NOTE

ON BANKRUPTCY APPEALS: EQUITABLE MOOTNESS AS GATEKEEPER TO PLAN CONFIRMATION REVIEW

Zachary R. Hunt†

In bankruptcy appeals, the judge-made prudential doctrine of "equitable mootness" allows appellate courts to dismiss an appeal as moot when granting the requested relief would undermine the finality of a substantially consummated plan of reorganization. As applied, however, the doctrine of equitable mootness is neither mootness nor equitable. On the former, equitable mootness is not mootness because even if a mootness-like jurisdictional exception is necessary to avoid "unscrambling the eggs" of a confirmed plan, in practice, equitable mootness has become the norm in bankruptcy appeals rather than the exception. On the latter, equitable mootness is not equitable because plan confirmation appeals are presented to appellate courts in a manner that systematically incentivizes them to find equitable mootness as often as possible. The result, in turn, is an appellate system that presently cannot guarantee appellate rights of the kind that litigants expect and that the constitutional bounds of bankruptcy jurisdiction require. In response, this Note proposes an amendment to Federal Rule of Bankruptcy Procedure 3020(e) that restores meaningful appellate review by limiting the bankruptcy court's discretion to deny a stay pending appeal.

† J.D., Cornell Law School, 2024. M.S. in Finance, University of South Florida, 2021. Senior Articles Editor, Cornell Law Review Vol. 109. The author would like to thank Professor Andrew J. Wistrich for his extraordinary guidance, expertise, and encouragement throughout the process of drafting and editing this Note.

Introduction

When a firm files for bankruptcy in the United States, a distinct body of law supplants otherwise applicable non-bankruptcy laws to provide its own special rules for resolving the firm's defaulted obligations. This is so despite the fact that analogous provisions of non-bankruptcy law would ordinarily govern those same defaults if not for the debtor's insolvency—namely, the panoply of state-level regimes governing collection, modification, and even forgiveness of unpaid debts.[1] Indeed, the very need for a special set of rules in the presence of insolvency is far from obvious; in a world without bankruptcy law, these non-bankruptcy analogs would presumably perform the same work as bankruptcy, disposing of claims against the debtor in accordance with the relevant scheme of state-law rights and remedies.[2]

The animating problem of insolvency, however, is that left to their own devices, creditors in a world without bankruptcy will normally attempt to enforce their claims in a manner that destroys overall value for the group as a whole.[3] Put differently, like predators in the desert, the pack of creditors will descend upon the wounded debtor, frantically extracting as much as they can until nothing is left. The function of bankruptcy law, then, is to facilitate cooperation among creditors so as to reach a value-maximizing resolution of the debtor—and in many cases, one that allows the debtor to emerge from bankruptcy as a viable business.[4]

---

1 G. Eric Brunstad, Jr., The Three Faces of Bankruptcy Law 205 (Feb. 2014) (J.S.D. dissertation, Yale University) (on file with Lillian Goldman Law Library, Yale Law School) http://hdl.handle.net/20.500.13051/17635 [https://perma.cc/7WBJ-ZDMQ].

2 *Id.* at 103.

3 *Id.* at 24 (observing that insolvency tends to generate a collective-action problem "because, following default, each individual creditor may seek to enforce its claim against the assets in the pool in a way that diminishes the pool's overall value for creditors as a whole, for example by seizing a particular item the debtor needs to conduct its operations, thereby destroying the value of the debtor's business as a going concern").

4 *See* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law*, *in* Research Handbook on Corporate Bankruptcy Law 6, 11–13 (Barry E. Adler ed., 2020).

Fortunately, policymakers have recognized this species of collective action problem since as early as the country's infancy.[5] And although the framers of the Constitution likely could not have envisioned the size and scale of modern business bankruptcies, they were keenly aware that addressing the unique challenges of insolvency would necessarily implicate the scope of the federal government's power to interfere with private ordering.[6] Accordingly, Article I of the U.S. Constitution vests in Congress the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[7] Two centuries later, Congress exercised that authority to enact the Bankruptcy Reform Act of 1978, which created what is now known as the Bankruptcy Code and established a unit of bankruptcy courts within the federal judiciary to administer the new Code.[8]

While Congress's decision to delegate bankruptcy authority in this manner is rarely discussed with the gravity it deserves, it has nonetheless proven pivotal in shaping the institutional characteristics of bankruptcy courts.[9] Perhaps most prominently, the Bankruptcy Reform Act of 1978 originally intended to give the bankruptcy courts broad jurisdiction over "all civil proceedings arising under . . . [the Code] or arising in or related to cases under . . . [the Code]."[10] Six years later, however, the Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that this framework encroached upon the powers of Article III courts by vesting "'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court[s]."[11]

---

5 *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 Notre Dame L. Rev. 605, 617 (2008).

6 *See id.*

7 U.S. Const. art. I, § 8, cl. 4.

8 Robert J. Keach & Lindsay Zahradka Milne, *The Unconstitutional Confluence of Statutory Mootness Under Bankruptcy Code § 363(m) & Bankruptcy Courts' Discretion Under Bankruptcy Rule 6004(h)*, 71 Syracuse L. Rev. 493, 495 (2021).

9 *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. Rev. 384, 388 (2012) ("[B]ankruptcy scholars have generally failed to take note of, or perhaps have turned a blind eye to, the central policymaking role played by the courts in administering the Bankruptcy Code."); *see also id.* (stating that "[t]he inattention given to Congress's choice of delegate in the bankruptcy sphere is unfortunate").

10 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, ch. 90, sec. 1471(b), § 1471(b), 92 Stat. 2549, 2668 (1978), *invalidated by* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

11 *Northern Pipeline*, 458 U.S. at 84–85. *See also* Petition for Writ of Certiorari, U.S. Bank Nat'l Ass'n v. Windstream Holdings, Inc., 144 S. Ct. 71 (2023) (No. 22-926) [hereinafter *Petition for Writ of Certiorari*].

In response to the constitutional misgivings identified in *Northern Pipeline*, Congress restructured the bankruptcy courts as adjunct "units" of the district courts and instituted a tiered system of Article III appellate review in which the district courts "shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees" of the bankruptcy courts.[12] Importantly, for this system to function as intended, the district courts must dutifully exercise their "virtually unflagging obligation" to hear and decide cases within their jurisdiction.[13] And the bankruptcy court, for its part, should refrain from taking action that would impede the district court from exercising its jurisdiction on an appeal from the bankruptcy court.[14]

Yet despite the constitutional significance of Article III appellate review, both of these maxims are routinely subverted when the appeal concerns an order confirming a plan of reorganization. First, the judge-made prudential doctrine of "equitable mootness" allows appellate courts to dismiss an appeal as moot "when to grant the relief requested will undermine the finality and reliability of consummated plans of reorganization."[15] Unlike the traditional mootness doctrine, which requires dismissal when granting even partial relief becomes impossible, equitable mootness allows appellate courts to dismiss appeals of plan confirmation orders "when it becomes impractical and imprudent 'to upset the plan of reorganization.'"[16] Hence, where

---

12 28 U.S.C. § 158(a)(1).

13 *See, e.g.*, Ryan v. Johnson, 115 F.3d 193, 195 (3d Cir. 1997) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

14 *See, e.g.*, *In re* Motors Liquidation Co., 536 B.R. 54, 60 (Bankr. S.D.N.Y. 2015) ("If I were to deny access to a district judge for Article III consideration of whether withdrawal of the reference is appropriate, such a ruling would impair Article III judges' ability to exercise the control over the bankruptcy system . . . .") (footnote omitted); Keach & Milne, *supra* note 8, at 497 ("Bankruptcy courts themselves avoid taking action that would purport to preclude litigants from benefiting from district court oversight on the basis that the bankruptcy courts lack the power to divest the district court of such supervisory authority."). The *In re Motors Liquidation* opinion further observed that impairing an Article III court's ability to review decisions of the bankruptcy court "would raise substantial constitutional issues, as 'the power of the federal judiciary to take jurisdiction,' upon which the *Wellness* holding was so heavily based, would no longer 'remain[] in place.'". *In re Motors Liquidation*, 536 B.R at 60 (alteration in original) (quoting *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 679 (2015)).

15 Tribune Media Co. v. Aurelius Cap. Mgmt., 799 F.3d 272, 277 (3d Cir. 2015).

16 Mac Panel Co. v. Va. Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002) (quoting *In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994)) ("[E]quitable mootness is often invoked when it becomes impractical and imprudent 'to upset the

the doctrine applies, it allows courts to dismiss even plainly meritorious appeals without reaching any consideration of the merits.[17]

Second, the present standard for staying a plan confirmation order pending appeal allows bankruptcy courts to freely deny stays in a manner that virtually guarantees mootness by the time the appellant has an opportunity to be heard on the appeal. The result is that the present standard effectively vests in the bankruptcy court the power to foreclose review of its own plan confirmation orders, which many have argued is incompatible with a well-functioning appellate system—particularly one predicated upon a constitutional right to have claims reviewed on the merits by an Article III court.[18]

Against that background, this Note proceeds in three Parts. Part I chronicles the life cycle of a plan confirmation order through three distinct phases: the negotiation phase, the confirmation phase, and the appellate phase. The overarching goal of this process is to reach consensus on a *plan of reorganization* (or "plan") that allows the debtor, with the consent of its creditors, to restructure its obligations and emerge from bankruptcy as a viable enterprise. In practice, however, unanimous consent among the firm's claimants is difficult to obtain, and when a plan is confirmed over a claimant's objection, that claimant can usually appeal the order to a higher court as of right.[19]

In Part II, this Note posits that even though the practical benefits of a mootness-like abstention doctrine are palpable, as applied, the doctrine of equitable mootness is neither mootness nor equitable. On the former, equitable mootness is not mootness because even if a mootness-like jurisdictional exception is justified to avoid "unscrambling the eggs" of a confirmed plan, in practice, equitable mootness has become the norm in bankruptcy appeals rather than the exception. On the latter, equitable mootness is not equitable because even though these decisions are ostensibly individualized, the institutional setting

plan of reorganization at this late date.'"). *Compare id.*, *with* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 307 (2012) ("A case becomes moot only when it is impossible for a court to grant '"any effectual relief whatever" to the prevailing party.'" (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

17 Robert Miller, *Equitable Mootness: Ignorance Is Bliss and Unconstitutional*, 107 Ky. L.J. 269, 271 (2018).

18 *See id.* at 313; Katelyn Knight, *Equitable Mootness in Bankruptcy Appeals*, 49 Santa Clara L. Rev. 253, 281–82 (2009).

19 *See* 28 U.S.C. § 158.

in which they occur systematically encourages appellate judges to find equitable mootness as frequently as possible. Together, these observations combine to reveal an appellate system that presently cannot guarantee appellate rights of the kind that litigants expect or that the constitutional bounds of bankruptcy jurisdiction require.

Finally, in response to these concerns, Part III of this Note proposes an amendment to Federal Rule of Bankruptcy Procedure 3020(e) that restores meaningful appellate review by reframing the choice architecture in which equitable mootness decisions occur. First, once an appeal is filed, Amended Rule 3020(e) automatically stays the plan confirmation order pending appeal, and that stay remains in effect until either the appeal ends or the stay motion is denied. Second, Amended Rule 3020(e) replaces the common law standard for granting stays pending appeal with a codified rule that significantly limits the bankruptcy court's discretion to deny a stay. Together, these amendments stand to provide a more optimal balance between the competing values that animate plan confirmation appeals.

I
The Life Cycle of a Plan of Reorganization

A. The Negotiation Phase

When a firm files for bankruptcy, one of its first important decisions is whether to liquidate under Chapter 7 of the Code or to reorganize under Chapter 11 of the Code.[20] In a Chapter 7 liquidation, the debtor ceases its operations, and the bankruptcy court appoints a trustee to sell the debtor's assets and distribute the proceeds to creditors.[21] Chapter 11, on the other hand, provides a platform for restructuring the assets and obligations of a debtor so that it may stay afloat and re-emerge from bankruptcy as a "going concern"—that is, as a financially viable business with sufficient assets and resources to continue operating indefinitely.[22]

---

20 *See* Kevin A. Kordana & Eric A. Posner, *A Positive Theory of Chapter 11*, 74 N.Y.U. L. Rev. 161, 161 (1999); *see also* 11 U.S.C. § 301 (providing that a voluntary bankruptcy case is commenced by filing a petition under the operative chapter of the Code).

21 Kordana & Posner, *supra* note 20, at 161; *see also* 11 U.S.C. § 726(a) (providing for distribution of the bankruptcy estate's property to claimants against the debtor); 11 U.S.C. § 704 (specifying the duties of the trustee in a Chapter 7 liquidation).

22 Kordana & Posner, *supra* note 20, at 161.

To accomplish this, the debtor engages in a court-supervised bargaining process with its creditors and other interested parties, the goal of which is to reach consensus on a *plan of reorganization*. In most cases, a proposed plan provides that some or all of the debtor's prebankruptcy obligations are modified or discharged, existing equity interests in the debtor are wiped out, and some of the debtor's assets or business units are designated for liquidation.[23] Often, these negotiations are the most complex and expensive phase of the reorganization; even the smallest and simplest Chapter 11 cases sometimes cost over one hundred thousand dollars in fees alone, while the largest and most complicated cases can quickly exceed hundreds of millions of dollars.[24]

Once the plan is approved by claimants and confirmed by the bankruptcy court, it becomes binding on all parties and typically operates to modify or eliminate the debtor's obligations to various constituencies of creditors.[25] Importantly, a proposed plan cannot be confirmed unless at least one class of impaired claimants has voted to approve the plan.[26] Under section 1122(a) of the Bankruptcy Code, each "class" consists of claims against the debtor that are substantially similar to one another, and a claim is "impaired" if the proposed plan would alter the holder's legal, equitable, or contractual rights vis-à-vis the debtor—for example, if the terms of the underlying instrument are modified, if the holder receives a distribution of

---

23 Christopher W. Frost, *Pragmatism vs. Principle: Bankruptcy Appeals and Equitable Mootness*, 15 N.Y.U. J.L. & BUS. 477, 480 (2019) ("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.").

24 GREGORY GERMAIN, BANKRUPTCY LAW AND PRACTICE 47 (4th ed. 2021).

25 *See* 11 U.S.C. § 1141 (describing the legal effect of confirmation); Frost, *supra* note 23, at 480.

26 *See* 11 U.S.C. § 1129(a)(10) (requiring acceptance by at least one impaired class for a plan to be confirmed). Note that the Bankruptcy Code distinguishes between "claims" and "interests." The Code defines a "claim" as either (1) right to repayment; or (2) a right to an equitable remedy for a breach of performance if the breach gives rise to a right to payment. *Id.* § 101(5). The term "interest" is not defined in the Code, but it generally refers to a proprietary right in the debtor itself. *See, e.g.*, *id.* § 501(a) (providing that an equity security holder may file a proof of interest). This Note generally discusses *claims* against the debtor by *claimants* (or *creditors*), but many provisions of the Bankruptcy Code apply equally to both claimants and interest holders.

restructured debt or equity, or if the holder receives no distribution at all.[27] Under section 1126(c), a class is considered to have accepted a proposed plan if the plan is approved by: (1) at least one-half of the total *number* of creditors in the class; and (2) creditors whose claims, added together, constitute at least two-thirds of the total *amount* of claims in the class.[28]

Unsurprisingly, a proposed plan is more likely to be confirmed when all impaired classes vote to accept it.[29] However, if one or more classes vote to reject the plan, section 1129(a)(8) allows the bankruptcy court to "cram down" the plan—that is, to confirm the plan anyway—if it finds that: (1) at least one class of impaired creditors has consented to the plan; (2) the

---

27 *See id.* § 1122(a) (providing that a claim or interest may only be placed in a class if it is substantially similar to every other claim in the class); *id.* § 1124(1) (defining impairment of a claim or interest). The purpose of the "substantially similar" requirement is to prevent plan proponents from gerrymandering the classes to create an impaired class that will vote to approve the plan. PRAC. L. BANKR. & RESTRUCTURING, OBJECTING TO PLAN CONFIRMATION: OVERVIEW, Westlaw W-000-5955 [hereinafter *Objection Practice Note*]. Note, however, that the Code does not require that all substantially similar claims and interests be placed in the same class. As long as they are equal in priority, two or more substantially similar claims may be classified separately if the plan proponent can show a rational basis or business justification for doing so. *See, e.g.*, *In re* Marlow Manor Downtown, LLC, 499 B.R. 717, 723 (Bankr. D. Alaska 2013); *In re* Dow Corning Corp., 280 F.3d 648, 661 (6th Cir. 2002).

28 *See* 11 U.S.C. § 1126(c) (specifying the voting requirements for classes of claims); *id.* § 1126(d) (specifying the required proportion of votes for classes of interests).

29 *See* KATHLEEN P. MARCH & JANET A. SHAPIRO, THE RUTTER GROUP CALIFORNIA PRACTICE GUIDE: BANKRUPTCY ch.11-F (2023). Usually, cramdown plans also take longer and cost more to confirm than consensual ones. *Id.* In *In re* Charter Communications, Inc., 691 F.3d 476 (2d Cir. 2012), for instance, the plan confirmation hearing lasted for nineteen days and featured objections at every stage of the proceedings. *See id.* at 481. These frictions may trace at least in part to the Code's additional requirements for confirming nonconsensual plans. *Compare* 11 U.S.C. § 1129(a)(8) (requiring the approval of all impaired classes), *with id.* § 1129(b) (setting aside paragraph (a)(8) but instead requiring an additional set of fact-intensive showings that tend to be heavily litigated). However, it is also plausible that cases that result in a cramdown consist disproportionately of cases that are more difficult and costly to resolve in the first place—perhaps, for example, because the cases in which creditors and debtors most strongly disagree are precisely those most likely to result in a cramdown. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 22–24 (2007) (describing representativeness heuristics); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 810–11 (2001) (observing, as an example of representativeness heuristics, that the doctrine of *res ipsa loquitor* is fallacious because events that do not ordinarily occur absent negligence are not necessarily more likely to have been caused by negligence).

plan does not discriminate unfairly among the classes of creditors; and (3) the plan is fair and equitable.[30]

B. The Confirmation Phase

The most significant event in a reorganization is typically the *plan confirmation hearing*, which signifies the bankruptcy court's approval of a proposed reorganization plan.[31] Section 1129 of the Bankruptcy Code sets forth an extensive list of requirements that a proposed plan must satisfy before it can be confirmed, and the plan proponent must prove by a preponderance of the evidence that the proposed plan meets all of the applicable requirements.[32] In turn, the task of the bankruptcy judge at the confirmation hearing is to determine whether the proposed plan satisfies each of the applicable requirements and to adjudicate any objections against confirmation of the plan.[33]

If an objection is filed, the objecting party has the right to be heard on the objection and to present evidence in its favor, and if the objection is sustained by the bankruptcy court, the proposed plan cannot be confirmed.[34] Typically, an objection to plan confirmation alleges that the plan fails to meet one or more of the statutory requirements set forth in section 1129.[35] Some of the most common objections to plan confirmation include:

- *Failure to comply with all applicable provisions of Chapter 11.* Under sections 1129(a)(1) and 1129(a)(2), the threshold requirements for confirming a proposed plan are whether the plan and the plan proponent, respectively, have complied with all applicable provisions of Chapter 11, including those not specifi-

30 11 U.S.C. § 1129(b)(1). Note that even in a cramdown, the plan must still comply with the rest of the usual statutory requirements for confirmation.

31 Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. Rev. 621, 622 (1993) (describing plan confirmation hearings as "ordinarily the most significant single event in the case" and "the climax of efforts that may have lasted years").

32 *See, e.g.*, *In re* Arnold & Baker Farms, 177 B.R. 648, 653–654 (B.A.P. 9th Cir. 1994); *In re* Monarch Beach Venture, Ltd., 166 B.R. 428, 431–32 (C.D. Cal. 1993).

33 Note that the bankruptcy judge has an independent duty to determine whether the plan complies with the Bankruptcy Code even if no objections are filed. *See, e.g.*, *In re* Coastal Equities, Inc., 33 B.R. 898, 906 (Bankr. S.D. Cal. 1983); *In re* Future Energy Corp., 83 B.R. 470, 481 (Bankr. S.D. Ohio 1988).

34 *See* Fed. R. Bankr. P. 3020; *id.* at 9014.

35 11 U.S.C. § 1129(a)(11).

cally enumerated in section 1129.[36] Section 1123(a), for example, specifies seven informational items that must be included in the contents of the plan, while section 1125(b) provides rules governing solicitation of votes for or against a proposed plan.[37]

- *Failure to satisfy the "best interests of creditors" test.* Section 1129(a)(7), commonly referred to as the "best interests of creditors" test, requires that any impaired creditor who voted to reject the plan must receive at least as much as it would have received in a Chapter 7 liquidation.[38] Ordinarily, to show that the proposed plan satisfies the "best interests" test, the plan proponent conducts a hypothetical liquidation analysis, which calculates the estimated recoveries that creditors would receive in liquidation and compares them to the creditors' estimated recoveries under the plan.[39] Objections on the basis of the "best interests" test usually allege that the calculations used in the hypothetical liquidation analysis were inaccurate, unsound, or improperly skewed in favor of the plan.[40]
- *Lack of good faith.* Section 1129(a)(3) provides that a plan must be "proposed in good faith and not by any means forbidden by law."[41] In general, a plan is proposed in good faith if it is likely to achieve the reorganization contemplated by the plan without violating the requirements of the Bankruptcy Code.[42] Although good and bad faith are fact-specific inquiries and thus evaluated on a case-by-case basis, the bankruptcy court will usually find bad faith if the objecting party shows that the plan is fraudulent, misleading, unrealistic, or demonstrably inadequate.[43]
- *Lack of feasibility.* Section 1129(a)(11), commonly referred to as the "feasibility test," provides that a plan can only be confirmed if it is not likely to lead to

---

36 *Id.* §§ 1129(a)(1), 1129(a)(2).

37 *Id.* §§ 1123(a), 1125(b).

38 *Id.* § 1129(a)(7).

39 *See* Jonathan Hicks, *Foxes Guarding the Henhouse: The Modern Best Interests of Creditors Test in Chapter 11 Reorganizations*, 5 Nev. L.J. 820, 821 (2005); *Objection Practice Note*, *supra* note 27.

40 *Objection Practice Note*, *supra* note 27.

41 11 U.S.C. § 1129(a)(3).

42 *Objection Practice Note*, *supra* note 27.

43 *See Objection Practice Note*, *supra* note 27; *In re* Leslie Fay Cos., Inc., 207 B.R. 764, 780–81 (Bankr. S.D.N.Y. 1997).

another bankruptcy filing by the debtor.[44] Typically, at a minimum, the reorganized firm's projected future income must be sufficient to satisfy its obligations under the plan.[45] In addition, courts will usually consider whether the debtor will be capable of remaining solvent, operating profitably, maintaining adequate cash flow, complying with the plan's restrictive covenants, and employing qualified management after the plan is implemented.[46]

- *Improper classification of claims.* As mentioned in Part I.A., section 1122(a) of the Code requires claims to be classified only with substantially similar claims.[47] A corollary provision, section 1129(a)(10), has the purpose of preventing plan proponents from gerrymandering the classes to create an impaired class that will vote to approve the plan.[48] Generally, a party objecting on the basis of improper classification will attempt to show that certain claims were classified separately in the plan without adequate justification.[49]
- *Improper third-party releases.* Third-party releases are plan provisions that release or limit the claims of non-debtor parties against other non-debtor parties.[50] Often, these provisions are used to enjoin a third party's claims against non-debtor parties who could assert indemnification claims against the debtor—for example, its officers, directors, guarantors, sureties, or insurance carriers.[51] Not all jurisdictions permit third-party releases, but even in those that do, a party may object if the releases are overbroad or inappropriate.[52]

Additionally, in cases where the plan proponent is seeking a cramdown, two other common objections are:

---

44 11 U.S.C. § 1129(a)(11).

45 *Objection Practice Note*, *supra* note 27.

46 PRAC. L. BANKR. & RESTRUCTURING & PRAC. L. FIN., CHAPTER 11 PLAN PROCESS: OVERVIEW, Westlaw 0-502-7396 [hereinafter *Plan Process Practice Note*].

47 *See supra* notes 27–29 and accompanying text.

48 *Objection Practice Note*, *supra* note 27.

49 *Id.*

50 *Id.*; TYLER LAYNE, CONSTITUTIONALITY OF NON-CONSENSUAL THIRD-PARTY RELEASES, Bloomberg Law (2021).

51 *See* LAYNE, *supra* note 50.

52 *Objection Practice Note*, *supra* note 27.

- *Unfair discrimination against a dissenting class.* In a cramdown, an objecting party can create a rebuttable presumption of unfair discrimination if it shows that the dissenting class is set to receive a materially smaller or less certain recovery than another class of equal priority.[53] If this presumption applies, the debtor must then show that the difference in treatment is justified based on legal or factual differences between the claims.[54]
- *Lack of fairness and equity.* Under section 1129(b)(1), a proposed plan must be "fair and equitable" in its treatment of dissenting creditors.[55] Section 1129(b)(2) lists three separate standards determining whether treatment of a class is fair and equitable with respect to secured creditors, unsecured creditors, and interest holders, respectively.[56] Accordingly, an objecting party can support a finding of lack of fairness and equity if it shows that the plan does not meet the applicable statutory standard.[57]

If the bankruptcy judge sustains any or all of a party's objections, the plan cannot be confirmed.[58] However, if she overrules the objection and confirms the plan, its terms become binding on the debtor, all of its claimants and interest holders, and any entities slated to enter into post-confirmation transactions with the reorganized debtor under the confirmed plan.[59]

C. The Appellate Phase

In an appeal from a bankruptcy court, the first-level appellate court reviews the bankruptcy court's conclusions of law de novo and its findings of fact under a "clearly erroneous" standard.[60] Ordinarily, these first-level appeals are heard by the district court in the district where the bankruptcy case is pending.[61] Depending on the jurisdiction and the circumstances

53 *Id.*; *In re* Tribune Co., 464 B.R. 126, 205 (Bankr. D. Del. 2011).

54 *Objection Practice Note*, *supra* note 27.

55 11 U.S.C. § 1129(b)(1).

56 *Id.* § 1129(b)(2).

57 *Objection Practice Note*, *supra* note 27.

58 *Id.*

59 *Id.*

60 *See* Prac. L. Bankr. & Restructuring, Appealing a Bankruptcy Court Order: Overview, Westlaw W-001-3320.

61 *Id.*

of the appeal, however, two other forums are sometimes available.[62] First, as an alternative to the district court, some circuits allow bankruptcy appeals to be heard in the first instance by a Bankruptcy Appellate Panel (BAP)—a specialized three-judge panel consisting of bankruptcy judges from another district within the circuit.[63] In circuits that have established a Bankruptcy Appellate Panel, the appeal will automatically proceed before the BAP unless either party elects to have the appeal heard by the district court.[64] Second, as part of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress created a mechanism for appealing directly to the court of appeals in a handful of limited circumstances, such as cases involving matters of public importance or questions of law with no controlling decision on point.[65]

When a bankruptcy judge confirms a proposed plan over a party's objection, the objecting party can appeal the confirmation to a higher court pursuant to the system of Article III appellate review set forth in the Bankruptcy Code.[66] Indeed, as discussed above, a vital limitation on the bankruptcy court's jurisdiction is that its decisions are subject to appellate review by Article III courts.[67] To facilitate this, Federal Rule of Bankruptcy Procedure 3020(e) automatically suspends plan confirmation orders for fourteen days following entry of an order, coinciding with the deadline for filing a notice of appeal.[68]

However, although Federal Rule of Bankruptcy Procedure 3020(e) automatically stays plan confirmation orders for fourteen days to allow parties time to *file* an appeal, receiving a decision on the merits usually takes far longer.[69] In many cases,

---

62 *See id.*

63 28 U.S.C. § 158(b)(1).

64 FED. R. BANKR. P. 8005. The appellant must make this election at the time of filing the appeal, but other parties may do so any time within thirty days of service of the notice of appeal. 28 U.S.C. § 158(c)(1).

65 *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 1233, § 158(2)(2)(A), 119 Stat. 23, 202 (codified at 28 U.S.C. § 158(d)(2)(A)).

66 *See* 11 U.S.C. § 158.

67 Donald L. Swanson, *A Primer on Equitable Mootness and Article III (In re VeroBlue)*, MEDIATBANKRY (Aug. 19, 2021) https://mediatbankry.com/2021/08/19/a-primer-on-equitable-mootness-and-article-iii-in-re-veroblue/ [https://perma.cc/8WE4-UD67] ("An important element of bankruptcy court jurisdiction is this: a bankruptcy court decision is subject to meaningful appellate oversight by Article III courts . . . .").

68 *See* FED. R. BANKR. P. 3020(e).

69 *See id.*; LESLIE C. STORM, OFF. OF THE CLERK, PRACTICE GUIDE FOR APPEALS TO THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT (2022), https://

the appellant might therefore wish to suspend implementation of the confirmed plan for a longer period so as to foreclose harm to the appellant while the appeal is pending. To that end, Federal Rule of Bankruptcy Procedure 8005 allows parties to seek a stay of a bankruptcy-court order pending appeal.[70] To obtain a stay pending appeal, the movant must file a motion for a stay in the bankruptcy court, and in general, the standard that courts apply is the same as the standard applied in non-bankruptcy cases. Originally articulated in *Hilton v. Braunskill*, 481 U.S. 770 (1987), and more recently in *Nken v. Holder*, 556 U.S. 418, (2009), that standard directs the bankruptcy court to weigh four factors in determining whether to grant a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;
>
> (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and
>
> (4) where the public interest lies.[71]

If a stay is granted, the debtor remains in bankruptcy and cannot implement the confirmed plan until the stay is lifted or the appeal concludes. In practice, however, stays of plan confirmation orders are rarely granted, leaving the debtor free to implement the confirmed plan even while the appeal is underway.[72] And once this occurs, the unstayed appeal is nearly always subject to dismissal under the doctrine of *equitable mootness*, which requires the appellate court to dismiss an appeal as moot when the requested relief would "significantly and irrevocably disrupt the implementation of the plan or disproportionately harm the reliance interests of other parties not before the court."[73] This judge-made prudential doctrine, which presently exists only in bankruptcy appeals, is usually invoked in situations where the debtor has already begun implementing the reorganization transactions contemplated in the confirmed

---

www.bap1.uscourts.gov/sites/bap1/files/BAP_Guide.pdf [https://perma.cc/RSU7-VGFM] (describing the filing deadlines for motion practice before the Bankruptcy Appellate Panel for the First Circuit) [hereinafter *BAP Practice Guide*].

70 *See* Fed. R. Bankr. P. 8005.

71 *Nken*, 556 U.S. at 434 (2009) (quoting *Hilton*, 481 at 776).

72 *See* Frost, *supra* note 23, at 483; *In re* Manges, 29 F.3d 1034, 1039–40 (5th Cir. 1994).

73 *See In re* City of Detroit, Michigan, 838 F.3d 792, 798 (6th Cir. 2016).

plan—for example, by purchasing and selling assets or distributing payments to creditors.[74]

Although courts differ in their precise formulations of the doctrine, in general, most recite a factor test substantially similar to the following:

> (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.[75]

In practice, however, courts have observed that some of these factors are redundant; for example, if a stay has been obtained, the plan ordinarily cannot be substantially consummated.[76] Accordingly, most courts usually distill the equitable mootness analysis into two primary considerations: (1) whether the confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested will "fatally scramble the plan and/or . . . significantly harm third parties who have justifiably relied on plan confirmation."[77]

Where equitable mootness applies, the result is dismissal even if the appellant is plainly correct on the merits.[78] And

---

[74] Frost, *supra* note 23, at 478.

[75] *In re* Cont'l Airlines, 91 F.3d 553, 560 (3d Cir. 1996) (citing *In re* Manges, 29 F.3d at 1039; *In re* Pub. Serv. Co., 963 F.2d 469, 471–72 (1st Cir. 1992)).

[76] Frost, *supra* note 23, at 486.

[77] *Id.* at 486–87, at 486–87 (quoting *In re* Semcrude, L.P., 728 F.3d 314, 321 (3d Cir. 2013)) (discussing courts' distillation of the analysis from the broader five-factor test into the two-factor test articulated in *In re Manges*); *accord In re* Manges, 29 F.3d 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." (quoting *In re* Block Shim Dev. Co., 939 F.2d 289, 291 (5th Cir. 1991)).

[78] *See* Frost, *supra* note 23, at 478 ("The loss of appeal rights under the doctrine is complete where it applies."); *In re* Cont'l Airlines, 91 F.3d at 571 ("[I]f we conclude that an appeal is moot in this sense, we have little remedial flexibility; we generally have no choice but to dismiss." (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 19–22 (1994); Mills v. Green, 159 U.S. 651, 653 (1895)); *Mills*, 159 U.S. at 653 (stating that when "an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff,

debtors, often at the urging of their counsel, capitalize on this by rushing to implement the plan's provisions as quickly as possible so as to preclude any potential appeals.[79] Hence, the quintessential challenge for appellants is to reach an appellate court before the debtor can substantially consummate the plan, which in practice will be virtually impossible absent a stay.[80]

II
Tensions in the Equitable Mootness Doctrine

A. Equitable Mootness Is Not Mootness

Central to every expression of bankruptcy policy is a trade-off between two competing values. On the one hand, bankruptcy policy seeks to ensure that creditors' rights are protected, including the right to fair and accurate administration of the Bankruptcy Code. On the other, the fundamental purpose of bankruptcy is to facilitate a value-maximizing resolution of the debtor, and observing the formalities of judicial process will sometimes make it more difficult to do so, particularly in cases where the debtor's days are numbered if it cannot successfully reorganize.[81]

Indeed, many of the most important features of bankruptcy law reflect a conscious choice to place certain rules closer to one side of this continuum than the other. For example, one of the signature features of Chapter 11 is its power to bind dissenting creditors to a confirmable plan even when those

---

to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal").

79 *See In re* One2One Commc'ns, LLC, 805 F.3d 428, 446–47 (3d Cir. 2015) (Krause, J., concurring) ("The doctrine was intended to promote finality, but it has proven far more likely to promote uncertainty and delay. Ironically . . . a motion to dismiss an appeal as equitably moot has become 'part of the Plan.' Proponents of reorganization plans now rush to implement them so they may avail themselves of an equitable mootness defense . . . .") (footnote omitted); David M. Reeder, *Ruling Limits 'Equitable Mootness' Doctrine in Bankruptcy*, L.A. Daily J. (Sept. 21, 2015) ("When a Chapter 11 plan of reorganization is confirmed over the objection of a creditor, the next phase of the contest is often a race. The debtor attempts to reach 'base' via substantial consummation of the plan in order to, arguably, render any appeal of the confirmation by an objecting creditor 'equitably moot.' At the same time, the creditor is often seeking a stay pending appeal enjoining the debtor from carrying out the terms of the plan.").

80 *See* Knight, *supra* note 18, at 279.

81 Frost, *supra* note 23, at 483 ("Delay in bankruptcy resulting from such niceties as traditional judicial process might result in there being nothing left to reorganize.").

creditors stand to receive only a fraction of their claims against the debtor.[82] Yet at the same time, the best interests test and the absolute priority rule limit the scope of this power by parameterizing the degrees of impairment that are acceptable.[83] The result is a discrete position on the continuum that differs from other positions policymakers could conceivably choose—for example, by requiring unanimous consent from creditors, or even by placing no limits whatsoever on impairment.

Appellate procedure, too, occupies a space on this type of continuum. For instance, somewhere on one extreme might lie a system in which plan confirmation triggers immediate and automatic review by one or more appellate bodies, while on the other extreme might lie a system that prohibits appeals of plan confirmation orders altogether. The former would almost certainly reduce the rate at which unconfirmable plans are confirmed, while the latter would likely maximize the rate at which reorganizations are successfully achieved. Yet few would suggest that either of these points constitutes an optimal expression of bankruptcy policy, and likewise, many observers—including scholars, practitioners, and judges alike—have suggested that equitable mootness does not either.[84]

Despite its name, the doctrine of equitable mootness is unrelated to the traditional mootness doctrine, which derives from the U.S. Constitution's "case or controversy" requirement.[85] Article III, Section 2 of the Constitution limits the jurisdiction of federal courts to "Cases" or "Controversies,"[86] meaning that federal courts are permitted to hear only "cases and controversies . . . traditionally amenable to, and resolved by, the judicial

---

82 *See id.* at 522.

83 *Id.* at 500.

84 *See, e.g.*, *In re* Cont'l Airlines, 91 F.3d, 553, 570 (3d. Cir. 1996) (Alito, J., dissenting); *Petition for Writ of Certiorari*, *supra* note 11, at 2–3 ("The court-made doctrine of equitable mootness has expanded to become a scourge on the proper functioning of the constitutionally mandated court system in bankruptcy cases. It goes far beyond any limit placed on Article III court review by the Constitution or by Congress, represents a sweeping delegation of authority from Congress to the courts, and, in application, wrongfully and unevenly deprives bankruptcy litigants of their constitutional and statutory rights to Article III court review. As such, it is entirely inappropriate.").

85 *See In re* Mortgs. Ltd., 771 F.3d 1211, 1214–15 (9th Cir. 2014) (describing equitable mootness as "unrelated to the constitutional prohibition against hearing moot" (citing *In re* Semcrude, L.P., 728 F.3d 314, 317, 317 n.2 (3d Cir. 2013); In re UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994)).

86 U.S. CONST., art. III, § 2, cl. 1

process."[87] Accordingly, when the circumstances of a matter render it "impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party," the matter must be dismissed as moot.[88]

Equitable mootness, on the other hand, addresses precisely the opposite circumstances—those in which "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."[89] As one Eleventh Circuit decision observed:

> The very fact that it could be so imprudent to disturb the Plan is a testament to the fact that there is indeed a live controversy; the pragmatic doctrine of equitable mootness exists precisely because the vindication of a party's rights must be balanced against the chaos that could result from rescinding a plan of confirmation in large and complex bankruptcy cases.[90]

Unlike traditional mootness, which derives from the Constitution's justiciability requirements, equitable mootness is a judge-made doctrine with no clear constitutional or statutory basis whatsoever.[91] On this observation alone, the doctrine is at least facially in tension with the "virtually unflagging obligation" of federal courts to "exercise the jurisdiction given them" by Congress.[92] The jurisdictional statute governing bankruptcy appeals, 28 U.S.C. § 158, expressly provides that the district courts "*shall* have jurisdiction to hear appeals . . . from final judgments, orders, and decrees" from the bankruptcy court, and although the Supreme Court has identified a handful of limited circumstances in which courts may abstain from

---

87 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (citing Muskrat v. United States, 219 U.S. 346, 356–57 (1911)).

88 Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)); *see also, e.g.*, Chafin v. Chafin, 568 U.S. 165, 172 (2013); Cnty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000).

89 Frost, *supra* note 23, at 479.

90 *In re* Ferguson, 683 F. App'x 924, 927–28 (11th Cir., 2017).

91 *See, e.g.*, Frost, *supra* note 23, at 494–96; *In re* One2One Commc'ns, LLC, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring) ("[A]s courts and litigants . . . have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none.").

92 *See, e.g.*, *In re* Cont'l Airlines, 91 F.3d 553, 568 (3d Cir. 1996) (Alito, J., dissenting) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)); *Colo. River Water Conservation Dist.*, 424 U.S. at 817; Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

hearing certain cases within their jurisdiction, none of those circumstances apply to bankruptcy appeals.[93]

The origins of equitable mootness are generally traced to *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981), a reorganization in which the Chapter 11 trustees appealed a plan confirmation order that authorized, among other transactions, a settlement with the Federal Deposit Insurance Commission (FDIC).[94] After the trustees failed to obtain a stay, the FDIC moved to dismiss the appeal as moot on grounds that the plan had already been implemented so substantially that unwinding the plan was not feasible.[95] The district granted the motion, and the Ninth Circuit affirmed, holding that because the appellants had neglected to diligently pursue a stay pending appeal, reversing the plan confirmation order "would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court."[96]

Following *Roberts Farms*, all other circuits soon developed their own iterations of equitable mootness.[97] But while the opinion in *Roberts Farms* heavily stressed that the appellants had "failed and neglected"[98] to pursue a stay pending appeal, subsequent jurisprudence in all circuits has expanded the doctrine to dismiss appeals even where the appellants have

---

93 *Id.* § 158(a)(1) (emphasis added); *see Petition for Writ of Certiorari*, *supra* note 11, at 9–11 (arguing that the doctrine of equitable mootness is inconsistent with the district courts' obligation to hear appeals within their jurisdiction under 28 U.S.C. § 158); *see also, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); Younger v. Harris, 401 U.S. 37 (1971); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983).

94 *See In re Roberts Farms, Inc.*, 652 F.2d at 797; Frost, *supra* note 23, at 487 n.27 (stating that *In re Roberts Farms* "is widely considered as the genesis of the doctrine"). *But see In re* Cont'l Airlines, 91 F.3d at 569 (3d Cir. 1996) (Alito, J., dissenting) (identifying an alternative theory of the doctrine's origins based on the Seventh's Circuit's ruling in *In re* UNR Industries, Inc., 20 F.3d 766 (7th Cir. 1994)).

95 *In re Roberts Farms, Inc.*, 652 F.2d at 795.

96 *Id.*

97 *See, e.g.*, *In re* Paige, 584 F.3d 1327, 1330 (10th Cir. 2009) ("[W]e formally adopt the doctrine commonly known as 'equitable mootness'"); *In re* Manges, 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* McGregory, 223 F. App'x 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.").

98 *In re Roberts Farms, Inc.*, 652 F.2d at 798.

diligently exercised all available means to obtain a stay.[99] Indeed, prior to joining the Supreme Court, then-Third Circuit Judge Samuel Alito, writing for the dissenters in *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc), sharply criticized the majority for extending the doctrine "well beyond anything that could be supported by the authority on which *Roberts Farms* rested."[100] As Justice Alito wrote:

> The majority's decision in this case creates a bad precedent for our circuit. The majority adopts the curious doctrine of "equitable mootness," which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief.[101]

Yet despite such admonitions, over time, courts have continued to interpret equitable mootness with such agility as to apply it in virtually any unstayed reorganization. Today, rather than being the exception that the court in *Roberts Farms* might have envisioned, dismissals on equitable mootness grounds have become the norm in plan confirmation appeals, leaving appellants without an opportunity to obtain review on the merits even when they would otherwise be entitled to relief.

B. Equitable Mootness Is Not Equitable

While Justice Alito's frustrations with the doctrine are palpable, the eagerness of appellate judges to find equitable mootness is unsurprising given the choice architecture in which these decisions occur. First, as a threshold matter, judges are only able to find equitable mootness with such frequency because facts that support such a finding are frequently available. Since stays pending appeal are rarely granted, once the brief automatic stay under Rule 3020(e) expires, the debtor will usually begin taking steps to substantially consummate the plan as quickly as possible so as to avail itself of equitable mootness.[102] The threshold for substantial consummation is not high; even in the most complex reorganizations, the debtor can usually demonstrate substantial consummation simply by

---

99 Tiffany Chang, Note, *Equitable Mootness in the Second Circuit*, 31 S. CAL. INTERDISC. L.J. 353, 357 (2022).

100 *In re Cont'l Airlines*, 91 F.3d at 570 (Alito, J., dissenting).

101 *Id.* at 567.

102 *See* Miller, *supra* note 17, at 292 (observing that "the proponents of the transaction will rationally rush to implement it and equitably moot any appeal").

showing that it has made the first distribution to creditors.[103] Hence, when the time comes to address the appeal, equitable mootness will usually be among the permissible rulings from which the judge may choose.

Moreover, even in cases where the judge could conceivably reject an equitable mootness claim, they are incentivized not to do so for several reasons. First, Article III judges maintain lengthy dockets of non-bankruptcy cases in addition to their bankruptcy appeals, and their workloads are quite high (and increasing).[104] This means that judges must often make difficult decisions about how to best allocate their time, attention, and resources, and dismissing cases on equitable mootness grounds offers a compelling opportunity to free up judicial capacity for other assignments.[105] At the same time, evidence suggests that most non-bankruptcy judges do not enjoy their bankruptcy work, making the option to dismiss bankruptcy appeals without a hearing on the merits more attractive than it might be otherwise.[106]

In addition, the institutional design of bankruptcy appeals systematically presents these decisions to judges in a manner that encourages deference to the bankruptcy court's initial confirmation. For example, the unique specialist-to-generalist pipeline in bankruptcy appeals means that appellate judges will often view decisions of the trial court as products of highly specialized expertise, tacitly nudging them toward greater deference than they might otherwise prefer.[107] Moreover, because the standard for granting a stay requires the bankruptcy judge to estimate the probability of success on appeal, the fact that a stay was requested and denied negatively frames the appeal

---

103 *See In re* H & L Devs., Inc., 178 B.R. 77, 82 (Bankr. E.D. Pa. 1994) ("The Code is clear that a plan is substantially consummated when payments commence and distribution has commenced under this Confirmed Plan.").

104 *See* David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1673 (2005) ("Judges' workloads have grown exponentially while the number of judges has remained relatively static. As a consequence, courts are so overwhelmed that they are engaged in judicial triage.").

105 *See id.*

106 *See, e.g.*, Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration*, 21 Ariz. St. L.J. 33, 121 (1989) ("Most district judges like bankruptcy about as much as AIDS . . . . They hate . . . [bankruptcy], they don't want anything to do with it . . . ."); *id.* at 122 ("Most judges will take two death penalty cases to one bankruptcy case.").

107 Edie Greene & Brian H. Bornstein, *Nudging the Justice System Toward Better Decisions*, 103 J. Crim. L. & Criminology 1155, 1166–67 (2013) (book review) (discussing nudges and their influence within choice architectures).

by signaling to the appellate judge that the bankruptcy court, a specialized expert in these matters, did not find the merits of the appeal particularly compelling.

Finally, and perhaps most importantly, equitable mootness has been allowed to flourish in large part because judges are rarely presented with a preferable alternative. In most cases, granting even partial relief of an unstayed confirmation order would entail reversing some or all of the post-confirmation transactions that have taken place to implement the plan.[108] In even the simplest reorganizations, the costs of disrupting a confirmed plan in this manner can be quite large, and in the most complex cases, the transactions that would need to be reversed could amount to billions of dollars spread across innumerable different counterparties.[109] Hence, when judges are presented with a legally meritorious appeal of an unstayed plan confirmation order, the balance of incentives will almost always weigh in favor of finding equitable mootness despite the fact that the appellant would ordinarily be entitled to relief.

Taken together, all of these influences combine to form a choice architecture that leads predictably—perhaps even inevitably—to courts applying the doctrine in a manner that permits as many dismissals as possible. The result, in turn, is a system that presently cannot guarantee appellate rights of the kind that litigants expect and that the constitutional bounds of bankruptcy jurisdiction require.

III
Amending Bankruptcy Rule 3020

On balance, the harm to prospective appellants in this system is far greater than the sum of individual errors that go unreversed. In plan negotiations, one of the most important points of leverage for non-debtors is the credible threat to appeal.[110] By limiting their ability to do so, the present system

108 *See* R. Jake Jumbeck, Comment, *"Complexity" as the Gatekeeper to Equitable Mootness*, 33 Emory Bankr. Devs. J. 171, 173 (2016).

109 *Id.* at 194 (describing cases in which "the appellate courts considered the debtors' reorganization plans complex because the plans involved billions of dollars in distributions and redefined thousands of creditors' rights").

110 *See* Frost, *supra* note 23, at 484 ("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

forces creditors to bargain from an inferior negotiating position, which fundamentally alters the balance of negotiations in a manner that systematically favors debtors at the expense of creditors. The result is that *all* creditors in this system, not just those who would have actually appealed, suffer pecuniary harm in the form of smaller recoveries or recoveries on inferior terms than they would otherwise be able obtain.

In response, this Note proposes an amendment to Rule 3020(e) of the Federal Rules of Bankruptcy Procedure that limits the bankruptcy court's discretion to deny a stay pending appeal. Currently, Rule 3020(e) reads as follows:

> (e) **Stay of confirmation order**
>
> An order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.[111]

As alluded to in Part I, although Rule 3020(e) gives prospective appellants an automatic fourteen-day stay to *file* an appeal, the time required to prepare and submit briefs, conduct a hearing, and render a decision is usually far longer than fourteen days.[112] Hence, when a motion for a stay pending appeal is denied, the debtor is free to begin implementing the plan as soon as the automatic stay period expires. This usually gives the debtor ample time to take steps to substantially consummate the plan and avail themselves of an equitable mootness claim, and once they do so, judges will rarely choose to "unscramble the eggs" even when they could conceivably do so and even when the appeal is plainly correct.[113]

Courts do, however, have a way to prevent the proverbial "egg" from becoming "scrambled" in the first place—the stay pending appeal. Yet stays pending appeal are rarely granted, and appellate courts presented with an unstayed appeal nearly always find equitable mootness.[114] Indeed, just as appellate

---

overturned or affirmed on appeal. By cutting off that prospect, equitable mootness reduces that leverage.").

111 Fed. R. Bankr. P. 3020(e). In practice, plan proponents routinely ask the court to "otherwise order," in which case the plan becomes effective immediately. Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 399–401 (2019).

112 *See BAP Practice Guide*, *supra* note 69 (describing the filing deadlines for motion practice before the Bankruptcy Appellate Panel for the First Circuit).

113 Knight, *supra* note 18, at 278 ("The five-factor equitable mootness analysis operates such that, in an unstayed reorganization, the district court nearly always finds the other factors present.").

114 *See id.*

judges will rarely prefer to grant relief when equitable mootness is available, bankruptcy judges, who prize the need for finality in reorganizations, will rarely prefer to suspend implementation of a confirmed plan even when the appeal is potentially meritorious.[115] And the present standard for granting a stay permits them to give these considerations controlling weight in the analysis, even when doing so effectively guarantees that the appeal will become moot before the appellant can receive a decision on the merits.

Accordingly, this Note argues that Federal Rule of Bankruptcy Procedure 3020(e) should be amended to read as follows:

(e) **Stay of confirmation order**

(1) Except as provided in paragraph (2), an order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.

(2) If a party files a timely notice of appeal of an order confirming a plan and a motion for a stay of that order pending appeal within 14 days after the entry of the order, that order is stayed and shall remain stayed pending appeal unless the motion for a stay pending appeal is denied.

(3) If paragraph (2) applies, the court shall grant a stay of the plan confirmation pending appeal if the movant shows that:

(i) the movant would suffer irreparable harm, including a substantial likelihood of equitable mootness, if the stay were not granted; and

(ii) the appeal is not frivolous.

(4) For the purpose of subparagraph (3)(ii), an appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the appeal contains no arguable basis in law or fact.

Amended Rule 3020(e) reforms the process of obtaining a stay pending appeal in several important ways. Most

115 *See* Frost, *supra* note 23, at 483. At the same time, because the stay motion must ordinarily be sought from the very bankruptcy judge who confirmed the plan in the first place, filing a stay motion essentially amounts to "ask[ing] the bankruptcy judge, who has just ruled in favor of confirmation and against the appellant, if she or he 'really meant it.'" Markell, *supra* note 109, at 400; *see also* Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863, 883 (2023) (describing "the tendency for people to receive and process information in ways that confirm their existing preconceptions, attitudes, and beliefs").

prominently, once an appeal *and* a motion for a stay pending appeal are filed, Amended Rule 3020(e)(2) automatically stays the plan confirmation order pending appeal, and that stay remains in effect until the appeal concludes or the stay motion is denied. At the same time, Amended Rule 3020(e)(3) replaces the common-law standard for granting stays pending appeal with a uniform standard that significantly limits the bankruptcy court's discretion to deny a stay. Taken together, the former reframes the stay decision to make granting stays the norm and denying stays the exception, while the latter moderates the frequency of those exceptions in a manner that forecloses irreparable harm to the appellant so long as the appeal is not frivolous.

Crucially, the two-factor analysis set forth in the Amended Rule departs considerably from the traditional, generally applicable standard for staying civil orders pending appeal. Three prongs of the traditional analysis—the likelihood of success on the merits, injuries to third parties from issuing the stay, and the catch-all "public interest" factor—are removed, and the "irreparable harm" prong is modified to expressly include equitable mootness, resolving a circuit split among the courts of appeal as to whether the risk of equitable mootness absent a stay constitutes irreparable harm.[116] While such broad discretion may be appropriate when the threat of mootness is more

[116] The majority of circuits have held that the risk of equitable mootness, standing alone, does not satisfy the "irreparable harm" prong. *See, e.g.*, *In re* Sports Auth. Holdings, Inc., Bank. No. 12-13262 (BLS), 2016 WL 3041846, at *1 (D. Del. May 27, 2016) ("[E]quitable mootness of an appeal, without more, does not constitute irreparable harm"); *In re* Sabine Oil & Gas Corp., 548 B.R. 674, 682 (Bankr. S.D.N.Y. 2016) ("A majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm." (citing *In re* Gen. Motors Corp., 409 B.R. 24, 31 (Bankr. S.D.N.Y. 2009); *In re* DJK Residential, LLC, Nos. 08-10375 (JMP), M-47 (GEL), 2008 WL 650389, at *4 (S.D.N.Y. March 7, 2008)). Others have held that equitable mootness constitutes a type of irreparable harm, but even these courts disagree on the degree of likelihood a movant must show. *See, e.g.*, *In re* BGI, Inc., 504 B.R. 754, 763 (S.D.N.Y. 2014) ("In my view, 'where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied.' But 'the seriousness of that threat is inextricably related to the appellants' likelihood of success on the merits.'" (first quoting *In re* Adelphia Commc'ns. Corp., 361 B.R. 337, 348 (S.D.N.Y. 2007); and then quoting *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 309 n.46 (S.D.N.Y. 2010)); *In re* DAEBO Int'l Shipping Co., Ltd., Case No. 15-10616 (MEW), 2016 WL 447655, at *3, (Bankr. S.D.N.Y. Feb. 4, 2016) ("SPV has alleged that the appeal could be rendered moot in the absence of a stay; courts have reached different conclusions as to whether such a risk amounts to irreparable injury, but this Court agrees that the 'loss of appellate rights is a "quintessential form of prejudice" warranting a finding of irreparable harm.'") (quoting *In re Adelphia Commc'ns Corp.*, 361 B.R. at 347–48).

speculative and variable, in bankruptcy cases, denying a stay virtually guarantees that the plan will be substantially consummated, which in turn nearly always results in a finding of equitable mootness on appeal. Thus, the traditional standard should not be applied in tandem with equitable mootness because doing so effectively empowers bankruptcy courts to moot appeals of their own orders at will.

Indeed, in addition to correcting errors and promoting confidence in the court system, one of the most important benefits of a properly functioning appellate system is diffusing the power of individual trial-level judges.[117] Under the present system, granting or denying a stay effectively determines whether the plan will be substantially consummated; thus, the power to deny a stay effectively gives the bankruptcy court unfettered discretion to confirm unconfirmable plans, as the likelihood of review on the merits—much less an actual reversal—is minimal. And although one would hope that bankruptcy judges do not exercise discretion in this manner, the fact that they could conceivably do so tends to undermine confidence in both individual decisions of the bankruptcy court and the bankruptcy system as a whole.

In contrast, the two-factor analysis in Amended Rule 3020(e) would be much more difficult to interpret with such agility. By design, both factors allow the bankruptcy court to ferret out appeals that are so baseless as to suggest gamesmanship; the modified "irreparable harm" requires the movant to show an actual need for the stay, while the non-frivolity requirement requires the *movant* to show that its appeal has some articulable basis in law or fact, limiting creditors' incentives to file (or threaten to file) meritless appeals simply to avail themselves of the automatic stay. Yet both factors are far less likely to permit judicial abuse than the traditional standard, in part because Amended Rule 3020(e) specifically defines frivolity in a manner that cannot easily be stretched beyond the arguments contained in the movant's motion.

To be sure, Amended Rule 3020(e) introduces friction into the bankruptcy system. Disgruntled creditors will file appeals more often, resulting in stays that can delay implementation

117 *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1275 (2013) ("The existence of compelling inaccuracies that are incapable of correction stokes distrust of the justice system generally; this effect is highly visible both in the number of 'innocence projects' around the country that seek to free the wrongly convicted and the call for constitutional protection of actual innocence claims.").

of a confirmed plan for weeks, months, or in some cases, even years.[118] In all likelihood, some of those appeals will lead to confirmed plans being overturned, forcing the parties to start from scratch. And in a world where debtors cannot safely pursue plans that violate the Bankruptcy Code, some of them may not be able to reach a viable alternative, potentially resulting in more liquidations and fewer "successful" reorganizations.

Nonetheless, this Note maintains that Amended Rule 3020(e) is necessary, on pain of inefficiency, to mitigate features of the bankruptcy appellate system that presently do more harm than good. Although equitable mootness may have originally been envisioned as an exception to jurisdiction, in practice, it has since become the norm in bankruptcy appeals. Stays pending appeal are rarely granted, and appellate courts presented with an unstayed appeal nearly always find equitable mootness.[119] The result is a system in which plan confirmation orders are not only unreviewed but unreviewable, which cannot coexist with a constitutional right to have claims reviewed on the merits by an Article III court.[120]

Of course, one might recognize these concerns but still believe—as many in the bankruptcy community do—that the present system strikes an appropriate balance between protecting creditors' rights and promoting finality. But even these observers have reason to worry about the unchecked proliferation of equitable mootness. Although the Supreme Court has thus far declined to evaluate the doctrine,[121] its persistent expansion may prompt them to do so, particularly given that some litigants have begun to raise equitable mootness

---

118 *See* Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319, 1323 n.22 (2016) ("If stays were available as a matter of right, the number of appeals would likely increase.").

119 *See* Knight, *supra* note 18, at 278 ("The five-factor equitable mootness analysis operates such that, in an unstayed reorganization, the district court nearly always finds the other factors present.").

120 *See id.* at 281–82 (stating that courts' interpretations of equitable mootness undermine the constitutional right to review by an independent judiciary); Miller, *supra* note 17, at 313 ("A prudential doctrine without a statutory basis where a judge can eliminate an appeal without even considering the merits simply does not comport with Supreme Court precedent or the historical nature of bankruptcy court authority and appellate review.").

121 *See, e.g.*, *In re* City of Detroit, Michigan, 838 F.3d 792 (6th Cir. 2016), *cert. denied sub nom.* Ochadleus v. City of Detroit, Michigan, 137 S. Ct. 1584 (2017), *cert. denied sub nom.*, Quinn v. City of Detroit, Michigan, 137 S. Ct. 2270 (2017); *In re* Tribune Media Co., 799 F.3d 272 (3d Cir. 2015), *cert. denied sub nom.*, Aurelius Cap. Mgmt., L. P. v. Tribune Media Co., 577 U.S. 1230 (2016).

arguments in non-bankruptcy cases.[122] And the Court's recent jurisprudence concerning prudential doctrines suggests that the doctrine would be unlikely to survive in its current form; in *Lexmark International v. Static Control Components*, 572 U.S. 118 (2014), for example, the Court held that "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[123] If the equitable mootness doctrine is not repackaged into a more overtly constitutional form, the result may be a Supreme Court ruling that eliminates the doctrine altogether, leaving courts with no choice but to scramble an unstayed reorganization whenever an appeal is correct on the merits. Hence, if the most important goal of equitable mootness is to avoid this outcome at all costs, limiting the frequency with which stays are denied may be inevitable.

Conclusion

As one scholar colorfully summarized, the bankruptcy system "is the platypus of U.S. law. It is part ordinary civil litigation, part complex litigation, and part something quite different again. It is not quite private law and not quite public law. It incorporates both state and federal law and both statutory and common law rules. In short, it does not look quite like anything else."[124] Indeed, bankruptcy law is perhaps the only major statutory regime that comes into being by grafting—sometimes inelegantly—one system of laws on top of another, imbuing it with quirks and oddities that are unique to bankruptcy alone.

By the same token, if bankruptcy is the platypus of law, bankruptcy appeals are the platypus of appeals. The urgency of bankruptcy means that judges face intense pressure to conform their decisions to the path of least resistance. Objectors, in turn, are the bottleneck in the system, leading courts to prefer flexible rules that allow them to dispense with troublesome

---

122 *See* United States v. Par. Chem. Co., 759 F. App'x 722, 726 (10th Cir. 2019) (rejecting appellees' argument that an appeal concerning a sale of property pursuant to a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) lien was equitably moot); Miller, *supra* note 17, at 272 (noting that "parties are now requesting the equitable mootness be applied outside of the insolvency cases").

123 *Lexmark Int'l, Inc.*, 572 U.S. at 128 (citation omitted).

124 Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. Chi. L. Rev. 1925, 1939 (2022) (footnote omitted); *see also id.* at 1939 n.66 ("I am indebted to Professor Adam Levitin for this comparison.").

objections more easily. The result is a unique creature in the federal judiciary—an appellate regime that ostensibly exists to vindicate appellate rights but simultaneously does all that it can to prevent itself from overturning erroneous decisions.

While designing an appellate system that balances these concerns has proven challenging, the weight of the evidence suggests that the present system is not an optimal one. By limiting the bankruptcy court's discretion to deny stays pending appeal, the amendments to Rule 3020(e) advanced in this Note have the potential to provide a more satisfactory—and more constitutional—balance between the competing values that animate bankruptcy appeals. And while reorganizations in a world of Amended Rule 3020(e) might be more onerous than they are today, this Note maintains that these types of prudential concerns should not outweigh the right of bankruptcy litigants to a well-functioning system of appellate review.