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Postscript on Equitable Mootness

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In the September 2015 Issue of this newsletter, we discussed two recent decisions of the U.S. Courts of Appeal for the Third and Ninth Circuits narrowing the equitable mootness doctrine. *See* "Time To Revisit Equitable Mootness," http://bit.ly/1OaNzfj. In both cases, the courts held that the appeals from Chapter 11 plan confirmation orders were not equitably moot because, among other things, the lender "diligently sought a stay" and the court could grant effective relief. *In re Transwest Resort Properties, Inc.*, 791 F. 3d 1140, 1142 1 (9th Cir. 2015) (2-1) (appellate review would not unfairly affect "third parties or entirely unravel the plan."); *One2One Communications LLC*, 2015 WL 4430302, *6 (3d Cir. July 21, 2015) (reversed district court's dismissal of confirmation order appeal on equitable mootness grounds; "[confirmed] Plan did not involve the issuance of any publicly traded securities, bonds or other circumstances that would make it difficult to retract the plan;" "limited evidence of potential third-party injury.") *Accord, In re Sagamore Partners, Ltd.*, 2015 WL 5091909 (11th Cir. Aug. 31, 2015) ("Requiring [debtor] to pay default rate interest is effective relief;" because such relief available, appeal held not equitably moot). We also noted the concurring opinion of Judge Krause in *One2One Communications* urging the entire court "to consider eliminating, or at the very least reforming equitable mootness." *Id.* at *7.

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Shortly after our September article went to press, the Third Circuit handed down another important equitable mootness decision, *In re Tribune Media Co.*, 2015 WL 4925923 (3d Cir. Aug. 19, 2015). It held that one of the two appeals before it was equitably moot because: 1) the plan had been "consummated"; 2) the appellant had "spurned the offer of a stay accompanied by a bond"; and 3) "it would be unfair" to unravel "the most important aspect of the overwhelmingly approved Plan." *Id.*

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at *11. The appellant there had sought to revoke a settlement that was "central" to the substantially consummated plan but had failed "to post a bond to obtain a stay pending appeal" after being given "the opportunity to" do so. *Id*. at *7-*8. Nevertheless, the court in *Tribune* held the second appeal, where the appellant had challenged the plan's allocation of funds among two classes of creditors, not to be equitably moot because relief could be granted to the appellant; third parties would not be harmed; and because the plan would not be fatally scrambled. *Id*. at *9-*10.

Moreover, two of the three judges (Ambro and Vanaskie) in *Tribune* issued a supplemental opinion, responding to parts of Judge Krause's concurring opinion in *One2One Communications*. They sought "to lay out briefly why this judge-made doctrine is abided by every Court of Appeals." *Id*. at *1. Judge Ambro's supplemental opinion reasoned that: 1) the equitable mootness doctrine does not violate Article III of the constitution; 2) the Bankruptcy Code ("Code") does not bar the doctrine; and that 3) equitable mootness "can be beneficial as a practical matter." *Id*. at 14. Thus, the doctrine can be used in "those few cases [when] shutting an appellant out of the courthouse does substantally less harm than locking a debtor inside." *Id*., at *15. Still, Judge Ambro stressed that "equitable mootness remains a last-ditch discretionary device for protecting the finality of an unstayed plan that has been consummated." *Id*. at *15.

In sum, the Third Circuit narrowly accepts the equitable mootness doctrine. Judge Ambro's *Tribune* opinion suggests that the entire court would not accept Judge Krause's proposed elimination of the doctrine. Four Third Circuit Judges in *Tribune* and in *One2One Communications* believe that the court has effectively managed any problem with equitable mootness. As Judge Ambro noted, "our Court has certainly not been reluctant to reverse ill-advised equitable mootness grants." *Id*. at 14, citing *In re SemCrude, L.P.*, 728 F. 3d 315, 323 (3d Cir. 2013); *In re Philadelphia Newspapers*, 690 F. 3d 161, 170 (3d Cir. 2012). Nevertheless, as noted in our September article, Judge Krause identified some of the abuses engaged in by practitioners to avoid appellate review: violation of Code's "cram down provisions;" "conflicts of interest or preferential treatment"; "…O]pportunistic plan proponents [who] can (and … regularly do)" use the equitable mootness doctrine in quickly "implementing … questionable [reorganization] plan[s] that favor … certain creditors over others;" and plans that 'classify similar claims differently in order to gerrymander an affirmative vote on reorganization.'"). 2015 WL 4430302 , at *16, *22, quoting *In re Graystone III Joint Venture*, 995 F. 2d 1274, 1279 (5th Cir. 1991) and *In re Pac. Lumber Co.*, 584 F. 3d 229, 251 (5th Cir. 2009). In Judge Krause's view, the doctrine "promote[s] uncertainity and delay." *Id*. at *15. When a district court dismisses an appeal as equitably moot, "that dismissal is appealed to [the Circuit Court], often resulting, in turn, in a remand and further proceedings." *Id*.

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