

EQUITABLE MOOTNESS, ITS EVOLVING CASE LAW AND IMPACT ON CHAPTER 11 PRACTICE

I. The Concept of Equitable Mootness

- a. Caroline L. Rosiek, *Making Equitable Mootness Equal: The Need for a Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans*, 57 SYRACUSE L. REV. 685 (2007).
 - i. Providing a good introduction to how the doctrine of equitable mootness is applied in bankruptcy proceedings.
 1. Equitable mootness is a tool that can be utilized by a debtor in Chapter 11 reorganization proceedings.
 - ii. Discussing the policy considerations underlying equitable mootness.
 1. The author calls for a national standard of application for the equitable mootness doctrine so that the doctrine can be applied in a uniform manner.
 2. This means that similar cases can result in inconsistent rulings due to the different standards applied throughout the appellate circuits.
 - iii. Discussing the difference between equitable and constitutional mootness.

II. Evolution of Equitable Mootness in Bankruptcy

- a. Bruce A. Markell, *Equitable Cuteness: Of Mountains and Mice*, 35 No. 11 BANKR. L. LETTER NL 1 (2015).
 - i. Providing a background on equitable mootness in bankruptcy and discussing most of the cases listed below.
- b. Key Case Law:
 - i. *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981).
 1. This case generally serves as the origin for the equitable mootness doctrine.
 2. The case cites for authority *Mills v. Green*, 159 U.S. 651, 653 (1895) (“[W]hen ... an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.”).
 - ii. *In re Cont’l Airlines*, 91 F.3d 553 (3d Cir. 1996).
 1. In this case, the Third Circuit, sitting on *en banc*, developed the five-factor balancing test for analyzing equitable mootness.
 2. The court relied heavily on *Roberts Farms* in reaching its decision.
 - iii. *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012).
 1. This case further cemented the Third Circuit’s use of the five-factor balancing test.
 2. The court cited to *In re Cont’l Airlines* and applied the five-factor balancing test.
 - iv. *R2 Invs., LDC v. Charter Commc’ns, Inc. (In re Charter Commc’ns, Inc.)*, 691 F.3d 476 (2d Cir. 2012).

1. This case was the Second Circuit's opportunity to develop its jurisprudence on the equitable mootness doctrine.
 2. The Second Circuit's approach to the doctrine is to determine if the debtor's plan of reorganization has been "substantially consummated."
- v. *Samson Energy Res. Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314 (3d Cir. 2013).
1. Before this case, *In re Cont'l Airlines* was the key precedent for the Third Circuit. In this case, however, the court adopted a two-part test for analyzing equitable mootness.
 2. The Third Circuit's approach calls for a more nuanced analysis than the previous five-part test.
- vi. *In re One2One Commc'ns, LLC*, 805 F.3d 428 (3d Cir. 2015).
1. This case served as a reaction to the *Semcrude* case. The case is notable for both its main opinion and the concurrence.
 2. The main opinion found that the granting of the motion to dismiss at the district court level had been an abuse of discretion. The court determined that application of the first and fourth *Continental* factors was an abuse of discretion.
 3. The concurrence was a blistering criticism of the equitable mootness doctrine. Judge Krause noted that "district courts have continued to invoke the doctrine in modest, non-complex bankruptcies and where appellants have sought limited relief." *In re One2One Commc'ns, LLC*, 805 F.3d at 7.
- vii. *In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015).
1. This case took up Judge Krause's challenge of the equitable mootness doctrine.
 2. The majority opinion reiterated that the circuit would rely on the more "mature" two-part test when analyzing equitable mootness.
 3. What is most interesting about this opinion is that Judge Ambro, who wrote the majority opinion in this case, also joined the concurrence of his own opinion, which was authored by Judge Vanaskie. This was an effort to respond to Judge Krause's criticism of equitable mootness.
- viii. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161 (9th Cir. 2015).
1. In this case, the court established its reliance on a four-factor test to analyze equitable mootness.
- c. Analyzing these cases together, one common theme emerges: a haphazard and non-strategic use of equitable mootness by litigators will most certainly fail. Circuits are refining how they analyze the doctrine.

III. Comparison of the Analyses Used Throughout the Circuits

- a. R. Jake Jumbeck, "*Complexity*" as the Gatekeeper to Equitable Mootness, 33 EMORY BANKR. DEV. J. 171 (2016).

- i. Discussing the varying analyses used by the circuits and arguing that a more uniform approach should be utilized.
 - ii. The author argues that “the lack of a uniform approach has prevented proper application” of the doctrine. *Id.* at 184.
- b. David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine?*, 25 NO. 4 J. BANKR. L. & PRAC. NL ART. 2 (2016).
 - i. Setting forth the varying multi-factor tests applied by many of the circuits
 - ii. The article also attempts to address the ongoing debate over the “legitimacy and efficacy of the equitable mootness doctrine” by discussing *In re One2One Commc’ns, LLC. Id.*
- c. Various Multi-Factor Tests: In general the circuits all try to answer the same question—is it prudent to upset the plan of reorganization at this late stage? The circuits try to answer this question through various multi-factor balancing tests.
 - i. Ninth Circuit:
 - 1. Four factor test is as follows: (1) whether a stay was sought, for absent that a party has not fully pursued its rights; (2) if a stay was sought but not granted, the court will look to whether substantial consummation of the plan has occurred; (3) the court will look to the effect that a remedy may have on third parties not before the court; and (4) whether the bankruptcy court can fashion effective relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation before the bankruptcy court. *Transwest*, 801 F.3d at 1167-68.
 - 2. An additional consideration is providing finality to bankruptcy judgments. *In re U.S. Airways Group*, 369 F.3d 806, 810-11 (4th Cir. 2004).
 - 3. This is the majority approach, which is applied in the Third, Fourth, Fifth, Sixth, and Tenth Circuits.
 - ii. Third Circuit:
 - 1. Initially applied the following 5-part test: (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. *Tribune*, 799 F.3d at 278 (citing *In re Continental*, 91 F.3d at 560).
 - 2. More recently, the test has evolved into a two-step analysis: (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. *Tribune*, 799 F.3d at 278 (citing *Semcrude*, 728 F.3d at 321).

3. Chad Shokrollahzadeh, *Equitable Mootness and its Discontents: The Life of the Equitable Mootness Doctrine in the Third Circuit After In re One2One Communications L.L.C. and In re Tribune Media Co.*, 18 Duq. Bus. L.J. 129.
 - a. This article provides an in-depth analysis of the both the *One2One* and *Tribune* opinions. Similar to other authors in this outline, the author highlights the need for reform on how the doctrine is applied.
 - b. The article also notes that the equitable mootness doctrine has an uneasy relationship with the Bankruptcy Code. “One of the main contentions surrounding the equitable mootness doctrine is whether it finds any support in the Bankruptcy Code.” *Id.* at 149.

iii. Second Circuit:

1. An appeal is presumed equitably moot where the debtor’s plan of reorganization has been substantially consummated as defined by Bankruptcy Code section 1101(2).
2. Substantial consummation will not moot an appeal if all the following circumstances exist: (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 proceeding; and (5) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order. *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993) (“*Chateaugay IP*”).

iv. Fifth Circuit:

1. 3-factor test: (1) whether the complaining party has failed to obtain a stay; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect the rights of parties not before the court or the success of the plan. *TNB Fin., Inc. v. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 231 (5th Cir. 2001).

v. Eleventh Circuit:

1. In deciding whether an appeal is equitably moot, the 11th Circuit follows a multi-factor analysis:
 - a. Has a stay pending appeal been obtained? If not, then why not?

- b. Has the plan been substantially consummated? If so, what kind of transactions have been consummated?
 - c. What type of relief does the appellant seek on appeal?
 - d. What affect would granting relief have on the interests on third parties not before the court?
 - e. Would relief affect the re-emergence of the debtor as a revitalized entity? *Ullrich v. Osborne (In re Nica Holdings, Inc.)*, 810 F.3d 781, 786 (11th Cir. 2015).
- d. In addition to applying different standards for application of equitable mootness, circuit courts are split with respect to the scope of equitable mootness and equitable considerations regarding who it is intended to protect:
- i. Application of equitable mootness outside of Chapter 11. *Compare In re San Patricio Cty. Cmty. Action Agency*, 575 F.3d 553, 558 (5th Cir. 2009) (arguing that equitable mootness likely does not apply outside Chapter 11), *with In re City of Detroit*, 838 F.3d 792 (6th Cir. 2016) (applying equitable mootness to a Chapter 9 bankruptcy).
 - ii. Protection of “sophisticated” or “participating” third parties. *Compare In Re Transwest Props., Inc.*, 801 F.3d 1161, 1169 (9th Cir. 2015) (holding that those parties present in the confirmation hearings are not the “innocent third parties” equitable mootness seeks to protect), *and In re Pacific Lumber Co.*, 584 F.3d 229, 244 (5th Cir. 2009) (refusing to apply equitable mootness when “appellate consequences were foreseeable to [appellants] as sophisticated investors...”), *with In re Cont’l Airlines*, 91 F.3d 562 (3rd Cir. 1996) (holding that investors who participated in reorganization are, “in particular,” protected by equitable mootness).
 - 1. In a current Southern District of Texas case, *In re Ultra Petroleum Corp.*, No. 4:17—cv—00945 (S.D. Tex. 2017), Judge Ellison referred the issue of the application of equitable mootness to sophisticated investors back to the Bankruptcy Court, and took the motion to dismiss for mootness under advisement.

IV. Overbroad Application of the Equitable Mootness Doctrine

- a. Charles Persons, *Equitable Mootness on Life Support: The Third Circuit Further Pares Back the Abstention Doctrine in One2One Communications*, JURISDICTION & APPEALS, (Aug. 3, 2015), <https://business-finance-restructuring.weil.com/jurisdiction/equitable-mootness-on-life-support-the-third-circuit-further-pares-back-the-abstention-doctrine-in-one2one-communications/>.
- b. Danielle Barav-Johnson & Mark G. Douglas, *The Ninth Circuit Reins in the Equitable Mootness Doctrine* (Nov./Dec. 2015), *available at* <http://www.jonesday.com/the-ninth-circuit-reins-in-the-equitable-mootness-doctrine-11-17-2015/>.
- c. There appears to be a growing concern among courts, especially in the Third Circuit, regarding the overbroad application of the equitable mootness doctrine.
 - i. Beginning with *Philadelphia Newspapers* followed by *Semcrude* and *One2One*, the Third Circuit has pared back and limited the applicability of the doctrine.

- ii. Will we see a further decline in its application?
- iii. Will courts develop a uniform test to be applied as an initial threshold inquiry?
 - 1. Building off the *One2One* opinion, the “complexity” as the *GateKeeper* article proposes the following four-part analysis of whether the case is a “complex” reorganization that should be used by all courts before they apply their respective multi-factor test to equitable mootness: (1) size of the bankruptcy; (2) whether the plan was a liquidation or a reorganization plan; (3) types of transactions involved; and (4) whether a settlement agreement was the fulcrum of the plan.
- d. Is it time for the Supreme Court to weigh in on the Equitable Mootness Doctrine?
 - i. Paul A. Avron, *Equitable Mootness: Is it time for the Supreme Court to Weigh In?* 36-MAR AM. BANKR. INST. J. 36 (2017).
 - 1. The author opines that “the doctrine of equitable mootness is an issue that is ripe for consideration, and resolution, by the Supreme Court.” *Id.*
 - ii. However, the Supreme Court has consistently declined to review the basis for equitable mootness. *See, e.g., In re City of Detroit*, 838 F.3d 792 (6th Cir. 2016), *cert. denied*, 2017 WL 1365666 (U.S. 2017); *In re Charter Comm’ns, Inc.*, 691 F.3d 476 (2nd Cir. 2012), *cert. denied*, 133 S. Ct. 2021 (2013); *In re Tribune Media Co.*, F.3d 272 (3rd Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016).