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Bankruptcy Appeal Barriers

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Abstract

Appeals in bankruptcy do not look like appeals elsewhere in the federal court system. In particular, bankruptcy appeal barriers are strikingly distinctive. These barriers serve outright to block an appeal from being decided. An appellate court may dismiss an appeal, rather than consider the merits, if facts on the ground have changed so much since the original decision that providing a remedy to an appellant, even if victorious, would not be prudent. Take ongoing litigation in the Boy Scouts bankruptcy case. A plan of reorganization was confirmed fixing the entitlements of victims to compensation. Dissenting creditors argued bitterly the plan was unlawful and have appealed. And they have been proven right: The Supreme Court recently found in its Purdue Pharma *decision that bankruptcy courts lack the authority to approve the plan's central legal device. Even so, those outraged creditors may receive nothing. The Boy Scouts argue that their appeal should be dismissed without reaching the merits because the plan is, in key respects, already implemented. And the existing case law surrounding bankruptcy appeal barriers offers considerable support for this outcome.*

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This Article attempts both to assess the significance of bankruptcy appeal barriers and to evaluate potential justifications for them. These barriers matter deeply to affected litigants but also have systemic consequences. The constitutional legitimacy of the bankruptcy courts is predicated on their supervision by Article III judges. This supervision is substantially eroded by bankruptcy appeal barriers. Nor are these concerns wholly abstract. Bankruptcy judges are powerful. Appeal subjects the insular world of bankruptcy to outside scrutiny from generalist judges who do not necessarily buy into the precepts of bankruptcy culture and are not presented with the same in-the-moment incentives as bankruptcy judges. This Article additionally finds troubling the degree to which some appellate courts seem ready to resort to appeal barriers as an escape hatch to avoid deciding appeals even in quite simple cases, often involving unsophisticated parties. The justifications for bankruptcy appeal barriers, therefore, require a careful look.

Normatively, this Article suggests that bankruptcy appeal barriers are on shaky ground. To make the case that bankruptcy appeal barriers could be sharply constrained or even abolished, this Article draws analogies both to the more general federal law of remedies, and to instances under state law—such as Delaware corporate law—where appellate courts must grapple with how to engage in an after-the-fact evaluation of an already consummated transaction.

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INTRODUCTION

Bankruptcy appeals are the "ninjas of the appellate world," always ready to "sneak up" on the unwary. So said one practitioners' guide.[1] Indeed, there is much that makes the bankruptcy appellate system distinctive. Basic architecture is different. Appeals are taken first to the district court or a bankruptcy appellate panel composed of bankruptcy judges, and only then to the federal courts of appeals.[2] So are many

1. Ceci Berman, *Bankruptcy Appeals: A Stealthy and Different Kind of Appeal*, 88 FLA. BAR J. 35, 35 (2014).

2. *See* 28 U.S.C. § 158(a), (d) (describing appellate jurisdiction for bankruptcy cases).

procedural rules.[3] Bankruptcy culture plays a role too.[4] Appellate review in the bankruptcy space is often deferential, implicitly—although usually not expressly—acknowledging the specialized nature of bankruptcy practice and the presumed expertise of the bankruptcy judge.[5] One remarkable difference, though, often surprising to those outside the bankruptcy world, are bankruptcy appeal barriers: doctrines that serve to block appeal outright. A disappointed party confident that the bankruptcy judge has entered an order inconsistent with her rights under the Bankruptcy Code or applicable non-bankruptcy law may nonetheless be turned away from the appellate courts for prudential reasons. Even though she has standing and a live, ripe, and justiciable dispute under Article III, the appellate court may find that it is believed to be too disruptive to the operation of the bankruptcy system and the resolution of the case at hand to allow for a potential upset of the bankruptcy judge's decision.[6]

To illustrate the stakes, it is helpful to consider an analogy. Take a business that possesses a litigation claim against a deep-pocketed competitor. It sues and, following a jury trial, secures a substantial money judgment. The trial court declines to stay the judgment, and so the business can collect. Since the lengthy litigation has strained it financially, it puts the cash to immediate use. Some money is used to pay down loans, while the remainder is put towards delayed and much-needed capital expenditures. That is not the end of the story, though, because the rival has appealed. An appellate court reverses the trial court's judgment, and the rival demands prompt return of the entire money judgment. Assume that the business no longer has the cash to be able to repay the money judgment. Perhaps payment would require dismembering the business by selling off

3. For example, bankruptcy appellate law has a different prudential limit on standing. *See, e.g.*, Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3d Cir. 1995). Bankruptcy appellate law also has different rules for determining what is a final and appealable order. *See* Bullard v. Blue Hills Bank, 575 U.S. 496, 502 (2015). And different rules govern the timeline and nuts and bolts for an appeal. *See* FED. R. BANKR. P. 8002(a)(1).

4. *See, e.g.*, Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1972–74 (2022) (describing the insular and rare nature of bankruptcy appeals).

5. *See id.* at 1973 ("[A]ppellate review is often limited and deferential.").

6. *See id.* at 1998.

valuable lines of business, jeopardizing the business's viability going forward. Neither the business's retail shareholders nor its employees played any role in deciding how to use the proceeds of the judgment. Yet the shareholders may be threatened with catastrophic losses, while the employees face job losses. In addition to those parties, the business's managers may feel aggrieved. The business went to court and prevailed, proceeding only in reliance on a final judgment after a full trial on the merits of its case against its rival. No principle of law, though, supports the business if it tries to resist a claim from its rival for return of the funds that it collected by virtue of the now-reversed judgment.

Consider an example with, arguably, even higher stakes. Here, a property developer wishes to build a tall commercial building but faces opposition from a city government that has concluded that applicable law does not permit construction on the developer's chosen site. The developer secures a declaratory judgment that it is entitled to proceed. While an appeal is pending and with the judgment of the district court in hand, the developer proceeds with construction. It spends substantial sums erecting the building, and leases space in the completed building to tenants, who all move in. Unfortunately, for the developer, though, when the appellate judgment comes down, it reverses the district court, finding that construction was unlawful. Once again, there are reasons to have sympathy with the developer's position. Assuming that the city so insisted, reversing course at this stage and taking down the building would be a heavy if not fatal financial blow. Huge expenditures may be wasted. Likewisetenants who signed leases and moved into the building not knowing anything was amiss face disruption and wasted expenditure if forced abruptly to move once the building is demolished. In this case, there are caveats. In some cases, appellate courts have created exceptions to the ordinary rules.[7] But for the most part, once again, the law does not protect the developer's reliance upon a now-reversed judgment.

The basic, underlying principle that runs throughout appellate law is that a prevailing party who proceeds knowing that an appeal is pending does so knowing that they risk

7. *See infra* Part III.A.2.

reversal.[8] They have no claim to protection because they acted in reliance on a decision that was later overturned. Nor do third parties rely on the post-trial state of affairs, like the tenants, even though at least some of these third parties may have been wholly innocent and unaware. The law of civil and appellate procedure has firmly decided upon the allocation of risk in such a situation. The risk belongs to the appellee who proceeds with its plans pending appeal. We may expect a different outcome as a practical matter. In the example of the tall building, even if the appellate court reverses, the building is unlikely to come down. Most likely, rather than see all the resources that went into the building's construction go to waste, the developer and city will strike some deal under which the developer pays for the right to keep the business in place. But the default allocation of risk is still of critical importance because it gives the leverage in any such negotiations to the city and requires the developer to proceed contending with the settled understanding that its original legal position was wrong.

Bankruptcy appeal barriers scramble this default within the narrow confines of the bankruptcy space. They do this by shaping—or in some cases limiting—the contents of any appellate decision under bankruptcy's equivalent of the above fact pattern.[9] Thus, under the rules of the road of bankruptcy, the appellate court in this example might have concluded that facts on the ground had changed so much since the district court decision that it, even though it believed the district court had wrongly decided the case, the appeal should nonetheless be with no remedy for the appellant. Alternatively, in the exercise of its discretion, the appellate court might decide that the building having been built, it makes the most sense not even to consider the merits of the appeal in the first place. Bankruptcy appeal barriers thus radically reallocate risk.[10] As compared to

8. *See, e.g.*, Parker v. U.S. Trust Co., 236 A.3d 423, 430 (D.C. Cir. 2020) (articulating that a party that acts in reliance upon a court order that is appealable does so at their own risk because the order could be reversed, and the conduct could become illegal).

9. *See* Bruce Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377, 397 (2019) (explaining how equitable mootness may be used if innocent third parties reasonably relied on the plan, rather than making the third parties bear the risk of the appeal).

10. *See id.*

ordinary civil litigation, leverage shifts dramatically towards the appellee that presses ahead at full speed.[11] And with this shift of leverage—both scholarly and judicial critics of bankruptcy appeal barriers have alleged—come a host of other potential problems.[12]

This Article focuses on two bankruptcy appeal barriers: equitable mootness and statutory mootness under Section 363(m) of the Bankruptcy Code.[13] The central order in a traditional business bankruptcy case is an order confirming a plan of reorganization. A plan is akin to a judicially approved contract among all the parties to the case which acts as a day of reckoning for the debtor's financial affairs, setting out whether and how the debtor will continue to operate as a reorganized entity, and how the debtor's value shall be used to repay creditors and equity owners, all with res judicata effect.[14]

Equitable mootness serves as a bankruptcy appeal barrier inhibiting appellate review of plan confirmations. As described above, when facts on the ground change substantially enough following the debtor's consummation of the plan and emergence from bankruptcy that granting relief to a victorious appellant would create an "unmanageable" or "uncontrollable" situation that jeopardizes the reorganization or threatens harm to third parties, the appellate court may dismiss the appeal, providing nothing to the appellant.[15]

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11. *See* Markell, *supra* note 9, at 401–03 (describing burdens that flow with the right to appeal and the risks that the appellants undertake).

12. *See, e.g.*, *id.* at 378–80; Christopher Frost, *Pragmatism vs. Principle: Bankruptcy Appeals and Equitable Mootness*, 15 N.Y.U. J.L. & BUS. 477, 485 (2019) (arguing that equitable mootness is an "overbroad way of dealing with" problems with appellate review of bankruptcy cases); *In re* One2One Commc'ns, LLC, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring) (calling for a reconsideration of equitable mootness because "it has proved highly problematic"); *In re* City of Detroit, 838 F.3d 792, 805 (6th Cir. 2016) (Moore, J., dissenting) ("Deciding not to decide can thus be a form of judicial overreach, not restraint.").

13. 11 U.S.C. § 363(m).

14. *See, e.g.*, DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 58–61 (7th ed. 2022) (describing a debtor's reorganization plan and how it affects creditors).

15. *See, e.g.*, *In re* Charter Commc'ns, Inc., 691 F.3d 476, 482 (2d Cir. 2012) ("[A]n appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated"). Importantly, equitable mootness is entirely distinct from constitutional mootness. Constitutional

Statutory mootness applies to an alternative kind of case-determining order that has grown in prominence since the Bankruptcy Code was enacted.[16] Many debtors choose, instead of pursuing confirmation of a traditional plan of reorganization, to sell all of their assets in an auction or similar proceeding pursuant to Section 363 of the Code, which allows bankruptcy courts to authorize the sale, use, or lease of property of the bankruptcy estate.[17] Section 363(m) of the Code is a separate bankruptcy appeal barrier from equitable mootness, binding appellate courts to non-intervention in such cases by providing that the validity of a court-approved sale shall not be affected by any subsequent appellate decision.[18]

The Boy Scouts bankruptcy provides a current example of bankruptcy appeal barriers in action. Boy Scouts of America's plan of reorganization to compensate survivors of sexual assault was fiercely contested, but ultimately, about 85% of survivors voting supported the plan in the bankruptcy court.[19] Many of the

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mootness, an element of standing, flows from Article III's case or controversy requirement. *See In re* VeroBlue Farms USA, Inc., 6 F.4th 880, 888 (8th Cir. 2021) (describing equitable mootness as "misleading" compared to "real" mootness). An appeal is constitutionally moot when there is no relief that an appellate court could possibly grant that would affect the outcome. *See, e.g.*, Mission Prod. Holdings v. Tempnology, LLC, 587 U.S. 370, 376–77 (2019) (holding that the Court may dismiss the case "only if 'it is impossible for a court to grant any effectual relief whatever'" (quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013))). And it will almost always be the case that an appeal is not constitutionally moot where an appellant seeks money. *See id.* at 377 ("[N]othing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents."). Equitable mootness involves appeals that are constitutionally live: It is not that the appellate court cannot grant relief but that it does not want to. *See VeroBlue*, 6 F.4th at 888 (articulating the difference between real mootness, an inability to alter an outcome, and equitable mootness, an unwillingness to alter the outcome).

16. *See infra* Part I.B.2 and III.A (addressing statutory mootness under Section 363(m) and its parallels to equitable mootness).

17. *See* 11 U.S.C. § 363 (discussing the use, sale, or lease of property in bankruptcy cases).

18. *See id.* § 363(m) ("The reversal or modification on appeal . . . does not affect the validity of a sale or lease . . . ."). Section 363(m)'s rule prohibiting appellate courts from disturbing a consummated sale is frequently dubbed "statutory mootness," and I use that term throughout this Article. *See, e.g.*, *In re* Energy Future Holdings Corp., 949 F.3d 806, 820 (3d Cir. 2020) (referring to Section 363(m) as statutory mootness).

19. *See* Appellees' Motion to Dismiss Appeal as Moot at 5, *In re* Boy Scouts of America, No. 23-1780 (3d Cir. Oct. 27, 2023), ECF No. 91.

dissenters, bitterly opposed to the plan's structure and to the compensation schemes it established, have appealed.[20] In a key respect, they have been vindicated. A core part of the Boy Scouts plan is a third-party release—a device that forces all of the Boy Scouts creditors to give up their claims against any organization affiliated with the Boy Scouts, regardless of whether or not those organizations are debtors in the bankruptcy.[21] And the Supreme Court recently found that the Bankruptcy Code does not authorize courts to approve such non-consensual third-party releases.[22] Yet the victory may be hollow. Although the case is currently pending in the Third Circuit, the Boy Scouts have asked that court to dismiss the case as equitably moot.[23] The Boy Scouts explain that the plan structure can no longer be revisited.[24] All of the scouting entities whose claims were released by the plan transferred consideration for the release to the settlement trust, and that trust has begun to make payments to survivors.[25] The Third Circuit's equitable mootness precedents, meanwhile, suggest that there is a considerable chance that the Boy Scouts will prevail. If so, dissenters will receive neither confirmation from the appellate courts as to whether their rights were violated by the plan, nor any relief. Statutory mootness is similarly implicated because a core component of the confirmed plan was the sale by various Boy Scouts entities of 1,050 insurance policies back to the issuing insurer.[26] The bottom line, the Boy Scouts insist, is that come what may, "these transactions cannot be unwound."[27]

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20. *See id.* at 4–6. The plan creates a matrix of settlement payments that fixes compensation for claims in a range that, at its lowest end, allows survivors to recover only $3,500. *See* Opening Brief of Certain Insurers at 22, *In re* Boy Scouts of America, No. 23-1780, ECF No. 42.

21. *See* Opening Brief of Certain Insurers, *supra* note 20, at 21.

22. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 227 (2024) (holding that "the bankruptcy code does not authorize a release and injunction that . . . effectively seeks to discharge claims against a nondebtor without the consent of the affected claimants").

23. *See* Appellees' Motion to Dismiss Appeal as Moot, *supra* note 19, at 7 ("The Appeals should be dismissed as equitably and statutorily moot.").

24. *See id.* at 10.

25. *See id.*

26. *See id.* at 8. Proceeds of the sales were transferred by the insurance companies to the Settlement Trust to fund payments to victims. *Id.*

27. *See id.*

Equitable and statutory mootness operate in parallel as bankruptcy appeal barriers and, although most scholarship to date has chosen not to do so, it makes sense to consider the doctrines together. Even so, they are markedly different in origin. Equitable mootness is a creation of the federal appellate courts traceable back to the early years of the Bankruptcy Code.[28] Section 363(m)'s statutory mootness provision was part of the Bankruptcy Code as originally drafted and enacted by Congress in 1978. But the use of auctions as an alternative to plans of reorganization in bankruptcy is a more recent development,[29] and there is thus little reason to suppose Congress intended Section 363(m) to serve as a barrier to appeal of case-determining orders.[30] The common feature, notwithstanding these different origins, is that neither Congress nor the Supreme Court has passed on the construction of these appeal barriers as they operate to preclude review of case-determining orders of the bankruptcy court.[31] Without such an authoritative endorsement, it makes sense to question their place, even if well-established, within the bankruptcy firmament.

Moreover, bankruptcy appeal barriers matter. The disappointed litigant may first and foremost be concerned with the unceremonious extinction of her potentially meritorious claim. But there are systemic consequences also. Here, the context of bankruptcy's legal architecture and culture are important. Bankruptcy judges are powerful. And, unlike the judge presiding over paradigmatic federal civil litigation, who

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28. Equitable mootness is traditionally traced to *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981).

29. BAIRD, *supra* note 14, at 245. Widespread use of this tool in bankruptcy dates to the 1990s. Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 788 n.164 (2002).

30. *Cf. In re* White Motor Credit Corp., 14 B.R. 584, 589–90 (Bankr. N.D. Ohio 1981).

31. The Supreme Court has been invited multiple times to review challenges to equitable mootness, but has each time turned down the opportunity. The Court most recently denied certiorari in a case challenging the equitable mootness doctrine in *U.S. Bank Nat'l Ass'n v. Windstream Holdings*, 144 S. Ct. 71 (2023) (mem.). And the respondent in *Windstream*, in opposing certiorari, was able to identify eight cases in the preceding eleven years in which the Court had previously done the same. Brief in Opposition for Respondent Windstream Holdings at 13, *Windstream*, 144 S. Ct. 71 (2023) (No. 22-926).

must decide whether a plaintiff or a defendant has the better case as to some dispute over past facts, the bankruptcy judge does not conduct autopsies.[32] Instead, she is entrusted in real time with the fate of a struggling company—and, together with the parties, is incentivized to want that company to succeed in reorganizing rather than be broken up for scrap.[33] The consequence is that bankruptcy is deeply associated with pragmatic "rough justice" and a results-oriented form of judging, in which creativity and flexibility are celebrated, all in service of the preferred end-goal of bankruptcy: a value-maximizing negotiated reorganization.[34] Throughout, bankruptcy judges "alter rights, create remedies, and steer cases out of fidelity to [these] unwritten norms."[35] But bankruptcy culture has losers as well as winners. Bankruptcy's sophisticated repeated players know how to deploy these norms to persuade judges to approve "rough justice" remedies that advance their own interests and thus—over time—sculpt the law in their favor.[36] And the institutional dynamics of bankruptcy are such that it relegates some parties to outsider status, positioned such that the incumbent players—and the judge—have little reason to be scrupulously attentive to their rights in formulating solutions to the tricky problems of bankruptcy.[37]

Under such circumstances, appeal is an essential corrective. Appeal subjects the insular world of bankruptcy to outside scrutiny from generalist judges who do not necessarily buy into the precepts of bankruptcy culture and are not presented with the same in-the-moment incentives as bankruptcy judges.[38] Appeals are not a panacea. Even when the pathway to appeal is clear, appellate review in bankruptcy may

32. *See* Seymour, *supra* note 4, at 1992.

33. *See id.* at 1962, 1992.

34. *Id.* at 1939–58.

35. *Id.* at 1938.

36. *Id.* at 1964–69 ("[C]orporate bankruptcy has been has become increasingly dominated by sophisticated repeat litigants").

37. *See* Vincent S.J. Buccola, *Unwritten Law and the Odd Ones Out*, 131 YALE L.J. 1559, 1573–79 (2022) (reviewing DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS (2022)).

38. *See* Seymour, *supra* note 4, at 1997–2001; *cf.* Frost, *supra* note 12, at 482 ("Review by generalist judges may therefore serve an important role in providing an objective view on matters that seem routine for bankruptcy specialists.").

not be that searching. In a world in which many non-bankruptcy judges "hate [bankruptcy]" and "don't want anything to do with it,"[39] it is natural for appellate courts to afford significant deference to the judgment of the bankruptcy experts about what the needs of the bankruptcy system are, even when the law technically calls for more hands-on scrutiny.[40] Nonetheless, interventions by the Supreme Court and federal appellate courts can significantly shape bankruptcy practice by providing greater or lesser leeway to bankruptcy courts to deploy the innovative tools prized by bankruptcy culture. The third-party release at the heart both of *In re Boy Scouts of America*[41] and *Harrington v. Purdue Pharma*[42] readily illustrates this.[43] Prior to the Supreme Court's intervention, and among the jurisdictions which see the largest volume of sophisticated corporate reorganization cases, nonconsensual third-party releases were authorized by Second and Third Circuit case law,[44] but largely prohibited by the Fifth Circuit.[45] Despite the unsettled legal picture, opportunities to clarify the law were repeatedly missed as cases presenting questions about the

39. Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 875 & n.3 (2015) (quoting Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration*, 21 ARIZ. ST. L.J. 33, 121 (1989)).

40. *See* Troy McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 777–78 (2010) (claiming that great deference is given to bankruptcy judges on appeal).

41. 650 B.R. 87, 138–147 (D. Del. 2023).

42. 603 U.S. 204 (2024).

43. *See In re Boy Scouts of America*, 650 B.R. at 138–147 (analyzing third-party releases as an essential aspect of the proposed plan); *Purdue Pharma*, 603 U.S. at 223–27 (rejecting nonconsensual third-party releases).

44. *See In re* Cont'l Airlines, 203 F.3d 203, 214 & n.11 (3d Cir. 2000) ("[W]e need not speculate on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration."); *In re* Millennium Lab Holdings II, LLC, 945 F.3d 126, 139–40 (3d Cir. 2019) (finding that bankruptcy court had constitutional authority to confirm nonconsensual third-party releases and that need for the release in question was "well-reasoned and well-supported by the record").

45. *See In re* Pac. Lumber Co., 584 F.3d 229, 251–53 (5th Cir. 2009) (foreclosing non-consensual non-debtor releases).

limits on third-party releases were dismissed with no decision on the merits.[46]

The issues at stake, meanwhile, are critical. Bankruptcy is increasingly the forum of choice for resolving multipolar disputes of both enormous complexity and great social importance.[47] Yet it remains unclear whether the current system is well-adapted to carry such freight. Contemporary bankruptcy practice is beset on all sides by critics. As in *Boy Scouts*, firms facing mass tort claims increasingly opt for the powerful tools of Chapter 11 over other traditional resolution structures like multidistrict litigation.[48] And here also is found some of the most pointed criticism, with arguments that debtor-tortfeasors are empowered by the Bankruptcy Code to create mandatory but ad hoc resolution structures that give tort claimants short shrift on due process and risk undercompensating disfavored classes.[49] Appellate courts in such cases quite literally draw and enforce the outer bounds of

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46. *See infra* Part II.C.

47. *See* McKenzie, *supra* note 40, at 775.

48. *See* Samir Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 454 (2022) (discussing the shift of mass tort cases to bankruptcy courts as a "preemption" of multidistrict litigation processes to facilitate global settlements); *see also* Adam Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1083 (2022). This trend is itself the subject of robust discussion. *See* Anthony Casey & Joshua Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 975 & n.8–10 (2023) (arguing that bankruptcy is a suitable forum for resolving mass torts due to collective action problems and proposing reforms to mitigate potential abuses).

49. *See, e.g.*, Parikh, *supra* note 48, at 485, 493; *see also* Sergio Campos & Samir Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 340–52 (2022) (arguing that the bankruptcy process inadequately represents future claimants' rights, risking constitutionality under due process challenges); *see also* Melissa Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1746–48 (2023) (highlighting deficiencies in mass tort bankruptcies, where the ad hoc use of Chapter 11 undermines traditional creditor protections and raises due process concerns); *see also* Natalie Earles, *The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants*, 82 LA. L. REV. 519, 554–57 (2022) (examining how Chapter 11 allows defendants to control litigation outcomes in ways that sidestep traditional judicial scrutiny, often to the detriment of mass tort victims); Lindsey Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1202–03 (2022) (identifying "bankruptcy grifters" who exploit Chapter 11's protections to escape liability without facing the burdens of bankruptcy, often at the expense of victims' rights). *But cf.* Casey & Macey, *supra* note 48, at 26–30, 50.

bankruptcy.[50] Setting aside the special case of mass torts, bankruptcy cases determine the fate of thousands of companies every year—from small businesses through to Chryslers or Hertzes.[51] Once again, appellate courts are the supervisors, charged with ensuring the bankruptcy system performs these functions both effectively and with due regard for the rights of stakeholders.[52] As much is a constitutional must.[53] The Supreme Court has explained that bankruptcy judges—not Article III judges and without life tenure—may permissibly adjudicate bankruptcy matters only because Article III judges "retain supervisory authority" over them.[54]

The justifications for bankruptcy appeal barriers, therefore, require a careful look. Justifications offered by the courts tend to be functional: that bankruptcy appeal barriers are necessary (or at least worthwhile) in order to prevent appellate courts and bankruptcy courts on remand from having to deal with the impossible complexity involved in unravelling consummated reorganizations;[55] and that bankruptcy appeal barriers protect the reliance interests of all of the various stakeholders that participate in multipolar proceedings such as bankruptcy.[56] Other potential justifications are unstated but may reflect the commonly shared beliefs of the bankruptcy community; most simply, that a "one-and-done" presumption of finality for the bankruptcy judge's rulings makes sense given the deeply-rooted

50. *See, e.g.*, *In re* LTL Mgmt., 64 F.4th 84, 93–95 (2023) (holding that a Chapter 11 petition filed by a solvent subsidiary created through a divisional merger lacked good faith due to insufficient financial distress).

51. U.S. COURTS, BANKRUPTCY STATISTICS DATA VISUALIZATIONS, https://perma.cc/4HBA-PZ86 (last visited Nov. 7, 2024) (providing statistical data on bankruptcy filings in the United States).

52. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 679 (2015) (describing limited authority of bankruptcy courts).

53. *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

54. *See Wellness Int'l Network*, 575 U.S. at 678 ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.").

55. *See* Levitin, *supra* note 48, at 1122–24 (discussing role of bankruptcy appeal barriers in protecting the interests of stakeholders and maintaining transaction finality).

56. *See id.* at 1127–28.

norms of bankruptcy's own culture.[57] The thesis of this Article, though, is that such justifications generally are not successful. Bankruptcy appeal barriers do real harm. And that harm is not warranted given the at best questionable evidence that those barriers are necessary for bankruptcy appeals to be administratively workable.

Part I begins with a brief description of the structure of the bankruptcy appellate system—demonstrating that bankruptcy appeal barriers layer on top of a system in which the appellant's task is already more challenging than in other fields—before providing an account of the doctrine surrounding the two key bankruptcy appeal barriers. Part II offers an assessment of bankruptcy appeal barriers in contemporary bankruptcy practice, focusing chiefly on equitable mootness. Part III asks whether bankruptcy appeal barriers are justifiable. It shows that claims that bankruptcy appeal barriers can be justified because they coherently emerged from or functionally parallel nonbankruptcy doctrines do not hold together. And it also suggests that functional justifications—that bankruptcy appeal barriers are necessary, for example, to prevent chaos in complex cases—are generally weak. Here, the experience of other courts—such as state courts that handle appeals from complex corporate transactions without resort to appeal barriers—is instructive.[58] The Article concludes, therefore, by arguing that bankruptcy appeal barriers should be eliminated, giving reasons in Part IV for why more modest proposals to reform bankruptcy appeal barriers likely will not produce meaningful change.

I. EXPLAINING BANKRUPTCY APPEAL BARRIERS

This Part begins by setting out the much-observed reality that appeal, within the world of bankruptcy, is considerably

57. *Cf.* McKenzie, *supra* note 40, at 780 (observing that the deference to bankruptcy judges in core proceedings and the autonomy granted within the Bankruptcy Code reflect a norm of "one-and-done" finality rooted in bankruptcy culture).

58. *See* Guhan Subramanian, *Delaware's Choice*, 39 DEL. J. CORP. L. 1, 22–24 (2014) (explaining that Delaware courts routinely handle appeals from complex corporate transactions, such as mergers and acquisitions, without appeal barriers, emphasizing rigorous appellate oversight in corporate matters).

more arduous and challenging for an appellant than in other kinds of civil litigation, before turning, in the second subpart specifically, to the role of bankruptcy appeal barriers.[59] This next subpart considers the impact of bankruptcy appeal barriers in this already-weak bankruptcy appellate system.[60]

A. *The Limitations of Appellate Review in Bankruptcy*

1. Structural Hurdles to Appellate Review

At first sight, the world of bankruptcy appeals is not one wholly through the looking glass. In principle, many of the rules that govern appeals in ordinary civil litigation transfer over to bankruptcy.[61] Structurally, though, securing appellate review is more arduous. The overwhelming majority of bankruptcy cases and proceedings are heard not in district courts but in bankruptcy courts.[62] By default, the bankruptcy court's decision is appealed first to the district court and only thereafter to the court of appeals.[63] This additional layer of appellate review, of course, forces the appellant to shoulder both substantial additional time and cost to secure a circuit court decision.[64] Indeed, a substantial number of cases proceed no further than the district court.[65] Nor do district court appellate decisions have

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59. *See infra* Parts I.A–B.

60. *See infra* Part I.A.

61. *See* 10 COLLIER ON BANKRUPTCY ¶ 7001.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2024) (noting that the Federal Rules of Bankruptcy Procedure incorporate many Federal Rules of Civil Procedure for adversary proceedings, ensuring that bankruptcy cases follow similar principles to those in civil litigation).

62. Withdrawal of the reference occurs in only a few hundred cases each year; in 2022, the U.S. Courts recorded 169 such cases. *See* U.S. COURTS, JUDICIAL FACTS AND FIGURES, U.S. DISTRICT COURTS—CIVIL CASES FILED, BY NATURE OF SUIT (2022), https://perma.cc/MEJ4-TY9A (PDF).

63. *See* 28 U.S.C. § 158(a), (d).

64. *See In re* Vylene Enters., Inc., 968 F.2d 887, 895 (9th Cir. 1992) (noting that the multiple levels of appellate review in bankruptcy cases may result in significant delay and expense for appellants seeking final resolution).

65. In the twelve-month period ending September 2022, 1,440 appeals were filed in the district court, and 377 in the bankruptcy appellate panel, for a total of 1,817, while a total of 839 were filed in the courts of appeal. *See* JUDICIAL FACTS AND FIGURES, U.S. DISTRICT COURTS—CIVIL CASES FILED, BY NATURE OF SUIT, *supra* note 62 (appeals filed in district court); U.S. COURTS,

the same effect as ordinary appellate decisions. District court judges, of course, are not bound to follow the decisions of sister judges sitting on the same court, so decisions even in a single district may reflect multiple different approaches.[66] While there is some contrary authority, the majority position is similarly that bankruptcy judges are not bound by the decisions of district court judges.[67]

The cast of characters in bankruptcy appeals also varies in a way that diminishes the predictability of appellate review. Bankruptcy appellate panels provide an alternative pathway for appeal within some federal circuits.[68] Each court of appeals has a choice: to retain the ordinary structure, in which appeals from a bankruptcy court go first to the district court judge and then to the circuit, or to establish a bankruptcy appellate panel of in-circuit bankruptcy judges who may hear—sitting as three-judge panels—appeals from bankruptcy court decisions in lieu of appeal to the district court.[69] Where a bankruptcy appellate panel exists, the litigants have the choice of which pathway to take.[70] Either party may opt out of bankruptcy appellate panel review and have the appeal heard instead by the

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JUDICIAL BUSINESS, U.S. BANKRUPTCY APPELLATE PANELS—CASES FILED, TERMINATED, AND PENDING (2022), https://perma.cc/TR7F-K6NW (PDF) (cases filed in bankruptcy appellate panel); U.S. COURTS, JUDICIAL BUSINESS, U.S. COURTS OF APPEALS–CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING (2024), https://perma.cc/622J-C86E (PDF) (cases filed in courts of appeals).

66. *See* Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) (explaining that district court decisions are not binding on other district judges within the same district and that different approaches may coexist within the same district).

67. *See* Lisa Laukitis & Edward Mahaney-Walter, *Precedent in Bankruptcy Cases*, 46 AM. BANKR. INST. L.J. 46, 116 (2018). A bankruptcy judge, of course, is likely to find a decision of a local district court judge to be persuasive, especially in smaller districts in which the bankruptcy judge knows or suspects that the district court judge will hear any appeal from the case at hand.

68. *See* 28 U.S.C. § 158(b)(1) (establishing that bankruptcy appellate panels may be created as an alternative appellate route for bankruptcy cases).

69. *Id.*

70. *Id.* § 158(c)(1).

district court.[71] Parties opt out in roughly half of cases.[72] Only a minority of courts of appeals, though, maintain a bankruptcy appellate panel, including none of the circuits—the Second, Third, and Fifth—that oversee the country's busiest and most influential commercial bankruptcy courts.[73]

Only in rare cases may an appellant adversely affected by a bankruptcy court decision dispense with this additional intermediate layer of review. Congress in 2005 authorized limited direct appeal from the bankruptcy court to the circuit court of appeals in response to concerns over the efficiency of bankruptcy appeals, rejecting more radical reform proposals that sought to eliminate the intermediate layer of appeal entirely.[74] The relevant provisions are not clearly drafted.[75] On their face, though, the requirements are relatively liberal. The statute permits direct appeal if one of a series of tests directed towards the need for clarifying precedent are met: The appeal must concern a question of law as to which there is no controlling court of appeals or Supreme Court decision, or where there are conflicting decisions.[76] Alternatively, the appeal may concern a matter of public importance, or immediate appellate

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71. *Id.*

72. *Compare* U.S. COURTS, JUDICIAL BUSINESS, U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING (2023), https://perma.cc/7MPV-6C8C (PDF) (number of appeals filed in the district court), *with* JUDICIAL BUSINESS, U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING, *supra* note 65, *and* JUDICIAL BUSINESS, U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING, *supra* note 62 (number of appeals filed in the bankruptcy appellate panel).

73. *See* 1 COLLIER ON BANKRUPTCY ¶ 5.02 (Richard Levin & Henry J. Sommer eds., 16th ed. 2024) (noting that the First, Sixth, Eighth, Ninth, and Tenth Circuits have bankruptcy appellate panels, and explaining that because a majority of district court judges in each district must vote to permit referrals to the panel, the Sixth Circuit's bankruptcy appellate panel cannot hear appeals from every district court within the circuit).

74. *See* 28 U.S.C. § 158(b) (allowing for limited direct appeals from bankruptcy court to circuit court of appeals under certain conditions to improve efficiency in bankruptcy appeals); *see also* Daniel Bussel, *Bankruptcy Appellate Reform: Issues and Options*, 1995–96 ANN. SURV. BANKR. L. 257, 263–69 (discussing proposed reforms to streamline bankruptcy appellate process and Congress's decision to maintain an intermediate appellate layer).

75. *See* 1 COLLIER ON BANKRUPTCY, *supra* note 73, ¶ 5.06.

76. *See* 28 U.S.C. § 158(d)(2)(A)(i), (ii).

resolution will "materially advance the progress" of the proceeding in which the appeal was taken.[77]

In practice, though, direct appeal is not common.[78] Courts of appeals have described direct appeal in relatively parsimonious terms. In that vein, the Second Circuit announced that Congress was "wise" not to have made circuit court acceptance of direct appeal mandatory, arguing Congress was "aware of the dangers of leapfrogging the district court[s]," and understood that percolation of cases through the normal channels has "salutary effects."[79] An early study found that rates of direct appeal varied among circuits, but that in the Second and Third Circuits, home of the New York and Delaware bankruptcy courts that, at the time, were the busiest in the country, 0.7% and 0.6% of bankruptcy appeals respectively were heard as direct appeals.[80] A study of bankruptcy appeal barriers, therefore, has to engage with what happens both at the intermediate level of appellate review—where, overwhelmingly, such appeals start and where many conclude—as well as in the courts of appeals for which the most high-profile cases are destined, and where circuit-wide precedent is set. And, furthermore, it must recognize this first part of the context over which bankruptcy appeal barriers are layered—a system that, by virtue of its structure, is already slower and more expensive than appeal taken elsewhere.

2. Robustness of Appellate Review

Even when appellants proceed through the tangled structure of bankruptcy appeals, the review they secure is questionably robust. At extremes, appellate review in bankruptcy has been characterized as "illusory,"[81] "often

77. *See id.* § 158(d)(2)(A)(i), (iii).

78. *See* Weber v. United States, 484 F.3d 154, 158 (2d Cir. 2007) (noting that legislative history confirms that direct appeal is most appropriate for cases involving pure questions of law, and not for questions "heavily dependent on the particular facts of a case"); *cf.* Bullard v. Blue Hills Bank, 575 U.S. 496, 508 (2015) (commenting on claim that "interlocutory appeals are ineffective because lower courts have been too reticent in granting them").

79. *Weber*, 494 F.3d at 160.

80. *See* Laura Bartell, *The Appeal of Direct Appeal – Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145, 164 (2010).

81. Levitin, *supra* note 48, at 1121.

absent,"[82] and worth "little" "as a practical matter."[83] Since the early years of the Bankruptcy Code, commentators have remarked on "district courts' perceived reluctance to supervise bankruptcy judges, or merely to rubber stamp those decisions they do review."[84] Scholars today continue to argue that limited appellate review "reduces public oversight in chapter 11 and intensifies the authority of bankruptcy courts."[85] Proving this empirically is difficult. The best indicative data is that district court review is not robust.[86] Laura Bartell studied cases in which bankruptcy courts, because they are constitutionally not permitted to enter final judgment on a claim, instead proposed findings of fact and conclusions of the law to the district court.[87] District courts are directed to review these findings of fact and conclusions of law de novo;[88] on paper, therefore, they should show *less* deference here than in handling appeals from a final judgment, given that appellate procedure may require the application of varying standards of review, ranging from de novo to abuse of discretion or plain error. Nonetheless, Bartell found that by far the most likely outcome in the cases she studied was for a district court to adopt the bankruptcy court's findings of fact and conclusions of law without amendment.[89] The courts of appeals do publish data on case dispositions; this discloses that bankruptcy decisions are reversed at a rate modestly lower than other types of civil litigation—for the twelve months prior to

82. *Id.* at 1122.

83. BAIRD, *supra* note 14, at 29.

84. Wendy Lynn Trugman, *The Bankruptcy Act of 1984:* Marathon *Revisited*, 3 YALE L. & POL'Y REV. 231, 241 (1984).

85. Melissa Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1733 (2018).

86. *Cf., e.g.*, *In re* One2One Comms., LLC, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring) (suggesting that "our district courts have not been so discriminating" in applying equitable mootness).

87. *See* Laura Bartell, *Stern Claims and Article III Adjudication – The Bankruptcy Judge Knows Best?*, 35 EMORY BANKR. DEV. J. 13, 14, 40 (2019).

88. *Id.* at 46; *see* 28 U.S.C. § 157(c)(1) (mandating de novo review by district courts of proposed findings of fact and conclusions of law in non-core proceedings).

89. *See* Bartell, *supra* note 87, at 46–50.

June 2023, at a rate of 13% in private civil litigation as against 8% in bankruptcy.[90]

A combination of factors produces this diminished appellate review. First is the unofficial and unstated but nonetheless commonplace deference that Article III judges routinely provide to bankruptcy judges.[91] Perhaps, at least for some nonbankruptcy judges, this stems from "hat[red]" of bankruptcy and not "want[ing] anything to do with it."[92] More charitable explanations are that appellate judges see at least some bankruptcy topics as complex and specialized and believe that they are unlikely to produce better or more accurate outcomes than the expert bankruptcy judge.[93] But bankruptcy's own institutional dynamics contribute. Bankruptcy prizes speed.[94] Much that happens in a bankruptcy case may not be appealed at least in part because the losing party knows that the dispute will be overtaken by events long before an appellate court rules.[95] Trying to appeal, meanwhile, may strain relationships

90. JUDICIAL FACTS AND FIGURES U.S. COURTS OF APPEALS—DECISIONS IN CASES TERMINATED ON THE MERITS, BY CIRCUIT AND NATURE OF PROCEEDING, *supra* note 62. (Previous iterations of this figure are available here: *Caseload Statistics Data Tables,* U.S. COURTS, https://perma.cc/R9SA-CE5A (last visited Nov. 14, 2024)). These figures do not indicate whether a reversed decision was made by a bankruptcy court, a district court, or a bankruptcy appellate panel, and so it cannot be used to assess the comparative quality of different decision makers. *See* Frost, *supra* note 12, at 515 & n.153.

91. *See* Bartell, *supra* note 87, at 40–41.

92. Jacoby, *supra* note 39, at 875 & n.3.

93. *See, e.g.*, Bartell, *supra* note 87, at 50 (observing that district courts judges defer to bankruptcy judges due to the complexity and specialization of bankruptcy law); *see also* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 428 (2012). Weighing against the conclusion that this dynamic is a product of bankruptcy-aversion, though, is the reality that district courts are also highly deferential in their review of magistrate judges.

94. *See, e.g.*, BAIRD, *supra* note 14, at 29 ("Appellate review takes time, and most of the important decisions in a bankruptcy case—whether the business should be shut down or whether the managers should be given another month to turn the operation around—are time sensitive and thus essentially unreviewable."); Levitin, *supra* note 48, at 1152 ("Closing speed is critical for large financial transactions . . . ."); Seymour, *supra* note 4, at 1973, 1993 ("Speed is highly prized in the Chapter 11.").

95. *See* Seymour, *supra* note 4, at 1973

with the judge and other parties working to keep the case on track, which a potential appellant may judge to be more significant than any individual dispute.[96]

So too does doctrine inhibit appeal. Some orders that might be of great significance—like a judge's decision not to confirm a plan—are not appealable as of right because the Supreme Court's case law does not classify them as "final orders."[97] Conversely, other mid-case orders *are* final, and must be appealed immediately—again, often an unattractive prospect—rather than taken up among a package of other issues at the end of the case.[98]

B. *Bankruptcy Appeal Barriers*

Bankruptcy appeal barriers thus layer on top of a context in which an appellant's undertaking to obtain reversal of a decision that she believes to be in error is already considerably more daunting than in most other fields of law. This subpart provides an account of those barriers. It begins with equitable mootness barring appeals from orders confirming plans of reorganization. It then proceeds to statutory mootness barring appeals from orders approving sales of all of a debtor's assets,

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> Appeal, even when available as a matter of law, may be unattractive or impractical simply because the exigencies of the debtor's financial circumstances need to be resolved on a much faster timeline than the courts of appeals can accommodate—and most bankruptcy appeals must first be heard in the district court or by a bankruptcy appellate panel before they even reach the court of appeals. (citation omitted).

As Baird explains, there is little practical way to appeal a decision like whether a business should be shut down promptly or kept open another month. BAIRD, *supra* note 14, at 29.

96. *See* Seymour, *supra* note 4, at 1973 ("And a party may also forego appeal because the rest of the case remains with the bankruptcy judge and the party fears that the bankruptcy judge may retaliate against an appellant in its other decisions.").

97. *See* Bullard v. Blue Hills Bank, 575 U.S. 496, 498–99 (2015) ("The question presented is whether such an order denying confirmation is a 'final' order that the debtor can immediately appeal. We hold that it is not.").

98. *See* Ritzen Grp, Inc. v. Jackson Masonry, LLC, 589 U.S. 35, 47–48 (2020) (holding that a bankruptcy court's order denying relief from the automatic stay is final and immediately appealable).

showing how statutory mootness operates in parallel with equitable mootness and raises many of the same concerns.

Both equitable mootness and statutory mootness under Section 363(m) can be characterized as case-determining bankruptcy appeal barriers. Bankruptcy is an "aggregation of individual controversies," many raising issues capable, outside of the bankruptcy court, of standing by themselves in separate litigation.[99] Bankruptcy dockets in complex cases frequently run to thousands of entries, far surpassing the length of the docket in a typical civil case, and a bankruptcy judge, accordingly, is called upon to enter dozens of orders in any given case.[100] Many of these orders are significant insofar as they fix in place elements of the case's ultimate resolution. And Congress and the courts have, in fact, erected bankruptcy appeal barriers that prevent disappointed litigants effectively from appealing a miscellaneous variety of those orders.[101]

Every bankruptcy case, though, builds towards an order (or bundle of orders) that resolves the case. The prototypical case-determining (and case-ending) order is an order confirming a plan of reorganization.[102] Confirmation of a plan finally fixes the entitlements to a distribution from the debtors' value of the various parties to the case, and the form and content of the plan is the essential subject of negotiation among stakeholders even predating the filing of the case.[103] A litigant who loses a dispute on an earlier order—even one like an order granting rights in connection with debtor-in-possession financing that both plays a significant role in steering the direction of the case and also is set in firmament by a bankruptcy appeal barrier—still has the

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99. *Bullard*, 575 U.S. at 501.

100. *See In re* Adelphia Commc'ns Corp., 361 B.R. 337, 342–43 (S.D.N.Y. 2007) (discussing the exceptional scale of one of the most challenging and contentious cases in bankruptcy history, with proceedings involving 230 jointly administered Chapter 11 cases over four years).

101. *See, e.g.*, 11 U.S.C. § 364(e) (statutory mootness for orders approving debtor-in-possession financing, as discussed in *infra* note 104); *id.* § 305 (no appeal of bankruptcy court's decision to abstain from hearing a case); *id.* § 557(g) (statutory mootness for orders concerning disposition of grain); *id.* § 1109 (SEC has standing to participate in case but may not appeal); *id.* § 1125(d) (government agency or official may not appeal from order approving a disclosure statement).

102. BAIRD, *supra* note 14, at 245, 251.

103. *See In re* PWS Holding Corp., 228 F.3d 224, 236 (3d Cir. 2000).

chance to pursue her goals and prevail over the course of the rest of the case. The plan, though, brings with it the end of litigation in the bankruptcy court itself. Even beyond the bankruptcy court, though, equitable mootness serves as a bankruptcy appeal barrier that may set her defeat in stone. This Article's choice, therefore, has been to focus on these kinds of barriers that have the most significant impact on the parties and the resolution of the case.[104] To equitable mootness, it adds one additional bankruptcy appeal barrier. Frequently, debtors, in lieu of a plan of reorganization, seek an order from the bankruptcy court authorizing the sale of all or substantially all of the debtor's assets. As Part I.B.2 below explains, these orders can be seen, in essence, as plans in all but name. For these

104. This Article does not, therefore, examine Section 364(e) of the Code, a parallel provision to Section 363(m) that provides that an appellate court may not disturb debt incurred or liens granted in connection with debtor-in-possession financing. §§ 363(m), 364(e). Unlike sales of estate property, debtor-in-possession financing orders are perhaps best seen not as case-determining orders. But it is notable that many of the concerns about case-determining bankruptcy appeal barriers can obtain here also. Even if not case-determining, debtor-in-possession financing orders are landmark moments in the bankruptcy case that have tremendous impact on future events. *See* BAIRD, *supra* note 14, at 231 ("The debtor-in-possession loan may grant the lender virtually complete control over the reorganization process."). In exchange for providing the debtor with financing, the lender acquires considerable ability to steer the case, such as by indicating whether the debtor should proceed towards confirming a plan or gaining approval for a sale and setting forth a timeline for that process. *Id.* Nor is this dynamic new; in 1989, Charles Tabb wrote arguing that, even within the first decade of the Code's life, Section 364(e) had begun to be abused. *See generally* Charles Tabb, *Lender Preference Clauses and the Destruction of Appealability and Finality: Resolving a Chapter 11 Dilemma*, 50 OHIO ST. L.J. 109 (1989). Even so, it is better not to overstate the importance of bankruptcy appeal barriers for such non-case-determining orders. Debtor-in-possession financing is not the only pathway for prominent stakeholders to influence the direction of the case. Nor are appeal barriers likely of that much consequence. The timing of a debtor-in-possession financing order, at the beginning of the case, would make appeal impractical even if a stakeholder objecting to the terms of a financing order did not have to grapple with statutory mootness. Meanwhile, financing of some kind is almost always an essential for the case to proceed with any prospect of a reorganization, and debtors generally have few options; dissenters, therefore, even if they could pursue appeal, might have little appetite to do so knowing the dangers of success.

case-determining orders, Section 363(m) of the Bankruptcy Code serves as a statutory bankruptcy appeal barrier.[105]

1. Equitable Mootness

The essence of equitable mootness is that there comes a point when it is too late for an appellate court *practically* to provide relief even to a litigant with a meritorious appeal.[106] Nobody is particularly happy with the label, which encourages confusion with constitutional or Article III mootness, from which equitable mootness is entirely distinct. Thus, equitable mootness is based on a finding that providing relief is undesirable, even though it is still possible.[107] Indeed, courts testily describe "equitable mootness" as a misnomer while typically continuing to use the term to avoid confusion.[108]

In original form, and in its most common applications, equitable mootness applies to appeals from orders confirming Chapter 11 plans of reorganization.[109] A plan is the traditional culmination point of a bankruptcy case.[110] In large cases, it is an extremely complex document, often running into hundreds of pages, that prescribes the disposition of the debtors' assets and the treatment of all of the various classes of creditors and equity-holders in the debtors.[111] Plan confirmation is governed

105. *See* 11 U.S.C. § 363(m) (providing that the reversal or modification of a sale or lease authorization on appeal does not affect the validity of the transaction if it was made in good faith).

106. *See In re* Semcrude, L.P., 728 F.3d 314, 317 (3d Cir. 2013) ("[E]quitable 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.").

107. *See In re* VeroBlue Farms USA, Inc., 6 F.4th 880, 888 (8th Cir. 2021) (holding that equitable mootness arises from equitable and pragmatic considerations, even when Article III judicial review is possible).

108. *See, e.g.*, *Cont'l Airlines*, 91 F.3d at 559; *VeroBlue*, 6 F.4th at 883; *Semcrude*, 728 F.3d at 317 n.2 ("[T]he term . . . is encrusted enough that we suffer its continued usage . . . ."). *But see In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) (attempting to "banish equitable mootness from the local lexicon").

109. *See Cont'l Airlines*, 91 F.3d at 560–61.

110. *See id.*

111. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 160–83, 212–37 (2001); *see also* 11 U.S.C. § 1123 (enumerating required and permitted provisions of plans).

by detailed procedural and substantive rules. The proposed plan must be adequately described to stakeholders in a disclosure statement approved by the bankruptcy court.[112] It must divide those stakeholders up into different classes, each of which, potentially, has the right to vote in favor or against the plan.[113] The preferred outcome is a consensual plan—one approved by every relevant class.[114] But dissent does not doom the plan. The plan may nonconsensually bind classes of creditors subject to compliance with the Code's substantive distributional provisions—in brief, that the plan not discriminate unfairly and be fair and equitable with respect to the dissenting class.[115] Because the goal for a plan is typically a global resolution of the debtors' financial affairs, and because it is routine in bankruptcy for there to be insufficient value to satisfy the claims of all comers, there are many stakeholders whose ox the plan may gore.[116]

Nothing in either the Bankruptcy or Judiciary Codes prevents any of the disappointed litigants from appealing the results of this process.[117] Nevertheless, as one authoritative treatise bluntly puts it, equitable mootness is "the judicial equivalent of saying 'why bother?'" in the face of such efforts.[118] The doctrine is found in early form in Ninth Circuit cases under the pre-1978 Bankruptcy Act, but is usually traced to that court's decision in *In re Roberts Farms*[119] which (although

112. *See* 11 U.S.C. § 1125 (requiring that a disclosure statement provide "adequate information" to allow stakeholders to make informed judgments about a proposed Chapter 11 plan).

113. *See id.* § 1122 (classification of claims and interests); *id.* § 1126 (holders of claims and interests may accept or reject plan).

114. *See* BAIRD, *supra* note 14, at 235.

115. *See* § 1129(b)(1); *see also* Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 118, 122 (1939) (explaining that "fair and equitable" is a term of art requiring the plan to comply with the absolute priority rule—i.e. provide that no class junior in priority right to the dissenting class receive any distribution until the senior class is paid in full).

116. *See* BAIRD, *supra* note 14, at 235 (noting that bankruptcy plans often involve compromises where some stakeholders' interests are adversely affected due to insufficient value to satisfy all claims).

117. *See In re* UNR Indus., 20 F.3d 766, 768 (7th Cir. 1994) (describing equitable mootness as "filling in the interstices of the Code").

118. *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.09[1] (Richard Levin & Henry J. Sommer eds., 16th ed. 2024).

119. 652 F.2d 793 (9th Cir. 1981).

arising from a case under the Act) was decided in the early years of the Code.[120] Every court of appeals has recognized the doctrine in one form or another, although the Supreme Court has never passed on its validity.[121] The earliest equitable mootness decisions purported to rest at least in part on generally applicable principles, but it is now usually recognized as a doctrine specific to bankruptcy law.[122]

Recitations of the elements of equitable mootness differ from circuit to circuit but share a common core.[123] A universal and essential prerequisite is substantial consummation of a confirmed plan of reorganization—meaning that all or substantially all of the transfers of property proposed by the plan have been made, the reorganized debtor has assumed the business of the debtor to the extent called for by the plan, and distributions have begun.[124] In effect, this serves as the trigger

120. *See In re* Combined Metals Reduction Co., 557 F.2d 179, 189 (9th Cir. 1977) ("The practical necessities involved in a successful reorganization require that unless an order of the bankruptcy judge or the district judge is stayed pending appeal, the trustee's acts in accordance with that order should not thereafter be subject to reversal, even if the order is subsequently overturned on appeal."); *see Roberts Farms*, 652 F.2d 793, 798 (9th Cir. 1981) (explaining that "the principle of dismissal of an appeal for lack of equity . . . is justified to prevent frustration of orderly administration of estates under various provisions of the Bankruptcy Act"); 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[2] (discussing *Roberts Farms*).

121. *See* 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[4] (summarizing each circuits' holdings on equitable mootness).

122. *Compare Combined Metals*, 557 F.2d at 189 (citing Brill v. General Ind. Enterprises, 234 F.2d 465, 469 (3d Cir, 1956) (analogizing to a "line of cases dealing with appeals from denial of injunctions")), *with, e.g.*, *In re* Walker Cnty. Hosp. Corp., 3 F.4th 229, 233 n.4 (5th Cir. 2021) ("Equitable mootness is a judge-created bankruptcy doctrine . . . ."); *In re* VeroBlue Farms USA, Inc., 6 F.4th 880, 883 (8th Cir. 2021) ("In dismissing the appeal, the district court invoked equitable mootness, a bankruptcy doctrine adopted by our sister circuits . . . .").

123. *See* 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[4] ("Each circuit has recognized mootness, although no two circuits have stated the standard for applying it in the same way.").

124. *See*, *e.g.*, *In re* Charter Comms., 691 F.3d 476, 482 (2d Cir. 2012) ("[A]n appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated."); 11 U.S.C. § 1101(2)

> [S]ubstantial consummation' means (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

for an equitable mootness analysis.[125] Recognizing the significance of substantial consummation, the second universal element is that an appellant has worked as diligently as possible to avoid equitable mootness by seeking a stay of the confirmation order prior to consummation[126]—typically asking in turn for a stay from each of the bankruptcy court, district court, and court of appeals.[127] Failure diligently to seek a stay is often fatal,[128] for all that the prospects of a stay are slim and the consequences likely in no party's best interests.[129]

Thereafter, the precise contours of the doctrine vary, but at the heart of the remaining requirements is a showing that the egg that was the bankruptcy case is now scrambled, and further intervention is thus infeasible.[130] The Second Circuit presumes an appeal to be equitably moot following substantial consummation, but has enumerated five factors that courts should consider, focusing on the impact of relief on the debtor

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> 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.

125. *See Charter Comms.*, 691 F.3d at 482–83 (noting the presence of substantial consummation does not automatically moot an appeal).

126. *See, e.g.*, *In re* Phila. Newspapers, LLC, 690 F.3d 161, 169 (3d. Cir. 2012) ("The second factor principally duplicates the first 'in the sense that a plan cannot be substantially consummated if the appellant has successfully sought a stay.'" (quoting *In re* Zenith Elecs. Corp., 329 F.3d 338, 346 n.4 (3d Cir. 2003))).

127. *See* 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[3] (describing that courts invariably seek to determine if the appellant has requested stays).

128. *See In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 145 (2d Cir. 2005) ("In the absence of any request for a stay, the question is not solely whether we *can* provide relief without unraveling the [p]lan, but also whether we *should* provide such relief in light of fairness concerns."); *In re* MPM Silicones, LLC, 874 F.3d 787, 804–05 (2d Cir. 2017) ("[W]e have placed significant reliance on the fifth factor, concluding that a 'chief consideration . . . is whether the appellant sought a stay' . . . . A special emphasis on this factor is sound." (citation omitted)). In the interest of disclosure, I note that I was among counsel to appellants in *MPM Silicones* when I was in practice.

129. *See infra* notes 158–162, 497–507 and accompanying text.

130. *See In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) ("[T]he reasons underlying [equitable mootness]—preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg—are so plain and so compelling . . . .").

and on third-parties.[131] *Inter alia*, the court must consider whether relief will "affect the re-emergence of the debtor as a revitalized corporate entity" and whether relief will "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."[132] The Ninth Circuit's test does not incorporate the presumption described by the Second Circuit that an appeal from a substantially consummated plan is equitably moot, but uses the same standard of whether relief would "creat[e] an uncontrollable situation" as the key element of its analysis.[133] The Third, Fifth and Seventh Circuit have less reticulated tests, but examine fundamentally the same questions, each calling for a fact-intensive inquiry that considers both the reliance interests of third parties and the difficulties of reversing the transactions that have taken place.[134]

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131. *See In re Charter Comms.*, 691 F.3d at 482

> (1) "the court can still order some effective relief"; (2) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity";(3) "such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court";(4) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings;" and (5) "the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from." (citation omitted).

132. *Id.*

133. *In re* Thorpe Insulation Co., 677 F.3d 869, 881 (9th Cir. 2012).

134. *See* Tribune Media Co. v. Aurelius Cap. Mgmt., 799 F.3d 272, 278 (3d Cir. 2015) ("[I]n cases where relief would *neither* fatally scramble the plan *nor* significantly harm the interests of third parties who have justifiably relied on plan confirmation, there is no reason to dismiss as equitably moot an appeal of a confirmation order for a plan now substantially consummated."); *In re* SemCrude, LP, 728 F.3d 314, 321 (3d Cir. 2013) ("[E]quitable mootness . . . proceed[s] in two . . . steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation."); Duff v. Cent. Sleep Diags., LLC, 801 F.3d 833, 840 (7th Cir.

All of the elements, though, lack precision in their application because equitable mootness is discretionary and prudential.[135] An appellate court may choose not to dismiss an appeal as equitably moot even if every element is met.[136] Indeed, the increasing trend within circuit courts of appeals decisions has been—without formally changing any of the elements—to stress the need for caution in applying the doctrine and the strong presumption that appellate courts should exercise the jurisdiction conferred upon them.[137] The impact of equitable mootness is also variable, because a court minded to find an appeal to be equitably moot is typically said to have a free choice

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2015) ("'[A] court must consider the effects of the relief on innocent third parties' . . . [and] may properly refuse to decide the merits of a challenge . . . where unwinding the plan . . . would be difficult and inequitable in light of the complexity of the transaction and the reliance interests involved."); *In re* UNR Indus., 20 F.3d 766, 770 (7th Cir. 1994) ("And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal."); *In re* Tex. Grand Prairie Hotel Realty, 710 F. 3d 324, 327–28 (5th Cir. 2013)

> To establish equitable mootness, a debtor must show that (i) the plan of reorganization has not been stayed, (ii) the plan has been "substantially consummated," and (iii) the relief requested by the appellant would "affect either the rights of parties not before the court or the success of the plan." (citations omitted).

135. *See* George Kuney, *Understanding and Taming the Doctrine of Equitable Mootness*, *in* 2018 NORTON ANNUAL SURVEY BANKRUPTCY LAW n.150 and accompanying text (citing Second Circuit cases); *see, e.g.*, *In re* Public Serv. Co. of N.H., 963 F.2d 469, 471 (1st Cir. 1992) (describing equitable component to mootness as "rooted in the 'court's discretion in matters of remedy and judicial administration' not to determine a case on the merits" (citations omitted)).

136. *See, e.g.*, *In re* Exide Holdings, Inc., No. 20-11157-CSS, 2021 WL 3145612, at *1 (D. Del. July 26, 2021) ("[W]hile the appeal meets the criteria for equitable mootness, I can readily resolve the merits of the appeal against the appealing party . . . .").

137. *See In re* SemCrude, LP, 728 F.3d 314, 318 (3d Cir. 2013) ("Its judge-made origin, coupled with the responsibility of federal courts to exercise their jurisdictional mandate, obliges us, however, to proceed most carefully before dismissing an appeal as equitably moot."); *In re* Pac. Lumber Co., 584 F.3d 229, 240–41 (5th Cir. 2009) (noting that equitable mootness is an exception to courts' "'virtually unflagging obligation' to exercise . . . jurisdiction" (citation omitted)); *In re* Charter Comms., 691 F.3d 476, 481–82 (2d Cir. 2012) ("'Equitable mootness applies to specific claims, not entire appeals' and must be applied 'with a scalpel rather than an axe.'" (quoting *In re* Pac. Lumber Co., 584 F.3d 229, 240–41 (5th Cir. 2009)).

as to when to do so.[138] It may do so at the outset, saying nothing as to the merits of the appeal, or it may first engage with the merits, analyzing whether plan confirmation complied with the Code before turning to the question (if the appellant is successful) of whether relief can equitably be granted.[139] Sometimes, finally, courts will turn to equitable mootness after finding that an appeal is not meritorious, deploying equitable mootness as an alternative—though not strictly necessary—basis for affirmance.[140] In practice, the trend appears to be to deploy equitable mootness when it is helpful as an escape hatch.[141] The survey of district court decisions discussed in Part II did not find any cases in which district courts found an appeal to be meritorious but then went on to conclude that it should be dismissed without any grant of relief on grounds of equitable mootness. The inference is that, while courts are happy to buttress their decisions by offering an easy call on the merits in addition to deployment of a bankruptcy appeal barrier, courts use barriers, where possible, to avoid engaging with potentially weightier arguments.

The outer bounds of equitable mootness also vary. The first equitable mootness cases involved plans of reorganization.[142] District courts have shown some amount of enthusiasm for

138. *See In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 144 (2d Cir. 2005) ("Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness."); *cf.* La Trinidad Elderly LP v. Loíza Ponce Holdings, 627 B.R. 779, 797 (B.A.P. 1st Cir. 2021) ("[W]e exercise our discretion to bypass the equitable mootness question and proceed to the merits.").

139. *See, e.g.*, *In re* 53 Stanhope LLC, No. 21-CV-5177, 2022 WL 3025930, at *4 n.8 (S.D.N.Y. Aug. 1, 2022) (acknowledging Second Circuit precedent stating that appellate courts may begin by reviewing the merits but noting that "[c]ourts in this district, however, regularly reach equitable mootness without first determining the merits").

140. *See, e.g.*, *In re Exide Holdings,* No. 20-11157-CSS, 2021 WL 3145612, at *1 (D. Del. July 26, 2021) (holding that the appeal could be readily resolved on its merits but presenting an analysis on equitable mootness as well).

141. *See id.* (explaining that the court could "resolve [the case on] the merits of the appeal" without falling back to equitable mootness).

142. *See In re* Roberts Farms, Inc., 652 F.2d 793, 796–97 (9th Cir. 1981); *In re* Info. Dialogues, Inc., 662 F.2d 475, 476 (8th Cir. 1981); *In re* AOV Indus., Inc., 792 F.2d 1140, 1148 (D.C. Cir. 1986); Cent. States, S.E. & S.W. Areas Pens. Fund v. Centr. Trans. Inc., 841 F.2d 92, 96 (4th Cir. 1988); *In re* Chateaugay Corp., 10 F.3d 944, 952 (2d Cir. 1993).

expanding the doctrine further to encompass other types of case-ending or case-determining orders. Thus courts have found equitable mootness to bar appeals from the distribution of assets in Chapter 7 liquidations,[143] and from structured dismissals—a kind of bespoke case-ending order in which a bankruptcy court, while dismissing the case, prescribes what should happen to key estate assets or rights contested in the case.[144] Circuit courts of appeals have been more cautious.[145] Some have explicitly held that equitable mootness begins and ends with appeals from Chapter 11 plans.[146] The Second Circuit, in contrast, while not specifically delineating the boundaries of equitable mootness, states that it can be applied "'in a range of contexts,' including appeals involving all manner of bankruptcy court orders."[147] The

143. *See, e.g.*, *In re* RS Old Mill, LLC, No. 20 CV 743, 2020 WL 2306447, at *4 (S.D.N.Y. May 8, 2020) ("Courts have imported the equitable mootness doctrine from its origin in Chapter 11 to cases under other Chapters of the Bankruptcy Code, including Chapter 7."); *In re* Leatherstocking Antiques, Inc., No. 12 Civ. 7758(ER), 2013 WL 5423995, at *4 (S.D.N.Y. Sept. 27, 2013) (importing the equitable mootness doctrine from chapter 11 to a chapter 7 case); ANR Co. v. Rushton, No. 2:10–CV–79, 2012 WL 1556236, at *4 (D. Utah May 2, 2012) ("[T]he Ninth Circuit has applied the equitable mootness doctrine in . . . Chapter 7 . . . liquidation proceedings. . . . [O]ther circuits have applied the equitable mootness doctrine in the context of Chapter 7 . . . . Indeed, when confronted with this issue, no circuit has affirmatively held equitable mootness inapplicable."); *In re* Carr, 321 B.R. 702, 707 (E.D. Va. 2005) ("Thus, the equitable mootness doctrine's principles counseling pragmatism in the exercise of equity apply with equal force to the Chapter 7 liquidation of a bankruptcy estate.").

144. *See, e.g.*, *In re* Jevic Holding Corp., No. 08-11006, 2014 WL 268613, at *4 (D. Del. Jan. 24, 2014) ("The court finds that the settlement has been substantially consummated as all the funds have been distributed. . . . The court concludes that the appeal is equitably moot in view of the settlement.").

145. *See* 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[8] ("Several circuits, however, have expressly reserved decision as to whether the doctrine applies at all in chapter 7 cases." (citations omitted)).

146. *See In re* SemCrude, LP, 728 F.3d 314, 317 (3d Cir. 2013) ("Equitable mootness comes into play . . . after a plan . . . is approved."); *In re* Jevic Holding Corp., 787 F.3d 173, 186 (3d Cir. 2014) (Scirica, J., concurring in part) ("We recently made clear in [*Semcrude*] that this doctrine applies only where there is a confirmed plan . . . ."), *rev'd on other grounds by sub nom.* Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017); *In re* Kramer, 71 F.4th 428, 452 (6th Cir. 2023) ("Ultimately, we must decline the request to expand broadly an already questionable doctrine. . . . [W]e hold that the doctrine of equitable mootness has no place in Chapter 7 liquidations.").

147. *In re* Windstream Holdings, Inc., 838 F. App'x 634, 637 (2d Cir. 2021) (quoting *In re* BGI, Inc., 772 F.3d 102, 109 (2d Cir. 2014)).

Eleventh Circuit likewise liberally applies equitable mootness. From the early years of the Code it has been prepared to extend equitable mootness to other situations that seem analogous either to plan confirmation or to sale of the estate's assets, from foreclosure on a debtor's assets to settlements of legal claims, and also outside of Chapter 11 in both Chapter 9 reorganizations of municipalities and Chapter 7 liquidations.[148] The Sixth Circuit has adopted an intermediate and more precise position, holding an appeal from the City of Detroit's Chapter 9 plan of reorganization to be equitably moot,[149] but finding that the "simple" distributions at issue in Chapter 7 liquidations do not implicate any of the policy concerns that motivate equitable mootness.[150]

The ideal-type case for equitable mootness might resemble the following: A large company—or family of companies—enters Chapter 11 in order to resolve financial distress and ultimately ends up winning the approval of a sufficient number of its creditors to confirm a plan of reorganization. The plan of reorganization issues new debt to the debtors' senior creditors

148. *See In re* Sewanee Land, Coal & Cattle, Inc., 735 F.2d 1294, 1296 (11th Cir. 1984) (applying appeal of equitable mootness to orders permitting a secured creditor to foreclose on its collateral); *In re* Nica Holdings, Inc., 810 F.3d 781, 788 (11th Cir. 2015) (concluding on facts that appeal from settlement in Chapter 7 liquidation was not equitably moot but not rejecting applicability of the doctrine); Bennett v. Jefferson Cnty., 899 F.3d 1240, 1250 (11th Cir. 2018) ("[W]e see no reason to reject the doctrine [in Chapter 9]. Indeed, in ways these principles will sometimes weigh more heavily in the Chapter 9 context precisely because of how many people will be affected by municipal bankruptcies."); *In re* JMC Memphis, LLC, 655 F. App'x 802, 805–06 (11th Cir. 2016) (affirming district court dismissal for equitable mootness in Chapter 7 case).

149. *See In re* City of Detroit, 838 F.3d 792, 795 (6th Cir. 2016) ("In resolving its bankruptcy, the City crafted a . . . comprehensive [p]lan, and obtained . . . ratification . . . . [E]quitable mootness applies and prohibits [the] challenges to the Confirmation Order . . . .").

150. *See In re Kramer*, 71 F.4th at 451 ("Simply put, these concerns and rationales [of equitable mootness] are not implicated in Chapter 7 liquidations. 'Chapter 7 governs only simple liquidations in which all non-exempt assets are liquidated and distributed to creditors.'" (quoting Tiffany Chang, Equitable Mootness in the Second Circuit, 31 S. CAL. INTERDISC. L.J. 353, 364 (2022))). *But see In re* Myers, 773 F. App'x 161, 162 (4th Cir. 2019) (applying equitable mootness to Chapter 7 appeals "given that the agreement has been fully consummated, the funds have been distributed accordingly, and the Appellants were not parties to that agreement"); Stokes v. Gardner, 483 F. App'x 345, 346 (9th Cir. 2012) (applying equitable mootness in Chapter 7).

and equity in the reorganized debtor to the junior creditor. The plan also incorporates a contribution of new money from related parties to the debtors, in exchange for which those insiders also receive equity in the reorganized debtor. After confirmation of the plan of reorganization, the plan is fully consummated. The old debtor entities cease to exist and claims against them and interests in them are extinguished. The new debt and equity are issued. Thereafter, the new debt and equity trade freely among third parties, such that few, if any, holders are among the original parties to the bankruptcy case. Some party-in-interest, though, opposed confirmation, claiming that some provisions of the plan of reorganization were unlawful. Perhaps the bankruptcy court incorrectly fixed the value of the dissenting creditors' claim, and the creditors were in fact entitled to more value than they actually received.[151] Perhaps the bankruptcy court was incorrect to allow the debtors' insiders to capture as great a share of the value of the reorganized debtor as they did, because the new value they provided was insufficient.[152] The dissenting creditors appeal.

Assuming the dissenting creditors prevail on the merits on appeal, the appropriate remedy would appear to be vacatur of the confirmation order. By confirming the defective plan, the bankruptcy court violated the Bankruptcy Code.[153] Yet appellate courts understandably recoil from this.[154] In the example just discussed, vacatur would create chaos. Third party holders of the reorganized debtor's debt or equity would face the sudden loss of their property—with litigation ensuing over their right in turn to recover from those from whom they acquired their interests. The debtor would return to bankruptcy and would be required once again to seek approval of a plan of

151. For just one of a multiplicity of possible examples, see, for example, *In re* MPM Silicones, LLC, 874 F.3d 787, 806 (2d Cir. 2017) ("The [bankruptcy] court erred in the process it used to calculate the interest rate . . . . On remand, the bankruptcy court should assess whether an efficient market rate can be ascertained, and, if so, apply it to the replacement notes.").

152. *Cf.* Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 454–58 (2009) (explaining limits to "new value transactions" involving prepetition shareholders).

153. *See* 11 U.S.C. § 1129(a)(1) ("The court shall confirm a plan only if all of the following requirements are met: The plan complies with the applicable provisions of this title.").

154. *See* cases cited *supra* note 134.

reorganization. Yet it may not have the resources for a second pass through that process and may equally find negotiating with creditors significantly harder now that their original expectations have been upset. Potentially, a firm that once appeared successfully to have reorganized will end up instead in liquidation.

Staying the confirmation of the plan, meanwhile, avoids these difficulties but creates formidable other problems.[155] As I discuss in Part IV of this Article, some scholars have proposed altering and reinvigorating the analysis for determining whether to grant a stay pending appeal as one way to reform the law of bankruptcy appeal barriers without fundamentally altering or eliminating it. In current bankruptcy practice, though, stays pending appeal are very rare.[156] It is hard to say that is not for good reason. Stays are, in the mine-run of cases, unlikely to be appetizing to any of the stakeholders to the case; arguably, they will not infrequently work to the detriment of all of the parties in the case.[157] Even to place the possibility of a stay on the table, the appellant may be faced with the task of mustering a gigantic bond—one that, because bankruptcy is multi-polar and the plan will affect far more than the appellant's own individual stake in the case, likely far exceeds in value its own economic interests.[158] And a stay is likely vehemently to be opposed.[159] Simply being in bankruptcy burns money, because of the costs of administering the case and subjecting the debtor's affairs to judicial supervision.[160] Equally, it forecloses opportunities, as potential business partners shy away from a debtor that cannot confidently promise that its financial affairs

155. *See* 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[3] ("Many factors may work against the likelihood of a stay, especially in large, complex reorganizations.").

156. *See id.* ("The obstacle here is that stays pending appeal may be difficult . . . to obtain. . . . As noted by the Ninth Circuit, 'the reality is that this court does not often grant stays in circumstances like these.'" (citation omitted)).

157. *See id.* (noting appellants are often disadvantaged by prohibitive costs of obtaining stays); *see infra* notes 497–501 (discussing drawbacks of stays from debtor perspective).

158. *See infra* notes 502–503 and accompanying text.

159. *See infra* notes 497–501 (describing debtors desire for finality and creditors lack of interest in furthering costs of litigation).

160. *See infra* notes 497–501 and accompanying text.

are in order.[161] At worst, the delay may cause the carefully negotiated deal behind the plan to collapse as the business environment changes and key stakeholders reevaluate their proposed investments in the reorganized debtor, such that—just as when a consummated plan is reversed—an apparently successful reorganization instead results in value-destructive liquidation.[162] And because it is routine for Chapter 11 plans at least in part to pay creditors by creating new debt instruments that the reorganized debtor will pay over time, or by awarding creditors equity in the reorganized debtor, this value destruction also impacts creditors' recoveries, potentially including the appellant.[163]

This ideal-type case, in which debtors will argue that there is no viable alternative to simply letting the consummated plan stand without appellate intervention, shows that equitable mootness can serve a number of different interests—only some of which are explicitly stated in the court opinions that set out the doctrine. Indeed, judicial accounts of the policy interest that equitable mootness serves tend to focus on finality.[164] Promoting finality, in turn, preserves judicial resources.[165] But finality and judicial economy are always concerns in litigation; invoking these values cannot alone explain why, in bankruptcy, they should dominate in a way that they do not in other contexts.

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161. *See infra* notes 497–501 and accompanying text.

162. *See infra* notes 497–501 and accompanying text.

163. 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[3] (discussing dismissal of appeal because of the "destructive scrambling" and the "upsetting justifiable expectations of investors" it would have caused).

164. *See, e.g.*, *In re* Pub. Serv. Co. of N.H., 963 F.2d 469, 471–72 (1st Cir. 1992) ("In bankruptcy proceedings, the equitable component centers on the important public policy favoring orderly reorganization and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court.'" (quoting *In re* Revere Copper & Brass, Inc., 78 Bankr. 17, 23 (S.D.N.Y. 1987))); *In re* Pac. Lumber Co., 584 F.3d 229, 240 (5th Cir. 2009) ("Equitable mootness is a kind of appellate abstention that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest." (citation omitted)); *In re* Charter Comms., Inc., 691 F.3d 476, 481 (2d Cir. 2012) ("Equitable mootness in the bankruptcy setting thus requires the district court to carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." (citations omitted)).

165. *See In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) ("[T]he reasons underlying [equitable mootness] . . . preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg—are so plain and so compelling . . . .").

Explicitly or implicitly, therefore, equitable mootness responds to the common understanding that bankruptcy litigation is different and distinctive from other types of civil litigation.[166] As Jay Westbrook has put it, comparing a bankruptcy case to an ordinary civil suit is like comparing a city to a single street.[167] This increased complexity—the daunting task of unscrambling an egg—motivates judicial concern around intervening with consummated plans.[168] One aspect of this complexity is the number of stakeholders involved.[169] Unlike in a simple suit of plaintiff against defendant, bankruptcies may "reorganize thousands of relationships among countless parties"[170]—and further impact a potentially endless chain of non-litigating third-parties that do business with the reorganized debtor.[171] In the leading Seventh Circuit opinion, Judge Easterbrook somewhat breezily centered the doctrine around the protection of the reliance interests of such parties.[172]

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166. *Cf.* Seymour, *supra* note 4, at 1991 ("[B]ankruptcy exceptionalism is often justified, whether explicitly or implicitly, on the understanding that bankruptcy needs its own different rules mode of judging because bankruptcy is special.").

167. *See* Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 205 (2020).

168. *See In re* Kramer, 71 F.4th 428, 449 (6th Cir. 2023) ("[T]he doctrine . . . 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." (second alteration in original) (internal quotations omitted)).

169. *See In re* Tribune Media Co., 799 F.3d 272, 288 (3d Cir. 2015) (Ambro, J., concurring).

170. *Id.*

171. *See In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) ("Undoing *part* of [the plan] . . . is possible but has ramifications for the rest . . . . [T]here will be a sudden revaluation of the shares of UNR, which current holders purchased on the assumption that all asbestos payments would be borne by the Trust.")

172. *See id.* ("Far stronger is the contention that reliance on the plan of reorganization makes it imprudent to revise things."); *see also Tribune Media*, 799 F.3d at 287 (Ambro, J., concurring) (explaining that equitable mootness prevents the "upset [of] third parties' legitimate reliance on the finality of such a plan"); *In re* Sneed Shipbuilding, Inc., 916 F.3d 405, 409 (5th Cir. 2019) ("Equitable mootness is aimed at limiting review of complex [reorganization] plans whose implementation has substantial secondary effects."(citations omitted)).

But the central economic parties in interest also benefit from equitable mootness.[173] The fact that a reorganizing debtor is able to give some assurance to investors that they can rely on the bankruptcy court proceedings both facilitates negotiations and likely makes securing capital cheaper for a debtor.[174] It may further help that the decision on which the parties can rely comes from a bankruptcy judge—who will likely share the key stakeholders' preference for wrapping things up quickly with a value-maximizing negotiated deal—rather than an appellate judge unfamiliar with the bankruptcy terrain.[175]

Perhaps attempting to thread a middle ground between these conceded benefits of equitable mootness and a reluctance to give up their judicial oversight role, appellate courts have increasingly rejected a binary choice between vacating confirmation orders and dismissing appeals.[176] Circuit courts, at least, increasingly emphasize the option to grant a prevailing appellant limited relief.[177] Depending on the circumstances, "limited" relief may be just as valuable to the appellant as would confirmation of a new and lawful plan—potentially even more valuable, accounting for the costs and uncertainty of redoing confirmation. *In re MPM Silicones, LLC*[178] provides a

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173. *See In re* Tribune Media, 799 F.3d at 280–81.

174. *Id.*

> All . . . players have a common interest in the finality of a plan: . . . the reorganized entity because it can . . . seek funding in the capital markets without the cloud of bankruptcy [and] investors because a reorganized entity will command a higher and more stable market value outside of bankruptcy.

175. *See infra* notes 268–275 and accompanying text; Seymour, *supra* note 4, at 1963 ("[B]ankruptcy judges . . . face pressure to reach decisions that make successful reorganizations more likely or that protect other valued public interest.").

176. *See, e.g.*, *In re* MPM Silicones, LLC, 874 F.3d 787, 791 (2d Cir. 2017) (remanding for the bankruptcy court to "address the single deficiency we identify with the proceedings below" instead of dismissing the appeal outright).

177. Although the Supreme Court has never engaged with equitable mootness, it has made comments in other contexts consistent with this trend. *Cf.* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 587 U.S. 370, 377 (2019) (stating that a case should be dismissed for constitutionality rather than equitable mootness "only if it is impossible for a court to grant any effectual relief whatever" including money damages (internal quotations omitted)).

178. 874 F.3d 787 (2d Cir. 2017).

straightforward example.[179] The Second Circuit in that case agreed that the bankruptcy court had confirmed a plan undervaluing the rights of senior secured creditors.[180] The *MPM Silicones* plan elected to pay the claims of those senior creditors by having the reorganized debtor issue new debt to replace the senior creditors' previous debt.[181] The problem for the senior secured creditors was that the bankruptcy court found that the notes in question should bear a below-market rate of interest;[182] the creditors, on appeal, argued that the plan violated the Bankruptcy Code's provisions on plan confirmation by failing to provide a market rate of interest.[183]

Following plan confirmation, the reorganized debtor sought to have the senior creditors' appeals dismissed as equitably moot.[184] According to the reorganized debtor, it was simply too late for appellate courts now to intervene: "*[T]en months* after the substantial consummation of the Plan, Appellant's request that the Court reverse the Confirmation Order is simply 'impractical, imprudent, and therefore inequitable.'"[185] Certainly, sending the parties back to the drawing board to negotiate a Code-compliant plan was one option for remedying the appellants' injury—which the reorganized debtor warned strenuously against.[186] But appellants did not seek—nor did the court of appeals order—the unscrambling of the *entire* plan.[187] Instead, the court of appeals ordered the bankruptcy court to revise the debt instruments issued to the senior secured creditors in order to provide them with an efficient market rate

179. *See id.* at 805 ("In light of the limited nature of the remand . . . we do not believe . . . concerns [over the viability of the plan or debilitating financial uncertainty] will materialize.").

180. *See id.* at 806.

181. *See id.* at 792.

182. *See id.* at 798.

183. *See id.* at 794.

184. *See generally* Motion to Dismiss Appeal as Equitably Moot, *In re* MPM Silicones, LLC, 874 F.3d 787 (2d Cir. 2017) (No. 15-1682).

185. *Id.* (quoting *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 144 (2d Cir. 2005)).

186. *See* Appellee's Motion to Dismiss Appeal, *supra* note 184, at 16 (explaining that ordering a new plan creates a risk of the parties being unable to reach an agreement).

187. *See MPM Silicones*, 874 F.3d at 801, 805 (arguing for recalculation of rates and remanding for individual elements of the plan to be reconsidered).

of interest.[188] There is an element of rough-and-readiness to such decisions. The reorganized debtors thus opposed this more limited remedy just as strenuously as they did reversal of the plan.[189] Perhaps it was true in *MPM Silicones*, for example, as some of the junior creditors argued, that they would have contributed less to the reorganization knowing that the senior creditors would be paid a higher rate of interest, since the debtor's financial situation would have been more precarious and their own investments, in turn, less safe.[190] Even if corners are cut, though, the damage to innocent parties seems less than if an appellant with a meritorious claim were to recover nothing at all.

Equitable mootness is something of anomaly. It is a bankruptcy-specific doctrine, nowhere reflected in statute but instead created by courts, that pragmatically seeks to further the norms of bankruptcy culture, including increasing the chances of success of reorganizations, and facilitating the use of bankruptcy to secure "global peace." Its defenders have linked it to notions that equity plays a special role in bankruptcy practice.[191] It is thus fully in keeping with claims made by those within the specialized bankruptcy community about values that are at the heart of bankruptcy practice. Yet, unlike other doctrines that quintessentially reflect bankruptcy exceptionalism, it is a doctrine entirely created and maintained not by bankruptcy courts but by appellate courts. And, as the next Part discusses in more detail, appellate court engagement with the doctrine discloses a fair amount of dissonance.[192] A reader of court of appeals decisions alone might conclude that equitable mootness is under sustained attack. Much quoted are

188. *See id.*

189. *See* Appellee's Motion to Dismiss Appeal, *supra* note 184, at 18–19 (explaining that the creation of a plan involves negotiating and arguing that appellants' proposed relief to alter individual elements of a plan upsets the balance created by parties' compromises).

190. *See id.* at 17.

191. *See In re* Tribune Media Co., 799 F.3d 272, 287 (3d Cir. 2015) (Ambro, J., concurring) ("A simpler way to reach the same conclusion [supporting equitable mootness] starts from the premise that 'bankruptcy courts . . . are courts of equity and appl[y] the principles and rules of equity jurisprudence.'" (quoting Young v. United States, 535 U.S. 43, 40 (2002)) (second and third alterations in original)).

192. *See infra* Part II.

admonitions that obligations of the appellate courts to exercise their jurisdiction are "virtually unflagging" and that the doctrine should be sparingly used.[193] Regardless, courts of appeals and, especially, district courts continue to dismiss even straightforward appeals on the grounds of equitable mootness.[194]

2. Section 363(m)

Equitable mootness—within the narrow confines of the bankruptcy world—makes headlines.[195] Yet although it is the most prominent bankruptcy appeal barrier, it is not alone. Section 363(m) of the Bankruptcy Code, sometimes called statutory mootness, serves the same purposes of promoting finality and protecting reliance interests as equitable mootness, as applied specifically to sales and leases of property of the estate—including case-determining sales of all or substantially all of a debtor's assets.[196] It rarely attracts as much attention as equitable mootness,[197] for all that it operates in close parallel.[198]

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193. *In re* Pac. Lumber Co., 584 F.3d 229, 240–41 (5th Cir. 2009); *see also* 7 COLLIER ON BANKRUPTCY, *supra* note 118, ¶ 1129.09[4].

194. *See infra* Part II.A.

195. *See, e.g.*, Markell, *supra* note 9, at 384–98; Frost, *supra* note 12, at 481–82; Brief of Bankruptcy Professors as Amici Curiae in Support of Certiorari at 11, Hargreaves v. Nuverra Env't Sols., Inc., 142 S. Ct. 337 (2021) (No. 21-17) (mem.) [hereinafter Ellias Brief]; Brief of Bankruptcy Professors as Amici Curiae in Support of Certiorari at 19–20, U.S. Bank Nat'l Ass'n v. Windstream Holdings, No. 22-926 (U.S. Apr. 18, 2023) [hereinafter Kuney Brief].

196. *Id.*; *cf. In re* Tribune Media Co., 799 F.3d 272, 287 (3d Cir. 2015).

197. *See* Levitin, *supra* note 48, at 1085 (noting that, aside from equitable mootness, "[o]ther factors limiting appellate review have largely been ignored").

198. *See* McKenzie, *supra* note 40, at 790, 791 n.227 (explaining that the two mootness doctrines rely on "similar considerations"). Courts frequently note the overlap between the two doctrines. *See In re* Castaic Partners II, LLC, 823 F.3d 966, 968 (9th Cir. 2016) ("[S]tatutory mootness codifies part, but not all, of the doctrine of equitable mootness."); *In re* PW, LLC, 391 B.R. 25, 35 (B.A.P 9th Cir. 2008) ("Section 363(m) is a codification of some aspects of equitable mootness with respect to sales. Unlike equitable mootness, however, § 363(m) provides for specific procedures and findings in order to provide certainty for sales."); *cf.* David Skeel, *Unwritten Rules and the New Contract Paradigm*, 36 EMORY BANKR. DEV. J. 739, 746 n.39 (2020) ("It also is difficult to appeal bankruptcy judges' orders confirming a reorganization plan, due to

But its statutory source means critics cannot hope for judicial curtailment of the doctrine in the same way as equitable mootness; neither, also, has it attracted the sharp criticism that some commentators have directed at the former doctrine.[199]

Although, in this context, put to creative use, the underlying statutory provisions are simple. When a debtor files a Chapter 11 bankruptcy case, it ordinarily continues to operate its business as a debtor-in-possession.[200] That authority permits the debtor to undertake ordinary course transactions such as the purchase or sale of inventory.[201] The debtor must go to court, though, for outside of the ordinary course transactions involving use, sale, or lease of property of the bankruptcy estate.[202] Invoking Section 363(b) of the Code,[203] a debtor might, for example, seek to replace a critical and expensive piece of equipment, or sell off a non-performing unit within its business. By the 1990s, though, a consensus developed among bankruptcy practitioners and judges that Section 363 allowed for more than this.[204] Instead of proposing a plan of reorganization (in which, typically, a debtor would distribute value to creditors in the form of equity in the reorganized debtor), debtors could simply use Section 363 to sell the entirety of the bankruptcy estate as a

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equitable mootness doctrine. But equitable mootness is not as complete a barrier to challenge as § 363(m).").

199. *See* Frost, *supra* note 12, at 492–98 (describing various judges' criticism of equitable mootness).

200. *See* 11 U.S.C. § 1107 ("[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.").

201. *See id.*; *see also id.* § 363(c)(1) ("[T]he trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing."); *id.* § 1108 ("[T]he trustee may operate the debtor's business.").

202. *See id.* § 363(b)(1) (allowing a trustee to engage in ordinary business transactions but requiring court notice and a hearing for transactions involving property of the bankruptcy estate).

203. *Id.*

204. *See* BAIRD, *supra* note 14, at 245 (describing the modern view and use of going-concern sales while acknowledging that "[t]he Bankruptcy Code contains no provision governing going-concern sales of the entire business").

going concern.[205] Following the sale, the debtor distributes cash, rather than equity, to its creditors.[206]

Section 363 orders approving the sale of all of a debtor's assets are not literally case-*ending*, in the sense that proceedings in front of the bankruptcy judge terminate once the sale is finalized.[207] A debtor, by itself, has no authority to distribute the cash realized from a sale to creditors.[208] Rather, some further order or process is required. That process may be a simple liquidating plan—most likely one that straightforwardly distributes the proceeds of the sale to creditors in accordance with bankruptcy's default rules of absolute priority.[209] In some cases—for example, when the bankruptcy estate is deeply administratively insolvent and is looking for the cheapest option—the case may convert post-sale to a Chapter 7 liquidation.[210] A cheaper and quicker option is to dispense with any type of Chapter 11 plan altogether and instead seek an additional order from the bankruptcy court—known as a structured dismissal—that prescribes how all remaining property of the estate should be distributed.[211] Critically, though, no matter the final process the debtor chooses for wrapping up the bankruptcy proceedings, it is an

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205. *See id.*

206. *See id.* at 250–51 (providing an example of cash distribution after a going-concern sale).

207. *See id.*, at 245–55 (explaining various post-sale processes and recognizing a judge's role in these processes).

208. *See* George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process*, 40 HOUS. L. REV. 1265, 1270–73 (2004) (describing the sale process and explaining that creditors and interest holders have to cooperate to determine distribution of assets).

209. *See, e.g.*, *id.* at 1271–72.

210. *See* Dennis J. Connolly and Christopher K. Coleman, *The Increasing Utilization (and Challenges) of Structured Dismissals as an Alternative Disposition of Bankruptcy Cases*, *in* 2021 ANNUAL SURVEY BANKRUPTCY LAW. Chapter 7 is almost always an unpalatable option though, because appointment of a Chapter 7 trustee means loss of control over the case. *See id.*

211. *See* Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 456 (2017). A structured dismissal is an order that dismisses the bankruptcy case but nevertheless includes other provisions effecting changes to the parties' rights (such as the distribution of any remaining property). *See id.* (recognizing that a structured dismissal allows a court to "alter a Chapter 11 dismissal's ordinary restorative consequences"); *see also* Connolly & Coleman, *supra* note 210 (describing the use of structured dismissals).

anticlimax.[212] It is the sale order that is the most significant landmark for creditors. First, the sale orders necessarily and conclusively determine the debtor's value—the most significant issue that would otherwise be litigated as part of the traditional plan confirmation process[213]—and thus the maximum recovery for creditors.[214] Sale orders may also determine other "core chapter 11 terms," including, potentially, issues of priority among competing creditors.[215] After the sale has gone through, it is likely too late for most dissenters to affect their fate.[216] Indeed, commentators critical of modern use of Section 363 analyze the extent to which sale orders should be described as "sub rosa plans" that have substantially all of the effect of confirmed plans of reorganization without any of the built-in procedural protections.[217] Even if not formally case-ending,

212. *Cf.* CHARLES TABB, THE LAW OF BANKRUPTCY 448 (5th ed. 2020) (describing the use of a plan following a Section 363 sale as a "fait accompli").

213. *See* Jonathan M. Seymour & Steven L. Schwarcz, *Corporate Restructuring Under Relative and Absolute Priority Default Rules*, 2021 ILL L. REV. 1, 16 (2021) (recognizing that "parties understand that such a valuation is likely to be hotly contested").

214. *See* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012–2014 FINAL REPORT AND RECOMMENDATIONS 204 (2014) (explaining that the sale order "basically determines the maximum recovery any particular creditor will receive in the case").

215. Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 735 (2010); *see also* Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of* Chrysler *and* GM, 2010 ILL. L. REV. 1375, 1379 ("Given that any particular 'plan' can be structured as a 'sale,' and any 'sale' can be effectuated through a 'plan' structure, it may simply be impossible to meaningfully distinguish between the two . . . in a manner that can preserve . . . distributional norms." (citations omitted)).

216. *In re Veg Liquidation* operates as an example. In that case, even a Chapter 7 trustee could not remedy alleged misbehavior in a previously approved asset sale that led to a reduced recovery for creditors. *In re* Veg Liquidation, Inc., 931 F.3d 730, 738–39 (8th Cir. 2019) (finding that the appellant was not entitled relief from a sale order even when the appellant alleged that the sale order was obtained through fraud).

217. *See* Roe & Skeel, *supra* note 215, at 736–39 (describing courts' treatment of "sub rosa plans" and recognizing that most modern courts allow plans that make Section 1129 determinations "only if an appropriate, even if makeshift, protection is used to substitute for the forgone conditions to plan confirmation"); *cf.* AM. BANKR. INST., *supra* note 214, at 204 ("[C]ourts and commentators note that these sales skirt the notice and due process protections of the plan process . . . ."); TABB, *supra* note 212, at 449 (characterizing Section 363 sales as "chapter 3 reorganization[s]").

orders approving the sale of all of a debtor's assets are fairly characterized as case-determining.

Just as with equitable mootness, statutory mootness under Section 363(m) steps in after a sale is consummated. The statutory text instructs that an appellate decision shall not "affect the validity" of a sale, so long as the buyer made the purchase in good faith.[218] Giving notice to the purchaser of the pendency of the appeal does not defeat statutory mootness, but preventing consummation by securing a stay pending appeal will.[219] Exactly what it means to say that the validity of a sale is "unaffected" by appeal was long disputed. The Second Circuit, along, apparently, with a majority of the courts of appeals, embraced an aggressive view of Section 363(m) under which a finding that the Section applied was by itself enough to end the appeal.[220] Otherwise stated, Section 363(m) created a jurisdictional limit on appellate review, permitting the court to inquire only into the question of good faith.[221] No element of discretion was involved. Under the minority rule of the Third, Sixth, and Tenth Circuits, Section 363(m) more closely resembled equitable mootness; an appellate court could not grant relief that would "claw back the sale" but could otherwise hear and decide the appeal.[222] That allowed those courts to engage, as in contemporary equitable mootness cases, in an analysis of whether limited relief short of unwinding the whole deal could be fashioned, asking "whether a remedy can be

218. 11 U.S.C. § 363(m).

219. *Id.* For all of the same reasons as with stays of plan confirmation orders, a stay of a sale order is likely to be neither an attractive nor a realistic prospect. *See infra* notes 497–507 and accompanying text.

220. *See In re* Gucci, 105 F.3d 837, 838 (2d Cir. 1997) ("We hold that pursuant to Bankruptcy Code § 363(m) we have no jurisdiction to review an unstayed sale order once the sale occurs . . . ."); *see also In re* Energy Future Holdings Corp., 949 F.3d 806, 820 (3d Cir. 2020) ("In many circuits, the 'mootness' label is an apt one because § 363(m) is read essentially as a jurisdictional bar against any appeal of an unstayed sale order." (citation omitted)).

221. *See In re* Lehman Bros. Holdings, Inc., 415 B.R. 77, 85 (S.D.N.Y. 2009) ("[A]ppellate jurisdiction over an unstayed sale order issued by a bankruptcy court is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser." (quoting *In re Gucci*, 105 F.3d at 839)).

222. *In re Energy Future Holdings Corp.*, 949 F.3d at 821 (quoting *In re* ICL Holding Co., 802 F.3d 547, 554 (3d Cir. 2015)).

fashioned that will not affect the validity of the sale."[223] On the one hand, requested relief that would substantially affect the purchase price of the sale would go to validity; on the other hand, requested relief that would reallocate the proceeds of the unchanged purchase price from one creditor group to another would not.[224]

In *MOAC Mall Holdings*,[225] the Supreme Court in 2023 resolved this circuit split, finding that Section 363(m) is not jurisdictional.[226] But uncertainty still remains. After *MOAC*, nothing now stops courts of appeals from reaching the merits in every appeal from a sale that they consider—although, having decided the merits, in some number of cases involving challenges to the purchase price or transfer of the assets, they will not be able to proceed any further towards fashioning relief.[227] But it remains to be seen how courts that previously had been able to avoid hearing any aspect of an appeal from a sale order will react. Applying principles from equitable mootness—which has long been recognized to overlap with Section 363(m)[228]—courts might exercise their discretion to dismiss appeals without reaching the merits where they know that Section 363(m) would ultimately prohibit overturning the

223. *Id.* (quoting Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc., 141 F.3d 490, 499 (3d Cir. 1998)).

224. *Compare In re Energy Future Holdings Corp.*, 949 F.3d at 807 ("[R]equested relief that would materially increase or decrease the purchase price would plainly affect the validity of the sale . . . ."), *with In re* ICL Holding Co., 802 F.3d 547, 554 (3d Cir. 2015) (finding that a reallocation of proceeds can occur without affecting the validity of a sale).

225. MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288 (2023).

226. *See id.* at 297 (rejecting "the Second Circuit's characterization of § 363(m) as jurisdictional").

227. *See In re Energy Future Holdings Corp.*, 979 F.3d at 821 ("The ultimate question is whether the grant of relief would, in effect, 'claw back the sale' . . . ." (citation omitted)).

228. *See, e.g.*, Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), , 391 B.R. 25, 35 (B.A.P 9th Cir. 2008) ("Section 363 (m) is a codification of some aspects of equitable mootness with respect to sales."); *see also In re* Mark Techs. Corp., Nos. CC-16-1435-KuFL, CC-16-1436-KuFL, CC-17-1069-KuFL, CC-17-1070-KuFL, 2018 WL 669112, at *2 (B.A.P. 9th Cir. Feb. 1, 2018) (dismissing appeal as both equitably and statutorily moot).

sale.[229] The Supreme Court's decision has left space for lower appellate courts to apply Section 363(m) in a way that looks like equitable mootness at its narrowest, with courts—proceeding by default with appeals, searching for available relief to grant to victorious appellants, and only turning appellants away when nothing short of tearing up the sale approved below would satisfy them. Equally, though, nothing in *MOAC* is inconsistent with appellate courts deploying Section 363(m) like equitable mootness at its broadest, with courts considering statutory mootness upfront and only proceeding any further if the doctrine is on its face inapplicable.

Evaluations of statutory mootness under Section 363(m) vary markedly. As with equitable mootness, it is said to serve the policy of finality and to protect the reliance interests of third parties.[230] Some critics of equitable mootness, though, view Section 363(m) as a much less troublesome cousin.[231] On this view, statutory mootness is a "narrow provision" that "merely prevent[s] the upsetting of certain *specific* transactions if stays are not obtained."[232] Even after *MOAC*, though, the doctrine likely remains sufficiently malleable that such a dismissive characterization is not warranted.

In origin, of course, the doctrines differ. Critics of equitable mootness frequently note that it is a judicial creation of doubtful provenance, in contrast to Section 363(m)—a straightforward

229. In the Second Circuit's first decision on the matter, considering the Supreme Court's remand from *MOAC*, that court proceeded straight to the merits of the appeal. *See In re* Sears Holdings Corp., Nos. 20-1846-bk, 20-1953-bk, 2023 WL 7294833, at *1 (2d Cir. Nov. 6, 2023).

230. *See In re* Trism, Inc., 328 F.3d 1003, 1006 (8th Cir. 2003) ("By providing reliability and finality, section 363(m) enhances the value of the debtor's assets sold in bankruptcy." (citation omitted)); Cinicola v. Sharffenberger, 248 F.3d 110, 121–22 (3d Cir. 2001) (recognizing that Section 363(m) "promote[s] certainty and finality in bankruptcy sales" and that "its certainty attracts investors and helps effectuate debtor rehabilitation" (citations omitted)); *In re* UNR, Inc., 20 F.3d 766, 769 (7th Cir. 1994) (describing "preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg" as the policy reasons underlying Section 363(m)).

231. *See infra* notes 233, 235 and accompanying text.

232. *In re* One2One Commc'ns, LLC, 805 F.3d 428, 443 (3d Cir. 2015) (Krause, J., concurring) (quoting *In re* Cont'l Airlines, 91 F.3d 553, 570 (3d Cir. 1996) (Alito, J., dissenting)).

application of a statutory provision created by Congress.[233] In a sense, this is an analysis made through the lens of bankruptcy exceptionalism. Applying the plain text of Section 363(m) does nothing to deviate from ordinary methods of judging; declining to exercise appellate jurisdiction for wholly prudential reasons seems wholly different. Conclusions that take account only of the provenance of the two doctrines, though, seem unsatisfying. In the context of case-determining orders, the doctrines work largely in parallel.[234] Although equitable mootness is the more-discussed of the two, most normative cases against equitable mootness also raise questions about whether Section 363(m) is justifiable, at least in its modern scope.[235] Conversely, a supporter of Section 363(m) might argue that disputes over equitable mootness might best be resolved by amendment of the Bankruptcy Code to create a similar statutory insulation from appellate review for plans of reorganization.[236] Although, in practice not frequently taken together, it makes sense for a normative analysis of bankruptcy appeal barriers to consider both doctrines.

II. ASSESSING THE IMPACT OF BANKRUPTCY APPEAL BARRIERS

This Part explores potential and actual harms caused by bankruptcy appeal barriers, concluding that they warrant skepticism and require special justification. It begins by examining bankruptcy appeal barriers' role in the institutional architecture of the bankruptcy appellate system, concluding that—although arguments that the barriers are unconstitutional in and of themselves do not succeed—they implicate constitutionally significant values surrounding due

233. *See* Frost, *supra* note 12, at 481–82 ("Although the doctrine has been adopted by every circuit, the constitutional and statutory bases of equitable mootness have recently been under increasing scrutiny."); *see also supra* notes 195, 198 and accompanying text.

234. *See supra* note 198 and accompanying text.

235. *Cf. In re One2One Commc'ns, LLC*, 805 F.3d at 443–44 (Krause, J., concurring) (arguing that the doctrine of equitable mootness is not supported by the Bankruptcy Code and stating that Section 363(m) is a "[n]arrow provision" that does not provide support for broad mootness doctrines).

236. *See* Markell, *supra* note 9, at 415 (explaining that amending the Bankruptcy Code to provide confirmation orders with immunity from appeal is a solution, although a "radical" one).

process, the separation of powers, and the right to an Article III judge in ways that have systemic distributional consequences.[237] This Part turns then to analyzing functional harms claimed for bankruptcy appeal barriers.[238] It shows that, although evidence is mixed, there is some basis for the claim that bankruptcy appeal barriers impede the substantive development of bankruptcy law by allowing appellate courts to avoid making precedential decisions on frequently litigated issues, all to the benefit of the bankruptcy system's dominant repeat players.[239] But it further describes an additional harm largely passed over in existing literature—that, especially in district courts, bankruptcy appeal barriers are deployed somewhat arbitrarily and in ways that do not seem to serve any of the interests which, on paper, they exist to protect.[240] This overdeployment of bankruptcy appeal barriers is consistent with a story of appellate courts reluctant to engage with the specialized world of bankruptcy.[241] And it is particularly concerning because the parties most affected seem likely to be unsophisticated litigants with smaller claims—those least likely otherwise to have the wherewithal to protect themselves.

A. *Institutional Concerns*

A first, and at first sight obvious—but also remarkably nebulous—observation as to the significance of bankruptcy appeals is that they disrupt an appeal right that is, at least in some sense, thought of as being central to the American legal process.[242] Broadly speaking, Supreme Court precedent is that there is no constitutional due process right to an appeal in civil (or even criminal) litigation.[243] And there is even less basis for a

237. *See infra* Part II.A.

238. *See infra* Part II.B.

239. *See infra* Part II.B.

240. *See infra* Part II.C.2.

241. *See supra* notes 4–5 and accompanying text.

242. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1220, 1224–25 (2013) (explaining that "[t]he promise of appeal is built into American culture" and highlighting the "significant role" of the appeal in the American justice system).

243. *See id.* at 1221 ("[A]ppellate review is not constitutionally guaranteed . . . ."); *see also* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 31 & n.4

constitutional challenge where some barrier to appeal does not involve "absolute deprivation of the opportunity to appeal."[244] Even so, legal culture treats the right to appeal as effectively "sacrosanct,"[245] a part of "American popular culture."[246] Appeal promotes consistency of doctrines and outcomes among a forest of differently minded lower court judges, offers the possibility of error correction,[247] reflects the gravity of the stakes at issue for the parties in many types of litigation,[248] and ensures that matters are passed on by more decision-makers than one single judge who, despite her best efforts, may for all sorts of idiosyncratic reasons be unable to give some litigants or arguments a fair shake.[249] Perhaps other interests at play in the bankruptcy space nonetheless justify placing appeal out of reach of some parties; that should not, though, be a decision that the bankruptcy appellate system makes lightly.

In the context of bankruptcy, doing so has further constitutional implications. Bankruptcy courts are not Article III courts, and bankruptcy judges are not Article III judges.[250] This limits what the bankruptcy court can do. A combination of statutory and constitutional law tells us when a bankruptcy judge may herself hear, decide, and enter final judgment on a claim, and when, instead, she may only recommend findings of

(1987) (Stevens, J., concurring) ("Pennzoil argues that . . . States are under no constitutional duty to provide for civil appeals. Our precedents do tend to support this proposition.").

244. *Pennzoil*, 481 U.S. at 32.

245. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985).

246. Robertson, *supra* note 242, at 1220, 1239.

247. *See id.* at 1221 ("Over the last century, both the federal and state judicial systems have increasingly relied on appellate remedies to protect individual rights . . . .").

248. *See id.* at 1258 ("On the civil side, courts today are facing a greater number of complex, high-value, high-stakes lawsuits.").

249. *Cf. id.* at 1258–60 (arguing that judges have become more powerful and are more often involved in quickly managing cases to deal with increased caseloads). More so in bankruptcy, of course, where, despite statutory authorization, jury trials are wholly absent. *Cf.* 28 U.S.C. § 157(e).

250. *See* Stern v. Marshall, 564 U.S. 462, 469 (2011); BAIRD, *supra* note 14, at 25 (describing how bankruptcy judges cannot exercise "'judicial power' within the meaning of Article III").

fact and conclusions of law to a district court judge.[251] Even beyond those specific limitations, though, the constitutional architecture of the bankruptcy system is premised on the notion that bankruptcy judges, across the whole range of their docket, are overseen by the Article III courts.[252] Supervision by Article III judges has been described as "a talisman of the constitutionality of bankruptcy judges,"[253] and the "foundation" of the contemporary bankruptcy system.[254]

Bankruptcy appeal barriers do not negate the ability of Article III courts to supervise bankruptcy courts, but do, at least, sit squarely in tension with them. Case-determining orders are the most significant orders that bankruptcy judges enter, and grapple with issues—such as valuation and distribution—that are central to bankruptcy litigation. As a technical matter, much of the contents of case-determining orders is statutorily and constitutionally core, such that it is not implicated by the Supreme Court's recent Article III bankruptcy jurisprudence.[255] No *direct* constitutional hurdles are presented when the bankruptcy court "restructures" relationships between

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251. *See* 28 U.S.C. § 157(b)–(c) (establishing procedural rules for bankruptcy proceedings); *Stern*, 564 U.S. at 482–503 (describing the constitutional limits on the statutory authority of bankruptcy judges and examining the boundaries of those limits); Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 30–34 (2014) (discussing *Stern* and examining the limits of the authority that can be delegated to bankruptcy judges); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 674 (2015) (discussing *Stern* and recognizing that "litigants may validly consent to adjudication by bankruptcy courts").

252. *See Wellness Int'l Network, Ltd.*, 575 U.S. at 678 ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process."); *Stern*, 564 U.S. at 515 (Breyer, J., dissenting) ("Article III judges control and supervise the bankruptcy court's determinations . . . ."); *cf.* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986) (explaining that Congress may not "create[] a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities").

253. *In re* Bellucci, 119 B.R. 763, 771 n.19 (Bankr. E.D. Cal. 1990); *see also In re* City of Detroit, 838 F.3d 792, 806, 811 (6th Cir. 2016) ("Article III supervision of bankruptcy judges is key to the constitutionality of the bankruptcy-court system . . . .").

254. Frost, *supra* note 12, at 498.

255. *Cf. Stern*, 564 U.S. at 503.

debtors and creditors that have submitted claims against the bankruptcy estate.[256] But Article III judges should nonetheless be clear-eyed that what bankruptcy judges are doing via such restructuring is pronouncing on property rights exactly of the kind litigated every day in state court.[257] It is troubling if this is done without effective oversight from other courts.[258] Judge Krause, a sharp critic of equitable mootness, thus wrote that equitable mootness implicates "non-waivable, structural concern[s]" that adjudication of judicial business in other fora impermissibly "threaten[s] the institutional integrity of the Judicial Branch" and "intru[des] on the province of the judiciary."[259] And Judge Moore, dissenting from the Sixth Circuit's decision not to consider the merits of the appeal of pension-holders from Detroit's Chapter 9 plan of reorganization, argued that equitable mootness "undermines the delicate constitutional balance on which bankruptcy adjudication is based."[260]

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256. *See id.* at 488; *cf.* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right.'").

257. Jonathan Seymour, *Bankruptcy in Conflict*, 98 AM. BANKR. L.J. 571, 577–80 (2024) ("Much of what bankruptcy judges do day-to-day is to determine disputes of 'ordinary' state law.").

258. *See City of Detroit*, 838 F.3d at 811–12 (Moore, J., dissenting) ("Even if a case is tried in the first instance in a non-article III tribunal, a separation-of-powers interest remains in ensuring appellate review by an article III court." (quoting Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 939 (1988)).

259. *See* One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 444–45 (3d Cir. 2015) (Krause, J., concurring); *see also* Markell, *supra* note 9, at 412.

260. *City of Detroit*, 838 F.3d at 811 (Moore, J., dissenting). Judge Moore overstates the case slightly, arguing, following Judge Krause in *One2One Commc'ns*, that "'bankruptcy courts control nearly all of the variables' that are considered in assessing whether an appeal is equitably moot." *Id.* at 812 (Moore, J., dissenting) (citations omitted). Equitable mootness can never apply, though, where consummation of a plan does not take place because the bankruptcy court's order is stayed. *See In re* Cont'l Airlines, 91 F.3d 553, 560 (3d Cir. 1996). Since "diligently seeking a stay" requires litigants to go to the appellate courts after their request for a stay is rebuffed by the bankruptcy court, appellate courts will have the ability to forestall equitable mootness in almost every case—for all that further intense litigation over stays may be unattractive. *See* Tribune Media Co. v. Aurelius Capital Mgmt., 799 F.3d 272,

Defenders of equitable mootness argue that current Supreme Court precedent cannot establish that the doctrine is actually unconstitutional under Article III.[261] Through a formalist lens, this seems hard to argue with.[262] Even if bankruptcy appeal barriers stop a district court or court of appeals from weighing in after the fact, the district court judge maintains, while the case is ongoing, the right on its own motion to withdraw the reference from the bankruptcy court and make decisions for itself.[263] In no case is the district court, at least, *precluded* by appeal barriers from supervising the bankruptcy court. But the constitutional problems cannot entirely be waved

285 (3d Cir. 2015). Judge McMahon's rulings in *Purdue* exemplify the steps an appellate judge can take to avoid equitable mootness. *See In re* Purdue Pharma, L.P., 634 B.R. 240, 249 (S.D.N.Y. 2021) ("I am on the record as stating that I will not allow this appeal to be equitably mooted. If at any time it appears that imminent action might lead to that result, I invite the Movants to knock on my door.").

261. *See* Tribune Media Co. v. Aurelius Capital Mgmt., 799 F.3d 272, 285 (3d Cir. 2015) (arguing that "the primary evil the [Supreme Court's] cases address (congressional aggrandizement) is irrelevant" to equitable mootness). Again, "irrelevant" probably overstates the case. Congress, of course, cannot be said to have been intentionally aggrandizing its power with equitable mootness, a judge-created doctrine, in the same way that the Supreme Court found to be so in *Northern Pipeline* and *Stern*. *See e.g.*, *Northern Pipeline*, 458 U.S. at 87 (concluding that 28 U.S.C. § 1471 improperly removed "the essential attributes of the judicial power" from Article III courts and vested them in a non-Article III adjunct, rendering the grant of jurisdiction unsustainable). But if Congress creates a non-Article III court that, in fact, turns out not effectively to be supervised by Article III judges, that may still create separation of powers concerns. *But cf. Tribune Media Co.*, 799 F.3d at 286 ("If [this] seems formalistic . . . that is because the Supreme Court's separation-of-powers cases . . . are often formalistic.").

262. Robert Miller, though, has suggested to the contrary, arguing that "[e]quitable mootness unconstitutionally abridges the right to Article III appellate review." Robert Miller, *Equitable Mootness: Ignorance Is Bliss and Unconstitutional*, 107 KY. L.J. 269, 309 (2018).

263. 28 U.S.C. § 157(d). In practice, of course, this happens rarely. Many treatises and practitioners' manuals note that withdrawal of the reference is a device for district courts to retain supervisory authority over bankruptcy courts; one, though, states this particularly aptly. WILLIAM HOUSTON BROWN, BANKRUPTCY AND DOMESTIC RELATIONS MANUAL § 2:2 (2023) ("[T]he district court may refer to and withdraw from the bankruptcy judge the bankruptcy jurisdiction, thus maintaining, technically even if not in actual practice, a level of Article III supervision.").

away.[264] Declining to review cases, at least to some extent, "results in a surrender of Article III authority and a corresponding de facto encroachment by bankruptcy judges."[265] Some appellate courts have suggested as much.[266] And, assuming we accept that allocating the power to resolve legal disputes to non-Article III courts raises real separation of powers issues, we should at least maintain a skeptical eye for doctrines and practices that strain or skirt the line on conflicting with those values, even where they do not rise to the level of outright violations.[267]

Equally, there are pragmatic reasons to maintain robust supervision of bankruptcy judges by Article III judges. Otherwise stated, reducing the supervision of bankruptcy judges by appellate courts has distributional consequences. Bankruptcy appeal barriers make bankruptcy judges even more powerful. Judges, in particular those sitting on courts that are popular destinations for filing complex, highly contested, and highly litigated commercial cases, have wide scope to shape the law. If we believe, though, that the decisions of bankruptcy judges have the potential to be skewed so as systemically to favor one set of litigants over another, such a substantial grant of power looks all the more problematic.

In fact, there are good reasons to believe that the decisions of bankruptcy judges may skew in this manner. Bankruptcy has its own distinct culture.[268] It prizes creativity, flexibility, a fidelity to substance over form, and tolerance for a certain degree of rough justice, all in service of the ultimate aim of

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264. *Cf.* Frost, *supra* note 12, at 498 (arguing equitable mootness "may have some serious problems with its foundation").

265. Trugman, *supra* note 84, at 241.

266. *See In re* VeroBlue Farms USA, Inc., 6 F.4th 880, 891 (8th Cir. 2021)

> If equitable mootness instead becomes the rule of appellate bankruptcy jurisprudence, rather than an exception to the Article III-based rule that jurisdiction should be exercised, we predict the Supreme Court, having up to now denied petitions for certiorari to review the doctrine, will step in and severely curtail—perhaps even abolish—its use . . . .

267. *See* Trugman, *supra* note 84, at 241 (suggesting practical realities of limited supervision of bankruptcy courts may inform constitutional decision-making).

268. *See* Seymour, *supra* note 4, at 1938 (discussing the role of equity in bankruptcy).

maximizing recoveries by facilitating a value-maximizing negotiated deal.[269] These deeply rooted commitments, though, produce losers as well as winners. Because the bankruptcy process relies on deals to resolve proceedings, "economically weaker parties" less able to fight for their share of the debtor's value, and to whose interests the most powerful dealmakers give short shrift, may find themselves frozen out.[270]

And particularly of concern is the fact that these commitments are likely to produce *repeat* losers—constituencies (such as the legacy creditors that Vincent Buccola describes) whom reorganization culture can be expected, over and over again to disfavor because they stand in the way of the preferred outcomes of most players in the system.[271] Nor, for many structural reasons, is it easy to fix this skew from within the bankruptcy system.[272] Even acting in good faith as neutral adjudicators, bankruptcy judges are colored by their own immersion in bankruptcy culture, and benefit from maintaining its norms.[273] For all but the routine losers in bankruptcy court, therefore, "the incentive [is] to protect the deal."[274] Multiple critics of aspects of current bankruptcy practice have suggested, in consequence, that substantial change is likely to occur only with the intervention of generalist judges from outside the bankruptcy world.[275] Bankruptcy appeal barriers stand in the way of such intervention.

B. *Specific Claims of Harms*

Critical discussion of bankruptcy appeal barriers focuses heavily on equitable, rather than statutory, mootness. This

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269. *Id.*

270. Frost, *supra* note 12, at 484.

271. *See* Buccola, *supra* note 37, at 1562.

272. *See id.* at 1572 (recognizing that identifying a flaw in bankruptcy law does not imply an easy solution, as reorganization culture resists incremental statutory reform, and fully overhauling the system could introduce new issues).

273. *See, e.g.*, Seymour, *supra* note 4, at 1958–64.

274. Frost, *supra* note 12, at 484.

275. *See, e.g.*, Seymour, *supra* note 4, at 1997; *see also* Levitin, *supra* note 48, at 1152–54; Frost, *supra* note 12, at 520 (explaining that equitable mootness "stands in the way of . . . checks on insularity" of the bankruptcy courts).

subpart tracks that focus, explaining the harms commonly attributed to equitable mootness by its academic and judicial critics.

A first and prominent criticism of equitable mootness in contemporary literature is that it stymies the substantive development of bankruptcy law.[276] A nonbankruptcy analogy here is to the doctrine of qualified immunity. Qualified immunity renders a government official immune from personal liability for a constitutional violation unless it was "clearly established" at the time that the official's conduct was unlawful.[277] To be successful, therefore, a civil rights plaintiff must prove two things: that her rights were violated, and that the official at fault would have understood his conduct was unlawful because the right in question was clearly established.[278] Courts, though, are free to decide this latter inquiry first, dismissing suits without ever passing on whether the official in fact violated a plaintiff's constitutional rights.[279] And, in turn, critics argue, the dismissals lead the law to stagnate: A fact pattern may arise again and again without any decision on the merits.[280]

Equitable mootness is not as formidable a barrier to the development of the law as qualified immunity. At the very least, the bankruptcy court must pass on the substance of the dissenters' objections to a plan of reorganization, even if an appellate court never reaches their merits. But the basic dynamic may be the same. Although some issues "cr[y] out for

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276. Frost, *supra* note 12, at 480–82.

277. *See, e.g.*, Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2004 (2018) (discussing evolution of the qualified immunity doctrine).

278. *See id.*

279. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 234 (2009) (holding that in resolving qualified immunity claims, courts need not first determine whether facts alleged or shown by plaintiff make out violation of constitutional right).

280. *But see* Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1485 (2022) (noting that without qualified immunity, courts would be compelled to issue merits decisions on constitutional issues, which would carry the full precedential force of stare decisis and potentially entrench rights-constricting decisions for decades).

appellate review,"[281] courts of appeals have access to an easy option—dismissing appeals because relief can no longer "prudently" be provided—that allows them to avoid the need to decide fine (yet important) questions of bankruptcy law. Academic critics of equitable mootness have thus claimed that it "stunts [the] normal process of jurisprudential development," creating a "troublesome deficit of binding precedent" on important issues that may "go to the heart of the bankruptcy process itself."[282] In particular, nothing in the equitable mootness analysis deployed by most courts prompts appellate judges to consider how important is the legal question on which they may be giving up an opportunity to weigh in.[283] Insofar as the largest and most complex cases are both those in which unscrambling the egg may be most difficult and those most likely to present questions at the cutting edge of bankruptcy practice, equitable mootness might, on its face, seem perfectly adapted to maintaining that void in precedent.[284]

In contrast, encouraging more rapid substantive development of bankruptcy law should also bring second-order benefits.[285] The status quo promotes inefficiency. Questions of law that have not definitively been resolved by a court of appeals in a precedential opinion may be litigated again and again at first instance.[286] Greater appellate intervention via precedential

281. One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 454 (3d Cir. 2015).

282. Ellias Brief, *supra* note 195, at 8–9.

283. The Tenth Circuit suggests that, as part of the equitable mootness analysis, the court take a "quick look at the merits" to see if the appellant's position is "legally meritorious or equitably compelling." Search Mkt. Direct, Inc. v. Jubber, 584 F.3d 1327, 1339 (10th Cir. 2009).

284. *See* Ellias Brief, *supra* note 195, at 9 (emphasizing that equitable mootness disproportionately precludes review of central disputes in the largest and most complex bankruptcies); *see also* Jacoby, *supra* note 85, at 1734 ("The larger and more complicated the case, the more likely the appeal will be equitably moot.").

285. *See* Oona A. Hathway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 641–42 (2001) (explaining that legal evolution can rapidly adapt during critical junctures, allowing higher courts to establish new rules that provides stability).

286. *See* Kuney, *supra* note 135 ("In the bankruptcy field an exception to the equitable mootness doctrine along the lines of the 'capable of repetition yet

opinions could both promote judicial economy and reduce litigation costs in what can be a hugely expensive process. And insofar as individual bankruptcy judges or courts disagree on legal questions in the absence of controlling precedent, the lack of uniformity may exacerbate bankruptcy's already deeply rooted problem with forum shopping.[287] Without robust appellate review to shape bankruptcy law, the judges whose opinions have the greatest impact on its development are those judges that the sophisticated repeat players who benefit from bankruptcy culture's prevailing norms themselves select.[288]

A second and well-rehearsed set of arguments focuses on leverage. Bankruptcy appeal barriers radically shift the ordinary allocation of risk in civil litigation under which a party victorious at trial but an appellee in a pending appeal proceeds at its own peril.[289] Bankruptcy's sophisticated repeat players are skilled at exploiting that reallocation of risk. Thus it is entirely typical for proponents of a plan of reorganization, once they have secured a confirmation order from the bankruptcy court, to rush to consummate the plan as quickly as possible before turning to the appellate court to argue that it is too late for them to

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evading review' exception would be particularly beneficial . . . ." (citation omitted)).

287. *See id.* (noting that a lack of geographically uniform rulings and standards interpreting the Bankruptcy Code contributes to significant forum shopping in Chapter 11 cases); *see also* Seymour, *supra* note 4, at 1969–70 (describing bankruptcy's "liberal venue rules" that allow for forum shopping); Levitin, *supra* note 48, at 1128–30 (same).

288. *Cf.* Ellias Brief, *supra* note 195, at 7 ("[Equitable mootness] leaves the development of [bankruptcy] jurisprudence to a relatively small number of non-Article III bankruptcy judges who sit in the jurisdictions where the most complex bankruptcy cases are concentrated."); *see* Seymour, *supra* note 4, at 1972 ("[L]awyers' decisions to select forums with judges that follow favored methodologies impact[s] the substance of bankruptcy law—in particular, driving it towards the flavor of bankruptcy exceptionalism most amenable to the repeat players that hold case-filing decisions in their hands.").

289. Markell, *supra* note 9, at 401–02 (explaining that bankruptcy appeal barriers shift the ordinary risk allocation in civil litigation, as appellants in Chapter 11 confirmations must guarantee the rights of appellees and other stakeholders instead of leaving the prevailing party to proceed at its own peril); *see also* Jacoby, *supra* note 85, at 1734 (explaining that equitable mootness fosters an environment where debtors rush to consummate plans to insulate them from judicial scrutiny and that the doctrine reduces the leverage of financially constrained parties who cannot afford the bond required to obtain a stay).

intervene.[290] And, again, the equitable mootness analysis does not directly invite courts of appeals to consider the degree of gamesmanship exercised by the parties below. Debtors rationally attempt confirmation of the most aggressive terms possible.[291] The more far-reaching a plan—and thus the more potentially disruptive its reversal—the stronger the argument that an appellate court, faced with a *fait accompli*, should do nothing.[292] At its extreme, equitable mootness vastly complicates the business of dealing with any distressed potential debtor.[293] The fear is that a bankruptcy court may "alter a non-debtor's contract rights in a manner contrary to law" and then, at least potentially, see equitable mootness "bar[] any appeal therefrom" based on a calculus focusing chiefly not on the extent of the harm caused to the injured appellant but the appellate court's conclusion, unknowable in advance, as to whether "third parties once or more removed will have relied on the improper alteration."[294]

A third, and interlinked, concern is equitable mootness's unpredictability.[295] It may be difficult even for sophisticated appellants who are aware of the risk of equitable mootness to protect themselves against it because even experienced litigants may have little sense of when appellate courts will be persuaded to dismiss an appeal.[296] Third parties rely on judicial decisions of all kinds; likewise, businesses every day enter into deals with each other relying, in some sense, on their counterparty's future

290. *See* Ellias Brief, *supra* note 195, at 13; *see also* Frost, *supra* note 12, at 513.

291. *See, e.g.*, Ellias Brief, *supra* note 195, at 13 ("Debtors and other plan proponents thus have every incentive to push the legality under the Bankruptcy Code, which affects bargaining power and skews outcomes in the bankruptcy court.").

292. *See* One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 434 (3d Cir. 2015).

293. *See, e.g.*, Ellias Brief, *supra* note 195, at 15 ("[D]ebtors have weaponized the equitable mootness doctrine . . . .").

294. Markell, *supra* note 9, at 408.

295. *See* Caroline L. Rosiek, Note, *Making Equitable Mootness Equal: The Need for a Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans*, 57 SYRACUSE L. REV. 685, 702 (2007) (explaining that the Seventh Circuit's vague standard for equitable mootness contributes to unpredictability, which may hinder a debtor's efforts to secure new creditors relying on the confirmed plan's finality).

296. *Id.* at 696.

ability to fulfil their obligations.[297] There is no clear way for an appellate court to prescribe how much in the way of such otherwise routine kinds of reliance should suffice before equitable mootness will bite. And malleable doctrine is more concerning, of course, to the extent we believe that appellate courts may have incentives to misemploy equitable mootness. Here, again, the oft-surmised but hard-to-prove likelihood that appellate courts simply dislike resolving bankruptcy prompts concern that some may use the open-textured nature of the equitable mootness standards (and, at least potentially, those for statutory mootness under Section 363(m) as well) as a mechanism to avoid engagement.

C. *Assessing the Effects*

Each of these concerns are real, and each is supported by at least some quantity of evidence. But they are extremely difficult to measure with precision. There is, for example, no ready way to understand how cases might be resolved differently but for the increased negotiating leverage that equitable mootness affords reorganizers. This subpart attempts, through case studies, to reach some rough conclusions about the significance of equitable mootness's footprint. It finds the evidence for the harms traditionally attributed to equitable mootness—including the stifling of the substantive development of bankruptcy law—to be mixed. There are, indeed, clear examples of courts of appeals refusing to pass on questions of great legal significance; many cases, though, are considerably more quotidian. Perhaps most concerning, though, is how equitable mootness is applied in routine cases by district courts, typically at the expense of those litigants that are least sophisticated and least able to protect themselves.

1. Case Studies: Third Circuit

The Third Circuit has seen the most intense contests among members of the judiciary over equitable mootness. The court

297. *See In re* City of Detroit, 838 F.3d 792, 812 & n.2 (6th Cir. 2016) (questioning the strength of the reliance interest justification for equitable mootness).

first sharply divided in *In re Continental Airlines*,[298] with the en banc court voting seven to six in favor of recognition of the doctrine.[299] Since then, the Third Circuit's equitable mootness case law has reflected considerable tension.[300] The court has repeatedly stated that it conceives of the doctrine as "narrow," a "scalpel rather than an axe,"[301] and only to be applied cautiously, even as it occasionally issues decisions that affirm the dismissal of appeals on the grounds of equitable mootness with comparatively cursory analysis. And the Third Circuit's judges have engaged in open debate over the doctrine.[302] In 2015, Judge Krause wrote a concurring opinion in *One2One Communications, LLC v. Quad/Graphics, Inc.*[303] calling for the court to revisit its recognition of equitable mootness from *Continental* and characterizing the doctrine as "legally ungrounded and practically unadministrable."[304] Less than a month later, Judge Ambro, a former bankruptcy practitioner, concurred in *Tribune Media Co. v. Aurelius Capital Management*,[305] responding to Judge Krause's challenge to equitable mootness and defending the doctrine's legal foundation and practical benefits.[306] And the Third Circuit may soon issue a landmark decision discussing equitable mootness (in addition to Section 363(m) in *Boy Scouts*. That court, therefore, provides a useful testing ground to examine the doctrine's impact. Since *Tribune*, the Third Circuit has issued six reported decisions including discussion at any significant

298. 91 F.3d 553 (3d Cir. 1996).

299. *See id.* at 570 (Alito, J., dissenting).

300. *Compare* Tribune Media Co. v. Aurelius Capital Mgmt., 799 F.3d 272, 282–83 (3d Cir. 2015) (rejecting equitable mootness because granting relief would not disrupt the reorganization plan or harm third parties, emphasizing that unjustifiable reliance does not warrant protection), *with In re* Millennium Lab Holdings II, LLC, 945 F.3d 126, 143–44 (3d Cir. 2019) (applying equitable mootness and emphasizing that granting relief to appellant creditor without requiring it to return the value it obtained through the reorganization would result in an unfair windfall).

301. *Tribune Media,* 799 F.3d at 278.

302. *See id.* at 443 (Krause, J., concurring) (quoting *Cont'l Airlines*, 91 F.3d at 570 (Alito, J., dissenting)).

303. 805 F.3d 428 (3d Cir. 2015).

304. *Id.* at 438 (Krause, J., concurring).

305. 799 F.3d 272 (3d Cir. 2015).

306. *See id.* at 284 (Ambro, J., concurring).

length of equitable mootness; in three of them, it affirmed a district court's conclusion that appeals were equitably moot.[307] All three decisions were written by the same judge.

The most recent case, *In re Nuverra Environmental Solutions, Inc.*,[308] does not quite fit the pattern of leaving bankruptcy courts and litigants without guidance on the substance of bankruptcy law because the court heavily signaled its view of the merits. But it does demonstrate the chilling effect which equitable mootness may have on dissenters' incentive to litigate, with the Third Circuit taking an on-the-whole cavalier approach to the question of whether providing relief on remand would be feasible. Likewise, in *In re Millennium Lab Holdings II, LLC*,[309] a preceding case, the Third Circuit appeared untroubled by the potential for gamesmanship in litigation over a third-party release—the great flashpoint in bankruptcy practice which the Supreme Court ultimately resolved in *Purdue Pharma*.[310] In the final case, *In re Allied Nevada Gold*,[311] equitable mootness looks like more of a shortcut.[312] The case was largely fact-bound, and the appellate court had a relatively straightforward pathway to affirmance on the merits.[313] It chose instead to dismiss the appeal.[314] Opinions will differ on whether

307. *See In re* Nuverra Env't. Sols., Inc., 834 F. App'x 729, 733 (3d Cir. 2021); *see also In re Millennium Lab Holdings II, LLC*, 945 F.3d at 144 (holding appeal to be equitably moot as granting the requested relief would fatally scramble the plan and harm third parties, leading to profoundly inequitable results); *In re* Allied Nev. Gold Corp., 725 F. App'x 144, 151 (3d Cir. 2018) (affirming the District Court's finding that equitable mootness is warranted to prevent the unwinding of complex bankruptcy reorganizations when timely action was not taken). I exclude here *In re Paragon Offshore PLC*, in which the Third Circuit in a footnote briefly noted that it had no reason to reach the district court's conclusion that an appeal was equitably moot because it agreed with the district court that the appellant lacked standing. No. 19-1627, 2022 WL 1055574, at *3 n.5 (3d Cir. Apr. 8, 2022).

308. 834 F. App'x 729 (3d Cir. 2021).

309. 945 F.3d 126 (3d Cir. 2019).

310. *See id.* at 137.

311. 725 F. App'x 144 (3d Cir. 2018).

312. *See id.* at 149–50.

313. Appellants were *pro se* creditor shareholders in an apparently deeply insolvent debtor, seeking to pursue claims that had been seeking a greater recovery under the plan. *See id.* at 146.

314. *Id.* at 151.

that is an edifying resolution; it looks, nonetheless, much more like a case in which equitable mootness was at least harmless.

a. Nuverra

Nuverra—a case which prompted one of the several recent petitions asking the Supreme Court to weigh in on equitable mootness—concerned the plan of reorganization of an enterprise providing services to oil and gas exploration companies that was affected by a prolonged fall in energy prices.[315] Hargreaves, a dissenting unsecured creditor, claimed that the debtors' plan violated the absolute priority rule and unfairly discriminated among unsecured creditors because Hargreaves's class was issued stock and cash paying no more than 6% of the value of their claims while unsecured creditors in other classes were paid in full.[316] Because unsecured creditors were out of the money, all of these distributions were funded by gifts from senior secured creditors.[317] Judge Krause separately concurred, noting that the appeal "implicates a series of open issues around the nature of unfair discrimination under § 1129(b)(1)."[318] The majority did not engage with the merits of Hargreaves's arguments about the plan, instead focusing solely on equitable mootness and the availability of relief.[319] For all that, litigants have a fair amount of signaling as to the substantive law. The district court analyzed the merits in the alternative to equitable mootness in a detailed decision that concluded that Hargreaves's claims were meritless.[320] In the Third Circuit, a district court decision does not bind a bankruptcy court, but it is nonetheless likely to

315. *See* 834 F. App'x at 731–32; *see also* Petition for Writ of Certiorari, Hargreaves v. Nuverra Env't. Sols., Inc., 142 S. Ct. 337, No. 21–17, at i (Oct. 12., 2021) (asking the Court to determine whether the doctrine of equitable mootness is inconsistent with federal courts' "virtually unflagging" obligation to hear and decide cases within their jurisdiction); Declaration of Robert D. Albergotti in Support of Voluntary Petitions, First Day Motions and Applications, at 2–5, *In re* Nuverra Env't. Sols., Inc., No. 17-10949 (Bankr. D. Del. filed May 1, 2017), ECF No. 12.

316. *See* Hargreaves v. Nuverra Env't. Sols., Inc., 590 B.R. 75, 79–81 (D. Del. 2018).

317. *Id.* at 79–80.

318. *See In re* Nuverra Env't. Sols., Inc., 834 F. App'x 729, 737 (3d Cir. 2021) (Krause, J., concurring).

319. *Id.* at 734–35.

320. *Nuverra*, 590 B.R. at 89.

be persuasive.[321] Judge Krause, meanwhile, did not give her reasoning but nonetheless indicated that, while she would have reached the merits, she also would have decided the case in favor of the reorganized debtors.[322]

Nuverra remains very troubling. The panel's handling of the equitable mootness test itself may sharply reduce the incentive for individual activist dissenters to appeal and secure favorable precedent.[323] Hargreaves ended up stuck on the horns of a dilemma. Available options for relief, if Hargreaves prevailed, would be either to make his entire class whole or to make only Hargreaves individually whole. The Third Circuit concluded that a finding that every member of Hargreaves's class was entitled to payment in full would cost the reorganized debtors about 23% of their total enterprise value, an unsustainable figure that would "fatally scramble" the reorganization.[324] Hargreaves, though, was the only member of his class to appeal, and argued that, if he prevailed on the merits, the court could simply order his individual claim paid, at a far lower cost—only $450,000, or 0.45% of enterprise value.[325] As to this argument, the Third Circuit found that paying only Hargreaves would itself constitute unfair discrimination, even in the face of what Judge Krause called a "colorable argument" that other members of the class had simply waived their own rights by failing to appeal.[326] Future

321. *See In re* U.S. Wireless Corp., Inc., 384 B.R. 713, 723 n.94 (Bankr. D. Del. 2008) ("In the Third Circuit there 'is no such thing as the law of the district' and, thus, the decision of a district court is not binding on a bankruptcy court." (quoting *In re* Raphael, 238 B.R. 69, 77 (D.N.J. 1999))); *cf. In re* Stafford Pool & Fitness Ctr., 252 B.R. 627, 631 (Bankr. D.N.J. 2000) ("Although decisions of the district court are entitled to substantial deference in this district, such decisions are not binding . . . ." (citations omitted)).

322. *See Nuverra Env't. Sols., Inc.*, 834 F. App'x at 737 (Krause, J., concurring) ("Because I would confine equitable mootness to the narrow role envisioned by our precedents, reach the merits questions outlined above, and ultimately resolve this appeal in favor of the reorganized debtors, I concur only in the judgment.").

323. *See id.* ("If unfair discrimination claims—like the one at issue here—must be brought as a class, and if awarding class-wide relief generally requires us to scramble a plan, the invocation of equitable mootness may prevent us from ever weighing in on these questions.").

324. *See id.* at 735 & n.8.

325. *See id.* at 733.

326. *See id.* at 736.

Hargreaves, of course, who hold small claims within a much larger pool, now have little reason to litigate.

b. Millennium Lab

In re Millennium Lab Holdings II, LLC is a third-party release case.[327] The debtor's pre-bankruptcy shareholders made a $325 million contribution to a plan, demanding in exchange releases of all claims by the debtors and their creditors, including claims related to a $1.3 billion special dividend that had been paid to those shareholders about eighteen months during the bankruptcy filing and after DOJ had commenced an investigation of the debtors for Medicare fraud.[328] Although most of the debtors' prepetition lenders supported a restructuring support agreement incorporating the releases, Voya, the appellant, did not, including because Voya claimed it had valuable misrepresentation claims against the equity holders.[329] Voya unsuccessfully objected to confirmation and thereafter pursued an appeal, attacking the third-party releases on numerous grounds, including that the bankruptcy court lacked constitutional and statutory authority to enter them.[330] The bankruptcy court, district court, and Third Circuit all wrote opinions discussing the constitutionality of the bankruptcy court's decision to enter a third-party release.[331] The district court and Third Circuit, though, also found the remainder of

327. 945 F.3d 126 (3d Cir. 2019). That is to say, the case turned on the issue the Supreme Court ultimately resolved in *Purdue Pharma*—whether, although the Bankruptcy Code contains no provision expressly authorizing as much, a plan of reorganization may compromise a creditor's claim against non-debtor entities (like the debtor's owner or managers) even over the objection of the dissenting creditor because doing so facilitates a global deal among all stakeholders to resolve the debtor's financial affairs. Harrington v. Purdue Pharma L.P., 603 U.S. 204 (2024). In *Purdue*, of course, the Court answered this question with a no. *See id.* at 226–27.

328. *In re* Millennium Lab Holdings II, LLC, 242 F. Supp. 3d 322, 329 (D. Del. 2017).

329. *See Millennium Lab*, 945 F.3d at 132.

330. *See id.*

331. *See id.* at 133 (describing the opinions from the bankruptcy and district courts); *Millennium Lab*, 242 F. Supp. 3d at 340 ("The Court will therefore remand this case to the Bankruptcy Court to consider whether . . . the Bankruptcy Court had constitutional adjudicatory authority to approve the nonconsensual release of Appellants' . . . claims . . . .").

Voya's appeal to be equitably moot.[332] As in *Nuverra*, the district court considered the merits of the remaining issues, finding that the third-party releases were authorized by the Bankruptcy Code and appropriate on the facts of the case; the Third Circuit, though, stopped its analysis after its finding of equitable mootness and did not reach the merits.[333]

Again, there are reasons to find *Millennium Lab* troubling. Bankruptcy courts and other observers already understand Third Circuit case law to authorize bankruptcy courts to approve third-party releases in limited circumstances, so *Millennium Lab*'s refusal to engage with the merits does not deprive litigants of foundational precedents. But a key part of the policy debate over third-party releases is—as Voya argued—the ratcheting effect of bankruptcy practice.[334] As Voya put it, "rais[ing] a 'floodgate' argument, . . . if we allow bankruptcy courts to approve releases merely because they appear in a plan, bankruptcy courts' powers could be essentially limitless and that an 'integral to the restructuring' rule would mean that bankruptcy courts could approve releases simply because reorganization financers demand them."[335] The court views this as a real concern.[336] It warns that "nothing in our opinion should be construed as reducing a court's obligation to approach the inclusion of nonconsensual third-party releases or injunctions in a plan of reorganization with the utmost care and to thoroughly explain the justification for any such inclusion."[337] But more detailed decisions demarcating the boundaries of what is permissible are probably an essential part of addressing such gamesmanship. A single decision like the Third Circuit's *Continental* opinion, considering essentially in the abstract what factors would support approval of a third-party release, and describing those factors in open-textured terms, is far more

332. *See Millennium Lab*, 945 F.3d at 144.

333. *See id.*

334. *See id.* at 139; *see also, e.g.*, Seymour, *supra* note 4, at 1968 (describing the dynamic as a game of "chicken").

335. *Id.*

336. *See id.* ("It is definitely not our intention to permit any action by a bankruptcy court that could 'compromise' or 'chip away at the authority of the Judicial Branch[,]' and our decision today should not be read as expanding bankruptcy court authority." (alteration in original) (citations omitted)).

337. *Id.*

amenable to gamesmanship and exploitation than a series of decisions each showing how those factors apply to given sets of facts. Again, some measure of guidance in *Millennium Lab* was provided by the district court opinion—which suggested that this was not a particularly close case[338]—but, to the extent the Third Circuit was genuinely troubled by the risk of gamesmanship, it could have done at least something more to forestall that possibility by passing on the merits itself.[339]

c. Allied Nevada Gold

Allied Nevada Gold is a brief non-precedential 2018 decision. "[O]f high significance" to the court's decision in that case was that the appellants failed timely to seek a stay.[340] While it is not clear from the opinion that such failure was outcome determinative and that a more diligent litigant might have avoided equitable mootness, that does appear at least plausible. The Third Circuit noted that an equitable mootness challenge to an appeal *may* fail as courts can award "whatever relief is practicable instead of declining review simply because full relief is not available."[341] But it did not engage with the question of whether any, even if limited, relief was available.[342] Instead, exhibiting fairly evident lack of patience with the appellant, it said it would consider only the relief the appellant

338. *See In re* Millennium Lab Holdings, II, LLC, 591 B.R. 559, 584–86 (D. Del. 2018).

339. Voya also arguably made tactical errors that decreased its chances of success. The district court, though not the court of appeals, noted that Voya failed to exhaust all opportunities to seek a stay. *Id.* at 578. Although in many cases, that might have been fatal to an appellant's chances, the district court concluded that "Voya's failure to obtain a stay does not weigh in favor of either party." *Id.* at 579. And the court of appeals noted that there were problems with the remedy Voya asked for—that it be carved out from the third-party release but retain its distribution under the plan. As the court of appeals noted, that would give Voya all of the benefit of the consideration equity provided for the releases without any of the cost. *See* In re Millennium Lab Holdings, II, LLC, 945 F.3d 126, 143 (3d Cir. 2019) ("Each of those arguments is a non-starter. Voya wants all of the value of the restructuring and none of the pain. That is a fantasy . . . .").

340. *In re* Allied Nevada Gold Corp., 725 F. App'x. 144, 150 (3d Cir. 2018).

341. *See id.* (adding that the "starting point is the relief an appellant specifically asks for" (quoting Tribune Media Co. v. Aurelius Capital Mgmt., 799 F.3d 272, 277 (3d Cir. 2015))).

342. *See id.*

actually asked for—here, expressly to vacate the confirmation order and unwind consummation.[343] Critics of equitable mootness can fairly argue that the court could and should have done more. But it also seems unlikely that equitable mootness did significant harm. The core of the appellant's complaint was that the bankruptcy judge had undervalued the debtor, and thus awarded insufficient value to the appellant, a prepetition stockholder.[344] Valuation, though, is an intensely factual question on which an appellate court is particularly likely to be deferential to the findings of the bankruptcy judge.[345] And while the valuation process in *Allied Nevada* has been criticized,[346] to prevail, the appellant needed a dramatic reversal of fortune; under the confirmed plan, the company was assessed to be so deeply insolvent that unsecured creditors, who would have been the primary beneficiaries of any increase in value, recovered only four cents on the dollar.[347]

2. Equitable Mootness in the District Courts

Arguably more significant than court of appeals treatment of equitable mootness, though, is how equitable mootness fares in the district courts. The district courts hear a much larger number of bankruptcy appeals than do the circuit courts of appeals.[348] And their own decisions on equitable mootness are likely to instruct the courts of appeals. [349] Setting aside the few

343. *See id.* at 151.

344. *See* Appellant's Opening Brief and Joint Appendix at 4–6, *In re Allied Nevada Gold Corp.*, 725 F. App'x at 145 (No. 17-1513), 2017 WL 4390136 (3d Cir. Sept. 25, 2017).

345. *See* Seymour, *supra* note 4, at 1930 ("[A]ppellate review of bankruptcy judges' decisions is difficult to obtain and frequently deferential.").

346. *See* Diane Lourdes Dick, *Valuation in Chapter 11 Bankruptcy: The Dangers of an Implicit Market Test*, 2017 U. ILL. L. REV. 1487, 1495 (2017) ("Because of the numerous assumptions, qualifications, and exclusions, Allied Nevada's estimates were—like those provided by most commercial debtors—essentially meaningless.").

347. *See* Brief of Appellant, *supra* note 344, at 6.

348. *See Appeals*, U.S. COURTS, https://perma.cc/AXR2-FQBT (last visited Nov. 19, 2024) ("An appeal of a ruling by a bankruptcy judge may be taken to the district court.").

349. My sense is that it is unusual for a circuit court of appeals to reverse a district court's holding that an appeal is *not* equitably moot, but I don't yet have the data to be able to make that claim.

cases in which direct certification occurs, every appeal, after all, makes it to the courts of appeals only after first being passed on by a district court or bankruptcy appellate panel.[350] And many appeals terminate there.[351] As to the claim that equitable mootness inhibits the substantive development of bankruptcy law, once again, the evidence is mixed. A review of over eight years of recent cases found one-hundred results in which district courts across the country found appeals to be equitably moot.[352] In half of those cases,[353] district courts found alternate bases for affirming the bankruptcy court or dismissing the appeal, either analyzing the merits of the appeals or finding that the appeal could not proceed because the appellant lacked standing.

There is, though, real evidence of harm. Indeed, the most concerning aspect of these cases is not those comparatively few cases in which even district courts dismiss appeals without so much as a peek at the merits. Instead, it is that the district court decisions show considerable arbitrariness in the application of equitable mootness. The doctrine is sometimes applied to dismiss appeals even in small bankruptcy cases that present none of the complexities of the ideal-type case for equitable mootness.[354] Relevant to such findings typically is that an appellant has failed to seek a stay from both the bankruptcy courts and appellate courts—even though unsophisticated litigants in smaller cases may be entirely unaware of the critical

350. *See supra* Part I.A.1.

351. Of the 100 cases involving a finding of equitable mootness discussed in this section, we identified a further appeal in only half (or 51 of 100 cases).

352. This is based on district court decisions in Westlaw decided between January 1, 2015 and September 30, 2023.

353. By our count, 52 of 100.

354. *See In re* One2One Commc'ns, LLC, 805 F.3d 428, 438 (2015)

> The [equitable mootness] doctrine was designed to be "limited in scope and cautiously applied," specifically in highly complex cases where limited relief was not feasible and upsetting a reorganization would cause substantial harm to numerous third parties. In the nearly twenty years since we launched that experiment, it has proved highly problematic, with district courts continuing to dismiss appeals in the simplest of bankruptcies. (Krause, J., concurring) (citations omitted).

importance of that step,[355] and it is in any event uncommon for any court to stay consummation of a confirmed plan. Although there is no direct evidence for such a conclusion, the most plausible explanation for many such decisions, once again, is that the appellate courts simply prefer to avoid deciding bankruptcy cases. This section, again, briefly presents some examples.

a. In re Cordero

At perhaps the most extreme end of the spectrum, one district court dismissed an appeal from a bankruptcy court's decision in an individual debtor's Chapter 11 case to authorize sale of a condo owned by the debtor as an investment property.[356] Apart from a brief paragraph rejecting an argument that the bankruptcy court did not have jurisdiction, the district court's opinion begins and ends with bankruptcy appeal barriers.[357] It first finds that Section 363(m) does not apply because the bankruptcy court did not make the factual findings—including on the good faith of the purchaser—necessary to trigger that barrier, before turning instead to equitable mootness and finding that doctrine to be applicable.[358] Neither before nor after its analysis of the appeal barriers does it give any consideration to the merits of the appeal.[359]

It is the substance of the equitable mootness analysis that is most startling. The court observes, in line with precedent, that equitable mootness serves "bankruptcy . . . public policy [that] values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order."[360] Its analysis of complexity, though, is essentially conclusory, quite remarkably asserting that

355. In comparison, the district court in *Millennium Lab* found the failure of the institutional creditor to seek a stay from the court of appeals after being turned away from the bankruptcy court not to weigh significantly in the equitable mootness analysis. *See supra* note 339 and accompanying text.

356. *See In re* Cordero, No. 19-00502, 2021 WL 1093620, at *9 (D. Haw. Mar. 22, 2021) (denying appellants' appeal and affirming bankruptcy court's order granting motion for summary judgment against the appellants).

357. *See id.* at *8.

358. *See id.* at *6.

359. *See id.* at *8.

360. *Id.* at *4.

unwinding proceedings would "be uncontrollable [and] highly inequitable" without establishing that more would need to occur than the reversal of a single real estate transaction.[361] As to reliance, the district court, in essence, founds its conclusion on speculation.[362] It noted that it did not know whether the condo had been resold, and that the appellant had not offered any evidence about how the sale might be unwound.[363] Rather than "the virtually unflagging obligation of the federal courts to exercise the jurisdiction conferred on them" that courts of appeals typically emphasize when discussing equitable mootness,[364] this seems to be the opposite—a presumption that an appeal is equitably moot that the appellant must rebut in addition to making out her case on the merits. Given that the appellant in most bankruptcy cases is the party that claims they were frozen out of the deal-making process by the main economic stakeholders in the case, making such a showing may well be challenging even for sophisticated and well-represented appellants. It is reorganized debtors, not appellants, for example, that will best know whether third-parties have acquired interests in the reorganized debtor's property that appeal will upset. And, consistent with the notion that equitable mootness in these smaller cases can serve as little more than a trap for unsophisticated litigants, the district court in *In re Cordero*[365] noted that it was material that the appellant had not sought a stay of the sale order despite the fact that for parts (although concededly not the whole) of the relevant

361. *Id.* at *8.

362. *See id.*

363. The court also asserted that "clawing back the Property would have untold effects on the remainder of the Plan," but did not explain this. *Id.* Instead, it seemed to suggest that a simple "transfer to a third party," *by itself*, "precludes meaningful relief." *Id.* But every sale and virtually every plan involves the transfer of property; were this the case, such orders would be effectively unappealable.

364. See, for example, *In re Semcrude, L.P.*, 728 F.3d 314, 320 (3d Cir. 2013); *In re Charter Communications, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012); *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009); *In re City of Stockton*, 909 F.3d 1256, 1271 (9th Cir. 2018) (Friedland, J., dissenting), each quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976).

365. No. 19-00502, 2021 WL 1093620, at *9 (D. Haw. Mar. 22, 2021).

proceedings in bankruptcy court, the appellant was "in effect, pro se."[366]

b. In re 53 Stanhope

Its fact are not as extreme, but *In re 53 Stanhope, LLC*[367] can likely offer greater insight into district court handling of bankruptcy appeal barriers, both because it is an appeal from a business bankruptcy case in which all the parties were represented commercial entities, and because it is a decision from the Southern District of New York, one of the small number of jurisdictions that most frequently sees bankruptcy litigation.[368] And it again illustrates the remarkably broad view that some courts take both as to what it means for reliance interests to support dismissal, and as to what it means for transactions to be too intricate for reversal to be contemplated.[369] Indeed, *Stanhope* is particularly useful because it comprises a bundle of separate appeals. In these individual component appeals, the district court made findings on reliance and intricacy that were each in isolation enough to support the conclusion of equitable mootness.[370]

One of the debtor's plans involved a sale: The debtor would sell thirteen multi-family residential properties (with an average value of around $1.5 million) and use the proceeds of the sale to repay creditors, including the appellant, who held mortgages against all of the properties.[371] The lender complained that its claims were incorrectly figured by the bankruptcy court because it was entitled to payment of default interest in addition to claims for principal and interest at the contract rate.[372] The court, questionably, argued that reversing the sale of the properties was the kind of unwinding of complex

366. *See id.*, at *6–7.

367. No. 21-CV-5177, 2022 WL 3025930 (S.D.N.Y. Aug. 1, 2022).

368. *See id.* at *1–2 (discussing the factual background and procedural history of the case).

369. *See, e.g.*, *id.* at *7.

370. *See id.*

371. *See id.* at *2.

372. *See id* at *7.

transactions that would be too "intricate" to contemplate.[373] But it also seemed to recognize that more limited relief was available: simply ordering that the lender be paid the default interest.[374] That relief was off the table, though, the district court found, because exposing the debtor to that liability would jeopardize its reemergence from bankruptcy, presumably thus threatening the interests of those that had relied on the plan.[375] This is an exceptionally broad conception of reliance. The district court does not identify specific third parties that were counting on doing business with the reorganized debtor specifically under the business arrangements contemplated by the plan. Instead, the affected entities appear to be the other parties to the plan—including the *debtor itself*.[376] In other words, the district court appears to suggest that because the beneficiaries of a (potentially unlawful) plan relied upon it, it is now too late to intervene on behalf of those parties disfavored by the plan.[377]

In an additional *Stanhope* appeal, the appellant complained not about the sale of properties but about a plan that refinanced

373. *See id.* ("The unraveling of the sales of the 13 properties associated with the 53 Stanhope Plan . . . would constitute the unraveling of intricate transactions that were green-lit in March 2022 [six months earlier].").

374. *See id.*

375. *Id.* at *5, 7 ("[R]eorganization would be jeopardized [by refinancing additional default interest] . . . because there is not enough value in the Properties in today's market . . . ." (second and third alterations in original)).

376. *See id.* at *5 (explaining that "some, if not all, of the Debtors would not receive a fresh start").

377. This kind of reliance is wholly different to the reliance interests at issue in a large case such as, for example, the *City of Detroit* bankruptcy, where thousands of third parties may be relying on a multiplicity of different elements of the plan. *See generally In re* City of Detroit, 838 F.3d 792 (6th Cir. 2016). In *In re Serta Simmons Bedding, LLC*, the Fifth Circuit explains why these types of party reliance interests should not found equitable mootness: From the moment any *party* agrees to a "contentious transaction, they could foresee the adverse consequences of an unfavorable appellate ruling. We will not save such sophisticated parties from the consequences of their own actions." 125 F.4th 555, 558 (5th Cir. 2024). Judge Alito similarly characterized equitable mootness as "assum[ing] an extraordinary degree of naivete" from the various parties to the case when critiquing the doctrine in his *Continental* dissent. *In re* Continental Airlines, 91 F.3d 553, 572 (3d Cir. 1996) (Alito, J., dissenting).

all of the mortgage loans that it owned.[378] The lender appeared to object to any kind of reorganization, arguing that the plan "legitimized" allegedly fraudulent statements that the debtor had made in connection with the original loan agreements, but also objected, more specifically, that the plan undercompensated the lender by denying it certain fees and expenses to which it was entitled.[379] The district court dismissed the appeal as equitably moot, finding that granting relief would require upsetting each of the refinancing agreements, and that doing so "would plainly require the unraveling of intricate transactions."[380] The opinion does not specify the extent of the unpaid fees, but once again, the dispute concerned multi-family residential buildings with an average value of $2.3 million.[381] And it is at least questionable whether the intricacy that the district court refers to here is the type of complexity that might necessitate an equitable mootness finding.[382] Certainly, unravelling a mortgage refinancing agreement involves some level of cost and administrative burden. But neither are real estate mortgages for small Brooklyn rental properties particularly complex transactions as compared to the kinds of deals at issue in the court of appeals case law that the district court cited; in the Second Circuit's leading *In re Chateaugay Corp.*[383] decision, for example, a challenge to a plan that restructured a much larger corporate enterprise was held not to be equitably moot precisely because, as with *Stanhope*, the essence of the appellant's complaint was that it was entitled to funds that "were wrongfully distributed to or wrongfully re-vested in one or more entities that are now before this Court," and thus the court could straightforwardly order the return of misallocated funds.[384]

Stanhope may well be correctly decided under existing Second Circuit precedent. It appears that the lender—who here

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378. *See In re* Cordero, No. 19-00502, 2021 WL 1093620, at *2 (D. Haw. Mar. 22, 2021) (describing the "D & W Plan"). A third plan, the "55 Stanhope Plan," was similar in structure to the D & W Plan. *Id.*

379. *See id.* at *2.

380. *Id.*

381. *Id.*

382. *See id.* at *4.

383. (Chateaugay II), 10 F.3d 944 (2d Cir. 1993).

384. *Id.* at 953.

was represented by experienced counsel—sought a stay only as to some of the orders it later appealed.[385] Its one attempt to secure a stay, though, was rebuffed because it does not appear to have been ready (or able) to post a *supersedeas* bond to support the stay, and it is questionable whether further "diligen[ce]" in this respect would materially have affected the equities of withholding relief from the lender.[386] Instead, it is better to understand *Stanhope* as illustrating the leeway that current case law gives appellate courts to decline to hear the merits even of apparently routine cases because of an imprecisely articulated sense that there is something about bankruptcy that especially requires "finality" of judgments.[387]

III. THE UNPERSUASIVE JUSTIFICATIONS FOR BANKRUPTCY APPEAL BARRIERS

The previous Part describes features of bankruptcy appeal barriers that appear troubling.[388] That, of course, is insufficient by itself to make a case against bankruptcy appeal barriers. Notwithstanding these potential harms, it may be that bankruptcy appeal barriers nonetheless serve necessary functions that justify their presence in the bankruptcy appellate landscape.

This Part, therefore, assesses potential justifications for bankruptcy appeal barriers. It begins with potential formal justifications.[389] To the extent that bankruptcy appeal barriers have respectable pedigrees, because they are historically deeply rooted in the bankruptcy language or because they operate in similar fashion to doctrines found in other fields of appellate litigation, their continued use may be justified notwithstanding

385. *See In re* 53 Stanhope LLC, No. 21-CV-5177, 2022 WL 3025930, at *6 (S.D.N.Y. Aug. 1, 2022) (noting that the lender never sought to stay the confirmation orders of either the 53 Stanhope or 55 Stanhope Plans).

386. *See id.* (concluding that Brooklyn Lender did not satisfy the fifth *Chateaugay II* factor—whether appellant diligently sought a stay of the reorganization plan).

387. *See id.* at *3 (explaining that equitable mootness "requires the Court to 'carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief'"(quoting *In re* Charter Commc'ns. Inc., 691 F.3d 476, 481 (2d Cir. 2012))).

388. *See supra* Part II.

389. *See infra* Part III.A.

the potential harms that they cause. This Part, though, suggests that is not the case, examining the development of equitable mootness and the evolving use of Section 363 (and thus, in turn Section 363(m)) to authorize case-determining orders approving the sale of all of a debtor's assets, and showing that both sit on shaky foundations. It then turns to the more functional question of whether the interests that bankruptcy appeal barriers are said to serve—typically, triaging complexity and protecting third-party reliance interests—actually necessitate so strong a remedy.[390] Ultimately, it concludes that neither mode of justification serves bankruptcy appeal barriers well.[391] The Part thus concludes with thoughts on possibilities for moving beyond bankruptcy appeal barriers.[392]

A. *Formal Justifications*

1. Pedigree

a. Equitable Mootness

Much repeated is the statement that equitable mootness is a bankruptcy specific and judge-made doctrine.[393] But early discussions of equitable mootness in the Ninth Circuit cases, which developed it, present it as nothing special.[394] *In re Roberts Farms, Inc.*,[395] traditionally identified as the originating case,[396] cites both bankruptcy and non-bankruptcy precedents to support dismissal of an appeal without suggesting that it is in any way breaking new ground.[397] If *Roberts Farms* were correct,

390. *See infra* Part III.B.

391. *See infra* Part III.B.

392. *See infra* Part IV.

393. *See* Markell, *supra* note 9, at 385.

394. *See, e.g.*, *In re* Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981) (discussing two grounds for dismissal: one founded upon futility of remedy and the other founded upon an equity-based analysis arising from a lack of diligence and a change of circumstances).

395. 652 F.2d 793 (9th Cir. 1981).

396. *See, e.g.*, 7 COLLIER ON BANKRUPTCY, *supra* note 118, at ¶ 1129.09[2] (tracing the origins of equitable mootness to *Roberts Farms*).

397. *See Roberts Farms*, 652 F.2d at 796–98 (9th Cir. 1981) (discussing bankruptcy and non-bankruptcy cases supporting dismissal of appeals on the

then equitable mootness might sit on firm foundations. In fact, though, the Ninth Circuit's reasoning does not hold together.

The bankruptcy-specific sources for equitable mootness are a miscellaneous collection of provisions regulating aspects of bankruptcy appeal. First is Bankruptcy Rule 805, created in the last years of the pre-1978 Bankruptcy Act, but described by its drafters as codifying pre-existing case law.[398] Rule 805 was, in substance, a precursor to Section 363(m), providing both that a bankruptcy referee had the power to stay orders and also that, unless stayed, reversal on appeal would not affect the validity of a "sale to a good faith purchaser or the issuance of a certification to a good faith holder."[399] Subsequent decisions buttressed this by pointing to Section 363(m) itself, to Section 364(e)—a bankruptcy appeal barrier prohibiting appellate court intervention with orders granting debtor-in-possession financing[400]—and to Section 1127(b) of the Code,[401] which provides that once a plan has been consummated, the bankruptcy court may no longer approve modifications to the plan.[402] *Roberts Farms* described a "statement of principle," "consistent with" and synthesized from Rule 805, that "practical necessities" required leaving in place a bankruptcy court order authorizing a consummated reorganization unless stayed pending appeal.[403] Judge Easterbrook, referring in a later case

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ground of mootness). *See generally* Mills v. Green, 159 U.S. 651 (1895); Valley Nat. Bank of Arizona v. Tr. for Westgate-California Corp., 609 F.2d 1274 (9th Cir. 1979).

398. *See, e.g.*, *Roberts Farms*, 652 F.3d at 796 (noting that a 1976 amendment to Rule 805 was said to be "declaratory of existing case law"); *see also In re* Abingdon Realty Corp., 530 F.2d 588, 590 (7th Cir. 1976) (same).

399. *Roberts Farms*, 652 F.3d at 796.

400. *See* 11 U.S.C. § 364(e); *see also id.* § 305 (no appeal of bankruptcy court's decision to abstain from hearing a case); *id.* § 557(g) (statutory mootness for orders concerning disposition of grain); *id.* § 1109 (noting the Securities and Exchange Commission has standing to participate in a bankruptcy case but may not appeal); *id.* § 1125(d) (noting that government agencies or officials may not appeal from an order approving a disclosure statement).

401. *Id.* § 1127(b).

402. *See In re* UNR Indus., 20 F.3d 766, 769 (7th Cir. 1994) (describing policy of the Bankruptcy Code that a plan of reorganization, once implemented, should be disturbed "only for compelling reasons").

403. *Roberts Farms*, 652 F.3d at 797; *In re* Combined Metals Reduction Co., 557 F.2d 179, 188–89 (9th Cir. 1977).

to the wider range of statutory sources, describes a policy of finality "so plain and so compelling that courts fill the interstices of the Code with the same approach."[404]

But applying contemporary and generalist approaches to statutory interpretation,[405] the "interstices" argument for equitable mootness seems quite extraordinarily weak—as critics of equitable mootness have long argued.[406] The fact that first the rules committee and then Congress created a barrier to appeal from orders authorizing sales says little about whether an appeal barrier from orders authorizing *plans* was contemplated—especially since, as the next subsection discusses, it was not generally understood at the time that the Bankruptcy Code was enacted that a Section 363 sale would commonly be used to effect case-determining orders.[407] Section 1127(b) says perhaps even less. The fact that Congress chose to provide that the parties to a bankruptcy case could not *themselves* return to the bankruptcy court and ask for some different provision once a plan was consummated surely does not indicate that Congress wished for the appellate courts not to intervene if they found some provision of the original plan to be unlawful.[408] Nor, even if it is possible to synthesize these various provisions together to reflect a more general "policy" of finality,

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404. *UNR Indus.*, 20 F.3d at 769.

405. *Cf.* Seymour, *supra* note 4, at 1946–56 (discussing the evolution of statutory interpretation in bankruptcy).

406. *See In re* Cont'l Airlines, 91 F.3d 553, 570 (3d Cir. 1996) (Alito, J., dissenting)

> Thus, the [Seventh Circuit in *UNR*] seemed to say that the Bankruptcy Code contains an "interstice"—a gap—regarding the circumstances under which an appeal that might upset a plan of reorganization may be pursued. Further, the court appeared to suggest that the federal courts have the authority to create a rule of federal common law to fill this gap. (quoting *UNR Indus.*, 20 F.3d at 769).

407. *See id.* at 569–70

> I do not see how any broader rule could reasonably be extracted from the provision of former Bankruptcy Rule 805 . . . or from the analogous provisions now contained in 11 U.S.C. §§ 363(m) and 364(e). If one begins with narrow provisions such as these . . . I do not see how one can derive the broad doctrine of "equitable mootness."

408. *Cf. In re* One2One Comm'ns, LLC, 805 F.3d 428, 443–44 (3d Cir. 2015) (Krause, J., concurring).

is it clear that the positive inference for which Judge Easterbrook argues—that same policy also applies to appeals from plans—is more persuasive than the alternative negative inference critics have suggested—that Congress meant that policy to apply only where it said so.[409]

The nonbankruptcy sources to which *Roberts Farms* points also provide very thin gruel for justifying equitable mootness. The court cites nonbankruptcy opinions in which appellants lost because they had failed to secure a stay of a trial court order.[410] The only reasoned nonbankruptcy decision cited, though, is the Supreme Court's 1895 decision in *Mills v. Green,*[411] describing how, if there is some intervening event "owing . . . to the plaintiff's own act, . . . the court will stay its hand."[412] *Mills*, though, is better described as a traditional, constitutional mootness case, in which it was *impossible* to grant relief, rather than a case of equitable mootness. In *Mills*, the appellant complained that South Carolina was wrongfully denying him permission to vote for delegates to a state constitutional convention; the absence of a stay meant that delegates were already selected.[413] Nothing about the case suggests the expansive construction which the *Roberts Farms* court later gave it.

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409. *See id.* at 444 ("Because Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel us to presume that Congress did not intend for other orders to be immune from appeal.").

410. *See, e.g.*, Mills v. Green, 159 U.S. 651, 653 (1895) (dismissing an appeal due to the appellant's failure to obtain a stay of a confirmation order from the lower court); Sterling v. Blackwelder, 405 F.2d 884, 884 (4th Cir. 1969) (dismissing appeal from an order confirming judicial sale as moot for failure to comply with Federal Rule of Civil Procedure 62(d)).

411. 159 U.S. 651 (1895).

412. *Id.* at 654.

413. *Id.* at 652. The second nonbankruptcy case that *Roberts Farms* cites is a single sentence order from the Fourth Circuit stating that an appeal was dismissed "for failure to comply with F.R.C.P. 62(d)," which authorizes appellants to seek a stay. *Sterling*, 405 F.2d at 884. The decision says nothing about whether relief would still have been possible, but an earlier decision in the case notes that the appellants' case was "patently frivolous." Sterling v. Blackwelder, 387 F.2d 346, 348 (4th Cir. 1967).

b. Statutory Mootness in Sales

An argument that statutory mootness under Section 363(m) for appeals from sales of all of a debtor's assets is not justified by relevant history must look different to that same argument in the context of equitable mootness. It is plain from the statutory text that Section 363(m) applies to any sales which the bankruptcy court authorizes, so long as the sale is consummated prior to entry of a stay and the relevant findings of fact are made as to the purchaser's good faith.[414] Even so, there are good reasons to conclude that this application of Section 363(m)—serving as an appeal barrier to appeals from case-determining orders—was not at all contemplated by Congress when it enacted the Bankruptcy Code in 1978.

That is, in turn, because it is relatively plain that—regardless of whether the best reading of the text permits it or not—Congress did not intend Section 363 to be used to authorize case-determining orders. At least until the 1980s, when attitudes towards the role of markets in bankruptcy began to shift, going concern sales were not thought to be a viable alternative to plans of reorganization.[415] It was assumed that, as compared to a plan, a market sale of the debtor's assets would fail to capture the debtor's true value.[416] And while the legislative history of Section 363 said nothing one way or the other about whether it could be used to support a sale of all assets, the introduction to Chapter 11 described the purpose of a case as being "to formulate and have confirmed a plan of reorganization or arrangement" (only), without reference to any other type of case-determining order.[417] Indeed, there was at least some reason to make a negative inference that going

414. *See* 11 U.S.C. § 363(m).

415. *See, e.g.*, Mark Roe & Mike Simkovic, *Bankruptcy's Turn to Market Value*, 92 U. CHI. L. REV. 285, 289 (2025) ("Bankruptcy courts' reorientation toward market-based valuation was plausibly central to bankruptcy's success."); Lynn LoPucki, *Bankruptcy Fire Sales*, 106 MICH L. REV. 1, 5 & n.10 (2007) (claiming that "going-concern sales of companies were not even considered among the alternatives").

416. *See* Roe & Simkovic, *supra* note 415, at 291 ("[B]ankruptcy courts in the 1970s and 1980s explicitly rejected the market as an arbiter of bankruptcy firm valuation.").

417. *See* H.R. REP. NO. 95-595, at 221 (1977) (referring to "do[ing] what is necessary to reduce the business' losses, by selling unprofitable divisions").

concern sales were *not* authorized by the Code; Congress had been presented with language that would authorize bankruptcy courts to approve sales of *all* of a debtor's assets; the Department of Justice opposed that language, and ultimately it was not incorporated into the Bankruptcy Code.[418]

And the uncertainty around whether Section 363 authorized case-determining orders is reflected by the fact that many courts refused to approve such orders in the early years of the Bankruptcy Code.[419] Over time, bankruptcy and appellate courts have come to effective consensus that the "sales" that the Code permits extend to sales of all assets. But it is also worth noting the substantial judicial shift in attitude towards such sales. Initially, a debtor was required to have some special reason for seeking to sell its assets rather than confirm a plan of reorganization—that the debtor was a "melting ice cube," losing value so quickly that the extended plan confirmation process was infeasible.[420] Only later did courts shift to deferring to the debtor's business judgment as to whether a plan or sale was in the best interests of the estate.[421] The modern law of Section 363 sales, therefore, is far removed from what seems likely to have been in the contemplation of Congress in 1978.[422] It is hard to conclude that Congress, in writing limits on appeals into Section 363, contemplated that it was insulating from appellate review the central transactions around which entire restructurings would be founded.[423]

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418. *See In re* White Motor Credit Corp., 14 B.R. 584, 589–90 (Bankr. N.D. Ohio 1981) (discussing the legislative history of the Bankruptcy Code).

419. *See* Roe & Simkovic, *supra* note 415, at 298–99.

420. *See* Jared Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591, 600 (2012) (explaining that until *In re Lionel Corp.*, courts rarely allowed comprehensive Section 363 sales except for situations in which an asset was wasting away and losing value).

421. *See id.*

422. *See* Karen Cordry, *Section 363 Sales: Cherry-Picking the Code: Successor Liability and Lessons from Wile E. Coyote*, 8 J. BANKR. L. & PRAC. NL ART. 1, Dec. 2019, at 1 ("The current analysis of Section 363 sales has built on itself step by step and edged ever further away from the plain language of the existing text.").

423. Certainly, there is no such indication in the legislative history, which does little more than restate the text of the section. *See* H.R. REP. NO. 95-595, at 346 (1977)

Assuming, as is very much the case in contemporary practice, that a bankruptcy court's authority to approve sales of all of a debtor's assets is a given, bankruptcy judges are not erring when they apply Section 363(m) to such sales. Nonetheless, to the extent we are looking to make a normative defense of the scope of statutory mootness and Section 363(m) today, it is difficult to do so via an invocation of Congressional intent.

2. Comparable Doctrines

Appellate court judges believe, when they are applying the doctrine of equitable mootness, that they are doing something unique to bankruptcy.[424] Both equitable mootness and statutory mootness, its close cousin, at least draw on elements of doctrines that are found outside the bankruptcy space. Yet careful analysis shows equitable mootness to be quite different both in design and in impact to these potential comparators.

First is abstention. Equitable mootness, after all, is frequently described by those courts that deploy it as a judicial abstention doctrine.[425] Abstention, though, seems quite different in concept to either bankruptcy appeal barrier. Abstention doctrines are generally understood to be motivated by

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> Subsection (l) protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The purchaser's knowledge of the appeal is irrelevant to the issue of good faith.

424. *See In re* Semcrude, L.P., 728 F.3d 314, 317 (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.").

425. *See, e.g.*, *id.* ("[E]quitable mootness, 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* Pac. Lumber Co., 584 F.3d 229, 240 (5th Cir. 2009) ("Equitable mootness is a kind of appellate abstention that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest."); *In re* Abengoa Bioenergy Biomass of Kansas, LLC, 958 F.3d 949, 955 (10th Cir. 2020) ("Equitable 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."); *In re* Mortgages Ltd., 771 F.3d 1211, 1214 (9th Cir. 2014) (referring to equitable mootness as a judge-made abstention doctrine "unrelated to the constitutional prohibition against hearing moot appeals").

federalism and comity concerns.[426] By abstaining, a federal court permits a state court to pass first on some question as to which the state also has an interest.[427] And, indeed, the Bankruptcy and Judiciary Codes incorporate their own bankruptcy abstention doctrines, requiring a bankruptcy court to abstain from hearing a bankruptcy proceeding where some action is subject to federal jurisdiction only because of the bankruptcy statute and can be timely adjudicated in some already pending state court action, and more generally permitting abstention when in the interest of the debtor or creditors.[428] The difference between these abstention doctrines and bankruptcy appeal barriers is that other types of abstention all contemplate that some other court—usually a state court—will hear and decide the dispute.[429] Bankruptcy appeal barriers, in contrast, ensure that a dispute will be further heard by no one—leading Judge Krause to characterize equitable mootness bitingly as an "abdication" rather than abstention doctrine.[430]

Non-bankruptcy prudential mootness is a potentially more successful comparison. In outline, prudential mootness bears a remarkable resemblance to equitable and statutory mootness. Then-Judge Gorsuch described prudential mootness as a doctrine that bites when "events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the

426. *See* Gearing v. City of Half Moon Bay, 54 F. 4th 1144, 1148 (9th Cir. 2022) (arguing that abstention doctrines serve federalism by "allowing a state court to decide state-law issues in the first instance").

427. *See id.* ("Abstention doctrines do not create a condition precedent to litigation; rather, they serve federalism by allowing a state court to decide state-law issues in the first instance."); *see also* R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941); Younger v. Harris, 401 U.S. 37, 52–53 (1971); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813–17 (1976).

428. *See* 28 U.S.C. § 1334(c)(1)–(2) (specifying bankruptcy doctrines of mandatory and permissive abstention); *see also* 11 U.S.C. § 305(a)(1) ("The court, after notice and a hearing, may dismiss a case under this title . . . if the interests of creditors and the debtor would be better served by such dismissal or suspension.").

429. *See In re* One2One Comms, LLC, 805 F.3d 428, 440 (3d Cir. 2015) (Krause, J., concurring) ("[A]bstention doctrines . . . proceed from . . . [the] premise [that] in rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." (alteration in original) (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996))).

430. *Id.*

trouble of deciding the case on the merits."[431] Like equitable mootness—and at least potentially like statutory mootness in the post-*MOAC* world—prudential mootness is discretionary, and courts may turn to it either before or after consideration of the merits.[432]

But again, prudential mootness seems in operation, even if not in conception, to be quite different. To be sure, there is by definition in any prudentially moot case a disappointed litigant who believes that some violation of her rights has not been satisfied.[433] Nonetheless, the best way of characterizing the typical prudential mootness case is that the court believes the litigant *ought* to be satisfied.[434] As Judge Gorsuch put it in *Winzler v. Toyota Motor Sales U.S.A., Inc.*,[435] the "prudential mootness doctrine often makes its appearance in cases where a plaintiff starts off with a vital complaint but then a coordinate branch of government steps in to promise the relief she seeks."[436] *Constitutional* mootness is not implicated because, for example, the branch of government that is promising relief might later return to its injurious practice.[437] But the judgment is that what the litigant has is good enough—something like a promise that we should see as "generally trustworthy" and that would render a judicial remedy overkill.[438] On the other hand, where there is "a cognizable, a perceptible, a recognizable danger" that the injury will continue, the case should proceed.[439] Indeed, though not every case describes the prudential doctrine in precisely this way, of the five reported court of appeals decisions applying prudential mootness during the last five-year period, each fits the framework of a judgment by the court of appeals that the

431. Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1210 (10th Cir. 2012).

432. *See id.* at 1210, 1213 (describing the "remedial discretion" of courts).

433. *See id.* at 1210.

434. *See id.* at 1211 (noting that any party invoking the prudential mootness doctrine must satisfy the court that the requested equitable remedial relief is needed).

435. 681 F.3d 1208 (10th Cir. 2012).

436. *Id.* at 1210.

437. *See id.*

438. *Id.* at 1211.

439. *Id.* at 1215.

appellant's situation is now at least good enough.[440] Thus the Eighth Circuit, in *Arc of Iowa v. Reynolds*,[441] found that a dispute over whether the State of Iowa, in the wake of the COVID-19 pandemic, could prohibit mask mandates in its schools, was at least prudentially moot because the pandemic had abated and transmission rates dramatically fallen.[442] Bankruptcy appeal barriers, of course, and in contrast, do not reflect a world in which the appellant is adjudged to be close to satisfied.

This examination of the prudential mootness case law points to one further key distinction: Unlike bankruptcy appeal barriers, prudential mootness appears rare. Judicial admonitions to that effect may stand for little given that courts of appeals, in the context of equitable mootness, also repeatedly call for that doctrine to be applied "sparingly."[443] What is perhaps more telling is that, notwithstanding Judge Gorsuch's clarification in *Winzler* that prudential mootness is distinct from constitutional mootness, courts apply the former sufficiently sparingly that in three of the five court of appeals cases, there was also at least a strong argument that the appeal was not just

440. *See* Great Divide Wind Farm 2 LLC v. Aguilar, No. 19-2214, 2021 WL 2690477, at *2 (10th Cir. Mar. 30, 2021) (agency had already begun process of amending challenged rule); Lopez v. Griswold, No. 22-1082, 2023 WL 1960802, at *2–3 (10th Cir. Feb. 13, 2023) (challenges to electioneering rules prudentially moot because election held and claim that injury would repeat in future elections too speculative); Robertson v. Biby, 719 F. App'x 802, 804 (10th Cir. 2017) (concluding that suit brought by state prisoner, a Messianic Jew housed in long-term administrative segregation, seeking access to an audio Bible, was prudentially moot where prison officials allowed him access to a portable audio player with a recording of the Bible loaded onto it); Seay v. Oklahoma Bd. of Dentistry, No. 21-6054, 2022 WL 2046511, at *2–3 (10th Cir. June 7, 2022) (although challenged regulation not amended, licensing board changed its position based on changes in Oklahoma law); Arc of Iowa v. Reynolds, 33 F.4th 1042, 1045 (8th Cir. 2022) (vacating preliminary injunction in action alleging that Iowa statute prohibiting mask requirements in schools in response to COVID-19 violated rights of students with health conditions as moot because COVID-19 vaccines decreased plaintiffs' children's risk of serious bodily injury or death from contracting COVID-19 at school).

441. 33 F.4th 1042 (8th Cir. 2022).

442. *See id.* at 1045.

443. *See, e.g.*, Kim Martin Lewis & Sarah S. Mattingly, *Recounting the History and Purpose of the Doctrine of Equitable Mootness and Exploring Its Evolving Persona*, 2020 ANN. SURV. BANKR. L. 8 (2020) (noting that the equitable mootness "was meant to be applied sparingly").

prudentially but constitutionally moot.[444] Not so, again, for bankruptcy appeal barriers, where, because most appellants' ultimate complaint boils down to a protest that they did not receive enough money from the bankruptcy proceeding (and a court could virtually always award money damages as a remedy), an appeal will very rarely be constitutionally moot.

Finally, we can consider narrower doctrines that the law deploys to protect appellees in specialized contexts. A particularly useful comparator here is the zoning-and-construction-law analogy with which this Article began.[445] Nothing stops a court of appeals from reversing a judgment on which a developer has relied to carry out some construction.[446] Indeed, courts do so. In a small number of cases, though, courts have concluded that tearing down already-completed constructions stretches too far. In *National Parks Conservation Association v. Semonite*,[447] the D.C. Circuit found that the Army Corp of Engineers violated the National Environmental Policy Act when it permitted Dominion Power to construct a series of electrical transmission towers across the James River in Virginia.[448] The D.C. Circuit initially vacated the permit, before changing course after learning that the towers had already been constructed.[449] The district court on remand found vacatur to be unwarranted, because of the "seriously disruptive and harmful consequences" that it would produce.[450]

444. *See* Great Divide Wind Farm 2 LLC v. Aguilar, No. 19-2214, 2021 WL 2690477, at *1 (10th Cir. Mar. 30, 2021) (determining the appeal was also constitutionally moot); Lopez v. Griswold, No. 22-1082, 2023 WL 1960802, at *1 (10th Cir. Feb. 13, 2023) (observing that holding election might have constitutionally mooted claim). The Eighth Circuit is not clear in *Arc of Iowa* whether it is applying constitutional mootness in addition to prudential mootness, but it notes that "there is little prospect that clear lines will be drawn between [these] constitutional and prudential doctrines." *Arc of Iowa*, 33 F.4th at 1045.

445. *Supra* Introduction.

446. *See e.g.*, City of Los Angeles v. Gage, 274 P.2d 34, 45 (Cal. Ct. App. 1954) (upholding the city's revocation of building permits in violation of zoning ordinances, regardless of the developer's reliance on the permits to begin construction).

447. 925 F.3d 500 (D.C. Cir. 2019).

448. *Id.* at 500.

449. *Id.* at 501–02.

450. Nat'l Parks Conservation Ass'n v. Semonite, 422 F. Supp. 3d 92, 100 (D.D.C. 2019).

The towers had become "a crucial source of electricity" and a shutdown would cause a "serious risk of blackouts."[451] No developer can safely assume that its construction work will be safe from appeal. The D.C. Circuit in *Semonite* pointed to statements made by various parties throughout the trial process that "[s]hould it ultimately be determined that the Army Corps of Engineers unlawfully issued the permit for the project, the Court can order the towers removed."[452]

At times, courts describe these mootness-in-building-construction cases using language that very much echoes equitable mootness—especially in the state courts that most frequently adjudicate zoning disputes of this kind. Indeed, the construction cases seem by far the best analog for defenders of equitable mootness hoping to suggest that bankruptcy is doing nothing out of the ordinary in maintaining appeal barriers. Thus, per one court "California law has long recognized that completion of a public works project moots challenges to the validity of the contracts under which the projected was carried out."[453] Another court stated that the policy of not requiring completed buildings to be torn down "would impose a substantial financial hardship on [the builder] for engaging in conduct that was expressly sanctioned by governmental action."[454] Courts emphasize practicality.[455] And courts also nod towards principles of finality, arguing that the equitable remedies should be directed towards preventing

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451. The district court further found it to be unlikely that the Dominion had engaged in the kind of gamesmanship that scholars argue is routine with equitable mootness. *See id.* at 101–02

> If defendants truly decommissioned [alternative sources of power] in the hopes that it would sway this Court to find vacatur unnecessary, they risked leaving the region without a stable power supply; this risk would be significant considering that vacatur is the default and that it is the defendant's burden to convince the Court to deviate from the standard remedy.

452. *Semonite*, 925 F.3d at 501.

453. Wilson & Wilson v. City Council of Redwood City, 120 Cal. Rptr. 3d 665, 679 (Cal. Ct. App. 2011).

454. Zoning Bd. of Adjustment of Garfield County v. DeVilbiss, 729 P.2d 353, 360 (Colo. 1986).

455. Conn. Coal. for Env'l Justice v. Dev. Ops. Inc., No. CV-03-0828997, 2005 WL 525631, at *8 (Conn. Super. Ct. Jan. 5, 2005) ("Connecticut courts also have dismissed cases on the ground of mootness where the court can offer no practical relief because the position of one of the parties has changed.").

"future mischief" and not remedying injuries that have already been done.[456]

And these construction cases offer to frustrated plaintiffs the same rejoinder that courts applying equitable mootness provide to those challenging a plan: Mootness could easily have been avoided by seeking a stay during the pendency of litigation.[457] Indeed, as with equitable mootness, courts have described it as a "chief" factor in showing entitlement to relief.[458]

It is this last point, though, that helps explicate a key distinction between mootness in construction cases and equitable mootness in bankruptcy. Fundamentally, what makes construction cases different to bankruptcy is the role of the stay. Construction of a building can much more plausibly be stayed pending resolution of an appeal than can a melting-ice-cube business be condemned to a prolonged stay in bankruptcy.[459] "[P]rohibiting th[e] construction" of buildings involves "a very different balance" to "shutting down and removing [them]."[460] In bankruptcy, although the ritualized dance of equitable mootness

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456. Rath v. City of Sutton, 273 N.W. 2d 869, 879–80 (Neb. 2004); *DeVilbiss*, 729 P.2d at 360.

457. *See* Citineighbors Coal. of Historic Carnegie Hill *ex rel.* Kazickas v. N.Y.C. Landmarks Pres. Comm'n, 811 N.E. 2d 727, 729–30 (N.Y. 2004)

> Importantly, petitioners did not try to enjoin construction during this litigation's pendency, nonfeasance that they chalk up to "monetary constraints" and the unlikelihood of success. . . . Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer, petitioners may not expect us to overlook the substantial completion of this construction project.

see also DeVilbiss, 729 P.2d at 360 (stating the plaintiff "failed to seek any form of temporary or preliminary injunctive relief to prohibit the commencement of construction and to preserve the status quo").

458. Kern v. Adirondack Park Agency, 223 A.D. 3d 990, 992 (N.Y. App. 2024) ("Chief among the factors to be considered 'has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation.'" (citation omitted)).

459. Indeed, in *Semonite*, part of the D.C. Circuit's chagrin stemmed from its suggestion that a stay would have been at least possible—even, reading between the lines of the opinion, likely—"[h]ad the Corps . . . said all along what they say now." Nat'l Parks Conservation Ass'n v. Semonite, 925 F.3d 500, 502 (D.C. Cir. 2019).

460. *Id.*

requires the appellant diligently to seek a stay from every court in the hierarchy, all understand that a stay is likely in few parties' interests.[461] Creditors throughout the capital structure may benefit from a healthy business that can emerge from bankruptcy and be free of Chapter 11's heavy shadow. In the zoning cases, a developer is less likely to be able to claim that a further delay in construction will cause irreparable harm. To the extent the zoning authority seeks a stay, meanwhile, the appellate court is presented with the kind of bipolar and largely zero-sum conflict over grant of a stay that is bread and butter for the courts, rather than the multipolar circus of bankruptcy. We might expect, therefore, stays to be granted in these cases with considerably more frequency than with Chapter 11 plans. Nor do the construction cases that deny injunctions leave plaintiffs wholly without the possibility of relief, as does equitable mootness. Instead, many expressly hold out the possibility that the plaintiff may secure (or could have attempted to secure) money damages.[462] Even these cases disclose something like an equitable mootness doctrine, it is therefore less likely to have the kinds of systemic effects that critics of equitable mootness bemoan in bankruptcy.

B. *Functional Justifications*

The most fertile sources of potential justifications for bankruptcy appeal barriers are functional: that the bankruptcy appellate landscape simply needs their presence in order to be able to operate workably.[463] Front and center to such an

461. *See* Markell, *supra* note 9, at 416 ("The irreparable injury inquiry cuts many different ways.").

462. See Golden Press, Inc. v. Rylands, 235 P.2d 592, 596 (Colo. 1951) ("[M]andatory injunction should have been denied by the trial court, with permission for plaintiffs to proceed, if desired, in damages."); Rath v. City of Sutton, 273 N.W. 2d 869, 880 (Neb. 2004) (noting that suits for damages are not mooted upon completion of a project but appellant "did not seek to recover the funds that may have been illegally expended"); Zoning Bd. of Adjustment of Garfield Cnty. v. DeVilbiss, 729 P.2d 353, 355 (Colo. 1986) ("[S]ince the complaint neither sought damages nor the removal of any structure but merely requested that construction be enjoined and building permits not be issued, the completion of the structure rendered DeVilbiss's complaint moot.").

463. *See* Levitin, *supra* note 48, at 1126 ("As the Second Circuit has explained, 'Equitable mootness is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented.'" (citation omitted)).

argument are the traditional policy interests of finality in the face of both complexity and third-party reliance that bankruptcy appeal barriers are said to serve.[464] Likely, it is also the case that many participants within the bankruptcy system believe that the barriers serve other purposes that are not (and perhaps cannot be) stated in case law. Because bankruptcy has its own distinctive culture, bankruptcy practitioners may believe bankruptcy judges (who share that culture) are more likely to get decisions right than appellate courts that are ignorant of it.[465] And bankruptcy litigants, who are used to bankruptcy's preference for rough-justice rules, may simply be more comfortable with a "one-and-done" approach to litigation in which all parties get one shot at litigating the issues and must live with their victory or loss rather than continuing proceedings for months or years with additional costly appeals.[466]

Sorting through these justifications is tricky. In large part, we are faced with a conflict among abstract principles that may boil down to competing axioms—disagreements as to fundamental values that, although usefully illuminated by more information, nonetheless remain unresolved because they are problems that "must ultimately dissolve into a study of aesthetics and morals."[467] Just how much weight we should give to an individual's desire to access the appellate process to vindicate a claim that her rights have been violated, as against others' desire to set matters to rest seems just such a debate: in as many ways about values as facts. That bankruptcy appeal barriers' prominence and reflects bankruptcy-specific values is evident from at least some of the arguments that proponents make in their defense, which are, on their face, much broader in scope than the bankruptcy context in which they are deployed.

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464. *See id.* at 1127 ("Finality lets creditors get on with their lives, enabling them to spend distributions they receive without fear of those funds being clawed back because of an appeal.").

465. Appellate judges may similarly believe that it makes sense to defer to the conclusions reached by bankruptcy judges, who, unlike them, are experts in a specialized and sometimes highly technical field.

466. *See* Levitin, *supra* note 48, at 1124–25 (describing how bankruptcy appeals are typically more costly and time consuming than other appeals).

467. Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 599 n.84 (1998).

Consider Judge Ambro's argument that, while appeals are pending, a debtor "will have a hard time attracting the investors, employees, and, in some industries, customers that it needs to exist and prosper."[468] Defendants in the shadow of all manner of potentially ruinous civil litigation, though, may see their business impaired while they wait for resolution from the courts.[469] Under ordinary principles, such harm may be a basis for expediting the appeal, but it is not a basis for eliminating the appellate right. Judge Ambro's argument, in effect, is perhaps better seen as a plea that the world would be better if the presumption with which this Article began—that the tall building constructed by the developer must be torn down if later appeals are lost—should be reversed, rather than any observation specific to bankruptcy practice. Similarly, normative conclusions on bankruptcy appeal barriers will depend at least in part on what one makes of the powerful status of the bankruptcy judge and her ability to make decisions that reflect bankruptcy's own deeply rooted culture with little in the way of appellate intervention.[470] A critic of bankruptcy exceptionalism will find bankruptcy appeal barriers troubling, in a way that bankruptcy practitioners who believe appellate intervention tends to upset the smooth running of the bankruptcy system will not.

One claim to which it is possible to respond, though, is that bankruptcy appeal barriers are necessary: That without equitable and statutory mootness, courts would routinely be faced with "uncontrollable" situations that require them to unscramble eggs or piece together again houses that have had the foundations knocked out from under them.[471] This strong claim for bankruptcy appeal barriers seems overstated.

A first, more theoretical attempt at a response reframes the effects of bankruptcy appeal barriers. Again, consider the tall

468. *In re* Tribune Media Co., 799 F.3d 272, 289 (3d Cir. 2015).

469. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032, 1050–52 (D.C. Cir. 2021) (explaining circumstances in which an agency order is enforceable despite disruptive consequences).

470. *See* Levitin, *supra* note 48, at 1148 ("Judge Drain took the unusual step of calling the United States Trustee's continuation of its appeal of his plan confirmation order 'reprehensible.'" (citation omitted)).

471. *See In re* Charter Comms., 691 F.3d 476, 482 (2d Cir. 2012).

building that a developer has constructed following a trial court judgment later reversed on appeal. Assume there is no doctrine of reliance on a prior judgment that the developer can invoke to resist insistence by the city that the unlawfully constructed building now be torn down. For all that, as a practical matter, the building is likely to stay up. The economically rational outcome is for the various parties to the case to recognize the costs that have gone into construction and the wastefulness of demolition, and to reach a settlement that allows the building to stay up—even if the city's appellate victory and newly found leverage means that settlement may be considerably more expensive for the developer than if a negotiation prior to the appellate court decision had been possible. Likewise in bankruptcy, which centers its whole ethos around facilitating value-maximizing negotiated deals. Appellants and appellees alike stand to gain little from the "chaos" of relitigating the entirety of a bankruptcy process at enormous expense, and are instead likely to seek to recalibrate the deal struck in the original plan or sale through settlement. On this view, bankruptcy appeal barriers largely determine the price at which a deal is ultimately struck and the leverage of the various negotiating parties. Although redistributing leverage away from debtors and reorganizers and in favor of dissenters may be unappealing to proponents of bankruptcy culture, there is little reason to view such a recalibration as a fundamental threat to the functioning of the bankruptcy system.[472]

The most persuasive hard evidence, meanwhile, that bankruptcy appeal barriers are not necessary, comes from other fields in which courts must grapple with the aftermath of complex transactions. Examples from the federal courts do tend to indicate why bankruptcy cases present particular difficulties. Thus, for example, appeals from class actions in federal court do not incorporate any kind of equivalent of equitable or statutory mootness.[473] Because the bulk of class actions provide class

472. *See* Markell, *supra* note 9, at 427 ("Rather, the likely consequence will be different deals, deals made with less emphasis on expediency and more deference to dissenters' legal claims.").

473. *In re* Diet Drugs, 582 F.3d 524, 552 n.55 (3d Cir. 2009). Judge Jordan, author of all three of the Third Circuit's most recent applications of equitable mootness, nonetheless raised equitable mootness as a tantalizing possibility

plaintiffs with an opt-out right, though, dissenting parties—as with multi-district litigation settlements—have an additional option to preserve their rights without resorting to appeal.[474] And, unlike in bankruptcy, it is more practical in the context of class actions and other aggregate litigation to wait to pay out any settlement fund until after an appeal is resolved, such that the task of unwinding consummated transactions seldom arises.[475]

Corporate law provides the best comparison. In a merger or other corporate acquisition, a dissenting stockholder may, just as with a plan of reorganization, assert a variety of complaints about the process and outcome of the transaction.[476] Thus, when a stockholder contemporaneously dissents from a merger, the Delaware chancery courts will only rarely halt the transaction pending appellate review.[477] Instead, the stockholder may seek appraisal from the court and receive, after the fact, fair compensation for the transaction.[478] Many bankruptcy disputes are neatly analogous to the kinds of disputes over corporate valuation that are ultimately resolved by appraisal damages. Any plan of reorganization must incorporate a valuation for the debtor; in a contested confirmation, valuation will be among the most intensely litigated issues.[479] Likewise, bankruptcy

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for class action appeals in a footnote, although concluding that the court had "no occasion to decide" the issue. *Id.*

474. *See* FED. R. CIV. P. 23(c)(3)(B) ("Whether or not favorable to the class, the judgment in a class action must: for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.").

475. See FED. R. CIV. P. 62(b) (allowing a party to stay the judgment "by providing a bond or other security").

476. *See, e.g.*, DEL. CODE ANN. tit. 8, § 262(a) (2023) (allowing the shareholder to demand appraisal rights for any reason, so long as they did not vote in favor of the merger).

477. *See* Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC, C.A. No. 2022-0344-JTL, 2024 WL 3579932, at *1 (Del. Ch. July 30, 2024) ("After the Merger closed, the two Hyde Park funds sought appraisal.").

478. *See* DEL. CODE ANN. tit. 8, § 262(a) (2023) (stating a shareholder that opposes a merger can receive "the fair value of the stockholder's shares of stock").

479. *See supra* note 213 and accompanying text.

requires the valuation and fixing of creditors' claims.[480] And while many aspects of valuation are intensely factual in nature, such that successful appeal is unlikely, valuation also frequently presents the kinds of mixed questions of fact and law on which appellate courts may usefully rule.[481] That is, in effect, the remedy that the Second Circuit ordered in *MPM Silicones*—that the bankruptcy court, instead of unwinding the bankruptcy, instead redo its valuation work and increase the senior secured creditor's recovery accordingly.[482]

Delaware law, though, provides a broader and more flexible remedy on which bankruptcy courts could usefully draw in more legally complex cases. A Delaware stockholder may also complain after the fact that the entire transaction was tainted by a breach of the duty of loyalty.[483] On paper, the Delaware courts have said that the "preferable" remedy here is rescission of the transaction.[484] In practice, rescission is almost never ordered. Instead, Delaware law makes available rescissory damages where rescission itself is no longer feasible.[485] Damages here are the monetary equivalent of rescission, but the Delaware chancery courts—as with the bankruptcy courts—emphasize the equitable nature of their jurisdiction, and acknowledge the court's ability to fashion relief in particular cases as appropriate.[486] That may extend to the award of a sum of money that the Delaware courts call "nominal damages" but

480. *See* 11 U.S.C. § 502(b) (requiring a reorganization plan to designate classes of claims).

481. *In re MPM Silicones*, which I described in Part I.B, neatly exemplifies a valuation dispute relating to a creditor's claim. So too—in much simpler fashion—does *In re 53 Stanhope*. *See supra* note 371–372 and accompanying text.

482. *See supra* note 180 and accompanying text.

483. *See, e.g.*, *In re* Orchard Enters., 88 A.3d 1, 38 (Del. Ch. 2014) ("The remedy is available for an adjudicated breach of the duty of loyalty, such as cases involving self dealing or where a fiduciary puts personal interests ahead of the interests of its beneficiary.").

484. *See id.* at 39.

485. *See id.* ("Delaware Supreme Court decisions hold that rescissory damages are one appropriate measure of damages for a controlling stockholder squeeze-out like the merger.").

486. *See In re* Columbia Pipeline Grp. Inc., 299 A.3d 393, 494 (Del. Ch. 2023) ("The Court of Chancery has broad latitude to exercise its equitable powers to craft a remedy." (internal quotations omitted)).

is actually a substantial award of damages.[487] For such quasi-nominal damages, the court acknowledges that there is no precise mathematical way to calculate an award of damages, but instead determines some amount that it believes to be "proportionate and reasonable" given all of the facts, including the defendant's ability to pay.[488]

In fact, almost without exception, bankruptcy disputes should be at least partially reducible in this way to money damages. Often, these damages should be readily calculable. The essence of most creditors' claims in bankruptcy is that their monetary recovery from the case is insufficient.[489] In other cases, even if the right with which the plan or sale interfered was not monetary in nature, the bankruptcy court should nonetheless be able appropriately to value it. As a bottom line, in any case in which the bankruptcy court can both identify some concrete way in which an appellant was harmed by a case-determining order, and some other party or group of parties that benefited from it, it could order payment of some amount of quasi-nominal damages to compensate for the harm.

To illustrate, take a case such as *Millennium Lab*, in which the appellant's claim was that it had been bound to a release that it does not wish to grant.[490] As a preliminary matter, it is worth some skepticism about claims, such as those of Judge Jordan in *Millennium Lab*, that universal sign-on to a third-party release is "integral" to a plan.[491] Indeed, after *Purdue Pharma*, bankruptcy practitioners nationwide must figure how to resolve cases *without* resort to nonconsensual third-party releases. Plausibly, even before *Purdue Pharma*, courts could have done this work. For example, if the Third Circuit in *Millennium Lab* had accurately predicted the Supreme Court's ultimate conclusion in *Purdue Pharma* that approving such a release exceeded the bankruptcy court's authority, it could have deployed the clean—if "rough justice"

487. *Id.* at 495.

488. *Id.*

489. *See, e.g.*, *In re* MPM Silicones, LLC, 874 F.3d 787, 791 (2d Cir. 2017) ("The creditors argue that the plan improperly eliminated or reduced the value of notes they held.").

490. *In re* Millennium Lab Holdings II, LLC, 945 F.3d 126, 129–33 (3d Cir. 2019); *see also supra* Part II.C.2.

491. *Id.* at 137.

inflected remedy—of permitting the retraction of the release by complaining creditors in exchange for the return of any part of that creditor's distribution that the bankruptcy court finds is traceable to the release.[492] Suppose, though, that retraction of the *Millennium Lab* release really was impossible without creating an uncontrollable situation. By binding the creditor to the release, the plan has effected a forced sale of the creditor's released claims. A trial of the value of those claims would permit entry of a judgment for money damages in an appropriate amount against the released party.[493] And quasi-nominal damages form an additional backstop if the bankruptcy court concludes that the value of the released claims is simply unquantifiable.[494] None of this additional process, of course, is costless. Likely, the released party, if it suspects that the release is vulnerable on appeal, will agree to contribute less to the bankruptcy case than if it were confident that of its invulnerability. Maximizing value by permitting released parties forcibly to buy global peace is a policy preference, though—and quite different from a claim that bankruptcy must function in this way to be workable.

IV. MOVING FORWARD

Proposals for reform of equitable mootness are numerous; many of those proposals, in turn, could readily be extended to the context of statutory mootness also.[495] Either legislative or

492. Seymour, *supra*, note 4, at 1927 (quoting *In re* Tribute Co., 972 F.3d 228, 245 (3d Cir. 2020)). The appellant in *Millennium Lab*, of course, argued that it should be entitled to retract the release without returning its distribution either. *See* 945 F.3d at 143. But, as the Third Circuit noted in that case, that appears to be a merits question: whether the distribution can be said to have been consideration for the release. *Id.* at 144.

493. The debtor and the released party, presumably, would claim that any distribution the creditor received already reflects the value of the release. But, equitable mootness would take from the creditor the opportunity to show otherwise in a trial of its claims on the merits.

494. *See In re* Columbia Pipeline Grp. Inc., 299 A.3d 393, 409 (Del. Ch. 2023) ("But that is not the end of the line, because equity will not suffer a wrong without a remedy. A court of equity has broad discretion when fashioning relief and is not limited to picking an option provided by the parties.").

495. *See* Markell, *supra* note 12, at 414–27 (outlining a variety of reforms to blunt the effects of equitable mootness).

judicial intervention could eliminate equitable mootness; legislative intervention, of course, would be necessary to revise statutory mootness under Section 363(m) such that it no longer applied to case-determining sales of all of a debtor's assets.[496] This Part explains this Article's ultimate conclusion that the best path forward, though, is to abandon bankruptcy appeal barriers entirely as they apply to prohibit appellate review of case-determining orders.

One at first sight attractive focus of attention is the potential role of the stay. Bankruptcy appeal barriers bite only once the plan of reorganization or sale of assets is consummated. Putting things on hold while an appellate court considers whether a case-determining order complies with the Code's requirements ensures that an appellant, if victorious, will always have recourse later down the line. But bankruptcy (and appellate) courts' current reluctance to grant stays is far from irrational. Being in bankruptcy is painful for debtors, who understandably, bankruptcy appeal barriers aside, want to get out as quickly as possible.[497] Much of what the debtor wants to do going forward will require court approval so long as the debtor technically remains subject to the jurisdiction of the bankruptcy court; some things (like trading shares publicly) will be impossible.[498] Bankruptcy has reputational costs.[499] Third

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496. I set to one side the question of whether Section 363(m) continues to make sense for non-case-determining sales.

497. Exceptions, meanwhile, tend to involve debtors that themselves elect not to proceed to consummation because some element of the confirmed plan is so vital that, even factoring in the protection of equitable mootness, the debtor cannot risk reversal. Thus, in *Purdue Pharma*, Purdue ultimately chose not to consummate pending a final decision on the lawfulness of the third-party release. A generation earlier, Dow Corning postponed its emergence from its 1995 bankruptcy case until litigation with dissenting creditors, including over a third-party release, was finally resolved in 2004. *Dow Corning Emerges from Bankruptcy*, NBC NEWS (June 1, 2004), https://perma.cc/X7PJ-J9KE.

498. *In re* Tribune Media Co., 799 F.3d 272, 289 (3d Cir. 2015) (Ambro, J., concurring) ("We acknowledge, however, that stays are costly to estates: in order to operate a business without court supervision and in order to sell shares on the public markets, entities must emerge from bankruptcy with prepetition liabilities restructured or discharged.").

499. *See* Samuel Antill & Megan Hunter, Consumer Choice and Corporate Bankruptcy 1 (May 17, 2023) (unpublished manuscript), https://perma.cc/G4QX-JTHH (PDF) (illustrating that consumers are less

parties may be reluctant to do business with the debtor until they have confidence that its reorganization will stick.[500] And the debtor will be concerned that any exit financing that it has lined up will evaporate as facts on the ground—or simply market conditions more broadly—change.[501] Nor is it feasible, as it might be outside of the bankruptcy space, to address concerns around the costliness of stays by requiring appellants to post *supersedeas* bonds.[502] That is because of bankruptcy's multi-polarity. A bond will have to account for the cost not just of preserving the debtor's position vis-à-vis the appellant's but of preserving the status quo in its entirety—including, for example, the delay in receiving and potential risk of loss of any exit financing. To the extent that the debtor really is a "melting ice cube" that is harmed by an extended stay in bankruptcy, the required value for a bond could be as much as the entire plan or sale value of the debtor—an amount that will be uneconomic and impractical for virtually any appellant to proffer.[503]

If anything, the notion that stays pending appeal play a vital role in adjudicating bankruptcy appeal barriers is something of a distraction. Indeed, it is understood by many participants in the bankruptcy appellate process that stay litigation is, in essence, a necessary but empty formality.[504] The appellant must urge expedited consideration of its request for a stay even though there is little practical chance that it is

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willing to do business with a firm once informed about a pending bankruptcy case).

500. *See id.* at 2 (describing consumers' fears about liquidation and lower quality products until a company emerges from bankruptcy proceedings).

501. *See* Levitin, *supra* note 48, at 1127 ("Large transactions, including bankruptcy plans, often involve financing. That financing must be committed in advance, but having it sitting on hold is expensive and risks market condition changes that give the financiers the right to exit the deal.").

502. *But see In re Tribune Media Co.*, 799 F.3d at 289 (Ambro, J., concurring) (suggesting that bonds "set within a reasonable range" may allow courts to grant stays).

503. Levitin, *supra* note 48, at 1127 ("The bonding requirement will frequently be economically impossible or impracticable for the would-be appellant.").

504. Because, as discussed in Part II, the most significant practical impact of the requirement that, to avoid equitable mootness, a party must diligently seek a stay from all available courts is to cause unsophisticated litigants inadvertently to give up any shot at appeal, the better course of action is likely to dispense with this element of calculus entirely.

granted.[505] Indeed, the larger and more complex the case, and therefore the more moving parts that are at issue, the less likely courts are to view it as realistic to put all arrangements on hold while all parties wait for an appellate court to weigh in.[506] At the margins, there is likely some space to solve for this problem by speeding up appellate review in bankruptcy. A stay of a few weeks might be palatable in a way that a stay of months or years is certainly not. Fundamentally, though, the problem with interventions of this type is that there appears to be no appetite for them within the appellate courts. Courts of appeals already have the ability, for example, to accept appeals via direct certification from the bankruptcy courts, skipping over the intermediate layer of review, and to expedite any appellate proceedings.[507] They very rarely do so.[508] The same problem of lack of judicial appetite likely dooms more ambitious proposals, such as Adam Levitin's suggestion that Congress create a federal court of business bankruptcy appeals staffed by a rotating complement of judges that can provide accelerated appellate review in complex bankruptcy cases.[509]

Other commentators have suggested that the harmful effects of equitable mootness could at least be mitigated by prescribing, in every case, that appellate courts must consider the merits of an appeal before moving to the question of whether any relief is available to grant.[510] First, of course, this intervention is responsive chiefly to concerns that bankruptcy appeal barriers function as a kind of *quasi*-qualified immunity, inhibiting the development of bankruptcy law and (perhaps) permitting sophisticated repeat players to game into law aggressive terms that never effectively receive appellate

505. *See* Markell, *supra* note 12, at 386.

506. *See id.* ("Many factors may work against the likelihood of a stay, especially in large, complex reorganizations.").

507. *See* 28 U.S.C. § 158(d)(2) (allowing for the appeals court to certify an appeal directly from the bankruptcy court).

508. *See* Bartell, *supra* note 80, at 175 (stating that, as of 2010, only seventy-six certifications had been granted pursuant to Section 158(d)(2)).

509. *See* Levitin, *supra* note 48, at 1152–53 ("Specifically, this Article calls for the creation of a Federal Court for Business Bankruptcy Appeals, that would operate much like the Court of Appeals for the Federal Circuit does for patent claims.").

510. *See* Kuney, *supra* note 135.

oversight.[511] Once again, these are real concerns—but the problematic features of bankruptcy appeal barriers extend more broadly than this. And there are also pragmatic reasons to be concerned about requiring appellate courts to opine on the merits about the substance of bankruptcy law when they know, at the end of the day, that they will withhold a remedy. In essence, that asks appellate courts to issue advisory opinions. Both litigants' advocacy and judges' analysis may be skewed if all the parties to an appeal in fact understand that there are no concrete stakes, in the case at hand, to the court's conclusion.

This Article's proposal, therefore, is to eliminate bankruptcy appeal barriers for case-determining orders. Section 363(m) of the Bankruptcy Code should be amended to exclude from its scope orders authorizing sales of all of a debtor's assets. And equitable mootness should simply be discarded. Perhaps it is sometimes the case that any intervention with a consummated transaction will prove catastrophic. If bankruptcy courts were to follow the lead of the Delaware courts and award quasi-nominal damages, then such cases should be exceptionally rare. That is not to deny that there may be circumstances in which the original deal was both so momentous and so precarious that the parties could not possibly hope to put together any kind of substitute if forced to return to the drawing board. Conceivably, that describes bankruptcies like Detroit's Chapter 9 reorganization, where a "grand bargain" that requires each separate and interlocking piece has been reached against a political backdrop too exhausted and acrimonious to allow for renegotiation.[512]

The best way to deal with such situations, though, is not to bar the aggrieved parties from access to the appellate courts. Bankruptcy appeal barriers, at least to some extent, stymie the development of bankruptcy law. In application, they also arbitrarily and likely inequitably cut off appellate review in cases where there seems little reason to withhold it. Instead, courts of appeals should decide the merits and, where an appellants' rights have been violated, remand to the bankruptcy

511. *See* Levitin, *supra* note 48, at 1127 ("While there is usually a business case for a rapid closing and quick effective date of a plan, debtors have also weaponized the doctrine, taking care that plans go effective—and money starts changing hands—as soon as possible after confirmation.").

512. *In re* City of Detroit, 838 F.3d 792, 799 (6th Cir. 2016).

court. The remand, by itself, will likely create considerable pressure upon the parties to negotiate a new settlement, and the bankruptcy judge can, if there is no new agreement, consider whether some amount of money damages can make the victorious appellant at least partially whole. In some cases, the bankruptcy court may ultimately conclude that there is no workable way to provide any remedy at all. Equitable or statutory mootness can sensibly survive to allow bankruptcy courts, in that situation, to close the remanded case without taking any further action. No longer, though, would either doctrine serve as an appeal barrier.

This is far from a perfect solution. To the extent we believe that bankruptcy judges' decisions in first instance are colored by their immersion in bankruptcy culture, the same pragmatic, rough-justice approach is likely to affect their decisions on whether and how to provide relief on remand. Some level of appellate oversight might help, in turn, to mitigate that problem. It would be unattractive for bankruptcy proceedings routinely to generate a second round of appeals over whether the bankruptcy judge adequately addressed the possibility, upon remand, of providing relief following a first appeal. But it is hard to take any action to limit bankruptcy appeal barriers without at least opening the door to appellate proceedings disputing the right result on remand. Even complete elimination of equitable and statutory mootness, insisting that, absent constitutional mootness, bankruptcy courts always provide at least *some* remedy, allows for further litigation and appeal over what the most appropriate remedy is. Calibrating the standard of review to be appropriately deferential to the bankruptcy court's findings of fact upon remand would both control the proliferation of second-round appellate proceedings and provide a failsafe against bankruptcy courts that are too unwilling to revisit their past work.

CONCLUSION

Bankruptcy appeals will inevitably be messy; that is because bankruptcy is messy. But appellate review serves too important a purpose in bankruptcy law to permit appellate courts to shy away from the task. Appellate review is, if not quite a constitutional must, in practice the most important way that Article III courts discharge their duty to supervise the work of

the bankruptcy courts, and appellate courts are further a necessary check on the sometimes free-wheeling approach to decision-making for which bankruptcy courts are known. Nor, applying the doctrines of bankruptcy appeal barriers as they currently exist, do appellate courts seem particularly, accurately, or persuasively to judge whether an appeal is one that deserves consideration on the merits or not.

For these reasons, this Article has argued that bankruptcy appeal barriers warrant special scrutiny. It is hard to conclude that they withstand it. The origins of both equitable and statutory mootness do not suggest a considered judgment from an authoritative decision-maker that appeals from case-determining orders should be so limited, but rather an ad hoc development of doctrines not originally conceived of as significant but that have turned out to have a major impact on the bankruptcy landscape. Nor does it seem that case-determining bankruptcy appeal barriers are necessary for the bankruptcy system to function. The best suggestive evidence is that courts could manage without them. Congress and the appellate courts should recognize as much and take action.