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EQUITABLE MOOTNESS AND BANKRUPTCY APPEALS

Equitable mootness is a well-recognized doctrine used by courts to refrain from deciding the merits of a bankruptcy appeal where the appellant seeks to vacate or modify a previously confirmed and implemented plan of reorganization. However, recently some courts have questioned the proper scope and application of the doctrine. Counsel involved in a bankruptcy appeal should be aware of the potential limits of the doctrine and the various factors courts consider in deciding whether to dismiss an appeal as equitably moot.

Mootness is a doctrine that precludes a reviewing court from deciding the underlying merits of a case. In federal courts, an appeal can be either constitutionally, statutorily, or equitably moot. Equitable mootness is a judicially developed doctrine used in bankruptcy cases to dismiss unstayed appeals, even where the court could arguably grant effective relief, if the relief sought would be inequitable or require unscrambling a previously confirmed and implemented plan of reorganization. The doctrine has been recognized in some form within every circuit that has jurisdiction over bankruptcy appeals.

Some courts have noted that the equitable mootness doctrine is an exception to courts' "virtually unflagging obligation" to exercise the jurisdiction conferred on them and should be construed narrowly (see, for example, *Samson Energy Res. Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 318, 320 (3d Cir. 2013) (stating that the judge-made origin of the doctrine, coupled with the responsibility of federal courts to exercise their jurisdictional mandate, obliges courts to proceed carefully before dismissing an appeal as equitably moot) (citation omitted); *Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009)). Similarly, some courts have explained that application of the doctrine is generally limited to complex reorganizations where the plan cannot be retracted without great difficulty and inequity (see, for example, *In re One2One Commc'ns, LLC*, 805 F.3d 428, 436 (3d Cir. 2015)).

Over time, issues regarding the appropriate parameters of the equitable mootness doctrine have generated substantial case law and some courts have moved toward more limited application of the doctrine. Attempts to rein in the doctrine are attributable, at least in part, to district courts' invocation of it even in "modest, non-complex bankruptcies and where appellants have sought limited relief" (*In re One2One Commc'ns, LLC*, 805 F.3d at 438-39 (Krause, J., concurring) (urging the court to eliminate or substantially reform the doctrine)).

Nevertheless, the equitable mootness doctrine remains viable, requiring both plan proponents and plan objectors to consider its implications on contested plan confirmations. In particular, counsel should understand:

- The factors courts consider in deciding whether to dismiss an appeal as equitably moot.
- The differing approaches the circuit courts take on certain key issues relating to the equitable mootness inquiry.
- The tools available to plan proponents and objectors to expedite or delay the finality of a confirmation order.
- The factors courts consider in deciding whether to require an appellant to post a bond in support of a stay pending an appeal.
- The courts' application of the blue penciling method of striking or modifying offensive provisions in a plan.
- The courts' application of the equitable mootness doctrine in non-plan contexts.

FACTORS CONSIDERED BY APPELLATE COURTS

In deciding whether to dismiss an appeal as equitably moot, courts generally consider some or all of the following factors:

- Whether the appellant has sought or obtained a stay.
- Whether the plan of reorganization has been substantially consummated.
- The effect the relief requested would have on the rights of third parties not before the court.
- The impact the relief requested would have on the likelihood of successful reorganization.
- Public policy concerns.

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

Although the exact wording of this test varies by circuit, courts generally undertake similar analyses (see, for example, *TNB Fin., Inc. v. James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 231 (5th Cir. 2001)). Depending on the circumstances, courts give each factor varying weight (see, for example, *In re One2One Commc'ns, LLC*, 805 F.3d at 434; *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339 (10th Cir. 2009); see below *Variations Among Circuits*).

WHETHER THE APPELLANT SOUGHT OR OBTAINED A STAY

In undertaking an equitable mootness analysis, nearly all circuits consider whether the appellant sought or obtained a stay pending appeal to prevent execution of the reorganization plan (see, for example, *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798 (6th Cir. 2016), cert. denied, 137 S. Ct. 1584 (2017); *Ullrich v. Welt (In re Nica Holdings, Inc.)*, 810 F.3d 781, 786-87 (11th Cir. 2015); *Prudential Ins. Co. of Am. v. SW Bos. Hotel Venture, LLC (In re SW Bos. Hotel Venture, LLC)*, 748 F.3d 393, 402 (1st Cir. 2014); *R^2 Invs., LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.)*, 691 F.3d 476, 482 (2d Cir. 2012); *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 881 (9th Cir. 2012); *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704, 713 (4th Cir. 2011); *In re Pac. Lumber Co.*, 584 F.3d at 240; *In re Paige*, 584 F.3d at 1340-41).

Courts generally are less inclined to dismiss an appeal as equitably moot if the appellant has sought and obtained a stay (see, for example, *In re Paige*, 584 F.3d at 1340-41). However, issues might arise where the appellant failed to seek a stay or was unsuccessful in its efforts to obtain a stay (see below *Effect of Failure to Seek a Stay*).

SUBSTANTIAL CONSUMMATION OF THE PLAN

"Substantial consummation" of a plan under Bankruptcy Code section 1101(2) means that each of the following has occurred:

- A "transfer of all or substantially all of the property proposed by the plan to be transferred."
- An "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."
- The "commencement of distribution under the plan."

(11 U.S.C. § 1101(2).)

A debtor may seek to effectuate its plan of reorganization quickly and all on the same day, particularly if facing a potential appeal of the confirmation order that might frustrate the implementation of the plan. Ultimately, whether a plan is substantially consummated is a question of fact to be determined by the circumstances of each case. Depending on the jurisdiction, substantial consummation of a plan might also affect the burden of proof for equitable mootness (see below *Burden of Proof*).

EFFECT ON THIRD PARTIES NOT BEFORE THE COURT

A court may decide an appeal is equitably moot if pursuing the appeal would have an adverse effect, either tangentially or directly, on the rights and interests of third parties that are not actively involved in the appeal (such as non-party creditors) (see *In re Tribune Media Co.*, 799 F.3d 272, 279-80 (3d Cir. 2015) (providing examples of the types of third parties equitable mootness is meant to protect), cert. denied sub nom. *Aurelius Capital Mgmt., L.P. v. Tribune Media Co.*, 136 S. Ct. 1459 (2016)).

IMPACT ON THE LIKELIHOOD OF SUCCESSFUL REORGANIZATION

Courts consider whether they can grant appropriate relief that would not undo the consummated plan of reorganization. If the relief entails undoing the plan, courts evaluate whether that would have a negative impact on the debtor's chance at a successful reorganization. (See, for example, *In re Paige*, 584 F.3d at 1348.)

PUBLIC POLICY CONCERNS

A major goal of bankruptcy (and reorganization) is to provide a fresh start to a debtor. Accordingly, courts recognize that there is a need for finality of confirmation orders, which encourages parties to rely on that finality in agreeing to the various transactions and exchanges that might allow the debtor to emerge from bankruptcy. (See, for example, *In re Paige*, 584 F.3d at 1347.)

VARIATIONS AMONG CIRCUITS

Although every circuit to consider the doctrine of equitable mootness has accepted it in some form, application of the doctrine varies in certain material respects. Chief among these differences are:

- Which party bears the burden to prove (or disprove) equitable mootness.
- The effect of the appellant's failure to seek or obtain a stay pending appeal.
- The standard of review for an equitable mootness determination on appeal.

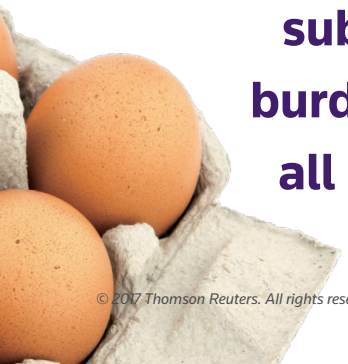
BURDEN OF PROOF

The majority approach, followed in the Third, Ninth, Tenth, and Eleventh Circuits, requires the party seeking dismissal of an appeal to demonstrate that the appeal is equitably moot (see, for example, *Rev Op Grp. v. ML Manager LLC (In re Mortgs. Ltd.)*, 771 F.3d 1211, 1214 (9th Cir. 2014); *In re Semcrude, L.P.*, 728 F.3d at 321-22; *Ala. Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1226 (11th Cir. 2011); *In re Paige*, 584 F.3d at 1339-40). Courts that follow this approach have stated that the refusal to undertake Article III review on equitable mootness grounds "should be the rare exception and not the rule" (*In re Semcrude, L.P.*, 728 F.3d at 321; see also *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1283 (10th Cir. 2013) (stating that substantial consummation does not act as a blanket discharge of the judicial duty to examine carefully each request for relief) (citation omitted)).

Notably, the majority approach is consistent with the test endorsed for constitutional mootness, which turns on whether a live case or controversy exists (see, for example, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993)).

Search Commencing a Federal Lawsuit: Initial Considerations for more on constitutional mootness.

In the Second Circuit, appeals are "presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." The appellant bears the burden of overcoming this presumption by establishing all five factors of the circuit's equitable mootness test.



However, in the Second Circuit, appeals are "presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." The appellant bears the burden of overcoming this presumption by establishing all five factors of the circuit's equitable mootness test. (*In re Charter Commc'ns, Inc.*, 691 F.3d at 482 (collecting cases).)

EFFECT OF FAILURE TO SEEK A STAY

In some circuits, an appellant's failure to seek a stay is fatal to the appeal. Courts in these jurisdictions often point to the appellant's obligation to diligently pursue all available remedies to obtain a stay of execution of the objectionable order. (See, for example, *In re Mortgs. Ltd.*, 771 F.3d at 1215-17; *In re Paige*, 584 F.3d at 1341.) By contrast, in the Sixth Circuit, the failure to pursue a stay merely weighs against the appellant, but is not fatal to the ability to proceed with an appeal (see *Liggett v. Schwartz (In re Schwartz)*, 636 F. App'x 673, 675 (6th Cir. 2016) (quoting *Bank of Montreal v. Official Comm. of Unsecured Creditors (In re Am. HomePatient, Inc.)*, 420 F.3d 559, 564 (6th Cir. 2005))).

Some courts focus on whether the appellant made diligent efforts to obtain a stay, even if those efforts were unsuccessful (see, for example, *In re Paige*, 584 F.3d at 1341). However, the Seventh Circuit has noted, in response to the appellants' argument that they sought a stay at every opportunity and were therefore entitled to full appellate review, that "requesting a stay is not a mandatory step comparable to filing a timely notice of appeal," and that "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization" (*In re UNR Indus., Inc.*, 20 F.3d 766, 769-70 (7th Cir. 1994)). Accordingly, in the Seventh Circuit, an appellant's success in obtaining a stay is relevant to the equitable mootness inquiry only to the extent that it prevents consummation of the plan (see *In re UNR Indus., Inc.*, 20 F.3d at 769-70; see also *In re Semcrude, L.P.*, 728 F.3d at 323 (reflecting a similar approach by the Third Circuit)).

Seeking a stay pending appeal is a (somewhat) easy prong to satisfy, and any potential bankruptcy appellant should at a minimum seek a stay to help preserve its chances of success on appeal (see below *Stay Pending Appeal*). Generally, if a stay was sought but not obtained, courts move on to consider the other equitable mootness factors.

Search Appealing a Bankruptcy Court Order: Overview for more on seeking a stay pending appeal.

STANDARD OF REVIEW

The circuit courts are split on the standard of review to apply to district court determinations on equitable mootness. Depending on the jurisdiction, courts may apply:

- **A *de novo* standard.** The Fifth, Sixth, Ninth, and Eleventh Circuits apply this standard (see, for example, *In re City of Detroit*, 838 F.3d at 798; *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); *Liquidity Sols., Inc. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Store, Inc.)*, 286 F. App'x 619, 622 & n.2 (11th Cir. 2008); *United States v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, 230 F.3d 788, 799-800 (5th Cir. 2000)). The Sixth Circuit explained that a *de novo* standard "is consistent with [the court's] plenary review of the decisions of a lower court exercising its appellate jurisdiction" (*Curreys of Neb., Inc., v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 946-47 (6th Cir. 2008)).
- **An abuse of discretion standard.** The Second, Third, and Tenth Circuits apply this standard (see, for example, *In re Tribune Media Co.*, 799 F.3d at 277 & n.2; *In re Charter Commc'ns, Inc.*, 691 F.3d at 483 & n.2; *In re Paige*, 584 F.3d at 1334-35; cf. *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986)). The Second Circuit explained that an abuse of discretion standard is appropriate because, in making an equitable mootness determination, a district court is not reviewing the bankruptcy court's decision, but rather "exercising its own discretion in the first instance" (*In re Charter Commc'ns, Inc.*, 691 F.3d at 483).

The First and Fourth Circuits have confronted, but declined to resolve, the issue of what standard of review should apply (see *In re SW Bos. Hotel Venture, LLC*, 748 F.3d at 403; *Retired Pilots Assoc. of U.S. Airways, Inc. (Soaring Eagles) v. US Airways Grp. (In re U.S. Airways Grp.)*, 369 F.3d 806, 809 n.* (4th Cir. 2004)).

APPELLATE TOOLS TO EXPEDITE OR DELAY PLAN FINALITY

Plan proponents and objectors alike should be aware of the tools available to achieve or delay finality of a plan's effectiveness. Confirmation orders could be subject to several procedural options, including:

- An automatic 14-day stay.
- Waiver of the automatic 14-day stay.
- A stay pending appeal.
- Accelerated appellate proceedings.
- Certification of a direct appeal to the circuit court.

Parties should consider how to best use these tools to achieve their (potentially competing) goals of avoiding equitable mootness and reducing costs and lost opportunities caused by delaying consummation of a plan (see *Box, Key Practice Considerations*).

AUTOMATIC 14-DAY STAY

A plan confirmation order is automatically stayed until 14 days after entry of the order, unless the bankruptcy court orders otherwise. This allows time for an objecting party to request a stay of the confirmation order pending appeal. (Fed. R. Bankr. P. 3020(e); 1999 Advisory Committee's Note to Fed. R. Bankr. P. 3020.)

WAIVER OF THE AUTOMATIC 14-DAY STAY

The bankruptcy court may, in its discretion, either:

- Waive the automatic 14-day stay.
- Shorten the automatic stay's 14-day period.

(1999 Advisory Committee's Note to Fed. R. Bankr. P. 3020; see, for example, *In re Chemtura Corp.*, 2010 WL 4607822, at *2 (Bankr. S.D.N.Y. Nov. 3, 2010).)

When shortening or eliminating the 14-day stay, courts consider the overall fairness of the plan and the interest in expeditious consummation, including the costs of delayed implementation (see, for example, *In re Chemtura Corp.*, 2010 WL 4607822, at *2; *In re Idearc Inc.*, 423 B.R. 138, 158 (Bankr. N.D. Tex. 2009), aff'd, 662 F.3d 315 (5th Cir. 2011)).

Plan proponents and objectors alike should be aware of the tools available to achieve or delay finality of a plan's effectiveness. Confirmation orders could be subject to several procedural options.

Plan objectors should oppose waiver of the 14-day stay at the same time they object to confirmation of the plan. The failure to do so could negatively impact the objector on appeal. (See *ROK Builders, LLC v. 2010-1 SFG Venture, LLC*, 2013 WL 3762678, at *6 (D.N.H. July 16, 2013) (where appellant sat on its rights and neither objected to the waiver of the 14-day stay nor sought a stay pending appeal, "equitable considerations weigh[ed] heavily in favor of a finding of equitable mootness").)

STAY PENDING APPEAL

As discussed above, to guard against a finding of equitable mootness, plan objectors must diligently pursue a stay of the confirmation order pending appeal (see above *Whether the Appellant Sought or Obtained a Stay* and *Effect of Failure to Seek a Stay*). Rule 8007 of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules) governs the procedures for seeking a stay pending appeal.

Ordinarily, a motion requesting a stay must be made in the bankruptcy court (Fed. R. Bankr. P. 8007(a)(1)). The movant may bypass the bankruptcy court only if "moving first in the bankruptcy court would be impracticable" (Fed. R. Bankr. P. 8007(b)(2)(A)). However, counsel should be aware that this strategy is risky because "[d]istrict courts and bankruptcy appellate panels have regularly dismissed [these motions] for unexplained failure to apply first to the bankruptcy court" (*Alexander v. Bank of Woodstock (In re Alexander)*, 248 B.R. 478, 484 (S.D.N.Y. 2000) (collecting cases); see also, for example, *Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.)*, 504 B.R. 754, 761 (S.D.N.Y. 2014) (stating that 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") (citation omitted)).

The movant bears the burden of proof and should present the court with testimony and other record evidence to support its motion (Fed. R. Bankr. P. 8007(b)(3)). Likewise, parties opposing a stay should be prepared to rebut the motion with similar evidence.

The standard for obtaining a stay pending appeal is similar to the standard for obtaining a preliminary injunction. Courts consider:

- The likelihood of success on the merits.
- Whether the movant will suffer irreparable harm absent a stay.
- The potential harm to other parties if a stay is granted.
- The public interests that might be affected.

(See, for example, *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015); *Ad Hoc Comm. of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.)*, 2017 WL 1177911, at *4 (E.D. Mo. Mar. 30, 2017); *Credit One Bank, N.A. v. Anderson (In re Anderson)*, 560 B.R. 84, 88-89 (S.D.N.Y. 2016).)

However, courts disagree on whether the risk of equitable mootness constitutes irreparable harm (see *ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 347-48 (S.D.N.Y. 2007) (noting the disagreement among courts, but finding that "where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied") (emphasis in original)).

EXPEDITED APPEAL

Especially in circumstances where the court denies a stay pending appeal, an objecting party should seek to expedite its appeal from a confirmation order. Bankruptcy Rule 8013 governs motions to expedite appeals.

A motion to expedite "must explain what justifies considering the appeal ahead of other matters" and should be supported by affidavits as necessary. The movant may designate the motion as an "emergency" if irreparable harm will occur during the time needed to consider a response to the motion. If the court grants the motion, it may accelerate the time for transmitting the record, filing briefs and other documents, conducting oral argument, and resolving the appeal. (Fed. R. Bankr. P. 8013(a)(2)(B), (C).)

IMMEDIATE APPEAL TO THE CIRCUIT COURT

Generally, the district court or bankruptcy appellate panel, if established, hears appeals from the bankruptcy courts, which are subject to further appellate review by the circuit court. However, because time is of the essence in appeals from unstayed confirmation orders, parties may consider having the bankruptcy court certify the order for immediate appeal directly to the circuit court. (28 U.S.C. § 158(d)(2); see, for example, *In re Pac. Lumber Co.*, 584 F.3d at 242.)

Search Appealing a Bankruptcy Court Order: Overview for more on appealing a bankruptcy court order to the district court, bankruptcy appellate panel, and circuit court.

Specifically, under 28 U.S.C. § 158, parties may seek the bankruptcy court's certification of an appeal directly to the circuit court when:

- The judgment, order, or decree involves a question of law for which there is no controlling decision of the circuit court or the US Supreme Court, or involves a matter of public importance.
- The judgment, order, or decree involves a question of law requiring the circuit court to resolve conflicting decisions.
- An immediate appeal from the judgment, order, or decree could materially advance the progress of the case or proceeding in which the appeal is taken.

(28 U.S.C. § 158(d)(2)(A).) If any of these circumstances exist, the bankruptcy court's certification to the circuit court is mandatory (28 U.S.C. § 158(d)(2)(B); see, for example, *In re Tribune Co.*, 477 B.R. 465, 470 (Bankr. D. Del. 2012)). Following the bankruptcy court's certification of the issue for direct appeal, the circuit court may then authorize or reject the direct appeal.

BOND REQUIREMENTS

A stay of a bankruptcy court's confirmation order pending appeal may be conditioned on the appellant's posting of a *supersedeas* bond (Fed. R. Bankr. P. 8007(a)(1)(B), (c); see also, for example, *In re Tribune Co.*, 477 B.R. at 483).

A bond protects the debtor and its other creditors against the substantial risks of harm caused by delaying the plan's effective date (see *In re Adelphia Commc'ns Corp.*, 361 B.R. at 350; *In re Calpine Corp.*, 2008 WL 207841, at *7 (Bankr. S.D.N.Y. Jan. 24, 2008)). For example, a delay might lead to incremental estate administration costs, lost opportunity costs, and market volatility.

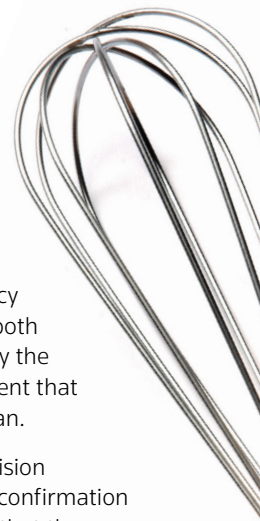
"In analyzing whether to order movants to post a bond in support of a stay pending an appeal of a bankruptcy court order, district courts have obtained guidance from Federal Rule of Civil Procedure 62(d), which requires appellants to post a bond when appealing a lower court order absent 'exceptional circumstances'" (*In re Adelphia Commc'ns Corp.*, 361 B.R. at 350 (footnote omitted)). Courts look 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." (*In re Tribune Co.*, 477 B.R. at 478 (quoting *In re Adelphia Commc'ns Corp.*, 361 B.R. at 350) (internal quotations omitted); see also, for example, *In re Calpine Corp.*, 2008 WL 207841, at *7.)

The failure to post a bond can be detrimental to an appeal. For example, in *In re Tribune Media Co.*, the Third Circuit considered a case in which the bankruptcy court conditioned a stay of its confirmation order on the posting of a $1.5 billion bond. The appellant failed to post the bond or seek to reduce it to a "more manageable figure," instead allowing the plan to be consummated. The Third Circuit found these failures significant, concluding that the appellant "effectively chose to risk a finding of equitable mootness and implicitly decided that an appeal with a stay conditioned on any reasonable bond amount was not worth it." In these circumstances, a finding of equitable mootness was "not unfair." (799 F.3d at 282; *In re Tribune Co.*, 477 B.R. at 483; but see *Rev Op Grp. v. ML Manager LLC (In re Mortgs. Ltd.)*, 771 F.3d 623, 628 (9th Cir. 2014) (finding the appellant "diligently pursued [the] appeal" and "did not sit on its rights" where it sought but failed to obtain a stay "because of the high cost of the bond necessary to secure the appeal").)

BLUE PENCIL METHOD

Faced with the prospect of an equitably moot appeal, a critical inquiry for appellants and appellate courts is whether it is possible to fashion limited remedies that would not cause an unwinding of the confirmed and substantially consummated plan. Courts might seek to balance the finality of plan confirmation against the plan objector's appellate rights by striking or rewriting, sometimes referred to as blue penciling, certain aspects of the confirmed bankruptcy plan on appeal. For example, rather than dismissing appeals as equitably moot, courts have allowed parties to:

- Seek disgorgement of plan distributions.
- Seek disgorgement of professional fees.
- Strike indemnification provisions.
- Strike plan releases.



DISGORGEMENT OF PLAN DISTRIBUTIONS

In *In re Tribune Media Co.*, the Third Circuit jointly considered two separate appeals from a bankruptcy court's order confirming a plan of reorganization, both of which had been dismissed as equitably moot by the district court. The plan involved a global settlement that was a "central issue" in the formulation of the plan.

The Third Circuit affirmed the district court's decision dismissing the appeal that sought to modify the confirmation order to reinstate the settled causes of action so that the claims could be fully litigated or re-settled but otherwise to leave the plan intact. The Third

Circuit explained that "allowing the relief the appeal seeks would effectively undermine the Settlement (along with the transactions entered in reliance on it) and, as a result, recall the entire Plan for a redo." (*In re Tribune Media Co.*, 799 F.3d at 277, 280-81.)

However, the Third Circuit refused to affirm as equitably moot the other appeal, which was brought by trustees acting on behalf of certain creditors and sought relief based on their rights as beneficiaries of a putative subordination agreement. The trustees argued that under the subordination agreement, they were entitled to $30 million of any recovery ahead of another class of creditors and that the plan unfairly allocated their recovery to the other class. (*In re Tribune Media Co.*, 799 F.3d at 282.)

In finding that the appeal was not equitably moot, the Third Circuit reasoned that the appeal concerned only the proper allocation of $30 million of plan distributions between two competing classes of creditors, in the context of a $7.5 billion reorganization, and there was "no chance" this would unravel the plan. The court explained that disgorgement could be ordered against the class of creditors who had received more than their fair share and the plan could be modified to make sure the creditors represented by the trustees would receive their recovery to the exclusion of the other class. Accordingly, the Third Circuit remanded the trustees' appeal for further proceedings to determine whether the confirmed plan should be modified and left open the possibility that such a modification might require certain creditors to disgorge previous plan distributions. (*In re Tribune Media Co.*, 799 F.3d at 282-84.)

DISGORGEMENT OF PROFESSIONAL FEES

In *Official Committee of Equity Security Holders v. Unofficial Committee of Equity Security Holders (In re Zenith Electronics Corp.)*, the Third Circuit considered an appeal by the US Trustee from a bankruptcy court's award of professional fees and expenses incurred by an unofficial committee of equity security holders in furtherance of its efforts to have the bankruptcy court order the appointment of an official committee of equity security holders. The US Trustee argued that the work performed did not meet the statutory requirement under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4) of providing a "substantial contribution" to the case. (329 F.3d 338, 340, 342 (3d Cir. 2003).)

The district court had dismissed the US Trustee's appeal as equitably moot, relying largely on the substantial consummation factor for finding equitable mootness (*In re Zenith Elecs. Corp.*, 329 F.3d at 340; see above *Substantial Consummation of the Plan*).

The Third Circuit reversed, concluding that the district court misapplied the equitable mootness test, specifically its "first, and most important" substantial consummation factor. The Third Circuit explained that this factor "does not call merely for a formalistic inquiry into whether the plan has been substantially consummated under the Bankruptcy Code definition." Instead, "the critical question" is "whether, if successful, the appeal might unravel the reorganization plan." Because the US Trustee merely sought the disgorgement of $76,500 in professional fees in a case where the reorganized debtor was valued at $300 million, there was no risk that granting the relief would unravel the plan. Therefore, the Third Circuit remanded for further proceedings to determine whether the challenged fees should be disgorged. (329 F.3d at 340, 346.)

STRIKING INDEMNIFICATION PROVISIONS

In *United Artists Theatre Co. v. Walton*, the Third Circuit considered an appeal by the US Trustee regarding the district court's approval of a debtor's application to retain a financial advisor. Specifically, the US Trustee objected to the debtor's agreement to indemnify the financial advisor against claims of negligence (as opposed to gross negligence) that might be asserted against the advisor. The financial advisor argued that the subsequent confirmation of the debtor's reorganization plan, which included plan releases in the advisor's favor, rendered the appeal equitably moot. (315 F.3d 217, 222, 228 (3d Cir. 2003).)

The Third Circuit rejected the financial advisor's equitable mootness argument, noting that the US Trustee sought only to strike the indemnification provision from the approved retention agreement. The court reasoned that granting this relief would "not entail 'knocking [out] the props' under the Plan." Instead, if the court "were to modify the indemnity provision, the Plan would otherwise survive intact." (*United Artists*, 315 F.3d at 228 (alteration in original) (citation omitted).)

STRIKING PLAN RELEASES

In *In re PWS Holding Corp.*, the Third Circuit considered an appeal from a confirmation order for a plan that contained certain releases, which would effectively release alleged claims arising out of a prepetition leveraged recapitalization. The plan

Courts might seek to balance the finality of plan confirmation against the plan objector's appellate rights by striking or rewriting, sometimes referred to as blue penciling, certain aspects of the confirmed bankruptcy plan on appeal.

KEY PRACTICE CONSIDERATIONS

Plan proponents and objectors alike should consider the implications of the equitable mootness doctrine in plan confirmation appeals.

PLAN PROPONENTS

- When structuring the plan, long before seeking confirmation, understand how courts in the applicable circuit analyze equitable mootness, including which factors are most relevant.
- Consider whether any justifiable exigencies might require a confirmed plan to promptly "go effective" and be substantially consummated (including the completion of transactions contemplated and authorized by the confirmed plan).
- Where the plan incorporates a global settlement, be prepared to establish a fulsome evidentiary record in the bankruptcy court demonstrating that the settlement is central to and necessary for confirmation. This might include evidence of:
  - the interdependence of each element of a multi-party, global resolution; and
  - the impossibility of severing any specific aspect of the settlement without unwinding the plan.
- Be prepared to argue that the court should require any plan objector seeking a stay pending appeal of the confirmation order to post an appropriate bond. The size of the bond proposed by the plan proponent should be supported by fact or expert evidence confirming the plan proponent's calculations.
- For purposes of arguing equitable mootness on appeal, establish an evidentiary record demonstrating the plan has been substantially consummated. Be prepared to file declarations or affidavits in the appellate proceedings documenting the various post-confirmation transactions that have been authorized and carried out in reliance on the plan and confirmation order.

PLAN OBJECTORS

- Identify early in the process (before confirmation proceedings) the various forms of possible relief, short of denying plan confirmation or later unwinding the plan, that might satisfy the plan objector's specific concerns about the plan.
- Through discovery, seek to establish that:
  - the forms of limited relief identified would not preclude plan confirmation or later cause an unwinding of the plan;
  - any alleged exigencies requiring immediate plan effectiveness and substantial consummation have been manufactured by plan proponents to moot a valid appeal; and
  - where the plan incorporates a global settlement, the plan proponents and settling parties could still proceed with the settlement and plan confirmation even if certain elements of the settlement were stripped away or diminished (for example, providing for a lesser settlement payment or striking certain release provisions).
- Exhaustively pursue a stay of the confirmation order pending appeal. Appellants' diligence in pursuing a stay is crucial to the equitable mootness analysis.

objector argued that the releases violated the absolute priority rule. (228 F.3d 224, 228-30 (3d Cir. 2000).)

In holding that the appeal was not equitably moot, the Third Circuit reasoned that "intermediate options" for granting relief existed that would not disturb the entire plan. In particular, some or all of the releases "could be stricken from the plan without undoing other portions of it." The Third Circuit nevertheless affirmed on the merits the district court's entry of the confirmation order, including the challenged releases. (228 F.3d at 236.)

By contrast, appellate courts have refused to strike releases from confirmed plans where the challenged releases were integral to the plan, instead finding the appeals from the confirmation orders in those cases to be equitably moot (see, for example, *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 145 (2d Cir. 2005); *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 626-27 (4th Cir. 2002); *In re Machne Menachem, Inc.*, 2008 WL 906476, at *5 (M.D. Pa. Mar. 31, 2008); *Kenton Cty. Bondholders Comm. v. Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 374 B.R. 516, 524 (S.D.N.Y. 2007), aff'd sub nom. *Ad Hoc Comm. of Kenton Cty. Bondholders v. Delta Air Lines, Inc.*, 309 F. App'x 455 (2d Cir. 2009)).

EQUITABLE MOOTNESS IN NON-PLAN CONTEXTS

As discussed above, equitable mootness in the plan confirmation context promotes finality of confirmation orders, and protects parties who have justifiably relied on the confirmation order and transactions effectuated pursuant to the order. Debtors have argued that the same goals of finality and protection of reliance interests warrant application of the equitable mootness doctrine to preclude bankruptcy appeals in additional situations,

including those involving sale orders and court-approved settlements (both in and outside of the plan context).

SALE ORDERS AND EQUITABLE MOOTNESS

Generally, courts find that statutory mootness provided under section 363(m) of the Bankruptcy Code, rather than the judicially crafted doctrine of equitable mootness, governs appeals of bankruptcy sale orders involving a good faith purchaser. The majority of circuits construe section 363(m) as creating a per se rule that appeals of bankruptcy sale orders to good faith purchasers are moot if the appellant fails to obtain a stay of the challenged sale order. (See *Brown v. Ellmann (In re Brown)*, 851 F.3d 619, 622-23 (6th Cir. 2017) (explaining that a majority of circuits construe section 363(m) as following the per se rule, but declining to apply the per se rule in the Sixth Circuit); see also *Parker v. Goodman (In re Parker)*, 499 F.3d 616, 620-21 (6th Cir. 2007) (gathering opinions from several circuits applying the majority per se rule).)

Search Buying Assets in a Section 363 Bankruptcy Sale: Overview for more on good faith purchasers.

Not all circuits strictly apply the per se rule of statutory mootness. Therefore, despite an appellant's failure to obtain a stay of the challenged sale order, courts in the Third Circuit may still consider the appeal if it will not "affect the validity of the sale," that is, as long as the court can "grant effective relief" without disturbing the sale. (See *In re ICL Holding Co.*, 802 F.3d 547, 553-54 (3d Cir. 2015) (citations omitted); see also *C.O.P. Coal Dev. Co. v. C.W. Mining Co. (In re C.W. Mining Co.)*, 641 F.3d 1235, 1238-39 (10th Cir. 2011) (section 363(m) "does not preclude a remedy that would not affect the validity of the sale").)

Some courts have even held that the equitable mootness doctrine may be independently applied, and therefore preclude appellate review under certain circumstances, in the context of section 363 sale order appeals (see, for example, *Bonnett v. Gillespie (In re Irish Pub-Arrowhead, LLC)*, 2014 WL 486955, at *5-6 (B.A.P. 9th Cir. Feb. 6, 2014); see also *Mission Prod. Holdings, Inc. v. Old Cold, LLC (In re Old Cold, LLC)*, 558 B.R. 500, 512-13 (B.A.P. 1st Cir. 2016)). Yet other courts have specifically found the equitable mootness doctrine inapplicable to appeals of sale orders (see *Cal-Bay Int'l, Inc v. Supertrail Mfg. Co. (In re Supertrail Mfg. Co.)*, 383 F. App'x 475, 478 n.5 (5th Cir. 2010); see also *In re ICL Holding Co.*, 802 F.3d at 554).

SETTLEMENT ORDERS AND EQUITABLE MOOTNESS

Some courts consider applying the equitable mootness doctrine to appeals of court-approved settlements. For instance, the First Circuit considered, but ultimately rejected based on the specific facts before the court, both equitable and statutory mootness in connection with an appeal of a settlement of a bankruptcy adversary proceeding (*Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.)*, 136 F.3d 45, 48 (1st Cir. 1998) (describing the equitable mootness doctrine as "import[ing] both 'equitable' and 'pragmatic' limitations upon our appellate jurisdiction over bankruptcy appeals") (citations omitted)).

Courts in the Second Circuit recognize equitable mootness in two situations, namely:

- When a reorganization is "substantially consummated."
- Where an unstayed order has resulted in a "comprehensive change in circumstances."

(*Fletcher v. Davis (In re Fletcher Int'l, Ltd.)*, 2016 WL 354292, at *3 (S.D.N.Y. Jan. 4, 2016) (citation omitted).)

The *Fletcher International* court explained that appeals may be found equitably moot in the settlement context where, among other things, "the parties entered into new agreements in reliance on the settlement agreement; engaged in complicated, irreversible financial transactions; or where the settlement was so integral to the Chapter 11 reorganization that undoing it would endanger the reorganization as a whole" (2016 WL 354292, at *3-4 (declining to dismiss an appeal as equitably moot because the settlement involved only "a straightforward transfer of a relatively small amount of cash and the exchange of limited releases") (citations omitted)).

Equitable mootness has also found application in appeals of bankruptcy orders approving settlement agreements contemplating structured or agreed dismissals of Chapter 11 proceedings (see, for example, *Musilino v. Ala. Marble Co.*, 534 B.R. 820, 829 (N.D. Ala. 2015), aff'd, 628 F. App'x 746 (11th Cir. 2016)).

Other courts have refused to extend the doctrine of equitable mootness to appeals involving settlement agreements. The Third Circuit, for instance, has held that equitable mootness does not apply to settlement agreements outside of the plan context (*In re ICL Holding Co.*, 802 F.3d at 554-55 (explaining that equitable mootness comes into play only after a bankruptcy plan of reorganization is approved)).

This article contains the views of the authors, and does not necessarily represent the views of Skadden or any one or more of its clients. Attorneys at Skadden are involved in the following cases where motions for equitable mootness are pending: In re Peabody Energy Corp. *and* In re Millennium Lab Holdings II, LLC.