcy courts must be able to confirm plans even if those plans affect other cases has it backwards. (Appellee's Br. at 59.) The Plan confirmation does not merely have a "tangential effect" on the Securities Litigation and other claims. Rather, the Plan has the ultimate effect — extinguishment — on the claims despite having — at most — a tangential effect on the bankruptcy estate. Therefore, the bankruptcy court has no independent authority on which to rely.

Indeed, as discussed above, *Stern* and its progeny stand for the proposition that Congress cannot enlarge the subject matter jurisdiction of the bankruptcy courts beyond permissible constitutional limits. Thus, Congress could not eviscerate the limits of Article III jurisdiction by enacting § 105. Article III simply does not allow third-party non-debtors to bootstrap any and all of their disputes into a bankruptcy case to obtain relief. *See In re Midway Gold US, Inc.*, 575 B.R. 475, 519 (Bankr. D. Colo. 2017) ("If proceedings over which the Court has no independent jurisdiction could be metamorphisized into proceedings within the Court's jurisdiction by simply by including their release in a proposed plan, this [Bankruptcy] Court could acquire infinite jurisdiction.") (citations omitted). Moreover, the Court does not view releasing a claim held by a third-party non-debtor against another third-party non-debtor as an "appropriate" order to carry out the Bankruptcy Code. And certainly, given many of the released claims' complete attenuation to the bankruptcy estate and proceeding, these releases cannot be considered "necessary." Any finding by the Bankruptcy Court otherwise constitutes a clear error.

b. The Parties did not Consent to Article I Adjudication of Non-Core Claims.

The Debtors further argue that the Third-Party Releases do not implicate the jurisdictional constraints of *Stern*, because the parties consented to the Releases. (Appellee Br. at 55-56.) This argument ignores the standard that the Supreme Court has set for consenting to bankruptcy court jurisdiction. Likewise, the Bankruptcy Court ignored the standard that must be met to find that a party has consented to its jurisdiction. As discussed below, the record contains no evidence that could meet the Supreme Court's standard for consent to non-Article III jurisdiction.

i. The Supreme Court's Standard for Consent

Following *Stern*, the Supreme Court took up the issue of whether a party could consent to having the bankruptcy court decide a *Stern* claim in *Wellness International Network, Ltd. v. Sharif*, 575 U.S. 665 (2015). The Court first answered the question of whether a litigant could waive the right to an Article III court, concluding that "allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts." *Id.* at 679. In reaching this decision, the Court relied on the fact that "*Stern* — like its predecessor, *Northern Pipeline* — turned on the fact that the litigant did not truly consent to resolution of the claim against it in a non-Article III forum." *Id.* at 681 (quotations omitted).

However, the Court next determined what constituted valid consent to adjudication by a bankruptcy court. The Court rejected the argument that "such consent must be express." *Id.* at 683. Instead, it held that "[t]he implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157." *Id.* at 684. Therefore, "the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." *Id.* at 685 (cleaned up). An understanding of the standard in *Wellness* necessitates a brief review of *Roell v. Withrow*, 538 U.S. 580 (2003).

***18** In *Roell*, the Supreme Court held that consent to proceedings before a magistrate judge under 28 U.S.C. § 636(c) need not be express and instead can be inferred from a party's conduct during litigation. 538 U.S. at 582. In *Roell*, the plaintiff agreed orally and in writing to having the magistrate judge preside over the entire case. *Id.* at 582-83. The district judge then referred the case to the magistrate judge for final disposition, but with the caveat that the defendants would have the opportunity to consent and the referral order would be vacated if they did not consent. *Id.* at 583. The clerk then sent the referral order to the defendants with instructions to submit a separate pleading indicating whether they consented or not. *Id.* One defendant consented to magistrate judge jurisdiction, but two others did not take a position at all. *Id.* The magistrate judge then proceeded to preside over a jury trial all the way to a verdict and judgment. *Id.* On at least three different instances, the parties did nothing when the magistrate judge stated that the parties had consented to her jurisdiction. *Id.* at 584, n.1. Following the judgment, the defendants submitted their consent in writing, but the district court and the Fifth Circuit Court of Appeals nevertheless vacated the judgment, ruling that consent had to be express under § 636(c). *Id.* at 585.

The Supreme Court disagreed that consent to magistrate judge jurisdiction had to be expressly written. *Id.* at 586. Instead, it found that the parties had "clearly implied their consent by their decision to appear before the Magistrate Judge, without expressing any reservation, after being notified of their right to refuse and after being told that she intended to exercise case-dispositive authority." *Id.* The Court noted that allowing the conduct of the parties to determine consent "checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Id.* at 590. Accordingly, it concluded that "the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Id.*

In *Wellness*, the Supreme Court found that applying the same standard in the bankruptcy context possessed the same pragmatic virtues that motivated its adoption in the magistrate judge concept. 575 U.S. at 684-85. However, the Court made clear that this standard has teeth: "[i]t bears emphasizing, however, that a litigant's consent — whether express or implied — must still be knowing and voluntary." *Id.* at 685 (citing *Roell*, 538 U.S. at 587, n.5 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent")).

ii. The Bankruptcy Court Incorrect Application of the Standard for Consent

Applying this standard here, it becomes clear that the Bankruptcy Court erred as a matter of law in finding that failure to return the opt-out form could constitute consent to Article I adjudication. The Bankruptcy Court relied on the fact that the Releasing Parties received notice and an opportunity to opt out of the Third-Party Releases as the basis for consent. (Bankr. Confirm. Op. at 31-33.) But, the Bankruptcy Court made this determination in the context of whether the Releasing Parties consented to the Third-Party Releases, not the threshold question of whether they consented to having the Bankruptcy Court adjudicate the released claims. [10] This will not suffice to support a finding of consent to Article I adjudication for all of the Releasing Parties.

10 As the Bankruptcy Court made no attempt to discern whether the Releasing Parties consented to it adjudicating their non-core claims, the Court must assume that it would have relied on the same manner of consent that it relied on in finding that the Releasing Parties consented to the Third-Party Releases.

Wellness and *Roell* make clear that courts can discern the implication of consent to a non-Article III court based on a party's *actions.* However, they do not permit a finding of consent based on *inaction.* In finding consent to Article I adjudication, *Roell* relied on the litigation conduct of the parties and the fact that they appeared before the magistrate judge to try their case after notification of the referral. Indeed, the Court even cited the definition of an appearance as an "overt act by which a party submits himself to the court's jurisdiction." *Roell*, 538 U.S. at 586, n.3. This reliance on the overt act of appearing in the non-Article III court demonstrates the importance of actions over inactions. Likewise, *Wellness* cited to *Roell* for the proposition that "actions rather than words" can support a finding of consent and that "the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." *Wellness Int'l*, 575 U.S. at 684-85 (cleaned up). Importantly, any consent "must still be knowing and voluntary." *Id.* at 685.

***19** Here, the Court cannot discern any actions undertaken by the Releasing Parties to support a finding that they knowingly and voluntarily consented to Article I adjudication of the claims that they released. Despite the enormous breadth of Releasing Parties deemed to have released claims, the Bankruptcy Court undertook no analysis to determine which Releasing Parties (if any) had consented to bankruptcy jurisdiction and which had not. Instead, as previously noted, the Bankruptcy Court took a myopic approach to the Releasing Parties, focusing only on the putative securities fraud class action members, ignoring all other Releasing Parties. And, because the Bankruptcy Court failed to parse the core claims from non-core claims in the Third-Party Releases, the Bankruptcy Court took no steps to determine which Releasing Parties needed to consent to Article I adjudication of their claims before the Bankruptcy Court could act on them. Rather, the Bankruptcy Court merely relied on the fact that a document was mailed out with the goal of reaching thousands of individuals. Then, without regard to whether those individuals received the document, and without regard as to whether those individuals took any overt actions in response to the document, the Bankruptcy Court determined that they had surrendered their constitutional right to an Article III court.

Again, the Bankruptcy Court ignored a wide swath of those releasing claims and, even for those targeted with the notice, the notice contained no information about agreeing to Article I adjudication. Indeed, counsel for Debtors conceded during oral argument that the distributed releases made no mention of agreeing to adjudication of their claims by an Article I court. (Arg.

Tr. at 41:10-11.) In any event, the record is silent as to how many of the targeted shareholders actually received the notice. Yet, hoping (without proving) that someone received a deficient document — without any further action from that person — does not meet the standard for knowing and voluntary consent to adjudication of a non-core claim by a bankruptcy court, as set forth by the Supreme Court in *Wellness.*

Additionally, the Supreme Court in both *Wellness* and *Roell* indicated that the implied consent standard that it set forth had its basis in the elimination of gamesmanship. *See, e.g., Wellness Int'l*, 575 U.S. at 685 (noting that "checking gamesmanship" motivated the adoption of the consent standard). Yet, allowing inaction to imply consent encourages the very gamesmanship that the Supreme Court intended to check. That is, non-debtors could tuck releases unrelated to a bankruptcy proceeding into bankruptcy plans, then secrete an opt-out opportunity into a convoluted legal document, send the document to non-parties previously unaware of the bankruptcy proceeding and use their non-response to extinguish all of their claims. This type of gamesmanship, aimed at extinguishing claims of unwitting individuals and providing a golden parachute to the parties drafting the plan, cannot be tolerated.

In words that apply equally well here, Judge McMahon wrote the following in *In re Purdue Pharma, L.P.*:

> The third-party claims at issue neither stem from [the debtor's] bankruptcy nor can they be resolved in the claims allowance process. Yet those claims are being finally disposed of pursuant to the Plan; they are being released and extinguished, without the claimants' consent and without any payment, and the claimants are being enjoined from prosecuting them. Debtors and their affiliated non-debtor parties cannot manufacture constitutional authority to resolve a non-core claim by the artifice of including a release of that claim in a plan of reorganization.

2021 WL 5979108, at *41. The Bankruptcy Court here exceeded its constitutional authority without any inquiry or factfinding. Accordingly, the Bankruptcy Court erred in adjudicating the *Stern* claims without the knowing and voluntary consent of the Releasing Parties.

6. Consequence of a *Stern* Violation

Having determined that the Bankruptcy Court violated *Stern* by exceeding its authority, the Court must vacate the Confirmation Order and treat it as a Report and Recommendation with proposed findings of fact and conclusions of law, which the Court reviews *de novo. Purdue Pharma, L.P.*, 2021 WL 5979108, at *42; 28 U.S.C. § 157(c)(1); Bankruptcy Rule 8018.1. Here, unfortunately, the Bankruptcy Court's opinion lacks any meaningful factfinding, so the Court will need to set forth its own factual findings based on the record from the confirmation hearing. Bankruptcy Rule 9033(d).

***20** Before turning to the factual findings in this case, the Court pauses for an observation about the procedure for the handling of third-party releases by bankruptcy courts going forward. Due to the substantial constitutional issues at play with the use of this perilous tool, it seems preferrable for a bankruptcy court to submit any third-party releases to the district court for approval via a Report and Recommendation in the rare and exceptional case that warrants the use of third-party releases. The Report and Recommendation should identify with specificity the claims and individuals released and provide detailed proposed findings of fact and conclusions of law to ensure that the released claims are truly integral to the reorganization. *See In re Seaside Engineering & Surveying, Inc.*, 780 F.3d at 1079 (noting that this "inquiry is fact intensive in the extreme"); *In re Dow Corning*

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Corp., 280 F.3d at 657-58 (criticizing conclusory statements and mandating specific evidentiary findings with separate analysis for each individual release). This practice would necessarily avoid any *Stern* issues.

Moreover, it would serve as an extra safeguard to ensure that third-party releases are reserved for the truly appropriate case, mindful that the use of third-party releases should be utilized "cautiously and infrequently." *Behrmann*, 663 F.3d at 712. As one bankruptcy court has observed:

> [t]hird-party releases are not a merit badge that somebody gets in return for making a positive contribution to a restructuring. They are not a participation trophy, and they are not a gold star for doing a good job. Doing positive things in a restructuring case — even important positive things — is not enough. Nonconsensual releases are not supposed to be granted unless barring a particular claim is important in order to accomplish a particular feature of the restructuring.

In re Aegean Marine Petroleum Network, Inc., 599 B.R. at 726-27.

C. Factual Findings Under Bankruptcy Rule 9032

The Court will now set forth its findings of facts in accordance with Rule 9033(d). The findings are based on the evidence submitted during the confirmation hearing.[11] For the hearing, Debtors tendered declarations from Carrie W. Teffner (President and Executive Chair of Debtors), Gary W. Begeman (a disinterested director of the Board of Directors for Debtors), Alex Orchowski (Director of Global Corporate Acts at Prime Clerk LLC), and William Kosturos (Managing Director of Alvarez & Marsal North America, LLC, who served as Debtors' financial advisor). Teffner and Begeman also testified during the confirmation hearing on February 25, 2021.

11 Notably, the evidence was uncontroverted; therefore, there is no need to assess the credibility of the witnesses.

The Court finds the following facts as relevant to the issues presented in this appeal:

1. On June 7, 2019, Securities Litigation Lead Plaintiffs filed a complaint as a putative class action in the District of New Jersey alleging securities fraud against Ascena Retail Group, Inc., David Jaffe and Robert Giammatteo in *Newman v. Ascena Retail Group, Inc., et al*, Case No. 2:19cv13529 (D.N.J.). On August 23, 2019, United States District Judge Kevin McNulty appointed Securities Litigation Lead Plaintiffs and their counsel as lead plaintiff and lead counsel, respectively. (Dkt. No. 26, *Newman v. Ascena Retail Group, Inc., et al*, Case No. 2:19cv13529 (D.N.J.) ("D.N.J. Dkt.").) On February 7, 2020, the defendants in that case filed a motion to dismiss that remains pending. (D.N.J. Dkt. No. 47). On July 27, 2020, the defendants in that case filed a pleading entitled "Suggestion of Bankruptcy" (D.N.J. Dkt. No. 58) that resulted in a stay of all proceedings in that case being entered the next day, July 28, 2020 (D.N.J. Dkt. No. 59). The case remains stayed as of the date of this Opinion.

2. David Jaffe previously served as the Chief Executive Officer of Debtors, while Robert Giammatteo previously served as Debtors' Chief Financial Officer. Both Jaffe and Giammatteo left their employment with Debtors several months before Debtors filed for bankruptcy. (USTAPP 0929, 1030.)

***21** 3. On July 23, 2020, Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. (USTAPP 0001-18.)

4. With the Bankruptcy Court's approval, Debtors consummated three transactions involving the sale of their businesses. On September 24, 2020, the Bankruptcy Court approved the sale of Debtors' Catherines enterprise. On November 12, 2020, the Bankruptcy Court approved the sale of Debtors' Justice enterprise. On December 8, 2020, the Bankruptcy Court approved the sale of Debtors' remaining businesses, including the sale of the Lane Bryant brand and the Premium business segment, which included Ann Taylor, LOFT, and Lou & Grey, to buyer Premium Apparel LLC. The last of these sales closed on December 23, 2020. These sales consisted of substantially all of the Debtors' assets. (Decl. of Carrie W. Teffner in Supp. of Confirmation of the Amended Joint Chapter 11 Plan ("Teffner Decl.") ¶ 5 (USTAPP 2318-2335).) The sale of the Debtors' Premium and Lane Bryant business resulted in Debtors receiving approximately $472 million in net cash proceeds. (Decl. of William Kosturos in Supp. of Confirmation of the Amended Joint Chapter 11 Plan ("Kosturos Decl.") ¶ 5 (Dkt. No. 1761, *In re Retail Group, Inc.*, Case No. 20bk33113 ("Bankr. Dkt.")).)

5. As a result of the sale of its assets, all that was left for the reorganization after December 23, 2020, was the distribution of Debtors' remaining estate cash. (Teffner Decl. ¶5.) By February 22, 2021, the Debtors had sold substantially all of their assets and all that remained was to distribute cash proceeds in accordance with the terms of the Plan. (Teffner Decl. ¶30.)

6. The Reorganization Plan reflects a global resolution with the Creditors' Committee and contemplates payment in full in cash of all allowed administrative and priority claims. The Reorganization Plan had the support of 97% of the Term Lenders. (Teffner Decl. ¶ 5.)

7. The Reorganization Plan resulted from the collaborative efforts between Debtors, their advisors and legal counsel, and their stakeholders. The Amended Plan reflects the wind down process and maximizes value to the Debtors' stakeholders. (Teffner Decl. ¶ 26.)

8. The Reorganization Plan contains third-party releases, an exculpation provision, and an injunction provision. According to Ms. Teffner, these provisions were the product of extensive good faith, arm's-length negotiations and were material inducements for the parties to enter into the comprehensive settlement embodied in the Plan. (Teffner Decl. ¶ 41.) The negotiations involved the Debtors and their lenders. (Tr. of Feb. 25, 2021 Hr'g ("Confirm. Tr.") at 22:24-25 (USTAPP 2673-2836).) None of the putative members of the securities fraud class action participated in the negotiation. And, Ms. Teffner acknowledged that none of the Releasing Parties had a seat at the table during the negotiations. (Confirm. Tr. at 23:5-10.)

9. David Jaffe and Robert Giammatteo did not participate in the negotiations involving the Third-Party Releases. Furthermore, the Third-Party Releases as they related to Jaffe and Giammatteo were not material inducements for the comprehensive settlement for the Reorganization Plan. (Confirm. Tr. at 23:11-24:2.). Moreover, neither Jaffe nor Giammatteo participated at all (directly or indirectly) in the Debtors' Chapter 11 process. Indeed, they were no longer employed by Debtors at the time of the reorganization. (Confirm. Tr. at 26:10-21.) Consequently, neither Jaffe nor Giammatteo played an integral (or any) role in the formulation and negotiation of the Debtors' plan. (Confirm. Tr. at 34:9-16; 48:20-23.) The Court therefore finds that the releases for Jaffe and Giammatteo were not integral to the reorganization.

***22** 10. The negotiations surrounding the Third-Party Releases were focused on all existing and prior officers and directors (including Jaffe and Giammatteo) and were designed to be broad. (Confirm. Tr. at 27:11-12; 32:23-25.) Ms. Teffner did not know whether the Third-Party Releases covered former employees and consultants. (Confirm. Tr. at 41:3-16.) Because the negotiations surrounding the Third-Party Releases were addressed to only officers and directors, the Third-Party Releases exceeded the terms of the negotiations.

11. At the time of the reorganization, Debtors had Director & Officer liability insurance coverage of at least $50 million. (Confirm. Tr. at 29:1-31:4.) No evidence exists in the record that any of the claims released by the Third-Party Releases would exceed the D&O insurance coverage and thereby cause a financial depletion of the estate.

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12. The Third-Party Releases were designed to limit time spent defending any type of litigation, which would deplete assets and resources of the estate. (Confirm. Tr. 33:19-24.) The failure to approve the Third-Party Releases included in the Reorganization Plan could potentially increase the time and expense of the Debtors' wind-down process to the detriment of the Debtors' stakeholders. According to Ms. Teffner, the *quid pro quo* for the contributions, concessions and support offered by the Released Parties was the Third-Party Releases. (Teffner Decl. ¶ 45.)

13. Debtors created a Special Committee that consisted of Mr. Begeman and one other disinterested director. (Decl. of Gary D. Begeman in Supp. of Confirmation of Amended Joint Chapter 11 Plan ("Begeman Decl.") ¶ 1 (Bankr. Dkt. No. 1759).) The purpose of the Special Committee was to conduct and oversee an investigation into historical transactions and evaluate any proposed release of any claims or causes of actions by Debtors in connection with a future transaction. The Special Committee retained Kirkland & Ellis (Debtors' counsel) to investigate potential causes of action that the Debtors could bring against any of the Related Parties during a six-year lookback period. (Begeman Decl. ¶¶ 6-8.) The investigation found no material claims in favor of the Debtors. (Begeman Decl. ¶ 9.)

14. After an extensive investigation, the Debtors were unable to uncover any material claims or causes of actions that could be brought against the Releasing Parties, and it is unlikely that the Debtors would recover material amounts, if any, from the Releasing Parties. (Teffner Decl. ¶ 42.) As such, the release by the Released Parties of claims against the Releasing Parties (described as the "mutual release" in this appeal) has no value and is fictional.

15. Mr. Begeman also reviewed the pending securities fraud class action filed in the District of New Jersey against the Debtor and its former directors and officers (Jaffe and Giammatteo) in Case No. 2:19cv12529. The Special Committee (Mr. Begeman and one other disinterested director) determined that the claims in the class action lacked merit and had no material value as related to the Debtors' estates. (Begeman Decl. ¶ 14.) Notably, the Bankruptcy Court did not accept this as an expert opinion; instead, it only received it as a report from the Special Committee. (Confirm. Tr. at 12:10-18.) This Court gives no credit to Mr. Begeman's assessment for this reason.

16. This Court explicitly rejects the Bankruptcy Court's finding that the Third-Party Releases were consensual. (Bankr. Confirm. Op. at 31.) Instead, the Court finds the Third-Party Releases to be nonconsensual both as a matter of fact and as a matter of law. In terms of factual grounds, the Bankruptcy Court's opt-out notice was directed only to the putative class members in the securities fraud case. The Bankruptcy Court made no effort to provide notice and obtain consent from the numerous other Releasing Parties as described in the Third-Party Releases.

***23** 17. As to the putative class members in the securities fraud case, the record fails to establish that *any* consented to the release of their claims against Jaffe and Giammatteo. Debtors used Prime Clerk to ensure to the best of their ability to get access to putative members of the class action and to distribute the notices to the putative members. (Confirm. Tr. 21:3-16.) Prime Clerk worked with third parties to attempt to identify putative members of the class action and then to communicate the Notice to them. (Decl. of Craig E. Johnson of Prime Clerk LLC in Supp. of the Debtors' Objection to Securities Lead Plaintiffs' Motion for Entry of an Order Authorizing Lead Plaintiffs to Opt Out of Third-Party Releases on Behalf of the Class ("Johnson Decl.") ¶¶ 7-9 (Bankr. Dkt. No. 947).) Prime Clerk sent the notice to approximately 300,000 individuals; however, the record contains no information about the success of their efforts to reach this group. (Bankr. Confirm. Op. at 13.) Indeed, Prime Clerk received only 596 opt-outs, which corresponds to 0.2% of those targeted. (Confirm. Tr. at 52:22-24.) The Court therefore finds that this effort was insufficient to establish notice of the opt-out provision in the Notice. Further, the record lacks any information establishing as a matter of fact that *any* of the targeted recipients of the Notice affirmatively consented to the release of their claims as provided in the Third-Party Release.

18. As to the shareholders who were putative class members in the securities fraud action, those who were deemed to have opted out did not receive anything of value for their releases. (Confirm. Tr. 18:13-22.)

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19. There is no evidence in the record of any evaluation of any other potential claims that the Releasing Parties could have brought against the Debtors other than the securities fraud class action filed in the District of New Jersey, nor does the record contain any effort to provide notice of the releases to any Releasing Party beyond the securities fraud class action.

20. According to Ms. Teffner, the Exculpation Provision resulted from good faith, arm's-length negotiations and was designed to protect those who served and assisted with the restructuring process, including those who did not necessarily owe a fiduciary duty to the Debtors. (Teffner Decl. ¶ 47.)

Against this factual backdrop, the Court will now turn its attention to the propriety of the Third-Party Releases.

D. The Application of *Behrmann* to the Third-Party Releases

In addition to the factual and constitutional defects in the approval of the Third-Party Releases outlined above, Appellants argue that the Bankruptcy Court erred in approving the Third-Party Releases under the applicable standards in the Fourth Circuit for approving nonconsensual third-party releases as set forth in *Behrmann.* (Trustee Br. at 37; Appellants' Br. at 73.) Debtors respond that the Releasing Parties consented to the releases, rendering the *Behrmann* factors inapplicable. (Appellee Br. at 41.) Additionally, Debtors contend that the Third-Party Releases satisfy the *Behrmann* factors. (Appellee Br. at 75.)

Thus, beyond the *Stern* issues, this appeal boils down to two questions: (1) whether the Bankruptcy Court erred by finding the releases consensual, and (2) whether the Bankruptcy Court erred by failing to conduct the seven-factor *Behrmann* analysis. The Court finds that the Bankruptcy Court erred on both fronts.

1. Third-Party Releases and *Behrmann* Generally

As previously noted, some Courts of Appeal have held that bankruptcy courts lack the power to grant nonconsensual third-party releases of the kind approved here. The Fifth, Ninth and Tenth Circuits prohibit nonconsensual third-party releases. *See, e.g., In re Pac. Lumber Co.*, 584 F.3d at 251-53; *In re Lowenschuss*, 67 F.3d at 1401-02; *In re W. Real Estate Fund, Inc.*, 922 F.2d at 600-02. These Circuits generally base this prohibition on 11 U.S.C. § 524(e), which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *See, e.g., In re Pac. Lumber Co.*, 584 F.3d at 252 ("In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties.") (collecting cases); *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 626 (9th Cir. 1989) ("We therefore conclude that the specific provisions of section 524 displace the court's equitable powers under section 105 to order the permanent relief sought by American.").

***24** Other Circuits have held that bankruptcy courts have the power to impose involuntary releases, but that such involuntary releases should be imposed in "only rare cases." *See, e.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d at 141-43 (holding that involuntary releases should only be approved if they form an important part of a reorganization plan, and that they are proper "only in rare cases"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078 (permitting releases and bar orders but cautioning that they "ought not to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances"); *In re Dow Corning Corp.*, 280 F.3d at 657-58 ("Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances.' ").

The Fourth Circuit has joined the circuits that allow non-debtor releases, but only "cautiously and infrequently." *Behrmann*, 663 F.3d at 712. In *Behrmann*, the Fourth Circuit confirmed that it had previously "rejected the notion that 11 U.S.C. § 524(e)

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forecloses bankruptcy courts from releasing and enjoining causes of action against nondebtors." 663 F.3d at 710 (citing *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989)). It noted that it had "declined to retreat from this holding" in a subsequent opinion and then, again, rejected as "without merit" the "blanket assertion that equitable relief in the form of non-debtor releases is never permissible under the Bankruptcy Code." *Id.* In rejecting this blanket assertion, the Fourth Circuit adopted the Sixth Circuit's test for approving non-debtor releases outlined in *In re Dow Corning Corp.* The Fourth Circuit quoted in full from *In re Dow Corning Corp.*:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor:
>
> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> (4) The impacted class, or classes, has overwhelmingly voted to accept the plan;
>
> (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
>
> (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and,
>
> (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Behrmann, 663 F.3d at 711-12 (quoting *In re Dow Corning Corp.*, 280 F.3d at 658).

Given the dramatic effect of third-party releases and that they are to be approved only in unique circumstances, "the meaningful exercise of appellate review at a minimum requires that the court make specific factual findings in support of its decision to grant equitable relief." *Id.* at 712. Ultimately, the Fourth Circuit remanded the case, because the bankruptcy court's conclusory statements regarding the factors "[were] meaningless in the absence of specific factual findings explaining why this is so." *Id.* at 713. Underscoring the point that non-debtor releases only have a place in unique circumstances, the Fourth Circuit found that the bankruptcy court's "conclusions could apply just as well to any number of reorganizing debtors." *Id.* Therefore, it remanded the case "to set forth specific factual findings supporting its conclusions" that the debtor's circumstances entitled it to the non-debtor releases. *Id.*

***25** Following remand, a different bankruptcy judge found the releases unenforceable and the district court affirmed the bankruptcy court. *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014). The Fourth Circuit affirmed, concluding that the debtor had "failed to carry its burden of proving that the facts and circumstances of this case justify the Release Provision." *Id.* at 347.

2. The Interrelationship Between *Stern* and *Behrmann*

The exacting caution and detailed findings demanded of a bankruptcy court in granting a non-debtor release in a unique circumstance stems from the constitutional limitations placed on the bankruptcy court's jurisdiction. As the *Stern* analysis demonstrates, the Constitution limits bankruptcy courts — as non-Article III courts — to adjudicating only matters integral to a bankruptcy proceeding. In essence, the *Behrmann* factors task a reviewing court with determining how integral the releases

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are to a bankruptcy plan. Indeed, one factor asks the court to consider whether the release "is essential to the reorganization" such that the "reorganization hinges on the debtor being free from indirect suits." *Behrmann*, 663 F.3d at 711-12. Another factor requires that the non-debtor "contributed substantial assets to the reorganization." *Id.* at 711. Yet another examines the identity of interests between the debtor and the third party and the extent to which the suit against the third party would deplete the assets of the estate. *Id.* Clearly, these factors ask the bankruptcy court to determine the extent of the entanglement between the released claim and the bankruptcy case. Likewise, a bankruptcy court determining whether it has "core" constitutional authority over a matter looks to the same relationship. *See Allied Title Lending, LLC*, 420 F. Supp. 3d at 448 ("A cause of action is constitutionally core when it 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' ") (quoting *Stern*, 564 U.S. at 499).

The Third Circuit's decision in *In re Millennium Lab Holdings II, LLC* illustrates this connection between the *Stern* analysis and the *Behrmann*-type analysis, and stands in stark contrast to what occurred here. There, the court examined a release in the debtor's restructuring agreement that released the debtor's two primary shareholders from conduct that occurred before the restructuring agreement. 945 F.3d at 131. Eventually, the bankruptcy court confirmed the plan that included the releases, over a lender's objection. *Id.* at 132. The bankruptcy court and district court both overruled the lender's objection that *Stern* prohibited the confirmation of a plan releasing its claims, stating that *Stern* did not apply to plan confirmation proceedings. *Id.* at 133. The lender appealed to the Third Circuit.

On appeal, the Third Circuit affirmed the confirmation, but not because it determined that *Stern* did not apply to plan confirmation proceedings.[12] Rather, the Third Circuit conducted an exhaustive discussion of *Stern* and the limitations that it places on the authority of bankruptcy courts. *Id.* at 133-37. It concluded its discussion as follows:

> In sum, *Stern* teaches that the exercise of "core" statutory authority by a bankruptcy court can implicate the limits imposed by Article III. Such an exercise of authority is permissible if it involves a matter integral to the restructuring of the debtor-creditor relationship. And, in determining whether that is the case, we can consider the content of the "core" proceeding at issue.

***26** *Id.* at 137.

12 Indeed, in a footnote, the court acknowledged the appellees' argument that a bankruptcy court could always constitutionally confirm a plan. However, it stated that "[w]e have our doubts about so broad a statement but we do not need to address it to decide this case." *Id.* at 137, n.10.

Applying those principles, the Third Circuit concluded that the bankruptcy court possessed constitutional authority to confirm the plan with the releases. Borrowing from its *Stern* analysis, the court stated that "the question is whether," in examining the release provisions at issue, "the Bankruptcy Court was resolving a matter integral to the restructuring of the debtor-creditor relationship." *Id.* at 137. Although it did not apply the facts to explicit factors like courts in the Fourth Circuit must, the court's reasoning closely resembles the *Behrmann* factors. For example, the court relied on the contributions made by the released parties — $325 million transfers of their equity to the lenders — and how the restructuring could not have occurred without those contributions. *Id.* at 137. The court noted how the releases resulted from protracted arm's-length negotiations in exchange for the contributions that allowed the debtor to continue operating. In short, "[r]estructuring in this case was possible only because of the release provision." *Id.* Ultimately, because the "Bankruptcy Court's conclusion that the release provisions were integral to the restructuring was well-reasoned and well-supported by the record," the bankruptcy court "was constitutionally authorized to confirm the plan in which those provisions appeared." *Id.* at 140. But even then, the Third Circuit made clear that

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the situation was an outlier. *Id.* at 140 ("In short, our holding today is specific and limited. It is that, under the particular facts of this case, the Bankruptcy Court's conclusion that the release provisions were integral to the restructuring was well-reasoned and well-supported by the record.").

The Third Circuit's reliance on the detailed factual findings below supporting the releases underscore the importance of a bankruptcy court fully supporting its basis for approving a non-debtor release. The detailed factual findings in *In re Millennium Lab* further highlight the lack of factual findings in this case. Here, the Bankruptcy Court stated in conclusory fashion that the Third-Party Releases were integral to the Plan, but it based this only on the fact that the Plan stated as much. Thus, instead of making detailed factual findings as to whether unique circumstances warranted the inclusion of non-debtor releases, the Bankruptcy Court abdicated this crucial function to the negotiators of the Plan — the very negotiators who stood to benefit from the Releases. However, the Bankruptcy Court cannot delegate to private citizens the determination of whether a court has the constitutional power to approve the releases. Thus, the Bankruptcy Court's lack of explanation constitutes clear error, in addition to erring both factually and as a matter of law in its determination that the parties' consent obviated the need to conduct the *Behrmann* analysis, as explained below.

3. Consent and the *Behrmann* Analysis

***27** Debtors argue that *Behrmann* does not apply to consensual releases (Appellee Br. at 60), whereas the Trustee argues that consent does not obviate the need to conduct the *Behrmann* analysis. (Trustee Br. at 24.) Aside from adopting the Sixth Circuit's approach for *nonconsensual* releases, the Fourth Circuit has not spoken directly on whether the *Behrmann* analysis applies to consensual releases. Again, courts around the country have split on the issue.

Several courts have found that a party can consent to a third-party release and eliminate the need for a *Behrmann* analysis. For example, the Seventh Circuit has noted approvingly that "courts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code." *In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993). Likewise, the United States Bankruptcy Court for the District of Maryland distinguished consensual releases from those requiring a *Behrmann* analysis, because "[i]t is well recognized that, where the application of the *Dow Corning* or other applicable factors leads to the conclusion that the third party releases should not be approved, the court can nevertheless approve the releases with the consent of the releasing parties." *In re Neogenix Oncology, Inc.*, 508 B.R. 345, 361 (Bankr. D. Md. 2014). The Second Circuit has also indicated that "[n]ondebtor releases may also be tolerated if the affected creditors consent." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 142. Similarly, the Northern District of Texas has noted that "[m]ost courts allow consensual nondebtor releases to be included in a plan." *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007).

a. Failing to Opt Out Does Not Rise to the Level of Consent Required to Obviate *Behrmann.*

Even if consent can obviate the need for a *Behrmann* analysis, the level of consent required to eliminate the need for a *Behrmann*-type analysis varies. Debtors contend that failing to opt out of a release evidences consent to that release. (Appellee Br. at 41.) The Trustee argues that the Bankruptcy Court erred in finding that this type of implied consent suffices. (Trustee Br. at 24.) The Court agrees with the Trustee as a matter of law and as a matter of fact (as previously determined).

The Fourth Circuit does not appear to have spoken on the issue of whether implied consent can give rise to a consensual non-debtor release. *See In re Neogenix Oncology, Inc.*, 2015 WL 5786345, at *5 (Bankr. D. Md. Oct. 1, 2015) ("The Fourth Circuit

has not expressly faced the issue presented here, whether a 'consensual' third party release must be express or whether implied consent can be sufficient."). Other courts have diverged on whether implied consent can suffice for a release.

Some courts, like the District of New Jersey, look to the principles of contract law rather than the bankruptcy court's confirmation authority to conclude that the validity of the releases requires affirmative consent. For example, in *In re Congoleum Corp.*, the court determined that a creditor must have "unambiguously manifested assent to the release of the nondebtor from liability on its debt." 362 B.R. 167, 194 (Bankr. D.N.J. 2007). Likewise, in *In re Arrowmill Development Corp.*, the court held that it was "not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan." 211 B.R. 497, 507 (Bankr. D.N.J. 1997).

***28** Yet, other courts have found that a creditor must individually consent by voting in favor of the plan. In *In re Coram Healthcare Corp.*, the court stated that "to the extent creditors or shareholders voted in favor of the Trustee's Plan, which provides for the release of claims they may have against the Noteholders, they are bound by that." 315 B.R. 321, 336 (Bankr. D.Del. 2004). Likewise, in *In re Washington Mutual, Inc.*, the court found the opt-out mechanism in the plan insufficient to support the third-party releases with respect to the parties who did not return a ballot. 442 B.R. 314, 355 (Bankr. D. Del. 2011).

However, other courts have determined that failure to return a ballot constitutes consent to a third-party release when the creditor received notice of implications of releasing parties. For example, in *In re Indianapolis Downs, LLC*, the court found that providing an opportunity to opt out along with detailed instructions for how to opt out warranted approval of the releases. 486 B.R. 286, 305-06 (Bankr. D. Del. 2013). However, the court allowed the "deemed" acceptance by the unimpaired creditors, because "these creditors are being paid in full and have therefore received consideration for the releases." *Id.* at 305. Likewise, in *In re Sponsion, Inc.*, the court found that parties who had accepted the plan and not opted-out would be bound by the release. 426 B.R. 114, 144 (Bankr. D. Del. 2010).

Still, other courts have allowed implied consent releases. In *In re DBSD North America, Inc.*, the court approved third-party releases when the releasing parties received adequate notice of the release and they had an opportunity to opt out of the release. 419 B.R. 179, 218-19 (Bankr. S.D.N.Y. 2009); *see also In re Calpine Corp.*, 2007 WL 4565223 (Bankr. S.D.N.Y. Dec. 19, 2007) ("[parties] choosing not to opt out of the releases were given due and adequate notice that they would be granting the releases by acting in such a manner"). Similarly, in *In re Conesco, Inc.*, the court found that impaired creditors who did not opt out had impliedly consented to the releases. 301 B.R. 525, 527-28 (Bankr. N.D. Ill. 2003).

Debtors advance this last approach by comparing the opt-out provisions to contract law and class action procedures. (Appellee Br. at 65.) However, both comparisons cut sharply against their argument.

i. Contract Law Does Not Support Consent by Failure to Opt Out.

First, contrary to Debtors' statement that "actual principles of contract law have long provided that the manifestation of assent may be made wholly by failure to act" (Appellee Br. at 65), black letter contract law dictates otherwise. *See Meekins v. Lakeview Loan Servicing, LLC*, 2020 WL 1922765, at *4 (E.D. Va. Apr. 21, 2020) ("A party's silence, however, is insufficient to show its intention to be bound by the terms of a contract.") (quotations omitted). Indeed, in one of the cases cited by Debtors for its acceptance-by-silence proposition, the First Circuit stated, "it's basic contract law that an offeror cannot unilaterally impose on another party the obligation to respond and reject their offer." *Rivera-Colon v. AT&T Mobility Puerto Rico, Inc.*, 913 F.3d 200, 211 (1st Cir. 2019) (citing 1 Corbin on Contracts § 3.19 (2018) ("It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so."); 2 Williston on Contracts § 6:50 (4th ed. 1993) ("Merely sending an unsolicited offer does not impose upon the party receiving it any duty to

speak or deprive the party of its privilege of remaining silent without accepting.”)). Limited exceptions to this rule exist, such as previous dealings or when an offeror gives the offeree reason to believe that silence or inaction will manifest assent, and the offeree remains silent or inactive with the intent to accept the offer. Restatement (Second) of Contracts § 69(1)(b). However, neither Debtors nor the Bankruptcy Court identified any facts that would support the application of an exception to the general rule of contracts that silence cannot manifest assent. Nor does the record reveal any such facts. Indeed, the Court has already found as a matter of fact that consent did not occur. Accordingly, any attempt to claim that contract law supports a finding of consent to third-party releases based on inaction rings hollow.

ii. Class Action Law Does Not Support Finding Consent by Failing to Opt Out.

***29** Likewise, Debtors' comparison to class actions falls short of providing support of their contention that a failure to opt out constitutes consent to the releases. In fact, the comparison to class action litigation highlights the impropriety of finding releases consensual based merely on a failure to opt out. True, as noted by Debtors, courts (notably, Article III judges) may bind absent class members to a judgment so long as they provide them notice of the action and the opportunity to either opt out or participate. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). But to do so, courts must ensure that the class action complies with the unique requirements of Rule 23 of the Federal Rules of Civil Procedure.

Importantly, Rule 23(a), in relevant part, allows an individual to sue on behalf of other class members only if he will “fairly and adequately protect the interests of the class” and his claims “are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3)-(4). Further, the class must be specifically defined to identify the class members and the class claims. Fed. R. Civ. P. 23(c)(1)(B). Moreover, the court must appoint class counsel that can best “represent the interests of the class.” Fed. R. Civ. P. 23(g). Indeed, the court *must* appoint class counsel to represent the class, as pro se litigants cannot represent absent class members. *See Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (“Ability to protect the interests of the class depends in part on the quality of counsel, and we consider the competence of a layman representing himself to be clearly too limited to allow him to risk the rights of others.”) (internal citations omitted). And, the presiding court bears responsibility for ensuring compliance with all of the above requirements. Most, if not all, of these requirements become heavily litigated throughout the life of a class action.

None of these protections exist in the context of a non-debtor release in a bankruptcy action. First and foremost, no party litigates on behalf of the absent releasing party. No party with a typical claim has a duty to ensure that he fairly and adequately represents the best interests of the absent releasing party. Moreover, the absent releasing party does not enjoy counsel that will represent his best interests in his stead. Indeed, the facts of this case highlight that distinction. The Bankruptcy Court expressly rejected the ability of certain absent releasing parties to have a party and counsel represent their best interests. Yet, the Bankruptcy Court still sought to extinguish their claims.

Similarly, and importantly, any class settlement that would bind absent class members requires court approval. Fed. R. Civ. P. 23(e). After giving notice to all class members of the proposed settlement, the court may only approve the settlement “after a hearing and only on finding that it is fair, reasonable, and adequate” taking into account whether “(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate; and (D) the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2). “The inquiry appropriate under Rule 23(e) ... protects unnamed class members from unjust or unfair settlements affecting their rights ....” *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (internal quotations omitted). And it is an Article III judge, acting with all of their powers and protections as described in *Stern*, that approves the settlement.

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Conversely, if mere failure to opt out obviates the need to conduct a *Behrmann* analysis, then no court carries an obligation to ensure the fairness, reasonableness and adequacy of the relief afforded the absent releasing parties. The *Behrmann* analysis at least provides some oversight that resembles the scrutiny given by a court to class settlement under Rule 23, even if it falls short of ensuring that the release of the claims is fair, reasonable and adequate. Again, the facts of this case highlight the need for scrutiny of what Debtors call a "settlement" of the released claims. No court would find this "settlement" fair, reasonable and adequate under Rule 23, as application of those factors demonstrate. No party or counsel represented the interests of the class, much less represented them adequately. The settlement of the released claims did not result from any negotiation with the Releasing Parties, much less one that occurred at arm's length. Instead, it appears that negotiations only occurred between the individuals and entities that would benefit from releases in an effort to shield themselves from any liability, not those who would confer the benefit in exchange for some other benefit.

***30** Along those lines, the settlement of the released claims provides no relief to the Releasing Parties, much less adequate relief. The fact that the Releasing Parties also receive a release provides nothing more than illusory consideration. The Court cannot envision a potential claim that a former officer or director of Debtors could have against a former shareholder that would give a mutual release any real value. Indeed, the Court has already found as a matter of fact that the mutual release lacked any value and was purely fictional.

The protections provided to absent class members under Rule 23 highlight the lack of protections provided to absent releasing parties in this context. Moreover, the comparison to class actions also demonstrates the due process issues that result from releasing a claim based only on the failure to opt out.

b. Releasing These Claims Raises Serious Due Process Concerns.

Third-party releases in bankruptcy actions based only on a failure to opt out also raise serious due process concerns, because they lack the critical due process protections of Rule 23. *See Bell v. Brockett*, 922 F.3d 502, 511 (4th Cir. 2019) ("Rule 23's adequacy requirements provide critical safeguards against the due process concerns inherent in all class actions."). In the seminal case on due process in class actions, the Supreme Court held that when "a fully descriptive notice is sent [by] first-class mail to each class member, with an explanation of the right to 'opt out,' [that procedure] satisfies due process" even if the absent class member would be bound absent an affirmative opt in. *Shutts*, 472 U.S. at 812.

However, the Supreme Court's basis for this holding underscores the lack of due process present here. First, "[t]he notice must be the best practicable, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 812 (quotations omitted). Second, the "notice should describe the action and the plaintiffs' rights in it." *Id.* Third, "an absent plaintiff [must] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* Fourth, "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.*

In this case, the Third-Party Releases fail three of the four elements required to afford due process. First, the Bankruptcy Court found the notice "sufficient." (Bankr. Confirm. Op. at 31.) But, "sufficient" falls short of the "best practicable, reasonably calculated" standard set forth by the Supreme Court. Although the Court will not now fully undertake the analysis of whether the notice constituted the "best practicable, reasonably calculated" notice "under the circumstances," it seems unlikely that the notice would meet that higher standard. Second, the notice did not describe the released claims or the rights given up by the absent Releasing Parties. Nor did it mention the only purported benefit (the illusory "mutual release") to the Releasing Parties as consideration for their release. Describing the bankruptcy action and generally stating that the absent party would release all claims does not identify the specific claims subject to release. It does not "describe the action and the plaintiffs' rights in it."

The notice satisfies the third element of providing the absent Releasing Parties the opportunity to opt out. Finally, as discussed above, the absent class members had no one to adequately represent their interests. Accordingly, allowing the release of claims based only on the failure to opt out does not comport with due process.

***31** In conclusion, the Court finds that the Bankruptcy Court erred both factually and legally in finding the Third-Party Releases to be consensual. Failure to opt out, without more, cannot form the basis of consent to the release of a claim. Whether the Court labels these "nonconsensual" or based on "implied consent" matters not, because in either case there is a lack of sufficient affirmation of consent. *See In re Neogenix Oncology, Inc.*, 2015 WL 5786345, at *6 ("*Behrmann* provides sufficient guidance on whether a court should approve a release for which there is insufficient affirmation of consent, whether the release is said to be 'nonconsensual' or based on 'implied consent.' "). And, it bears emphasizing again that Debtors' argument about consent focuses only on the pending securities fraud case in the District of New Jersey, which constitutes only the tip of the release iceberg, as the Third-Party Releases cover far more than a single case against two former officers. No argument about consent can be raised about all of the other Releasing Parties that the Bankruptcy Court never even considered.

Accordingly, the mandates of *Behrmann* unquestionably apply, and the Bankruptcy Court should have conducted the *Behrmann* analysis to determine if this case constitutes the rare case warranting such third-party releases.

4. The Bankruptcy Court's Error in Failing to Conduct a *Behrmann* Analysis

Behrmann commands that a bankruptcy court may only grant nonconsensual non-debtor releases "cautiously and infrequently." *Behrmann*, 663 F.3d at 712. Because only cases with unique circumstances warrant granting such releases, a bankruptcy court must make "specific factual findings" demonstrating why the debtor's circumstances entitle it to the benefit of the releases. *Id.* at 712-13.

Here, the Bankruptcy Court failed to conduct any *Behrmann* analysis, precluding any meaningful appellate review. Indeed, the Bankruptcy Court addressed the *Behrmann* factors in a single footnote — again, a single footnote — that merely said: "were the *Behrmann* factors applicable to the Third-Party Releases, the Court would find the *Behrmann* factors were satisfied for the reasons stated in the *Debtors' Memorandum of Law* ...." (Bankr. Confirm. Op. at 38, n.28). It should be obvious that a court may not satisfy its judicial responsibilities by simply incorporating by reference a party's brief. *Cuthbertson v. Biggers Bros.*, 702 F.2d 454, 458 (4th Cir. 1983) ("We have previously condemned the practice of adopting the prevailing party's proposed findings of facts and conclusions of law, and we repeat that admonition here."). As the Third Circuit reminded in *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004):

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Id. at 732. And such a cursory consideration of the *Behrmann* factors disregards the Fourth Circuit's command to limit the use of third-party releases to the exceptional case warranting them.

Moreover, the vast Third-Party Releases broadly release a wide variety of claims, against a wide variety of individuals, held by a wide variety of individuals. The variety of claims released here necessarily means that the specific factual findings supporting the propriety of releasing each type of claim will also vary. Accordingly, the Court cannot conduct meaningful appellate review as a result of the Bankruptcy Court's failure to address that which has been released, setting forth the specific factual findings for each type of claim released. Meaningful review requires detailed findings of fact by the Bankruptcy Court. That did not happen here.

***32** Indeed, the only identified claims released in this appeal are those against the Individual Defendants (Jaffe and Giammatteo) as asserted in the putative class action filed in the District of New Jersey. Yet, by way of example, they demonstrate the Third-Party Releases' inability to meet the *Behrmann* factors. A brief examination of the *Behrmann* factors as applied to these claims follows.

a. Identity of Interests

Under the first factor, "a court must consider whether there is an identity of interests — usually an indemnity obligation — between the debtor and the released parties," such that the "suit against the non-debtor may, in essence, be a suit against the debtor that risks depleting the assets of the estate." *Nat'l Heritage Found., Inc.*, 760 F.3d at 348 (cleaned up). Debtors claim that they had an indemnification obligation to the Individual Defendants. (Appellee Br. at 78-79.) But, Debtors have essentially liquidated and, therefore, it remains uncertain whether Debtors have a continuing indemnification obligation to the Individual Defendants. Moreover, the Court agrees with the Third Circuit's view in *In re Continental Airlines*:

> We conclude that granting permanent injunctions to protect non-debtor parties on the bases of theoretical identity of interest alone would turn bankruptcy principles on their head. Nothing in the Bankruptcy Code can be construed to establish such extraordinary protection for non-debtor parties.

203 F.3d at 217. Consequently, this factor does not weigh in favor of the releases.

b. Substantial Contribution

The second factor requires Debtors "to demonstrate that the Released Parties made a substantial contribution of assets to its reorganization." *Nat'l Heritage Found., Inc.*, 760 F.3d at 348. The record does not support that the Individual Defendants made any financial contribution to the reorganization or any other contribution. Indeed, the Court has already made a factual finding that the Individual Defendants played no role in the reorganization (they had already left Debtors' employment) and their releases were not integral to the reorganization. The fact that they also provided releases to Debtors does not amount to a "substantial contribution of assets," especially given the illusory nature of the releases. Even if it could, the record does not support that the releases provided by the Individual Defendants could amount to a contribution of substantial assets. Accordingly, this factor weighs heavily against granting the release.

c. Essential to the Reorganization

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To satisfy the third factor, "a debtor must demonstrate that the non-debtor release is essential to its reorganization, such that the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor." *Id.* As an initial matter, Debtor largely liquidated, rather than reorganized. This alone cuts against the essential nature of the releases. The third and final asset sale transaction closed on December 23, 2020 — well before confirmation of the Plan. That the deals closed and the assets changed hands well before any release was finalized or went into effect demonstrates that the Plan does not hinge on the inclusion of the releases.

Moreover, the record does not reveal that the Plan would be doomed if the Individual Defendants did not obtain a release. Indeed, as previously noted, the releases of the Individual Defendants were not integral to the reorganization. And, the Court cannot discern any reason why a lack of release for the Individual Defendants would prove fatal to the implementation of the Plan. Accordingly, this factor also weighs heavily against granting the release.

d. Approval by the Affected Class

***33** The fourth factor requires Debtor "to prove that the class or classes affected by the Release Provision overwhelmingly voted in favor of the Plan." *Id.* at 350. Here, the Class Members, as a class receiving nothing under the Plan, were deemed to reject the Plan as a matter of law. 11 U.S.C. § 1126(g). Debtors claim that the small number of opt outs satisfy this prong. However, for the reasons stated above, the Court gives little weight to the failure to opt out of the Plan and will not view it as analogous to an affirmative vote in favor of the Plan. Therefore, this factor also weighs heavily against the release.

e. Mechanism to Pay Substantially All of the Class Affected

Under the fifth factor, the court considers "whether the debtor's reorganization plan provides a mechanism to consider and pay all or substantially all of the class or classes affected by the non-debtor release." *Id.* at 350. Here, the Plan does not create a separate fund to pay the claims released or provide any other mechanism to consider or pay the securities claims. Indeed, the Third-Party Releases are so broad that there has been no effort to even discern the full extent of the claims. Because the Plan extinguishes these claims entirely without giving any value in return, this weighs strongly against granting the Release. *See id.* at 351 (concluding that "the absence of such a [channeling fund] can weigh against the validity of a non-debtor release, especially when the result is that the impacted class's claims are extinguished entirely").

f. Opportunity to Recover

The final substantive factor "is whether the plan provides an opportunity for those who chose not to settle to recover in full." *Id.* at 351. Here, the Plan provides the class members an opportunity to opt out of the Release and pursue the Securities claims. However, given the deficient notice, the Court has already found that here, as a matter of fact, notice did not occur. Accordingly, this factor also weighs against granting the Release.

In sum, the *Behrmann* factors clearly weigh against releasing the Individual Defendants from liability in the Securities Claims. As with the *Stern* analysis, these claims have no meaningful connection to the bankruptcy case. Indeed, the Court has already made a factual finding that these releases were not integral to the Plan. Therefore, they do not implicate the unique circumstances that would warrant a bankruptcy court — or, at least one that grants non-debtor releases only cautiously and infrequently — to release these claims as part of the bankruptcy proceedings. Debtors' claim that "virtually every confirmed plan in every complex bankruptcy case [in the Eastern District of Virginia] includes consensual third-party release provisions of this variety"

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(Appellees' Br. at 8), harms, rather than helps, its argument. That the Bankruptcy Court grants such non-debtor releases as a matter of course, rather than "cautiously and infrequently" and only when warranted by unique circumstances, underscores the lack of specific factual findings supporting the releases here.

For these reasons, the Bankruptcy Court clearly erred in finding that the releases satisfied the *Behrmann* factors. Consequently, the Third-Party Releases must be voided and rendered unenforceable. The Court will now turn to the impact on the Plan of the voiding of the Third-Party Releases and whether the voided releases may be severed from the Plan.

E. Severability

The Court finds that it can sever the unenforceable releases from the Plan. Debtors argue that the nonseverability provision renders the Third-Party Releases nonseverable from the Plan. (Appellee Br. at 34-35.) The provision relied upon by Debtors follows in its entirety:

> ***34** If, before Confirmation, any term or provision of the Plan is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of the Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the Debtors' or the Reorganized Debtors' consent, as applicable; and (3) nonseverable and mutually dependent.

(the "Nonseverability Provision") (USTAPP 2528).) Boiled down to its essence, the Plan explicitly provides that the Bankruptcy Court could sever any provision before confirmation without it affecting the rest of the Plan, but following confirmation all provisions are integral and only the Debtors can consent to severance of a particular provision. It does not explain why each provision becomes integral only upon confirmation.

As explained above, after having found a *Stern* violation and vacated the Confirmation Order, the Plan now comes before the Court under Rule 8018.1 "as proposed findings of fact and conclusions of law." Therefore, the Court steps into the shoes of the Bankruptcy Court in terms of the Nonseverability Provision. That is, the first half of the Nonseverability provision remains the operative provision, and the Plan itself has not declared the Third-Party Releases nonseverable. Consequently, the Plan provides that the Court should sever the voided Third-Party Releases from the Plan. And the Court will do so. However, just as the Court would not find the Third-Party Releases nonseverable after confirmation based only on the boilerplate Nonseverability Provision, it will not rely solely on the Nonseverability Provision to find the provisions severable now that the Plan returns to the pre-confirmation phase. Instead, the Court will analyze the law surrounding severability and the record to determine that it can sever these Third-Party Releases that lack any connection to the reorganization.

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1. The Nonseverability Provision's Textual Support for Severability

As described above, the Nonseverability Provision provides that, before confirmation, the Plan remains in full effect in the event that the Bankruptcy Court finds any provision unenforceable. Having now vacated the Confirmation Order, the Court steps into the shoes of the Bankruptcy Court before confirmation, when the parties agreed that the Third-Party Releases could be severed. Yet, Debtors maintain that the Nonseverability Provision reinforces that the Third-Party Releases carry too much import in the Plan for it to survive without the Releases.

However, the contradictory text and operation of the Nonseverability Provision belies the argument that the Plan cannot survive without the Third-Party Releases. The Nonseverability Provision expressly provides that, before confirmation, the Bankruptcy Court could find the Third-Party Releases (or any provision) unenforceable, as the Court is now doing. In the event of such a holding, the Plan would "in no way be affected, impaired, or invalidated." The fact that the Plan would have survived if the Bankruptcy Court had severed the Third-Party Releases just before confirmation, without any further changes, demonstrates that the Third-Party Releases are not inextricably tied to the rest of the Plan. Therefore, just as the Bankruptcy Court could sever the Third-Party Releases before confirmation, this Court can sever the Third-Party Releases after vacating the Confirmation Order.

***35** Likewise, the Nonseverability Provision provides that a provision of the Plan can be deleted with Debtors' consent. Again, this demonstrates that the Plan could survive in the absence of any particular provision. Debtors attempted to reserve for themselves the right to sever provisions of the Plan — without the consent of any other affected parties — while arguing here that the Court lacks the same authority to sever legally unenforceable provisions. This confirms that the Nonseverability Provision amounts to nothing more than a hollow attempt to evade judicial review of the Third-Party Releases. The negotiating parties here have attempted to release a wide variety of claims of a wide variety of absent and nonconsenting individuals and then use a boilerplate Nonseverability Provision to constrain Article III review of those releases. The Court cannot let such gamesmanship occur. Therefore, the Court will look to the record in determining that the releases do not form an integral part of the Plan and, consequently, the Court may sever this provision without upending the entire Plan.

2. The Importance of the Provision to the Plan's Determination of Severability

In determining severability, courts must look to the evidence in the record and not simply whether the parties state in a conclusory fashion that the provision cannot be severed. As the Second Circuit has explained, "normally a nonseverability clause standing on its own cannot support a finding of equitable mootness." *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 485 (2d Cir. 2012). The Second Circuit's reasoning in the equitable mootness context provides sound guidance in examining severability generally. The Second Circuit explained that "[a]llowing a boilerplate nonseverability clause, without more, to determine the equitable mootness question would give the debtor and other negotiating parties too much power to constrain Article III review," and would "moot virtually every appeal where a stay had not been granted." *Id.* Importantly, "[w]hile a nonseverability clause may be one indication that a particular term was important to the bargaining parties, a district court cannot rely on such a clause to the exclusion of other evidence." *Id.*

The Second Circuit ultimately found the release provisions nonseverable, but only because courts below "did not rest [their] decision exclusively on the nonseverability clause." *Id.* at 486. Instead, it relied on specific testimony regarding the importance of the releases. *Id.* This included an examination of how the releases induced a specific released party to settle and an explanation of why the plan required that released party's contribution. *Id.* The court relied on evidence that "these provisions could not be excised without seriously threatening Charter's ability to re-emerge successfully from bankruptcy," because the parties would need to reenter negotiations. *Id.*

Other circuits, including the Fourth Circuit, have followed a similar approach in looking to the facts to determine severability. For example, in *Behrmann*, the Fourth Circuit rejected the equitable mootness argument based not only on a severability provision, but also on the absence of any factual support that the releases "[were] important to the overall objectives of the Plan" as argued. 663 F.3d at 714. The debtor had "failed to demonstrate how the relief requested by Appellants would jeopardize the success of the Confirmed Plan." *Id.* After explaining that the importance of the releases to the overall plan lacked factual support, the Fourth Circuit "also note[d]" the existence of a severability provision — allowing provisions to be severed, like the posture here now — "suggests that the plan would remain viable absent the Release Provisions." *Id.* Thus, the Fourth Circuit relied on the facts to determine the importance of a provision to the plan, not just the provisions in the plan addressing severability.

Similarly, in the *In re Continental Airlines* case, the Third Circuit rejected an argument as to the essential nature of third-party releases to a plan where the debtors presented "[n]o evidence or arguments ... that Plaintiffs' appeal, if successful, would necessitate the reversal or unraveling of the entire plan of reorganization." 203 F.3d at 210. It explained that the debtors had provided no evidence that "investors and creditors, in deciding whether to support the Continental Debtors' plan, ever considered Plaintiffs' claims." *Id.* The Third Circuit ultimately invalidated the releases. *Id.* at 217-18.

3. Other Areas of the Law's Support for Focusing on the Provision's Importance to the Plan

***36** This focus on the overall importance of the provision proposed to be severed finds support in other areas of severability. For example, when confronted with an unconstitutional provision in a statute, courts typically "sever[ ] any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010). This presumption operates in the presence or absence of a severability provision. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2352-53 (2020) ("Even if the severability clause did not apply to the government-debt provision at issue in this case (or even if there were no severability clause in the Communications Act), we would apply the presumption of severability as described and applied in cases such as *Free Enterprise Fund.* And under that presumption, we likewise would sever the 2015 government-debt exception, the constitutionally offending provision.").

With this presumption in mind, courts look to the importance of the provision to the overall statute. "The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Indeed, if "the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," then courts will invalidate only the unconstitutional portion. *Free Enter. Fund*, 561 U.S. at 508. Thus, courts look to whether severing the offending provision would upend the entire statute and, if not, they default to severing the provision.

Likewise, contract law supports looking to the overall importance of the unenforceable provision. As the Fourth Circuit has described Virginia contract law: "Generally, when a contract covers several subjects, some of whose provisions are valid and some void, those which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible." *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974). Similarly, "Delaware law is clear that an invalid term of an otherwise valid contract, if severable, will not defeat the contract. Thus, a court will enforce a contract with an indefinite provision if the provision is not a material or essential term." *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 284-85 (3d Cir. 2014) (cleaned up). Thus, when faced with an unenforceable provision in a contract, courts will look to whether severing the provision will upset the entire contract.

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4. The Evidence in This Case Supports Severing the Third-Party Releases

Applying these principles, the Court finds that severing the Third-Party Releases at this stage would not upset the viability of the Plan. In fact, the evidence demonstrates otherwise. Indeed, Carrie Teffner testified that, as of February 22, 2021, "Debtors have sold substantially all of their assets and all that remains is to distribute cash proceeds in accordance with the terms of the plan." (Teffner Decl. ¶ 30.) To that end, the three main sales of the assets had all closed months before the confirmation hearing. No evidence exists that severing the Third-Party Releases would upset these already-closed sales, require Debtors to return any of the funds generated by the sales or disrupt the distribution of the cash proceeds.

Teffner further testified that the various release provisions "are the product of extensive good faith, arm's-length negotiations and were material inducements for the parties to enter into the comprehensive settlement embodied in the plan." (Teffner Decl. ¶ 41.) Yet, this "arm's-length" negotiation occurred without the Releasing Parties having a seat at the negotiating table. Teffner admitted as much during cross-examination during the Confirmation hearing. (Confirm. Tr. at 23:1-10.) Moreover, she did not describe how the releases operated as a material inducement for the parties to enter into the settlement, especially given that many of the parties did not enter into the settlement. Instead, she testified that it was the Debtors, not third parties, who sought the broad releases. (Confirm. Tr. at 36:1-4.) Again, she admitted as much on cross-examination. (Confirm Tr. at 23:21-24:2.) In fact, she admitted that with respect to her statement regarding the material inducement, "the third-party releases were addressed in totality with no specific individuals called out." (Confirm. Tr. 23:25-24:2.) The Court cannot agree that the Third-Party Releases provided a material inducement to such a broad array of individuals without examining the inducement to each individual. Additionally, Teffner admitted that the Releasing Parties had no participation in the bankruptcy process at all. (Confirm. Tr. at 26:10-14.)

***37** Furthermore, Teffner claimed that not approving the Third-Party Releases "could potentially significantly increase the time and expense of the Debtors' wind down process, to the detriment of the Debtors' stakeholders." (Teffner Decl. ¶ 45.) On cross-examination, she expanded that this referred to the time and expense of engaging in discovery and defending litigation. (Confirm. Tr. at 33:19-22.) However, expending additional time and expense to respond to discovery does not amount to unwinding the Plan, especially with the presence of substantial insurance to offset certain litigation costs. Indeed, Debtors had in excess of $50 million in insurance, and perhaps in excess of $100 million dollars. (Confirm. Tr. 30:14-31:4.)

Critically, during the Confirmation Hearing, Teffner could not offer specific reasons why the Third-Party Releases comprised a necessary part of the Plan. (Confirm. Tr. at 36:1-4.) Instead, she offered only general statements that the overall intent of Debtors was to provide releases for everyone. (Confirm. Tr. at 36:1-4.) And she admitted that the negotiations focused only on past/current officers and directors, not the vast universe of Released Parties contained in the Third-Party Releases. (Confirm. Tr. at 27:19-24; 42:3-9.) She refused to answer whether the reorganization would fail absent the releases. [13] (Confirm. Tr. at 36:10-19.)

13 Likewise, Gary Begeman refused to testify when asked whether the confirmation could proceed absent the Third-Party Releases. (Confirm. Tr. at 47:18-21.)

In fact, Teffner confirmed that the most important reasons for the inclusion of the Third-Party Releases — pushing the Plan to completion, playing an integral role in the bankruptcy, expending time and resources, and making concessions — would not apply to individuals or entities that worked for Debtors before the bankruptcy filing. (Confirm. Tr. at 42:3-44:6.) Yet, the only addressed Released Parties involves two former executives (Jaffe and Giammatteo) who had left their employment with Debtors months before the bankruptcy and played no role in the reorganization.

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In sum, the record contains no evidence of how the Third-Party Releases induced specific releasing parties to settle, or why the Plan required that Releasing Party's contribution. It contains no evidence as to why the Court could not excise the Third-Party Releases without seriously threatening Debtors' ability to re-emerge successfully from bankruptcy. Nor does the record suggest that the parties would need to reenter any negotiations. Indeed, Debtors have made clear that the Plan "is substantially consummated — and then some." (Appellee Br. at 30.) Simply saying that the Third-Party Releases form an integral part after confirmation of the Plan does not make it so. And, by saying the Third-Party Releases do not form an integral part of the Plan before confirmation, Debtors essentially admit that they do not form an integral part at any time.

The Court will not allow parties who gifted themselves a release in the Plan to hold this appeal hostage with a Nonseverability Provision, especially when the parties have not articulated a sound basis for nonseverability. For these reasons, the Court has no difficulty in severing the voided Third-Party Releases from the Plan.

F. Equitable Mootness

Debtors also argue that the Court should dismiss this appeal on the grounds of equitable mootness. (Appellee Br. at 30.) The Court declines the invitation to use its equitable powers to ignore the serious errors that have occurred here.

1. Equitable Mootness Doctrine Generally

"Equitable mootness is a pragmatic doctrine grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." *In re Bate Land & Timber LLC*, 877 F.3d 188, 195 (4th Cir. 2017). The doctrine's application "is based on practicality and prudence, does not employ rigid rules, and requires that a court determine whether judicial relief on appeal can, as a pragmatic matter, be granted." *Id.* In making this determination, courts can examine the following relevant factors:

***38** (1) whether the appellant sought and obtained a stay;

(2) whether the reorganization plan or other equitable relief has been substantially consummated;

(3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and,

(4) the extent to which the relief requested on appeal would affect the interests of third parties.

Id. The reviewing court has discretion whether to find an appeal equitably moot. *Behrmann*, 663 F.3d at 714 ("In sum, we decline to exercise our discretion to dismiss this appeal as equitably moot."). And, notably, "equitable mootness applies to specific claims, not entire appeals and must be applied with a scalpel rather than an axe." *In re Charter Commc'ns, Inc.*, 691 F.3d at 481-82 (cleaned up).

Before addressing the factors, the Court notes that four threshold issues weigh against a finding of equitable mootness. First and foremost, vacating the Confirmation Order undercuts the argument in support of equitable mootness. The Confirmation Order no longer constitutes a final judgment, such that the Court no longer faces "the passage of time after a judgment in equity and implementation of that judgment," *In re Bate Land & Timber LLC*, 877 F.3d at 195, that the equitable mootness doctrine is based upon. The inquiry could end here. However, the Court will continue its analysis of the equitable mootness doctrine and find that it does not apply even if the Confirmation Order had not been converted into a Report and Recommendation.

Second, the fact that the Trustee brings this appeal counsels against applying the equitable doctrine. The Trustee argues that equitable mootness should never apply against an appeal brought by the Government. (Trustee Reply at 30.) Although the Court need not adopt such an ironclad rule, the Court believes that equitable mootness should not lie against the Trustee under these or similar circumstances. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) ("But it remains true that we need not embrace a rule that no [equitable] estoppel will lie against the Government in any case in order to decide this case.").

As the Fourth Circuit has articulated, the equitable mootness doctrine applies especially "when a party, seeking a return to the status quo ante, sits idly by and permits intervening events to extinguish old rights and create new ones." *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002). This reasoning does not apply when the Trustee brings an appeal on behalf of absent individuals. The Trustee does not occupy the normal status as a "party" attempting to create or enlarge its own rights. Rather, the Trustee acts as a "watchdog" serving the role of "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991). As the Supreme Court has recognized, when the public interest rather than private rights are at stake, equitable doctrines take on a different role in favor of protecting the public interests. *See Kansas v. Nebraska*, 574 U.S. 445, 456 (2015) ("As we have previously put the point: When federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.' "); *Off. of Pers. Mgmt.*, 496 U.S. at 419 ("From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants.").

***39** Here, a finding of equitable mootness would preclude the Trustee from fulfilling its duty of protecting the public interest and preventing the abuse of the bankruptcy system. In fact, these facts demonstrate the need for the Trustee to discharge his statutory responsibilities. Not only did the parties craft a release that would extinguish the rights of countless individuals, they did so in a way that would insulate the release from judicial review. As the Securities Litigation Lead Plaintiffs' plight reveals, any party that challenges the Third-Party Releases loses standing to challenge the Third-Party Releases. Indeed, Debtors have argued vehemently that the Securities Litigation Lead Plaintiffs lack standing to challenge the releases. Without the Trustee's ability to serve as a watchdog, the Court might not ever endeavor to conduct a merits-based review of the Third-Party Releases that discharge the claims of thousands of absent individuals. The Trustee must have the ability to speak for those parties affected by a bankruptcy proceeding when the other interested parties have been effectively silenced from speaking on behalf of themselves. Accordingly, the Court will not apply the doctrine of equitable mootness against the Trustee when the Trustee seeks to protect the rights of absent individuals.

Third, the seriousness of the Bankruptcy Court's errors counsels against a finding of equitable mootness. As the Eighth Circuit recently explained in response to the assertion of equitable mootness, "invoking this doctrine often results in the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded. An Article III appellate court has a virtually unflagging obligation to exercise its subject matter jurisdiction." *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 883 (8th Cir. 2021) (cleaned up). Here, the Bankruptcy Court extinguished the claims of absent and nonconsenting parties without the constitutional authority to adjudicate those claims. Pragmatism does not outweigh the need to remedy constitutional errors. *See Stern*, 564 U.S. at 501 ("It goes without saying that the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.")(cleaned up). These constitutional errors directly concern the integrity of the bankruptcy process. "Equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Pac. Lumber Co.*, 584 F.3d at 251-53.

Fourth, the facts here do not suggest that "effective judicial relief is no longer practically available." *In re Bate Land & Timber, LLC*, 877 F.3d at 195. Debtors have offered no reason for the Court to conclude that it could not sever the Third-Party Releases here, and the Court has already found them severable. Such relief would not alter any creditor's recovery or affect the bankruptcy estate in any way. *Id.* Indeed, the overriding defect in the Third-Party Releases arises from the fact that it releases claims entirely attenuated from the Bankruptcy Case — claims that have no connection to the Bankruptcy Case against non-debtors held by

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third parties. Although Debtors point to the Nonseverability Provision, the Court does not believe that this provision constrains the ability to offer effective judicial relief. For one, without a valid Confirmation Order in place, the Nonseverability Provision now provides that the Court can sever the offending releases. In any event, a boilerplate nonseverability clause included by a debtor and other negotiating parties must not preclude appellate review of provisions that extinguish the rights of others in favor of those negotiating parties. *In re Charter Commc'ns, Inc.*, 691 F.3d at 485 ("Allowing a boilerplate nonseverability clause, without more, to determine the equitable mootness question would give the debtor and other negotiating parties too much power to constrain Article III review.").

2. Application of the Equitable Mootness Factors

Turning to the factors, they do not support a finding of equitable mootness and the Court will decline to exercise its discretion to avoid reviewing the merits of this appeal. *See Behrmann*, 663 F.3d at 711 ("[W]hether a court should lend its aid in equity to a Chapter 11 debtor will turn on the particular facts and circumstances of the case ....")

***40** First, Appellants sought a stay in the Bankruptcy Court and this Court but failed in both attempts. Although they failed to obtain a stay, they moved for one at both levels, so this differs from the case where a party makes a strategic choice that "allow[s] the reorganization plan to go into effect, taking the risks that attended such a decision." *Mac Panel Co. v. Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) (moving for a stay in the bankruptcy court but choosing not to in the district court weighs in favor of a finding of equitable mootness). Moreover, the Trustee's requested relief does not seek to affect the recovery of any creditor; therefore, its unsuccessful attempts to obtain a stay would not render it inequitable for the Court to rule on the appeal. *See In re Bate Land & Timber, LLC*, 877 F.3d at 196 ("But because BLC merely seeks to add to its recovery from the Debtor's pocket without affecting the recovery of any other creditor, we conclude that BLC's unsuccessful attempt to obtain a stay would not render it inequitable for this court to provide the requested relief."). Additionally, this Court denied the request for a stay based on the high burden placed on a party requesting a stay. It expressly left open the door for Appellants to prevail on the merits. Closing that door now, simply because the Court did not previously grant a stay, would itself cause inequity.

Second, the substantial consummation of the Plan does not render it inequitable to rule on this appeal. When "the relief requested does not seek to undo any aspect of the Confirmed Plan that has been consummated, it would not be impractical, imprudent, or inequitable to allow the appeal to proceed." *Id.* The Plan is no longer in the post-confirmation phase. Moreover, the Trustee does not seek to undo any transactions that have occurred in the Plan's undertaking. Indeed, the requested relief — invalidating all or parts of the releases at issue — would only prospectively affect the ability of parties to bring suits based on past events. It would require no unwinding.

Similarly, the third factor, the extent to which the relief requested would affect the success of the reorganization plan, counsels against a finding of equitable mootness. Invalidating or altering the releases would not impact the recovery of any creditors. Indeed, the Plan itself states that the Third-Party Releases can be severed. The Plan would not be disturbed in any material way by allowing third parties to retain their causes of action against non-debtors.

The fourth — and most important — factor concerns the effect on the interests of third parties. *In re VeroBlue Farms USA, Inc.*, 6 F.4th at 889-90 (stressing that the most important factor in this analysis is the impact on third parties). As the releases here only apply to claims arising on or before the Effective Date, no post-confirmation transactions with third parties have occurred in reliance on the releases. Thus, considering the merits of the appeal would not negatively affect any third parties who relied on the confirmation of the Plan. *See In re Bate Land & Timber, LLC*, 877 F.3d at 196 ("The Debtor has not engaged in significant transactions with third parties who relied on the Confirmed Plan's terms such that alteration of the Confirmed Plan would negatively impact the Confirmed Plan and the third parties who relied upon it."). Conversely, extinguishing the

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claims of thousands of individuals without compensation, without consent and without due process reeks of inequity to third parties. *See In re Continental Airlines*, 203 F.3d at 211 ("In balancing the policy favoring finality of bankruptcy court judgments — particularly reorganization plans — against other considerations, we note as well that the equities here would not dictate dismissal. Plaintiffs, who have never had their day in court, have been forced to forfeit their claims against non-debtors with no consideration in return.").

Finally, the doctrine of equitable mootness is all too often invoked to avoid judicial review, as Debtors seek to do here. *In re VeroBlue Farms USA, Inc.*, 6 F.4th at 889-91; *In re Charter Commc'ns, Inc.*, 691 F.3d at 485. That concern takes on greater import here with the shockingly broad releases and the inclusion in the Plan of an attempted "poison pill" Nonseverability Provision. The errors committed by the Bankruptcy Court here are serious and command review by an Article III court. That Debtors invoke an equitable principle designed to promote a fair outcome embodies the height of irony.

***41** Consequently, the Court concludes that the equities strongly favor considering the merits of this appeal. Debtors' doomsday scenarios all stem from the inclusion of the Nonseverability Provision. However, the Court will not allow that provision or an equitable doctrine to preclude appellate review of plainly erroneous release provisions. Indeed, the Released Parties have given themselves broad releases and have sought to immunize the unconstitutional releases from appellate review with the inclusion of an inflexible Nonseverability Provision (which no longer has any effect). Equity does not support this.

G. The Exculpation Provision

The Trustee further argues that the Bankruptcy Court erred in approving the Exculpation Provision. (Trustee Br. at 43.) First, the Trustee submits that the Bankruptcy Court should have applied the *Behrmann* factors to the Exculpation Provision. (Trustee Br. at 43.) Second, the Trustee asserts that the Exculpation Provision bars claims against an overly broad set of parties and fails to include an exception for claims to proceed with court approval. (Trustee Br. at 44.) The Exculpation Provision provides:

> [N]o Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from any Cause of Action or any claim arising from the Petition Date through the Effective Date related to any act or omission in connection with, relating to or arising out of, the Chapter 11 Cases ... except for claims related to any act or omission that is determined in a Final Order to have constituted actual fraud, willful misconduct, or gross negligence.

In contrast to third-party releases that offer protection to non-debtors for preconfirmation liability, an exculpation provision serves to protect court professionals who act reasonably while carrying out their responsibilities in connection with the bankruptcy case. Exculpation provisions do not release parties, but instead raise the liability standard of fiduciaries for their conduct during their case. *In re Health Diagnostic Lab. Inc.*, 551 B.R. 218, 232 (Bankr. E.D. Va. 2016). Exculpation provisions "generally are permissible, so long as they are properly limited and not overly broad." *In re Nat'l Heritage Found., Inc.*, 478 B.R. 216, 233 (Bankr. E.D. Va. 2012). To that end, courts will approve an exculpation provision "so long as it is limited to those parties who have served the debtor, is narrowly tailored and complies with the applicable standards." *In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 260 (Bankr. E.D. Va. 2016). "Exculpation is appropriate when it is solely limited to fiduciaries who have served a debtor through a chapter 11 proceeding." *In re Health Diagnostic Lab., Inc.*, 551 B.R. at 232-33.

Exculpation clauses have their genesis in two different sources: the *Barton* Rule and Section 1103(c) of the Bankruptcy Code. *In re Nat'l Heritage Found., Inc.*, 478 B.R. at 233. Under the *Barton* Rule, based on *Barton v. Barbour*, 104 U.S. 126 (1881), a party cannot bring a suit against a bankruptcy trustee or the trustee's attorneys for acts within the trustee's duties of recovering

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assets for the estate without first obtaining leave of court. *McDaniel v. Blust*, 668 F.3d 153, 157 (4th Cir. 2012). "The Barton doctrine serves the principle that a bankruptcy trustee is an officer of the court that appoints him and therefore that court has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties." *Id.* In *McDaniel*, the Fourth Circuit affirmed dismissal of claims against the trustee's counsel, because the plaintiff's allegations "can be considered by the bankruptcy court ... in its role as gatekeeper." *Id.* at 157.

***42** Under Section 1103(c) of the Bankruptcy Code, the Creditors' Committee possesses broad authority to formulate a plan and perform "such other services as are in the interest of those represented." 11 U.S.C. § 1103(c). Courts have interpreted this section to imply both a fiduciary duty to committee constituents and a limited grant of immunity to committee members. *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000). "This immunity covers committee members for actions within the scope of their duties." *Id.* "[A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions." *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. at 721. Thus, a narrowly tailored exculpation provision serves only those aims of protecting parties who have performed necessary duties in connection with the case.

1. *Behrmann* and Exculpation Provisions

The Trustee argues that the Bankruptcy Court erred in failing to apply the *Behrmann* factors to the Exculpation Provision. (Trustee Br. at 43.) However, he cites no case law in support of his argument. Further, the Fourth Circuit in *Behrmann* did not analyze the exculpation provision at issue; instead, the Court only mentioned it as being part of the plan.

Moreover, the purposes behind the *Behrmann* factors do not fully align with the purposes of an exculpation provision. As discussed above, the *Behrmann* factors seek to determine the necessity of a release to the ultimate success of a particular plan and the release's effect on the impacted classes. Exculpation provisions, on the other hand, serve to ensure that court-supervised parties can carry out transactions to effectuate the plan without fear of liability for court-authorized actions. Accordingly, the Court concludes that the Bankruptcy Court did not err by failing to apply the *Behrmann* factors to the Exculpation Provision. However, that does not end the analysis of the Exculpation Provision.

2. The Bankruptcy Court's Error in Approving the Exculpation Provision

On remand from the Fourth Circuit, the bankruptcy court in the *Behrmann* case approved the exculpation provision there (but not the third-party release provision). *In re National Heritage Found., Inc.*, 478 B.R. at 234.[14] Specifically, the bankruptcy court approved the exculpation provision because it:

> (a) is narrowly tailored to meet the needs of the bankruptcy estate; (b) is limited to parties who have performed necessary and valuable duties in connection with the case (excluding estate professionals); (c) is limited to acts and omissions taken in connection with the bankruptcy case; (d) does not purport to release any pre-petition claims; and (e) contains a gatekeeper function by which the Court may, in its discretion, permit an action to go forward against the exculpated parties.

Id. The Court finds these factors persuasive, with additional limitations found in the case law and the underpinnings of the bases for exculpation provisions. Therefore, an exculpation provision that "is limited to those parties who have served the debtor,

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is narrowly tailored and complies with the applicable standards," *In re Alpha Nat. Res., Inc.*, 556 B.R. at 260, must contain the following limitations:

(a) it must be limited to the fiduciaries who have performed necessary and valuable duties in connection with the bankruptcy case;

(b) is limited to acts and omissions taken in connection with the bankruptcy case;

(c) does not purport to release any pre-petition claims;

(d) contains a carve out for gross negligence, actual fraud or willful misconduct; and,

(e) contains a gatekeeper function.

14 The parties thereafter did not appeal the approval of the exculpation provision.

***43** An exculpation clause narrowly tailored to these factors serves the purposes underpinning exculpation provisions. Additionally, adhering to these limitations ensures that a court need not test the exculpation provision against the *Behrmann* factors. The further that an exculpation provision stretches beyond these limitations, the closer that it becomes in substance to a more general non-debtor release to which the *Behrmann* analysis must apply.

Here, the Exculpation Provision satisfies some, but not all, of these limiting factors. In support of approval, it is limited to acts and omissions taken in connection with the bankruptcy case, does not release any pre-petition conduct and contains a carve out for gross negligence, actual fraud or willful misconduct. However, it extends beyond fiduciaries who have performed necessary and valuable duties. Instead, the "Exculpated Parties" include all current and former employees, attorneys, accountants, managers, financial advisors and consultants of every party being exculpated. Additionally, it lacks a gatekeeping function.

In conclusion, the Exculpation Provision extends beyond the permissible parties and fails to contain a gatekeeper function that would allow an avenue into court for some claims. Therefore, the Court concludes that the Bankruptcy Court clearly erred in approving the Exculpation Provisions. However, unlike the Third-Party Releases, the Court believes that this can be redrafted on remand to comply with the requirements outlined here.

IV. CONCLUSION

The Bankruptcy Court extinguished a broad swath of claims held by a wide variety of people. However, despite this drastic action, the Bankruptcy Court failed to determine whether it had the authority to rule on those claims or whether the facts supported extinguishing those claims. Indeed, the Bankruptcy Court plainly lacked the constitutional power to adjudicate many of the claims encompassed by the Third-Party Releases and to confirm the Reorganization Plan. Therefore, the Court VACATES the Bankruptcy Court's Order (Bankr. Dkt. No. 1811; USTAPP 2530-2672) confirming Debtors' Reorganization Plan, VOIDS the Third-Party Releases and RENDERS the Third-Party Releases UNENFORCEABLE. The Court FINDS the voided Third-Party Releases to be SEVERABLE from the Reorganization Plan and, therefore, SEVERS the voided Third-Party Releases from Debtors' Reorganization Plan.

Additionally, the Court FINDS the Exculpation Provision to be overly broad and, therefore, VOIDS the Exculpation Provision as currently drafted. However, the Court believes that the Exculpation Clause could be redrafted to comply with the applicable law in a manner consistent with this Opinion. Consequently, the Court hereby REMANDS this case to the Bankruptcy Court with

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instructions to redraft the Exculpation Provision in a manner consistent with this Opinion and then to proceed with confirmation of the Plan without the voided Third-Party Releases. [15]

15 The Court notes that the Exculpation Provision does not implicate *Stern* issues, so the Bankruptcy Court possesses the constitutional authority to confirm Debtors' Reorganization Plan without the voided Third-Party Releases. Additionally, no party objects to any other aspect of the Plan than addressed here.

Finally, the Court FINDS that the interests of justice warrant reassigning this case to another Bankruptcy Judge in this district outside of the Richmond Division and therefore ORDERS the Chief Judge of the Bankruptcy Court for this district to REASSIGN this case on remand to another Bankruptcy Judge in this district outside of the Richmond Division. [16] The Chief Judge may reassign the case to himself if he believes the interests of justice so warrant. [17]

16 The Court has considered the factors for reassignment as set forth in *United States v. McCall*, 934 F.3d 380, 384 (4th Cir. 2019), and believes that reassignment is warranted here due to the practice of issuing third-party releases in the Richmond Division in contravention of the Fourth Circuit's admonitions in *Behrmann.* To be clear, the undersigned does not question the integrity or impartiality of Judge Huennekens. Indeed, the contrary is true, as the undersigned holds Judge Huennekens in high regard. However, the practice of regularly approving third-party releases and the related concerns about forum shopping call into question public confidence in the manner that these cases are being handled by the Bankruptcy Court in the Richmond Division.

17 Even though the case shall be reassigned to a Bankruptcy Judge outside of the Richmond Division, the case shall remain a Richmond Division case and any appeal after remand shall be assigned to the undersigned.

***44** Accordingly, this case will be remanded to the Bankruptcy Court in accordance with the instructions herein. An appropriate order shall issue.

The Clerk is directed to file this Memorandum Opinion electronically, notify all counsel of record and forward a copy to the chambers of Chief United States Bankruptcy Judge Frank J. Santoro and United States Bankruptcy Judge Kevin R. Huennekens.

It is so ORDERED.

Richmond, Virginia

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