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Delaware Views from the Bench

Bankruptcy Appeals: Current Issues and Practical Advice

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2024 Delaware Views from the Bench

Appellate Panel—Equitable Mootness and The Art of Winning on Appeal[1]

The Honorable Thomas L. Ambro, The Honorable Craig T. Goldblatt, Matthew Harvey, and Margaret Vesper

I. Equitable Mootness

Equitable mootness is "a judge-made abstention doctrine that allows a court to avoid hearing the merits of a bankruptcy appeal because implementing the requested relief would cause havoc." *In re Semcrude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2013).

A. History and Origins

After the enactment of the current Bankruptcy Code in 1978, the Ninth Circuit was first to establish the modern equitable mootness doctrine in *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981). *See* R. J. Jumbeck, *Complexity As the Gatekeeper to Equitable Mootness*, 33 EMORY BANKR. DED. J. 171 (2016) (discussing the history of the equitable mootness doctrine). The Ninth Circuit, relying on former Bankruptcy Rule 805, which governed a stay pending appeal, explained that without a stay the court encountered a situation "where the plan [] has been so far implemented that it is impossible to fashion effective relief for all concerned." *Roberts Farms, Inc.,* 652 F.2d at 797. The Ninth Circuit determined that it was therefore "inequitable for th[e] court to consider the merits of the appeal." *Id.* at 798.

B. Equitable Mootness as Applied in Each Circuit

Some version of the equitable mootness doctrine has been recognized in every circuit that has jurisdiction over bankruptcy appeals—all but the Federal Circuit. *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.09[1], n.6 (16th 2024) (observing that although "there is not as yet any generally accepted statement of the doctrine," "the equitable mootness doctrine is embraced in every circuit"). The chart below details the various Circuit formulations of the doctrine and the factors considered when determining if equitable mootness applies, with special emphasis on the Third Circuit's approach.

Circuit	Courts' Description of the Doctrine and Factors that are Considered
First	Applying the equitable mootness doctrine, the First Circuit has "long recognized that 'where a reorganization plan has been in place for an extended period of time after thorough vetting and approval by the bankruptcy court, there comes a point where "the impracticability of fashioning fair and effective judicial relief" cautions against disturbing the reorganization plan.'" *In re Fin. Oversight And Mgmt. Bd. for Puerto Rico*, 989 F.3d 123, 129–30 (1st Cir. 2021) (dismissing Plan challenge as equitably moot) (citing *United Sur. & Indem. Co. v. López-Muñoz (In re López-Muñoz)*, 983 F.3d 69, 72 (1st Cir. 2020) (quoting *Rochman v. Ne. Utils. Serv. Grp. (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469, 471 (1st Cir. 1992)).

[1] The materials included herein regarding The Art of Winning on Appeal were drafted by Judge Ambro and Judge Goldblatt.

Circuit	Courts' Description of the Doctrine and Factors that are Considered
	In determining "whether to reject an appeal of an order confirming a plan of reorganization because the plan has been implemented calls for us to consider at least three factors: '(1) whether the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order; (2) whether the challenged plan proceeded to a point well beyond any practicable appellate annulment; and (3) whether providing relief would harm innocent third parties.'" *Id.* (emphasis in original) (internal quotation marks and alterations omitted) (citing *Pinto-Lugo v. Fin. Oversight & Mgmt. Bd.*, 987 F.3d 173, 180 (1st Cir. 2021) (quoting *PPUC Pa. Pub. Util. Comm'n v. Gangi*, 874 F.3d 33, 37 (1st Cir. 2017)).
Second	In *Windstream*, the Second Circuit described equitable mootness as a "prudential doctrine" that "allows a court to dismiss a bankruptcy appeal 'when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.'" *In re Windstream Holdings, Inc.*, No. 21-1754, 2022 WL 14199458, at *1–2 (2d Cir. Oct. 25, 2022), *cert. denied sub nom. U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc.*, 144 S. Ct. 71, 217 L. Ed. 2d 11 (2023) (quoting *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005)). The Second Circuit has recognized that the purpose of equitable mootness is "to avoid disturbing a reorganization plan once implemented," and therefore, "a bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated," *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144; *In re BGI, Inc.*, 772 F.3d 102, 108 (2d Cir. 2014). An appellant must show all five of the *Chateaugay* factors to overcome a presumption of equitable mootness. *See Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952–53 (2d Cir. 1993). Those factors are whether: "(i) effective relief can be ordered; (ii) relief will not affect the debtor's re-emergence; (iii) relief will not unravel intricate transactions; (iv) affected third-parties are notified and able to participate in the appeal; and (v) [the] appellant diligently sought a stay of the reorganization plan." *In re MPM Silicones, L.L.C.*, 874 F.3d 787, 804 (2d Cir. 2017) (internal quotation marks omitted). "Although we require satisfaction of each *Chateaugay* [] factor to overcome a mootness presumption, we have placed significant reliance on the fifth factor, concluding that a chief consideration under *Chateaugay* [] is whether the appellant sought a stay of confirmation." *Id.*
Third	The Third Circuit has explained that "[m]ootness is a threshold issue that prevents a federal court from hearing a case where there is no live case or controversy as required by Article III of our Constitution. Equitable mootness, in contrast, does not ask whether a court can hear a case, but whether it should refrain from doing so because of the perceived disruption and harm that granting relief would cause." *In re Semcrude, L.P.*, 728 F.3d 314, 317–18 (3d Cir. 2013). "Equitable mootness comes into play in bankruptcy (so far as we know, its only playground) after a plan of reorganization is approved. Once effective, reorganizations typically implement complex transactions requiring significant financial investment.

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	Following confirmation of a plan by a bankruptcy court, an aggrieved party has the statutory right to appeal the court's rulings. Nonetheless, if debtors or others believe granting the requested relief would disrupt the effected plan or harm third parties, they may seek to dismiss the appeal as equitably moot. Their contention is that even if the implemented plan is imperfect, granting the relief requested would cause more harm than good." *Id.* The Third Circuit assesses equitable mootness by engaging in a two-step inquiry—"(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *In re Trib. Media Co.*, 799 F.3d 272, 278–79 (3d Cir. 2015) (citing *Semcrude*, 728 F.3d at 321). As the Third Circuit has explained, "[s]ubstantial consummation is defined in the Bankruptcy Code to mean the (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." *In re Semcrude, L.P.*, 728 F.3d at 320–22 (quoting 11 U.S.C. § 1101). The first statutory step of the equitable mootness inquiry being met "indicates that implementation of the plan has progressed to the point that turning back may be imprudent." *Id.* Once the statutory threshold is met, a court in the Third Circuit "should look to whether granting relief will require undoing the plan as opposed to modifying it in a manner that does not cause its collapse." *Id.* (citations omitted). Furthermore, the court should "also consider the extent that a successful appeal, by altering the plan or otherwise, will harm third parties who have acted reasonably in reliance on the finality of plan confirmation." *Id.* (citations omitted). The burden for this two-step analysis is placed on the party seeking dismissal based on equitable mootness. *Id.* The Third Circuit previously examined the applicability of the equitable mootness by considering five overlapping factors; however, the application of the two-step test now used in the Third Circuit reduces uncertainty that was caused by the five factors. *Id.* at 317–18 (citing *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc)) (explaining five factors "(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.").

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	The Third Circuit has recognized that "[d]ismissing an appeal over which we have jurisdiction, as noted, should be the rare exception and not the rule. It should also be based on an evidentiary record, and not speculation." *Id.*
Fourth	The Fourth Circuit views equitable mootness as "a pragmatic doctrine 'grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.'" *In re Bate Land & Timber LLC*, 877 F.3d 188, 195–96 (4th Cir. 2017) (quoting *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)). In this circuit, "application of the doctrine 'is based on practicality and prudence,' 'does not employ rigid rules,' and requires that a court 'determine whether judicial relief on appeal can, as a pragmatic matter, be granted.'" *Id.* The factors that are considered by the Fourth Circuit for equitable mootness are: "(1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated; (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties." *Id.* (reversing the district court's dismissal of an appeal as equitably moot, where the factors considered did not "support the conclusion that it would be impractical, imprudent, or inequitable to provide the requested relief.").
Fifth	The Fifth Circuit noted that "[t]he judge-made doctrine of equitable mootness allows appellate courts to abstain from reviewing bankruptcy orders confirming 'complex plans whose implementation has substantial secondary effects.'" *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 429–30 (5th Cir. 2022), *cert. denied sub nom. Highland Cap. Mgmt., L.P. v. Nex-Point Advisors, L.P.*, 144 S. Ct. 2714 (2024), and *cert. denied sub nom. NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.*, 144 S. Ct. 2715 (2024) (quoting *New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.),* 916 F.3d 405, 409 (5th Cir. 2019) (citing *In re Trib. Media Co.*, 799 F.3d 272, 274, 281 (3d Cir. 2015)). The Fifth Circuit explained that this doctrine "seeks to balance 'the equitable considerations of finality and good faith reliance on a judgment' and 'the right of a party to seek review of a bankruptcy order adversely affecting him.'" *Id.* (quoting *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (quoting *First Union Real Estate Equity & Mortg. Inv. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992)); *see In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). The Fifth Circuit "uses equitable mootness as a 'scalpel rather than an axe,' applying it claim-by-claim, instead of appeal-by-appeal." *Id.* (quoting *In re Pac. Lumber Co. (Pacific Lumber)*, 584 F.3d 229, 240–41 (5th Cir. 2009)).

Circuit	Courts' Description of the Doctrine and Factors that are Considered
	On a claim-by-claim basis the Fifth Circuit analyzes the following three factors, none of which is dispositive: "(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." *Id.* (quoting *In re Manges*, 29 F.3d at 1039 (citing *In re Block Shim Dev. Co.*, 939 F.2d 289, 291 (5th Cir. 1991); and *Cleveland, Barrios, Kingsdorf & Casteix v. Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994)); *see also, e.g., In re Blast Energy Servs.*, 593 F.3d 418, 424–25 (5th Cir. 2010); *In re Ultra Petroleum Corp.*, No. 21-20049, 2022 WL 989389, at *5 (5th Cir. Apr. 1, 2022).
Sixth	In discussing the equitable mootness doctrine, the Sixth Circuit has highlighted that "[t]he presumptive position remains that federal courts should hear and decide on the merits cases properly before them." *In re Kramer*, 71 F.4th 428, 445–50 (6th Cir. 2023), *reh'g denied*, No. 20-2273, 2023 WL 5498744 (6th Cir. Aug. 16, 2023) (quoting *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880, 891 (8th Cir. 2021) (quoting *Samson Energy Res. Co., v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 326 (3d Cir. 2013)). As the Sixth Circuit explained, "[w]hen properly applied, equitable mootness may bar 'appeals from bankruptcy confirmations in order to protect parties relying upon the successful confirmation of a bankruptcy plan from a drastic change after appeal.'" *Id.* (quoting *Curreys of Nebraska, Inc., v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 947 (6th Cir. 2008). In the Sixth Circuit, once it is determined "that the equitable-mootness doctrine can apply to the type of issue on appeal, courts then 'weigh three factors: "(1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated'; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan."'" *Id.* (quoting *In re United Producers, Inc.*, 526 F.3d 942, at 947–48 (quoting *City of Covington v. Covington Landing Ltd. P'ship*, 71 F.3d 1221, 1225 (6th Cir. 1995)). The Sixth Circuit also applied the equitable mootness doctrine to an appeal concerning the City of Detroit's chapter 9 municipal reorganization cases because of the complex nature of the reorganization. *In re City of Detroit, Michigan*, 838 F.3d 792, 798 (6th Cir. 2016) (citations omitted) (explaining that equitable mootness "was created and intended for exactly this type of scenario, to 'prevent[ ] a court from unscrambling complex bankruptcy reorganizations' after 'the plan [has become] extremely difficult to retract.'").
Seventh	Despite "shy[ing] away from" the term equitable mootness "because it fosters confusion," the Seventh Circuit explains that equitable mootness "essentially derives from the principle that in formulating equitable relief[,] a court must consider the effects of the relief on innocent third parties." *United States v. Segal*, 432 F.3d 767, 773-74, 774 n. 4 (7th Cir.2005); *SEC v. Wozniak*, 33 F.3d 13, 15

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	(7th Cir. 1994), *overruled on other grounds by SEC v. Enter. Trust Co*., 559 F.3d 649 (7th Cir. 2009); *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 331 (7th Cir. 2010) (quotation marks omitted); *see also, 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."). The Seventh Circuit has clarified that equitable mootness "is not 'real mootness'; the court has jurisdiction to alter the outcome, but equitable considerations make it unfair or impracticable to intervene." *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015) (citing *In re UNR Indus.*, 20 F.3d at 769 (distinguishing the concept of equitable mootness from "real mootness")). The "the two key factors" identified by the Seventh Circuit when considering equitable mootness are "(1) the legitimate expectations engendered by the plan; and (2) the difficulty of reversing the consummated transactions." *Id.* (citing *Wealth Mgmt.*, 628 F.3d at 332). In conducting "[t]his fact-intensive inquiry" the court weighs "the virtues of finality, the passage of time, whether the plan has been implemented and whether it has been substantially consummated, and whether there has been a comprehensive change in circumstances." *Id.* (citing *Segal*, 432 F.3d at 774 (citing cases) (quotation marks omitted)); *see also, In the Matter of Specialty Equip. Co., Inc.*, 3 F.3d 1043, 1048 (7th Cir. 1993).
Eighth	The Eighth Circuit notes that although this doctrine has "misleadingly come to be known as 'equitable mootness,' like the Tenth Circuit we agree with '[e]very other circuit to consider the issue. . . that "equitable," "prudential," or "pragmatic" considerations can render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot.'" *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 883–84 (8th Cir. 2021) (quoting *In re Paige*, 584 F.3d 1327, 1337 (10th Cir. 2009)). The Eighth Circuit has not adopted a specific multi-factor test for the equitable mootness analysis but has noted the "many different routes" developed by the other circuits to "answer the ultimate question" and recognized that "[a]s with any equitable determination, a variety of factors may be relevant in a particular case." *Id.* The Eighth Circuit has explained that "[t]he ultimate question to be decided is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties." *Id.* (quoting *In re SI Restructuring, Inc.*, 542 F.3d 131, 136 (5th Cir. 2008)). In the Eighth Circuit, "[t]he most important factors are whether the confirmed plan has been substantially consummated and, if so, what effects reversal of the plan would likely have on third parties. Whether appellant sought or obtained a stay pending appeal is relevant but not determinative." *Id.* (citations omitted).

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Ninth	The Ninth Circuit, in applying the equitable mootness doctrine to a chapter 9 case, explained that "[a]n appeal is equitably moot if the case presents transactions that are so complex or difficult to unwind that debtors, creditors, and third parties are entitled to rely on the final bankruptcy court order." *Cobb v. City of Stockton (In re City of Stockton)*, 909 F.3d 1256, 1263 (9th Cir. 2018) (quoting *JPMCC 2007–C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161, 1167 (9th Cir. 2015)). In the Ninth Circuit, the court "weighs four factors in applying equitable mootness: (1) whether a stay was sought; (2) whether the plan has been substantially consummated; (3) the effect of the remedy on third parties not before the court; and (4) 'whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.'" *In re CPESAZ Liquidating, Inc.,* No. 22-60039, 2023 WL 7411536, at *1 (9th Cir. Nov. 9, 2023) (quoting *In re City of Stockton*, 909 F.3d at 1263) (quoting *In re Transwest Resort Props., Inc.*, 801 F.3d at 1167–68); *see also In re Pac. Gas & Elec. Co.*, No. 21-15447, 2022 WL 911780, at *1–2 (9th Cir. Mar. 29, 2022) The Ninth Circuit has also explained that "[f]ailure to seek a stay 'without adequate explanation' is generally sufficient on its own to compel dismissal of an appeal." *Id.* (citing *In re City of Stockton*, 909 F.3d at 1264). "If a stay was sought and not gained, we then will look to the other factors, but at the very least we require the creditor seek a stay of proceedings before the bankruptcy court to avoid a determination of mootness." *In re Pac. Gas & Elec. Co.*, 2022 WL 911780, at *1–2 (quotations and citations omitted).
Tenth	The Tenth Circuit explains that "[e]quitable mootness is a judicially-created doctrine of abstention that permits the dismissal of bankruptcy appeals where confirmed plans have been substantially completed and reversal would prove inequitable or impracticable." *Abengoa Bioenergy Biomass of Kansas, LLC*, 958 F.3d 949, 955–56 (10th Cir. 2020) (citing *Castaic Partners II, LLC v. Daca-Castaic, LLC (In re Castaic Partners II, LLC)*, 823 F.3d 966, 968 (9th Cir. 2016) ("Equitable mootness concerns whether changes to the status quo following the order being appealed make it impractical or inequitable to unscramble the eggs.")). The Tenth Circuit has instructed that "courts should decline to consider appeals from decisions rendered by the bankruptcy court when doing so would prove either inequitable or impracticable." *Id.* (citing *In re Paige*, 584 F.3d 1327, 1339 (10th Cir. 2009) In the Tenth Circuit, courts "assess the propriety of dismissal premised on equitable mootness around six overlapping inquiries. (1) Has the appellant sought and/or obtained a stay pending appeal? (2) Has the appealed plan been

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	substantially consummated? (3) Will the rights of innocent third parties be adversely affected by reversal of the confirmed plan? (4) Will the public-policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely upon decisions of the bankruptcy court—be undermined by reversal of the plan? (5) If the appellant's challenge were upheld, what would be the likely impact upon a successful reorganization of the debtor? And (6) based upon a quick look at the merits of the appellant's challenge to the plan, is it legally meritorious or equitably compelling?" *Id.* (citing *Paige*, 584 F.3d at 1339). And, "[a]lthough this assessment must be holistic, the third question—what effects reversal would impose on third-party creditors—represents [court's] 'foremost concern.'" *Id.* (citing *Paige*, 584 at 1343).
Eleventh	As the Eleventh Circuit notes, "[t]he equitable mootness 'doctrine provides that reviewing courts will, under certain circumstances, reject bankruptcy appeals if rulings have gone into effect and would be extremely burdensome, especially to non-parties, to undo.'" *In re Hazan*, 10 F.4th 1244, 1252–53 (11th Cir. 2021) (quoting *Bennett v. Jefferson County*, 899 F.3d 1240, 1247 (11th Cir. 2018)). The Eleventh Circuit in describing the applicability of this doctrine explained that "[w]hile equitable mootness often arises in appeals from orders confirming plans of reorganization, we have held that it is also applicable in appeals that effectively 'seek[ ] to modify or amend [a plan's] provisions.'" *Id.* (citing *Smith v. United States (In re Holywell Corp.)*, 911 F.2d 1539, 1543 (11th Cir. 1990), *rev'd on other grounds sub nom. Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992). The Eleventh Circuit has applied the equitable mootness doctrine "in a variety of circumstances, including in a Chapter 13 individual bankruptcy." *Id.* (citing *Bennett*, 899 F.3d at 1242 (citing *Hope v. Gen. Fin. Corp. of Ga. (In re Kahihikolo)*, 807 F.2d 1540, 1543 (11th Cir. 1987)). The Eleventh Circuit has recognized the following factors to "consider in deciding whether to dismiss an appeal for equitable mootness are whether the appellant has obtained a stay pending appeal, whether the plan has been substantially consummated, and whether third parties' rights or the debtor's ability to successfully reorganize would be adversely affected by granting the relief sought by the appellant. *First Union Real Est. Equity & Mortg. Invs. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992). Whether a stay is in place and whether the plan has been substantially consummated are especially important. *See, e.g., Bennett*, 899 F.3d at 1252–53 (dismissing an appeal on the ground of equitable mootness where the debtor and others had "taken significant and largely irreversible steps in reliance on the unstayed plan confirmed by the bankruptcy court."). The failure to timely obtain a stay is critical because it is an "important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained." *Miami Ctr. Ltd. P'ship v. Bank of N.Y.*, 838 F.2d 1547, 1555 (11th Cir. 1988). Substantial consummation of the plan also is an important marker because "[f]or the general

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	bankruptcy enterprise, inability to rely on a plan before exhaustion of all appeals would entail delay that would often impair or kill the most beneficial opportunities. The debtor's chance for a 'fresh start' could be seriously impaired." 13B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3533.2.3 (3d ed. 2021)." *Id.*
D.C.	The D.C. Circuit first adopted equitable mootness in 1986, finding the Ninth Circuit's *Roberts Farms* reasoning persuasive. The Court was "mindful of the finding of substantial consummation below and, guided by that decision, [would] not allow a piecemeal dismantling of the Reorganization Plan in subsequent appeals of individual transactions." *In re Aov Indus.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986). As in other circuits, the considerations in making this determination are "whether an unstayed order has resulted in a comprehensive change in circumstances, and when a settlement is substantially consummated." *Advantage Healthplan, Inc. v. Potter*, 391 B.R. 521, 542–43 (D.D.C. 2008) (cleaned up) (quoting *In re Delta Air Lines, Inc.*, 374 B.R. 516, 522 (S.D.N.Y. 2007), and *In re American HomePatient, Inc.*, 420 F.3d 559, 563–64 (6th Cir. 2005)), *aff'd sub nom. Greater Se. Cmty. Hosp. Found., Inc. v. Potter*, 586 F.3d 1 (D.C. Cir. 2009).

C. Criticism and Controversy

The equitable mootness doctrine has faced criticism from judicial and academic sources. *See, e.g.*, *One2One Communications, LLC*, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring) (describing equitable mootness as "a legally ungrounded and practically unadministrable 'judge-made abstention doctrine'"); *In re City of Detroit, Michigan*, 838 F.3d 792, 810 (6th Cir. 2016) (Moore, J., dissenting) ("Divorced as it is from any statutory basis, equitable mootness is nothing but a prudential doctrine of 'judicially self-imposed limits.' However 'prudential' equitable mootness may be, it operates to cut off entirely a litigant's right to appeal in a case that would otherwise be within our appellate jurisdiction.").

In *In re Continental Airlines,* then-Third Circuit Judge Alito shared his view in a dissent that the equitable mootness doctrine is overbroad and has been extended too far. *In re Continental Airlines*, 91 F.3d 553, 569–70 (3d Cir. 1996) (Alito, J., dissenting), *cert. denied sub nom. Bank of N.Y. v. Cont'l Airlines, Inc.*, 519 U.S. 1057, 117 S. Ct. 686, 136 L.Ed.2d 610 (1997). Judge Alito explained that, in his view, equitable mootness, as a byproduct of the "holding of *Roberts Farms* was gradually extended well beyond anything that could be supported by the authority on which *Roberts Farms* rested." *Id.* at 570. Furthermore, Judge Alito wrote that that "majority should have made an independent examination of the basis and scope of the doctrine of 'equitable mootness' before engraving it in our circuit's law." *Id.* at 569. In the dissent, Judge Alito then considered the potential bases for the equitable mootness doctrine. Judge Alito identified former Bankruptcy Rule 805 and sections 363(m) and 364(e) of the Bankruptcy Code as potentially providing a basis

for the doctrine or the possible authority of federal courts to gap fill "regarding the circumstances under which an appeal that might upset a plan of reorganization may be pursued." *Id*. at 569–70 (citing *In re UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994)). In Judge Alito's view, equitable mootness is "a federal common law rule designed to promote certain policies of Chapter 11 of the Bankruptcy Code." *Id.* at 571. However, Judge Alito, in a view shared by other jurists, did not believe that "[Chapter 11] policies justify [the application of the equitable mootness doctrine, resulting in] the refusal of the Article III courts to entertain a live appeal over which they indisputably possess statutory jurisdiction and in which meaningful relief can be awarded." *Id.*

More recently, Judge Krause of the Third Circuit urged her colleagues to "reconsider" whether the "doctrine should exist at all," and, if so, "to reform it substantially." *One2One Commc'ns*, 805 F.3d at 438 (Krause, J., concurring). She challenged the doctrine on three main grounds: constitutional, statutory, and prudential.

In her view, equitable mootness has no constitutional basis because "[d]ismissing appeals in the name of equitable mootness violates [the] 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,'" *id.* at 439–440 (citing *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976), and, in turn, "infringe[s] on a litigant's 'entitlement to an Article III adjudicator," *id.* at 445 (citing *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015)).

As to statutory support, Judge Krause argued "the Bankruptcy Code and related jurisdictional statutes provide no support for equitable mootness and actually undermine it." *Id.* at 441. She found nothing in the Code that "states or implies that district courts may decline to exercise that jurisdiction by dismissing an appeal as equitably moot, *id.* (citing 11 U.S.C. §§ 157, 158), nor evidence of any broader congressional intent to fashion "an equitable mootness exception to the federal courts' appellate jurisdiction in bankruptcy cases," *id.* at 443.

Lastly, Judge Krause "question[ed]" the "efficacy" of the doctrine—ostensibly "intended to promote finality, but . . . far more likely to promise uncertainty and delay." *Id.* at 446. She criticized what she viewed as the doctrine's "deleterious effect on our system of bankruptcy adjudication," as it "tends to insulate errors by bankruptcy judges or district courts [and] stunts the development of uniformity in the law of bankruptcy." *Id.* at 447.

Soon after, Judge Krause's "well-crafted challenge to equitable mootness" drew a thorough response from Judge Ambro, concurring (and joined by Judge Vanaskie) with his own majority opinion in *In re Trib. Media Co.*, 799 F.3d 272, 284 (3d Cir. 2015) (Ambro, J., concurring).

Judge Ambro did not "share the constitutional concerns expressed" by Judge Krause's *One2One* concurrence. *Id.* at 286. In his view, equitable mootness did not implicate the personal constitutional right "to have claims decided before judges who are free from potential domination by other branches of government." *Id.* at 285 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). Nor does equitable mootness violate any structural right by "redirect[ing] adjudication" from "Article III courts to Article I courts." *Id.*

Judge Ambro also found no statutory bar to equitable mootness. Rather, he read "various provisions of the Bankruptcy Code . . . [to] bespeak a congressional intent 'that courts should keep

their hands off consummated transactions.'" *Id.* at 286 (quoting *In re UNR Indus., Inc.,* 20 F.3d 766, 769 (7th Cir.1994)) (citing §§ 363(m), 1127(b)).

Regarding Judge Krause's prudential arguments, Judge Ambro countered that "the *One2One* concurrence . . . misses the point that [the doctrine] is in the *equitable* toolbox of judges for that scarce case where the relief sought on appeal from an implemented plan" would "leave the plan in tatters" and "the bankruptcy battlefield strewn with too many injured bodies." *Id.* at 288. Comparing equitable mootness to "injunctions, a classic form of equitable relief," Judge Ambro observed that "courts always consider the balance of harms to the public and parties." *Id.* at 287. At bottom, "[e]quitable mootness, properly applied, similarly reflects a court's decision" to refrain from "undoing a confirmed and consummated plan" when it would "do more harm to many than good for one." *Id.* "In a very few cases, shutting an appellant out of the courthouse does substantially less harm than locking a debtor inside." *Id.* at 289.

Judges and academics continue to debate the purpose and application of the doctrine. *See In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 891 (8th Cir. 2021) (predicting that the Supreme Court may "step in and severely curtail—perhaps even abolish—its use"); *see generally* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L. J. 377, 397–413 (2019); Robert Miller, Equitable Mootness: *Ignorance is Bliss and Unconstitutional*, 107 KY. L. J. 269 (2018); Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than Axe in Bankruptcy Appeals*, 19 NORTON J. BANK. L. & PRAC. 1 (2010) ("Based upon the anomalous nature of equitable mootness, it may be best for courts to treat it as so many other judicial doctrines are treated by courts—as flags that are often raised but rarely saluted.").

D. The Supreme Court Has Yet to Address Equitable Mootness

The Supreme Court had not yet addressed the statutory basis or constitutionality of equitable mootness, and has recently denied petitions seeking review of the doctrine. *See, e.g., KK-PB Fin., LLC v. 160 Royal Palm, LLC*, 142 S. Ct. 2778, 213 L. Ed. 2d 1016 (2022); *GLM DFW, Inc. v. Windstream Holdings, Inc.*, 142 S. Ct. 226, 211 L. Ed. 2d 99 (2021).

Most recently, on March 15, 2023, unsecured noteholders of Windstream Holdings, Inc., filed a petition for certiorari, asking the Supreme Court to review the Second Circuit's decision dismissing on equitable mootness grounds the indenture trustee's appeal of a plan confirmation order and a related settlement. *See* Petition for a Writ of Certiorari, *U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc.,* No. 22-926 (Mar. 24, 2023). In the cert. petition, the indenture trustee characterized equitable mootness as a "scourge on the proper functioning of the constitutionally mandated court system in bankruptcy cases." *Id.* The Supreme Court denied the petition in October 2023, *see U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc.,* 144 S. Ct. 71, 217 L. Ed. 2d 11 (2023), declining once again to reach the statutory or constitutional challenges to the doctrine. That noted, one shouldn't draw any inference about the merits of the Supreme Court's denials of certiorari to date.

II. The Art of Winning on Appeal:

A. Brief Writing

1. Brief writing (your speech/you are on offense)
    a. Judges read mounds of pages, so write to stand out.
    b. Preliminary Matters
        i. Determine strongest issues (if you can't defend it, don't brief it). N.B. Not a law school exam, where you spot all issues and say something on each
        ii. Establish cohesive theme or themes (usually not more than two).
        iii. Whether you are appellant or appellee, begin the brief with your affirmative case. Tell the story about why you are right and why your position makes more sense. Then respond to the other side's arguments.
        iv. Establish priority of arguments (best arguments at front of brief).
        v. Outline (way to organize). In a good, well-organized brief, the table of contents will read like a summary of the main points in the brief.
        vi. Acknowledge and think about how to deal with weaknesses (this is critical).
        vii. If possible to know, consider your judges'
            A. Approaches to decision making:
                1. Textualist;
                2. Structuralist;
                3. Consequentialist;
                4. Fairness.
            B. Likes
            C. Dislikes
                1. Examples:
                - briefs that won't stay open
                - too many issues and framing them in ways not readily understood
                - too long (even summaries of argument too long)
                - appealing/briefing clear losers

c. Actual Writing

i. Short (Don't cheat on word count/damages your credibility.)

A. Eliminate boilerplate.

B. Petitions for rehearing/cert. are the most consistent examples of writings that connect and persuade.

ii. Simple (Linda Greenhouse/Thomas Friedman/Warren Buffett/Thomas Boswell/Jacques Barzun/Hemingway, not Faulkner)

iii. Avoid law review syndrome.

A. Not simple

B. Too many footnotes

iv. Stress reason (logic) over emotion.

v. Eliminate adverbs (*e.g.,* avoid "clearly" to the extent you can).

vi. Light on adjectives

vii. Treat the record and the caselaw fairly. As soon as a judge looks at the case or the document in the record and concludes you cannot be trusted, you've effectively lost the case.

viii. Sentences

A. Key issue in first sentence

B. One idea to a sentence

C. Short declarative sentences

D. Active voice

E. Prefer short word to long word (Lincoln/Kennedy).

F. Use one word rather than 3-4 (legal, valid, binding and enforceable).

G. Avoid Latinisms (*ratio decidendi*)/not much you can do about *habeas*, *in rem*, *i.e.*, *e.g.*

H. Avoid rhetorical questions.

I. Avoid grammatical/spelling mistakes (*see*, *e.g.,* John Minor Wisdom, *Wisdom's Idiosyncrasies*, 109 YALE L.J. 1273 (2000)).

ix. Paragraphs

A. Make first and last sentences interesting.

B. Avoid block quotes as a general rule:

1. Harder to read;

2. Give impression of being lazy;

3. Instead, work quotes into text.

x. Edit.

d. Ethical Considerations

i. Do not denigrate opposing side.

ii. Don't sandbag by not:

A. Noting cases against you;

B. Alerting court to new case since briefing.

iii. Don't sandbag as well by waiting to your reply brief to note a case that favors your position (it too often is too late and is forfeited).

2. Summation

a. Judge Frank Easterbrook

> "[Brief writing] is an art . . . . An effective brief is simple, to the point, easy to read (no passive subjunctive constructions, please), addressed to a generalist (no jargon; no unusual acronyms; don't assume that the reader knows your area of the law), and honest to a fault. Lawyers who face up to factual or legal weaknesses win respect and win cases; lawyers who dodge or substitute bluster lose respect; lawyers who dissemble get the trap door."

B. Oral Argument

1. Introduction: 5 Ps: proper planning prevents poor performance. But we want to go beyond merely avoiding poor performance – to art, the highest level of performance.

Overarching Goal: Establish credibility/dovetails with good ethics.

2. Oral Argument (you are on defense)

a. Overarching Principles

i. Not about you

ii. About the judges' questions

iii. Reason for oral argument: judges want to talk with you.

A. You are going to answer their questions.

B. But you have little time.

b. Nuts and Bolts

i. Relearn your case

A. Review (and refine if necessary) your themes

B. Work backward: What do you want/how would you write a summary of the court's opinion?

C. Re-read

1. Record (tab quick access);

2. Briefs (noting shifts in posture/tone, *e.g.*, opening brief is aggressive, reply brief defensive);

3. Statutes/regulations;

4. Cases (distinguish holdings/*dicta*);

ii. Know your judges and what primarily motivates them:

A. Text;

B. Structure;

C. Consequences;

D. Fairness.

iii. Know standards of review.

iv. Focus on weaknesses and your responses to them:

A. Your case;

B. Opposing counsel's case.

v. Talk with others; do not be a hermit.

A. Test ideas.

B. Test formulations.

C. Show how ideas work in real world (an outgrowth of you looking at consequences; in this regard, test how your theories work in hypothetical fact situations).

D. Explore fallback positions.

vi. Moot (at least 2X)

A. Pick persons with appellate experience (want rigorous questions and suggestions for improvement).

B. It is a dress rehearsal:

1. Puts at ease;

2. Gives sense of timing;

3. Helps discover bad habits (*e.g.*, moving from podium);

4. Way to pick up on leading/trick questions.

vii. Know court customs.

viii. Know judges:

A. Learn how to pronounce names (Sloviter/Posner); when in doubt, simply use "Your Honor";

B. Their styles;

C. How they handle oral argument;

D. How they ruled in other cases.

ix. Observe other arguments (both before and day of argument).

x. Be ready to fill pauses by reverting back to your theme(s).

xi. Plan what you take to podium:

A. Outline;

B. Key questions/responses;

C. Case summaries or highlighted portions of important cases;

D. Record/statutes/regulations (well-tabbed).

xii. Answer questions directly (yes or no or maybe), then explain (if possible, weaving back to your theme(s)).

xiii. Things Not To Do:

A. Prepare inadequately;

B. Be arrogant, demeaning or sarcastic;

C. Not answer questions (*e.g.*, "I'll get to that later.");

D. Not conceding or acknowledging weak points, especially on rebuttal when you stand up and point out all the things wrong with the responses of appellee's counsel but offer no counter to your own weaknesses;

E. Failing to read the judge(s);

F. Arguing with the judge(s);

G. Overstating facts or law;

H. Basing argument on obscure technicalities (unless that is all you have);

I. Using arcane acronyms;

J. Giving in to sudden inspiration.

3. Secrets:

a. Be yourself;

b. You know your case better than the judges (or at least you should).

Faculty

Hon. Thomas L. Ambro is a U.S. Circuit Judge of the U.S. Court of Appeals for the Third Circuit in Wilmington, Del., appointed in 2000. Previously, he was in private practice in Wilmington from 1976-2000 at Richards, Layton & Finger, where he was the head of its Bankruptcy Group and was involved in many of the most significant reorganizations in the 1990s. Judge Ambro joined the firm in 1976 following a judicial clerkship with Delaware Supreme Court Chief Justice Daniel L. Herrmann. On the Third Circuit, he has authored over 1,000 opinions, many of which relate to bankruptcy and reorganization issues. Judge Ambro is a past chair of the Section of Business Law of the American Bar Association and past editor of *The Business Lawyer*. He also is a past member of the Board of Trustees of the American Inns of Court Foundation, and in Delaware he is a past president of the Richard S. Rodney Inn of Court and a former co-chair of the Collins J. Seitz Bankruptcy Inn of Court. Within the Delaware State Bar Association, Judge Ambro is a former chair of the Commercial Law Section and for 20 years chaired that Section's Committee on the Uniform Commercial Code. He currently is a member of the American Law Institute, the American College of Bankruptcy and the National Bankruptcy Conference, where he served on its Executive Committee. Judge Ambro is a member of the Third Circuit Judicial Council and chairs its Budget Committee, and he is a member of several committees, including the Bankruptcy Judges Committee and the Automation and Technology Committee. At the national level, he is a member of the Judicial Conference's Committee on the Judicial Branch. Judge Ambro has published numerous articles and lectured frequently throughout the country, including on bankruptcy and reorganization matters. Judge Ambro received his B.A. in 1971 from Georgetown University and his J.D. from Georgetown University Law Center in 1975.

Hon. Craig T. Goldblatt is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, appointed in April 2021. Prior to his appointment, he was a bankruptcy litigator in the Washington, D.C. office of WilmerHale, where his practice primarily involved the representation of financial institutions and other commercial creditors in complex bankruptcy litigation and appeals. Earlier in his career, Judge Goldblatt clerked for Hon. Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit and Hon. David H. Souter of the U.S. Supreme Court. He is a Conferee in the National Bankruptcy Conference (for which he serves as Secretary) and is a vice president of the American College of Bankruptcy. He also has been active on the Business Bankruptcy Committee of the American Bar Association's Business Law Section. Judge Goldblatt has served on the Education Committee of the National Conference of Bankruptcy Judges and as an adjunct professor at Georgetown University Law Center and George Washington University Law School, where he teaches classes focused on bankruptcy law. He has helped coach teams of law students (from George Washington University Law School, Howard Law School and Temple Law School) in the Duberstein Moot Court Competition for each of the past seven years. Judge Goldblatt received his Bachelor's degree *magna cum laude* from Georgetown University in 1990 and his J.D. with honors from the University of Chicago Law School in 1993, where he served as comment editor of the *University of Chicago Law Review*.

Matthew B. Harvey is a partner with Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Del., and focuses his practice on chapter 11 business bankruptcy, bankruptcy litigation, reorganization and restructuring. He represents international, national and regional clients, including debtors, official and ad hoc committees, asset-purchasers, debtor-in-possession (DIP) lenders, secured and unsecured

creditors, petitioning creditors in involuntary bankruptcy filings, and other parties in interest. Mr. Harvey's experience includes in- and out-of-court restructuring transactions for publicly traded and private companies, and he has represented clients in bankruptcy litigation and appeals, as well as commercial litigation. He also has substantial experience representing debtors, foreign representatives and others in cross-border cases. Mr. Harvey devotes a portion of his time to *pro bono* matters, such as serving as an attorney guardian *ad litem* in the Family Court for the State of Delaware. He is also a volunteer attorney for the Federal Civil Panel of the U.S. District Court for the District of Delaware. Mr. Harvey is a 2021 honoree of ABI's "40 Under 40" program, and he also was one of a dozen corporate restructuring lawyers under the age of 40 recognized as a 2021 outstanding young restructuring lawyer in *Turnarounds & Workouts*. In 2022, *Chambers USA* ranked him as being among leading Delaware attorneys in the bankruptcy and restructuring area. In 2017, Mr. Harvey participated in the renowned National Conference of Bankruptcy Judges (NCBJ) Next Generation Program. Also in 2017, he was one of eight attorneys selected for the Bankruptcy Trial Practice Seminar sponsored by the U.S. District Court for the District of Delaware and the Delaware Chapter of the Federal Bar Association. Mr. Harvey is admitted to practice in Delaware and Maine, before the U.S. District Courts for the Districts of Delaware and Maine, and before the U.S. Supreme Court. He received his B.A. *magna cum laude* and Phi Beta Kappa in English literature from Florida State University in 2005 and his J.D. in 2008 from Boston College Law School, where he participated in the Duberstein National Bankruptcy Memorial Moot Court Competition.

Margaret A. Vesper is an associate in Ballard & Spahr LLP's Litigation Department and Bankruptcy, Creditors' Rights and Restructuring Group in Wilmington, Del. She works with a diverse group of clients, including commercial landlords and various other businesses in commercial litigation and corporate bankruptcies. As a 2019 Ballard Spahr summer associate, Ms. Vesper drafted memoranda on corporate and commercial litigation issues. She is admitted to practice in Delaware and Pennsylvania, and before the U.S. District Courts for the District of Delaware and the Eastern District of Pennsylvania. Ms. Vesper received her B.A. *summa cum laude* in 2016 from Loyola University Maryland and her J.D. *magna cum laude* in 2020 from the University of Pittsburgh School of Law, where she was admitted to the Order of the Coif and was a managing editor of the *University of Pittsburgh Law Review*.