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").

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.

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).

"'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-

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-

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.

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).

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).

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,

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)

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).

> 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.

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

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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).

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

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.

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-

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.*

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

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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).

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.*

> 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

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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).

"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.

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]

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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).

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.

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).

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 rearview 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.

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

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).

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).

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.

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.*

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).

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.

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.").

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

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).

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,

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).

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.

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).

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

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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.'").

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.

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.").

> 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

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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,

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-*

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.").

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—

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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.

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.

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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.").

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.

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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).

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.

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).

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

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).

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.