By Olivia Maier

Equitable Mootness: Has the Scalpel Become an Axe?

It has been said that "[i]n bankruptcy, mootness comes in a variety of flavors: constitutional, equitable, and statutory."[1] The U.S. Supreme Court has already engaged with a source of statutory mootness, § 363(m).[2] Now, equitable mootness has come under increased scrutiny, as demonstrated by *In re Serta Simmons Bedding LLC*.[3] This article evaluates the current state of equitable mootness through a survey of important decisions across several circuits and recent Supreme Court comments on mootness doctrines.

Olivia Maier
U.S. Bankruptcy Court (E.D.N.C.) Greenville

Olivia Maier is a term clerk for Hon. Joseph N. Callaway of the U.S. Bankruptcy Court for the Eastern District of North Carolina in Greenville.

Equitable Mootness Generally

Equitable mootness allows appellate courts to dismiss a bankruptcy appeal as moot when granting relief would be inequitable.[4] The doctrine recognizes the need for finality of bankruptcy judgments.[5] This doctrine is distinct from constitutional mootness, which is derived from the Article III requirement that there be a live case or controversy. While true mootness involves an *inability* to alter an outcome, equitable mootness is invoked when a court is *unwilling* to alter an outcome.[6] The doctrine has been applied to both chapter 11 plans of reorganization and liquidation.[7]

Courts have utilized equitable mootness "as a scalpel rather than an axe."[8] Courts will generally decline to find an appeal equitably moot when even incomplete relief is possible.[9] While equitable mootness can be a powerful tool to avoid disturbing an already implemented reorganization plan,[10] courts typically rebut attempts to use the doctrine as a "shield for sharp or unauthorized practices."[11] Despite the relatively brief history of equitable mootness, it has been embraced in every circuit.[12] However, courts have questioned both the soundness of the doctrine, as well as the extent of its application, which raises the following question: Has the scalpel become an axe?

Serta

While most of the coverage of *Serta* has revolved around the resulting definition of an "open-market purchase" and the implications for non-*pro rata* debt exchanges, a closer examination revealed that the Fifth Circuit also narrowed equitable mootness. In 2016, Serta refinanced its debt through a series of syndicated loans, which resulted in $1.95 billion in first-lien syndicated loans and $450 million in second-lien syndicated loans.[13] Serta exercised an uptier transaction in 2020, a liability-management transaction in which a borrower amends the terms of a credit facility to allow the issuance of new superpriority debt.[14] Serta agreed to indemnify the lenders involved in the 2020 uptier transaction (the "prevailing lenders") for their participation.[15] Serta filed for bankruptcy on Jan. 23, 2023.[16]

Serta's initial proposed reorganization plan preserved its promise to indemnify the prevailing lenders.[17] Those left out of the transaction (the "excluded lenders") were joined by creditor Citadel and objected to corresponding proofs of claim under § 502(e)(1)(B).[18] The version ultimately included in the second amended plan (the "settlement indemnity") differed from the original indemnity provision by including participants in the 2020 uptier transaction who continued to hold superpriority debt and entities who later purchased the superpriority debt on secondary markets.[19] The settlement indemnity was justified as a part of a settlement between Serta and certain creditors, which was necessary to gain approval for plan confirmation.[20] While heavily contested, the bankruptcy court found that the settle-

1 *Clear Channel Outdoor Inc. v. Knupfer (In re PW LLC)*, 391 B.R. 25, 33 (B.A.P. 9th Cir. 2008).
2 *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 292 (2023).
3 *Excluded Lenders v. Serta Simmons Bedding LLC (In re Serta Simmons Bedding LLC)*, 125 F.4th 555 (5th Cir. 2025).
4 *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 980, 990 (9th Cir. 2012).
5 *Id.*
6 *FishDish LLP v. VeroBlue Farms USA Inc. (In re VeroBlue Farms USA Inc.)*, 6 F.4th 880, 888 (8th Cir. 2021).
7 *Beeman v. BGI Creditors' Liquidating Tr. (In re BGI Inc.)*, 772 F.3d 102, 104 (2d Cir. 2014).
8 *Nexpoint Advisors LP v. Highland Cap. Mgmt. LP (In re Highland Cap. Mgmt. LP)*, 48 F.4th 419, 429 (5th Cir. 2022).
9 *In re Thorpe Insulation Co.*, 671 F.3d at 993.
10 *GLM DFW Inc. v. Windstream Holdings Inc. (In re Windstream Holdings Inc.)*, 838 F. App'x 634, 636 (2d Cir. 2021).
11 *In re Serta Simmons Bedding LLC*, 125 F.4th at 558; *see also Tribune Media Co.*, 799 F.3d 279, 279 (3d Cir. 2015) ("We agree with the Second Circuit that the disgorgement of 'ill-gotten gains' is proper assuming that the disgorgement otherwise leaves a plan of reorganization not in tatters.").
12 7 *Collier on Bankruptcy* ¶ 1129.09 (16th 2025).
13 *In re Serta Simmons Bedding LLC*, 125 F.4th at 567.
14 *Id.* at 568.
15 *Id.* at 569.
16 *Id.*
17 *Id.* at 570.
18 *Id.* at 570-71.
19 *Id.* at 571.
20 *Id.*

ment indemnity was fair and equitable as being part of a § 1123(b)(3) settlement.[21]

The Fifth Circuit's Opinion

On appeal, the excluded lenders and Citadel sought excision of the settlement indemnity from the confirmed plan.[22] The prevailing lenders and Serta argued that this request was equitably moot.[23] The Fifth Circuit held that the plan-indemnity appeals were not equitably moot due to (1) the application of the Fifth Circuit's three-factor test; (2) the twin purposes of 28 U.S.C. § 158(d)(2); and (3) a firm "full-throated rebuttal" against the "fairness" argument put forth by Serta and the prevailing lenders.[24]

The Fifth Circuit began its inquiry into whether the appeal was equitably moot by applying a three-factor test: whether (1) a stay has been obtained; (2) the plan has been substantially consummated; and (3) the relief requested would affect either the rights of parties not before the court or the plan's success.[25] While the first two factors weighed in favor of equitable mootness, the Fifth Circuit found that the third factor was not applicable, so it declined to dismiss the appeal.[26] The Fifth Circuit also discussed the twin purposes of 28 U.S.C. § 158(d)(2): (1) to expedite appeals in significant cases, and (2) to generate binding appellate precedent in bankruptcy cases.[27]

The appellees' final argument — fairness — was rejected wholeheartedly by the Fifth Circuit. The Fifth Circuit observed that should it accept the "fairness" argument, it would "effectively abolish appellate review of even clearly unlawful provisions in bankruptcy plans."[28] The Fifth Circuit concluded its equitable mootness analysis by determining that "to the extent equitable mootness exists at all, we affirm that it cannot be 'a shield for sharp or unauthorized practices.'"[29] The Fifth Circuit ultimately excised the settlement indemnity without allowing a revote in spite of the nonseverability clause in the plan and ample testimony that this provision was necessary to gain sufficient support for confirmation.[30]

The opinion demonstrates an increased level of scrutiny being directed toward the doctrine of equitable mootness. The Fifth Circuit is not alone in its critique, as the Third Circuit similarly questioned the doctrine's viability.

The Third Circuit: An Internal Debate

Differing from the Fifth Circuit's three-point test on whether an appeal is equitably moot, the Third Circuit conducts a two-step inquiry: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation."[31]

The Third Circuit narrowly adopted equitable mootness in *In re Continental Airlines*, a decision with a dissent from then-Judge Samuel Alito, who was left "puzzled and troubled" by the majority's decision to dismiss the case without reaching the merits, despite a live case or controversy being present.[32] Nearly 20 years later, Hon. Cheryl Ann Krause called for the reconsideration of equitable mootness in her *One2One* concurrence, urging the court to consider eliminating or reforming the doctrine.[33]

This view is not necessarily shared by the entirety of the Third Circuit. Hon. **Thomas L. Ambro** utilized his concurrence in *In re Tribune Media Co.* to respond to criticism of the doctrine.[34] He acknowledged that "unfairness ... might result where an aggrieved party is deprived of appellate relief even in the face of an erroneous lower court decision."[35] However, the risk of unfairness is countered by limiting the application of equitable mootness to instances when granting relief would do significant harm.[36] Judge Ambro observed that instances where an appeal is equitably moot "are rare, but they are real."[37]

In addition, *In re Tribute Media Co.* found that while an appellate court could excise a settlement that was a central issue in the formulation of the plan, it could decline to do so on the basis that excision would undermine the settlement, and the transactions entered into in reliance on it, and recall the plan for a redo.[38] This outcome stands in contrast with the Fifth Circuit's decision to excise the settlement indemnity. Following *In re Tribune Media Co.*, Judge Krause and others "continue to question the doctrine's wisdom," especially when equitable mootness results in a "gloss[ing] over" of merit questions.[39]

The Eight Circuit's Skepticism

The Eighth Circuit most recently addressed equitable mootness in *In re VeroBlue Farms USA Inc.*[40] The opinion demonstrates a clear skepticism of the doctrine and heavily references the concerns voiced by Judge Krause in *One2One*. Specifically, the Eighth Circuit shared Judge Krause's concerns over the lack of merit review.[41] The Eighth Circuit ultimately remanded the case to the district court to "make at least a preliminary review of the merits" before determining whether equitable remedies, including dismissal, would be appropriate.[42]

The Second Circuit's Presumption

The Second Circuit's approach to equitable mootness substantially differs from that of other circuits. Rather than

21 *Serta Simmons Bedding LLC v. AG Ctr. St. P'ship (In re Serta Simmons Bedding LLC)*, Adv. P. No. 23-9001, 2023 Bankr. LEXIS 1479, at *33, 2023 WL 3855820, at *11 (Bankr. S.D. Tex. June 6, 2023).
22 *In re Serta Simmons Bedding LLC*, 125 F.4th at 584.
23 *Id.* at 585.
24 *Id.* at 585, 587, 588.
25 *Id.* at 585.
26 *Id.* at 586.
27 *Id.* at 587.
28 *Id.* at 588.
29 *Id.*
30 *Id.* at 593.
31 *Tribune Media Co.*, 799 F.3d at 278.
32 *In re Cont'l Airlines*, 91 F.3d 553, 568 (3d Cir. 1996) (Alito, J., dissenting).
33 *One2One Commc'ns LLC v. Quad/Graphics Inc.*, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring).
34 *Tribune Media Co.*, 799 F.3d at 284 (Ambro, J., concurring).
35 *Id.* at 288.
36 *Id.*
37 *Id.*
38 *Tribune Media Co.*, 799 F.3d at 281.
39 *In re Nuverra Env't Sols. Inc.*, 834 F. App'x 729, 736 (3d Cir. 2021) (Krause, J., concurring).
40 *FishDish LLP v. VeroBlue Farms USA Inc. (In re VeroBlue Farms USA Inc.)*, 6 F.4th 880 (8th Cir. 2021).
41 *Id.* at 890.
42 *Id.*

continued on page 73

from page 33

applying a multi-factor analysis, if a plan is found to be substantially consummated, a presumption arises that an appeal of that plan is equitably moot.[43] The presumption can be rebutted by a review of five conditions: (1) effective relief can be ordered; (2) relief will not affect the debtor's reemergence; (3) relief "will not unravel intricate transactions"; (4) affected third parties are notified and able to participate in the appeal; and (5) the appellant diligently sought a stay of the reorganization plan.[44] The appellant has the burden of demonstrating that all five conditions are satisfied, with the final factor having "significant reliance."[45] The Second Circuit has also determined that a court is not precluded or otherwise inhibited from considering the merits of an appeal before considering equitable mootness.[46]

The Second Circuit dismissed a creditor's appeal on equitable mootness grounds in *In re Windstream Holdings Inc*. The court reiterated that equitable mootness is to be deployed in a "pragmatic and flexible fashion."[47] As previously noted, the diligence requirement is chief in the Second Circuit, which weighs not whether relief *can* be provided, but rather whether it *should* be provided in light of fairness concerns.[48] In this instance, "tens of millions of dollars[']" worth of claims may have been revived, and creditors could have been required to return funds more than a year later.[49] "[W]hile a parade of horribles is not guaranteed to occur, '[h]aving sought no stay of the bankruptcy court's order (and no expedited appeal), [GLM] bear[s] the burden of this uncertainty.'"[50] In general, the decision in *GLM DFW Inc. v. Windstream Holdings Inc*. reaffirms the Second Circuit's continued embrace of equitable mootness.

The Supreme Court

The Supreme Court may soon address the viability of equitable mootness. As stated by Hon. James Loken of the Eighth Circuit, "if equitable mootness instead becomes the rule of appellate bankruptcy jurisprudence, rather than an exception ... we predict [that] the Supreme Court ... will step in and severely curtail — perhaps even abolish — its use."[51] Speculation regarding the Court's appetite for review of the doctrine increased following *MOAC Mall Holdings LLC*,[52] which resolved a dispute on whether § 363(m) is jurisdictional and potentially provided insights on the future of equitable mootness.

The buyer in the case, Transform Holdco LLC, argued that the appeal was moot because no relief could be granted.[53] The Supreme Court noted that these kinds of mootness arguments are "disfavor[ed]," as MOAC "simply seeks typical appellate relief," and reiterated that a case remains live "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation."[54]

The Court recently declined to grant *certiorari* in two recent cases that involved the doctrine: *Windstream* and *KK-PB*.[55] As such, the future of equitable mootness remains in limbo, but the comments made in *MOAC Mall Holdings LLC* certainly question the continued viability of this doctrine.

Moving Forward

While the future of the equitable-mootness doctrine remains unknown, there are a few themes that practitioners should remain aware of. First, as demonstrated by the Second and Eighth Circuits, courts are not precluded from reviewing the merits of a case prior to deciding whether an appeal is equitably moot. Second, increased skepticism might result in an increased willingness for courts to "fashion whatever relief is practicable."[56] While the Fifth and Third Circuits seem to diverge in their willingness to redline material provisions, practitioners should be wary of the potential for terms to be struck from a confirmed plan.

Third, it is necessary to keep in perspective that equitable mootness was always intended to be the exception, not the rule. The narrowing of the doctrine might result in a return to its original application: the rare exceptions where shutting an appellant out of the courthouse does less harm than locking a debtor inside.[57] abi

43 *In re Windstream Holdings Inc.*, 838 Fed. App'x at 636.
44 *Id.*
45 *Momentive Performance Materials Inc. v. BOKF NA (In re MPM Silicones LLC)*, 874 F.3d 787, 804 (2d Cir. 2017).
46 *Deutsche Bank AG v. Metromedia Fiber Network Inc. (In re Metromedia Fiber Network Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005).
47 *In re Windstream Holdings Inc.*, 838 Fed. App'x at 636.
48 *Id.* at 637.
49 *Id.*
50 *Id.* at 637-38.
51 *In re VeroBlue Farms USA Inc.*, 6 F.4th at 891.
52 *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023).
53 *Id.* at 295.
54 *Id.* at 295-96.
55 *GLM DFW Inc. v. Windstream Holdings Inc.*, 142 S. Ct. 226 (2021) (denying *certiorari*); *KK-PB Fin. LLC v. 160 Royal Palm LLC*, 142 S. Ct. 2778 (2022) (denying *certiorari*).
56 *In re Serta Simmons Bedding LLC*, 125 F.4th at 557 (internal citations omitted).
57 *Tribune Media Co.*, 799 F.3d at 289 (Ambro, J., concurring).