

## **“COMPLEXITY” AS THE GATEKEEPER TO EQUITABLE MOOTNESS**

### **ABSTRACT**

*When confronted with appeals from chapter 11 plan confirmation orders, appellate courts face a delicate balancing of interests. On the one hand, a court must consider the interests of the reorganized debtor and innocent third parties that relied on the order. On the other hand, the court must consider a claim or interest holder that feels the plan treated them unfairly. These jilted parties often want the plan undone to accommodate their interests. By the time an appellate court finally hears an appeal, however, the reorganized entity often has already entered into various transactions—e.g., closed stores, contracted with vendors, issued publicly traded securities, or merged into a different entity. Unwinding the plan at such a late date is no longer feasible because a court cannot “unscramble the egg.”*

*Appellate courts created the doctrine of equitable mootness for this situation. The underlying basis for the doctrine is the reliance of innocent third parties on the finality of the plan confirmation order. Despite equitable mootness’s express limitation to “complex reorganizations,” courts have bastardized the doctrine. Courts have found appeals from relatively simple reorganization, liquidation, and chapter 9 plans equitably moot. Recent criticisms have centered on the doctrine’s appropriateness in light of constitutional, efficacy, and statutory challenges. These attacks, however, ultimately stemmed from equitable mootness’s misapplication.*

*This Comment will argue that when a party asserts an appeal is equitably moot, appellate courts must formally determine whether a complex reorganization occurred as a threshold matter. If a court concludes a complex reorganization occurred, only then should it proceed to an equitable mootness analysis. Through a four-part test, courts can keep this super-finality doctrine the exception, not the rule.*

## INTRODUCTION

The goal of a chapter 11 case is to achieve the debtor's financial reorganization that will avoid the need for further bankruptcy relief in the future.<sup>1</sup> Bankruptcy courts attempt to accomplish this goal by moving the chapter 11 debtor through bankruptcy with "speed . . . consistent with [the] orderly and efficient administration of the case."<sup>2</sup> Failing to reorganize and rehabilitate results in liquidation, meaning a loss of jobs and "potential misuse of economic resources."<sup>3</sup>

The speed and efficiency of the system is evident when looking at chapter 11 emergences of large, publicly traded companies with assets over \$100 million. In 2007 and 2008, in the midst of the economic crisis, these companies, respectively, spent an average of 691 and 447 days in bankruptcy.<sup>4</sup> For chapter 11 debtors that filed for relief in 2016, the average number of days spent "in bankruptcy" has decreased to 158.<sup>5</sup> Minimizing the time that chapter 11 debtors spend in bankruptcy is vital because bankruptcy inhibits a business's ability to operate normally. As the Third Circuit explained in *Tribune Media Co. v. Aurelius Capital Mgmt., L.P. (In re Tribune Media Co.)*, each day a business spends in bankruptcy is "a day when it will have a hard time attracting the investors, employees, and, in some industries, customers that it needs to exist and prosper."<sup>6</sup>

The bankruptcy appellate process not only reflects an emphasis on speed,<sup>7</sup> but it also reflects another goal of bankruptcy: the finality of confirmation orders.<sup>8</sup> This principle facilitates a debtor's chance at successful reorganization

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<sup>1</sup> 5 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKR. L. & Prac. § 91:9 (3d ed. 2015), Westlaw, 5 Norton Bankr. L. & Prac. 3d § 91:9.

<sup>2</sup> 1-6 COLLIER ON BANKRUPTCY ¶6.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) [hereinafter COLLIER (16th ed.)]; see also Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527, 529 (1983) (identifying speed as one of "three principal characteristics desirable for a reorganization mechanism").

<sup>3</sup> NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984).

<sup>4</sup> See Lynn M. LoPucki, *Year Emerged—Study Summary*, UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, [http://lopucki.law.ucla.edu/design\\_a\\_study.asp?OutputVariable=YearEmerged](http://lopucki.law.ucla.edu/design_a_study.asp?OutputVariable=YearEmerged) (last visited Aug. 27, 2016).

<sup>5</sup> *Id.*

<sup>6</sup> 799 F.3d 272, 289 (3d Cir. 2015) (Ambro, J., concurring), *cert. denied*, 136 S. Ct. 1459 (2016).

<sup>7</sup> See Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty on Predictable Precedent*, 159 U. PA. L. REV. 543, 546 (2011).

<sup>8</sup> See *In re Cont'l Airlines*, 91 F.3d 553, 561 (3d Cir. 1996) (noting the "strong public interest in the finality of bankruptcy reorganizations").

by “fostering confidence in the finality of confirmed plans,”<sup>9</sup> which encourages investors and other third parties to rely on confirmation orders.<sup>10</sup> It also helps serve the two underlying policies of chapter 11: (1) preserving the business as a going concern; and (2) maximizing property available to satisfy creditors.<sup>11</sup>

Appellate courts face a difficult task, however, with appeals from confirmation orders. They have to “stri[k]e the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him.”<sup>12</sup>

To balance these considerations, appellate courts fashioned and now employ the doctrine of equitable mootness for chapter 11 appeals.<sup>13</sup> Courts developed this doctrine<sup>14</sup> in the context of appeals from plan confirmation orders advanced by claim or interest holders that argue the plan treated them unfairly. The specific relief sought by an appellant varies from case to case.<sup>15</sup> Granting such relief often means that the court would have to unwind some, or even all, of the actions taken to implement the plan in an effort to return the estate to the status quo as it existed before the debtor’s plan was confirmed. In certain instances, however, courts determined that the debtor’s reorganization plan had been substantially consummated and was so complex that reversing the plan’s implementation would be impractical and inequitable.<sup>16</sup> Rewinding

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<sup>9</sup> *In re Phila. Newspapers, LLC*, 690 F.3d 161, 170 (3d Cir. 2012).

<sup>10</sup> *See id.*

<sup>11</sup> *Bank of Am. Nat. Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 435 (1999).

<sup>12</sup> *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992).

<sup>13</sup> *See In re Cont’l Airlines*, 91 F.3d at 558–59. *See generally Moot*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“2. Having no practical significance; hypothetical or academic <the question on appeal became moot once the parties settled their case>.”); *Mootness Doctrine*, *id.* (“The principle that American courts will not decide moot cases—that is, cases in which there is no longer any actual controversy.”). It should be noted that a circuit split exists regarding whether equitable mootness applies to chapter 9. *Compare Ochadleus v. City of Detroit (In re City of Detroit)*, Nos. 15-2194, et al., 2016 U.S. App. LEXIS 17774 (6th Cir. Oct. 3, 2016) (affirming the district court’s dismissal of an appeal by a group of pensioners from an order confirming Detroit’s chapter 9 plan), and *Alexander v. Barnwell Cty. Hosp.*, 498 B.R. 550 (D.S.C. 2013) (finding the appeal was equitably moot), and *Lionel v. City of Vallejo (In re City of Vallejo)*, 551 F. App’x 339 (9th Cir. 2013) (holding the appeal was equitably moot), with *Bennett v. Jefferson Cty.*, 518 B.R. 613 (N.D. Ala. 2014) (holding that equitable mootness does not apply to chapter 9 cases).

<sup>14</sup> Throughout this Comment, the term “doctrine” will refer to equitable mootness.

<sup>15</sup> *Compare In re Cont’l Airlines*, 91 F.3d at 561 (seeking payment from the reorganized debtor after the bankruptcy court rejected the appellant’s claim), with *Varde Inv. Partners, L.P. v. Comair, Inc. (In re Delta Air Lines, Inc.)*, 386 B.R. 518, 531 (Bankr. S.D.N.Y. 2008) (seeking revocation of the confirmation order).

<sup>16</sup> *See* 11 U.S.C. § 1101(2) (2012) (defining substantial consummation); *Manges v. Seattle-First Nat’l Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994) (“[A] reviewing court may decline to consider the

the clock would have a detrimental effect on third parties not related to the bankruptcy proceeding that relied on the plan. Courts found it no longer equitable to upset the plan of reorganization and therefore refused to consider the merits of the appeal.<sup>17</sup> In these instances, “equitable considerations make it unfair . . . to intervene.”<sup>18</sup>

The doctrine is “grounded in the notion that, with the passage of time after a judgment . . . effective relief on appeal becomes impracticable, imprudent, and therefore inequitable.”<sup>19</sup> Courts and commentators have explained the problem with a useful, if unconventional, ovoid metaphor: asking the court to unscramble an egg.<sup>20</sup> Asking courts to unwind certain chapter 11 plans is asking courts to undo what cannot feasibly be undone. It would be a waste of judicial resources, in such a situation, to consider each party’s arguments that actions taken under the plan should or should not be undone; the result will inevitably be the same—once “[t]he eggs are thoroughly scrambled,” there is nothing more that can be done.<sup>21</sup> The merits of the appellant’s case are irrelevant; the appeal is equitably moot.

Equitable mootness occupies an interesting space in bankruptcy law, an area driven by statutory interpretation.<sup>22</sup> This judicially created doctrine seems to favor finality over appellate review for equitable or prudential reasons, for “it is one thing for a plan to be binding on the parties, and something else for it

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merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available . . .”).

<sup>17</sup> See 8B C. J. S. *Bankruptcy* § 1271 (2016).

<sup>18</sup> See *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015); see also *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994).

<sup>19</sup> *Mac Panel Co. v. Va. Panel Corp. (Mac Panel II)*, 283 F.3d 622, 625 (4th Cir. 2002); see also *Almeroth v. Innovative Clinical Sols., Ltd. (In re Innovative Clinical Sols., Ltd.)*, 302 B.R. 136, 142 (Bankr. D. Del. 2003) (quoting *Chang v. Servico, Inc. (In re Servico, Inc.)*, 161 B.R. 297, 301 (S.D. Fla. 1993)) (“Confirmation plans eventually reach a point of completion where to reverse the confirmation order would be to ‘knock the props out from under the authorization of every action that has taken place’ under the plan.”).

<sup>20</sup> Courts have also likened granting the relief an appellant seeks to repairing “Humpty Dumpty.” See *In re Tribune Media Co.*, 799 F.3d 272, 281 (3d Cir. 2015) (quoting *Rochman v. Northeast Utils. Serv. Group (In re Pub. Serv. Co. of N.H.)*, 963 F.2d 469, 475 (1st Cir. 1992)), *cert. denied*, 136 S. Ct. 1459 (2016); *Mac Panel II*, 283 F.3d at 626.

<sup>21</sup> Brief for the Appellees at 2, *In re Tribune Media*, 799 F.3d 272 (Nos. 14-3333, 14-3332), 2015 WL 222905 at \*2; cf. *In re UNR Indus.*, 20 F.3d at 769 (“[T]he reasons underlying §§ 363(m) and 1127(b)—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 that courts fill the interstices of the Code with the same approach.”).

<sup>22</sup> See Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 2 (2005), [hereinafter Ahart, *The Limited Scope*] (“[A] bankruptcy judge’s powers stem virtually exclusively from statutes.”).

to bind an appellate court tasked with reviewing its validity.”<sup>23</sup> Equitable mootness is a powerful tool in an appellate court’s arsenal and raises constitutional, statutory, and efficacy issues in the bankruptcy appeals process.<sup>24</sup>

Although appellate courts intended to apply the doctrine only to complex reorganizations involving intricate transactions, “with a scalpel rather than an axe,”<sup>25</sup> they have not done so.<sup>26</sup> This misapplication resulted in preventable appellate litigation involving relatively simple bankruptcies.<sup>27</sup> Appellate courts limited and criticized the doctrine over the past several years to rein it back in from its misuse.<sup>28</sup>

The doctrine’s controversy resulted in three decisions within ten weeks of each other: *One2One Communications, LLC v. Quad/Graphics, Inc.* (*In re One2One Communications, LLC*),<sup>29</sup> *In re Tribune Media Co.*,<sup>30</sup> and *JPMCC*

<sup>23</sup> Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition at 6, *In re Tribune Media Co.*, 799 F.3d 272 (No. 15-891), 2016 WL 676009, at \*6; see *Alta. Energy Partners v. Blast Energy Servs., Inc.* (*In re Blast Energy Servs., Inc.*), 593 F.3d 418, 424 (5th Cir. 2010) (“Equitable mootness authorizes an appellate court to decline review of an otherwise viable appeal of a Chapter 11 reorganization plan, but only when the reorganization has progressed too far for the requested relief practically to be granted.”).

<sup>24</sup> See *One2One Commc’ns, LLC v. Quad/Graphics, Inc.* (*In re One2One Commc’ns, LLC*), 805 F.3d 428, 438–48 (3d Cir. 2015) (Krause, J., concurring).

<sup>25</sup> *Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors’ Comm.* (*In re Pac. Lumber Co.*), 584 F.3d 229, 240 (5th Cir. 2009); see, e.g., *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015); *In re Tribune Media*, 799 F.3d at 279 (Ambro, J., concurring) (“[W]e decline to disturb ‘complex transactions undertaken after the Plan was consummated’ that would be most difficult to unravel.”); *Rev Op Grp. v. ML Manager, LLC* (*In re Mortgs. Ltd.*), 771 F.3d 1211, 1215 (9th Cir. 2014); *R<2> Inv., LDC v. Charter Commc’ns, Inc.* (*In re Charter Commc’ns, Inc.*), 691 F.3d 476, 485 (2d Cir. 2012); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 169 (3d Cir. 2012); *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745–46 (9th Cir. 2000) (“The doctrine also turns in part on whether the transactions at issue are complex and would be difficult to unwind.”).

<sup>26</sup> See *In re One2One*, 805 F.3d at 439 (Krause, J., concurring).

<sup>27</sup> See Bruce A. Markell, *Equitable Cuteness: Of Mountains and Mice*, BANKR. L. LETTER (Thomson Reuters, Saint Paul, Minn.), Nov. 2015, Westlaw, 35 No. 11 Bankruptcy Law Letter NL 1 (“They pressed equitable mootness in all cases, even ones that were small and simple. Their actions could be characterized as proceeding ‘[w]ith the thrust and lack of craft of a berserk sword; All lion, none of the fox.’”).

<sup>28</sup> See *Samson Energy Res. Co. v. SemCrude, L.P.* (*In re SemCrude, L.P.*), 728 F.3d 314 (3d Cir. 2013) (narrowing acceptable uses of equitable mootness doctrine); *In re Pac. Lumber*, 584 F.3d 229 (5th Cir. 2009) (narrowing the scope of equitable mootness); see also *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring); *In re Cont’l Airlines*, 91 F.3d 553, 567–69 (3d Cir. 1996) (Alito, J., dissenting) (questioning the doctrine’s basis in law, and whether the goal of furthering the Code was enough authority to refuse to entertain a viable appeal); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (“[W]e banish ‘equitable mootness’ from the (local) lexicon. We ask not whether the case is moot, ‘equitably’ or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.”).

<sup>29</sup> 805 F.3d 428 (3d Cir. 2015).

2007-C1 *Grasslawn Lodging, LLC v. Transwest Resort Properties (In re Transwest Resort Properties)*.<sup>31</sup> Each appeal involved “efforts by plan proponents to dismiss potentially meritorious appeals on [equitable mootness] grounds.”<sup>32</sup> Each decision, fascinating in its own right, is accompanied by impassioned, separate concurring or dissenting opinions providing alternative analyses of the equitable mootness concerns at issue in the case. These opinions, read together, illustrate the concerns that have called the doctrine’s legitimacy into question and the ongoing efforts to limit its scope.<sup>33</sup> Despite these concerns, however, appellate courts have already articulated an applicable standard for equitable mootness: *complex reorganizations*.

This Comment argues that to apply equitable mootness as intended, to complex reorganizations, appellate courts should be required to determine, as a threshold matter, whether a complex reorganization occurred. Only after a court finds that a complex reorganization occurred should it proceed to an equitable mootness analysis. Through a four-part analysis,<sup>34</sup> “complexity” will serve as the gatekeeper to the doctrine.

If appellate courts adopt this approach, they will eliminate the doctrine’s unwarranted application to the relatively simple appeals that courts should hear on their merits. Too much of the circuits’ current equitable mootness analyses focuses on when equitable mootness should apply; it is more effective to look at when it should *not* apply.

This Comment proceeds as follows. First, this Comment will begin by providing a brief overview of the chapter 11 plan process and discuss the doctrine’s origin, along with its varying application in the circuits. Throughout this discussion, this Comment will highlight the lack of a “complexity”

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<sup>30</sup> 799 F.3d 272 (3d. Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016).

<sup>31</sup> 801 F.3d 1161 (9th Cir. 2015).

<sup>32</sup> Markell, *supra* note 27; *see In re One2One*, 805 F.3d at 437–38 (holding that the appeal was not equitably moot because the reorganization was relatively simple); *In re Tribune Media*, 799 F.3d at 282, 283–84 (holding that the first creditor’s appeal was equitably moot because the relief sought required undoing a global settlement of a multi-billion dollar leveraged buyout litigation; but the second creditor’s appeal was not equitably moot because resolving a \$30 million inter-creditor dispute between two different classes would not unscramble the plan); *In re Transwest*, 801 F.3d at 1173 (holding that although the plan was substantially consummated, the plan was not equitably moot because the third party investor was an active participant in the bankruptcy and therefore was not an unsuspecting third party and the court could fashion some nominal relief).

<sup>33</sup> *See, e.g.*, Markell, *supra* note 27; Randolph J. Haines, *Ninth Circuit Eviscerates Equitable Mootness*, NORTON BANKR. L. ADVISER (Thomson Reuters, Saint Paul, Minn.), Aug. 2015, Westlaw, 2015 No. 8 Norton Bankr. L. Adviser NL 1.

<sup>34</sup> *See infra* Part II.D.

determination in the circuits’ various analyses. Next, this Comment will analyze the Third Circuit’s decision in *In re One2One* and will offer a positive list of factors that constitute a complex reorganization. Finally, this Comment will use these factors to provide a normative approach to “complexity” that will determine whether a complex reorganization occurred, thus warranting the doctrine’s analysis.

## I. BACKGROUND

The chapter 11 plan process allows claim and interest holders to have a say in how they are treated in bankruptcy proceedings.<sup>35</sup> Understanding this process is useful when considering how a claim or interest holder would think it had its rights trampled during the voting or confirmation processes. Appeals in bankruptcy cases are similar to appeals in civil cases, but they have an added emphasis on finality because “in bankruptcy proceedings, . . . finality is essential to the fashioning of effective remedies.”<sup>36</sup>

Appellate courts fashioned equitable mootness to deal with this issue, which originates from the Ninth Circuit’s decision in *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*.<sup>37</sup> Even though each circuit adopted equitable mootness after the decision in *In re Roberts Farms*, the circuits did not adopt a uniform application for the doctrine.<sup>38</sup> The lack of uniformity contributed to equitable mootness’s misapplication.<sup>39</sup>

### A. Chapter 11 Plan Confirmation and the Bankruptcy Appeals Process

Before a discussion of equitable mootness, a brief overview of the chapter 11 plan confirmation process is helpful because it illustrates why a claim or interest holder may feel overshadowed during the voting or confirmation processes and appeal a confirmation order.

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<sup>35</sup> See 11 U.S.C. § 1126 (2012); *id.* § 1129.

<sup>36</sup> *In re Chateaugay Corp. (Chateaugay I)*, 988 F.2d 322, 325 (2d Cir. 1993).

<sup>37</sup> 652 F.2d 793.

<sup>38</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 6–7.

<sup>39</sup> See *id.* at 7.

### 1. Chapter 11 Plan Voting and Confirmation

A debtor filing for chapter 11 protection may design a plan that outlines its emergence from bankruptcy.<sup>40</sup> Norton Bankruptcy Law and Practice (“Norton”) explains that “[t]he basic goal of a Chapter 11 case is to achieve the debtor’s financial reorganization that will avoid the need for further reorganization or debtor’s relief in the future.”<sup>41</sup> The plan requirements under chapter 11 are stringent and comprehensive.<sup>42</sup> Two Bankruptcy Code (the “Code”) provisions are particularly important for purposes of bankruptcy appeals: §§ 1126 and 1129.<sup>43</sup>

Section 1126 specifies the voting procedures required for plan acceptance.<sup>44</sup> While claim or interest holders vote on the plan individually, classes as a whole accept or reject the plan.<sup>45</sup> A class accepts a plan only if fifty percent of voting claim holders accept the plan and if these accepting claim holders possess at least two-thirds of the aggregate dollar amount of the voting claims in the class.<sup>46</sup>

Once a plan passes the voting stage, the bankruptcy court holds a confirmation hearing.<sup>47</sup> Section 1129 specifies the plan requirements necessary for a court to confirm a plan.<sup>48</sup> Any party in interest can object to the plan at this hearing.<sup>49</sup> A court will overrule this objection and confirm the plan as long as the plan meets the requirements of § 1129.<sup>50</sup> Many of the § 1129

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<sup>40</sup> See 11 U.S.C. § 1121(a).

<sup>41</sup> 5 NORTON, JR. & NORTON III, *supra* note 1, § 91:9.

<sup>42</sup> See generally Matthew D. Pechous, Comment, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness Determinations*, 28 EMORY BANKR. DEV. J. 547, 551–54 (2012) (outlining the specifics of the plan proposal and confirmation process).

<sup>43</sup> See 11 U.S.C. §§ 1126, 1129.

<sup>44</sup> *Id.* § 1126.

<sup>45</sup> See *id.* § 1126(c)–(d); see also David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 477 (1992) (“[T]he emphasis of section 1126 rests on whether the class as a whole votes for or against the plan.”).

<sup>46</sup> 11 U.S.C. § 1126(c); Pechous, *supra* note 42, at 552.

<sup>47</sup> See 11 U.S.C. § 1128(a).

<sup>48</sup> See *id.* § 1129.

<sup>49</sup> See *id.* § 1128(b); FED. R. CIV. P. 17(a); see also *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010) (“[Federal] Rule [of Civil Procedure] 17(a) requires that the plaintiff ‘actually possess, under the substantive law, the right sought to be enforced.’” (quoting *United HealthCare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir.1996)); *BAC Home Loans Servicing, LP v. Tex. Realty Holdings, LLC*, 901 F. Supp. 2d 884, 907 (S.D. Tex. 2012) (“The real party in interest is the person with the right to sue under substantive law. . . .”).

<sup>50</sup> See 11 U.S.C. § 1129(a); see also Pechous, *supra* note 42, at 553 (listing several of the requirements a plan must meet).



requirements are general and apply to all chapter 11 cases.<sup>51</sup> If a debtor cannot obtain creditor consent, the debtor may seek confirmation by cramdown under § 1129(b).<sup>52</sup> Cramdown is exactly what it sounds like, as Norton succinctly explains: “[I]t permits the proponent (with the approval of the court) to rewrite the terms of the creditor’s contract, imposing terms that the court finds fit in lieu of terms negotiated by the parties.”<sup>53</sup>

If the plan meets these requirements, the bankruptcy court will confirm the reorganization plan and grant the debtor a discharge from all pre-bankruptcy debts.<sup>54</sup> The plan is essentially a new contract that binds “the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor . . . .”<sup>55</sup>

Sections 1126 and 1129 deserve the most attention when discussing bankruptcy appeals because they illustrate how an objecting creditor could have its objection overshadowed or crammed down against. Several reasons exist why a creditor would seek to appeal the confirmation order.<sup>56</sup> A party may believe the plan lumped it together with a dissimilar claim to garner the requisite majorities under § 1126 or was crammed down while the plan proponent used an artificially impaired class to satisfy § 1129(a)(10).<sup>57</sup> Undervaluation of a bond or stock could deprive a claim or interest holder from recovering on its claim because of the cramdown process.<sup>58</sup> The above examples illustrate why a dissenting claim or interest holder would believe the plan treated it unfairly and decide to appeal the confirmation order.

## 2. *The Bankruptcy Appeals Process*

A party in interest who has standing may appeal a confirmation order.<sup>59</sup> Only an aggrieved party—one who had a financial interest in the lower court’s

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<sup>51</sup> See 11 U.S.C. § 1129(a)(3), (7), (10), (11).

<sup>52</sup> *Id.* § 1129(b); 6 NORTON, JR. & NORTON III, *supra* note 1, § 113:1.

<sup>53</sup> 6 NORTON, JR. & NORTON III, *supra* note 1, § 113:1.

<sup>54</sup> See 11 U.S.C. § 1141(d).

<sup>55</sup> *Id.* § 1141(a); accord 6 NORTON, JR. & NORTON III, *supra* note 1, § 114:1 (“A confirmed plan is a document that is legally binding upon all parties, including creditors, equity interest holders, debtors, and others within the court’s jurisdiction whether or not they consented to the plan.”).

<sup>56</sup> *E.g.*, Pechous, *supra* note 42, at 554 (illustrating reasons a party might appeal).

<sup>57</sup> See, *e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229, 238, 250–251 (5th Cir. 2009).

<sup>58</sup> See, *e.g.*, *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 183–84 (3d Cir. 2001) (noting interest holders appealed a \$300 million valuation of debtor, claiming debtor was actually worth \$1.05 billion).

<sup>59</sup> See *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987); 1–5 COLLIER (16th ed.), *supra* note 2, ¶ 5.07.

order—has standing to file an appeal.<sup>60</sup> The standing requirement in bankruptcy appeals is more restrictive than traditional Constitutional (Article III) standing because the appellant must show that its interests were directly, adversely, and monetarily affected by the order from which it appeals.<sup>61</sup> This party may seek a stay of the execution of the plan while it appeals,<sup>62</sup> but courts rarely grant these motions.<sup>63</sup>

Two first-level appellate courts may hear appeals from final judgments, orders, and decrees by bankruptcy judges: either the district court<sup>64</sup> or a bankruptcy appellate panel if the circuit has established a one.<sup>65</sup> A party can further appeal to the appropriate court of appeals and potentially to the Supreme Court.<sup>66</sup> However, a party can only appeal as of right final judgments, orders, and decrees.<sup>67</sup>

Appellate courts can take a long time to hear an appeal, however.<sup>68</sup> For example, from June 30, 2015 to June 30 2016, the Fourth Circuit had the lowest “Median Time From Filing Notice of Appeal to Disposition,” at 4.4 months.<sup>69</sup> The Second and Third Circuits, where the majority of large, corporate bankruptcy filings occur, had respective median times of 11.1 and 7.4 months.<sup>70</sup> In the meantime, a debtor will begin to implement its

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<sup>60</sup> See, e.g., *Di Ferrante v. Young (In re Young)*, 416 F. App’x 392, 399 (5th Cir. 2011); *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 214 (3d Cir. 2004).

<sup>61</sup> See, e.g., *In re Knight-Celotex, LLC*, 695 F.3d 714, 720 (7th Cir. 2012) (“Bankruptcy standing is narrower than constitutional standing and requires that a person ‘have a pecuniary interest in the outcome of the bankruptcy proceedings.’” (quoting *Cult Awareness Network, Inc. v. Martino (In re Cult Awareness Network, Inc.)*, 151 F.3d 605, 607 (7th Cir. 1998))); *Spenlinhauer v. O’Donnell*, 261 F.3d 113, 117–18 (1st Cir. 2001) (stating that for appellant to qualify as “person aggrieved” with standing to appeal bankruptcy court order, challenged order must directly and adversely affect appellant’s pecuniary interests).

<sup>62</sup> See FED. R. BANKR. P. 8007.

<sup>63</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 8–9 (“Obtaining such a stay, however, is typically a daunting task, and most efforts to do so are not successful.”).

<sup>64</sup> See 28 U.S.C. § 158(a)(1) (2012).

<sup>65</sup> See *id.* § 158(b)–(c). The First, Sixth, Eighth, Ninth, and Tenth Circuits have established bankruptcy appellate panels. 6 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 117.02[2], n.25 (Alan N. Resnick & Henry J. Sommer eds., 2015), LEXIS, 6–117 Collier Bankruptcy Practice Guide P 117.02 (2015). See generally Pechous, *supra* note 42, at 554–57 (outlining the specifics on the bankruptcy appeals process).

<sup>66</sup> See 28 U.S.C. § 158(d); *id.* § 1254.

<sup>67</sup> See *id.* § 158(a)(1). See generally Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1691–94 (2015).

<sup>68</sup> ADMIN. OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS FEDERAL COURT MANAGEMENT STATISTICS: U.S. COURT OF APPEALS SUMMARY 2 (2016).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

reorganization plan. Of primary consideration in bankruptcy appeals is the need for finality.<sup>71</sup> From this need, equitable mootness developed.<sup>72</sup>

*B. In re Roberts Farms: The Foundation for the Modern Equitable Mootness Doctrine*

The Ninth Circuit laid the foundation for the modern doctrine in *In re Roberts Farms*.<sup>73</sup> In that case, a creditor, Trone, appealed orders from the bankruptcy court disallowing its claims, approving a settlement, and confirming a reorganization plan.<sup>74</sup> In the district court, the appellees moved to dismiss the case as moot, and the district court granted the motion.<sup>75</sup> Trone appealed further.<sup>76</sup> The Ninth Circuit determined the only issue was the correctness of the mootness ruling.<sup>77</sup>

The Ninth Circuit found the appeal moot because the court could not feasibly undo the transactions that occurred under the plan.<sup>78</sup> The court explained that the plan contained “many intricate and involved transactions.”<sup>79</sup> Consummation of these transactions caused “such a comprehensive change of circumstances to occur as to render it . . . inequitable to consider the merits of the appeal.”<sup>80</sup> The court therefore dismissed the appeal as moot.<sup>81</sup>

Besides laying the foundation for the modern equitable mootness doctrine, *In re Roberts Farms* is significant for its emphasis on “intricate and involved transactions.”<sup>82</sup> As early as the first application of mootness with equity considerations, the court was concerned with the complexity of the

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<sup>71</sup> See *Chateaugay I*, 988 F.2d 322, 325 (2d Cir. 1993).

<sup>72</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 10.

<sup>73</sup> 652 F.2d 793 (9th Cir. 1981).

<sup>74</sup> *Id.* at 794–95.

<sup>75</sup> *Id.* at 795.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 796.

<sup>78</sup> See *id.* at 798.

<sup>79</sup> *Id.* at 797. Under the plan, the debtor made payments in full of all allowed general unsecured claims plus 7% interest per year from the date of the debtor’s original filing to date of payment in full and in cash immediately on the effective date of the plan. *Id.* at 794. The plan also required the debtor to pay the FDIC \$17.2 million over a period of more than four years in exchange for the FDIC subordinating its claim to the unsecured creditors. *Id.* at 794–95. The trustee continuously implemented the plan until November 7, 1979. *Id.* at 798.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*

<sup>82</sup> *Id.* at 797.

reorganization. Despite this emphasis, however, the court did not define what constituted “intricate and involved transactions.”<sup>83</sup> Each circuit subsequently adopted the doctrine over the years,<sup>84</sup> but the circuits were left without guidance on how the Ninth Circuit’s decision fit with other mootness doctrines.

### C. Equitable Mootness’s Distinct Features

Appellate courts have determined equitable mootness is not Constitutional (Article III) mootness or statutory mootness.<sup>85</sup> Constitutional mootness arises when a change in circumstances prevents a court’s ability to grant any relief whatsoever.<sup>86</sup> A real and substantial case or controversy must exist throughout the litigation that requires specific relief.<sup>87</sup> Statutory mootness arises from two specific Code provisions directly limiting an appellate court’s ability to overturn certain post-petition transactions if a party in interest did not timely file a stay.<sup>88</sup>

Equitable mootness is much broader than both constitutional and statutory mootness.<sup>89</sup> The requested relief is still possible, but offering that relief is no longer feasible.<sup>90</sup> The Fourth Circuit in *MAC Panel Company v. Virginia Panel Corporation* explained that the doctrine is grounded in the notion that “with the passage of time after a judgment . . . effective relief becomes impracticable, imprudent, and therefore inequitable.”<sup>91</sup>

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<sup>83</sup> See *id.*

<sup>84</sup> See Nil Ghosh, *Plan Accordingly: The Third Circuit Delivers a Knockout Punch with Equitable Mootness*, 23 NORTON J. BANKR. L. & PRAC. 224, n.8 (2014), Westlaw, 23 J. Bankr. L. & Prac. NL 2 Art. 3 (listing the circuits’ adoption of equitable mootness over the years).

<sup>85</sup> See *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network, Inc.*), 416 F.3d 136, 143 (2d Cir. 2005); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994).

<sup>86</sup> See *In re Cont’l Airlines*, 91 F.3d 553, 558 (3d Cir. 1996).

<sup>87</sup> See *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997) (“The constitutional mootness question is a threshold inquiry because a live case or controversy is a constitutional prerequisite to federal jurisdiction” (citation omitted)).

<sup>88</sup> See 11 U.S.C. § 364(e) (2012) (limiting ability to overturn transactions involving extensions of credit through debt, a lien, or priority to a debtor); *id.* § 363(m) (limiting ability to overturn transactions involving sales or leases of property); see also *In re UNR Indus.*, 20 F.3d at 769 (using § 1127(b) as an example of statutory mootness).

<sup>89</sup> See *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000); *In re Cont’l Airlines*, 91 F.3d at 558; George W. Kuney, *Slipping Into Mootness*, in 2007 NORTON ANN. SURV. OF BANKR. L. 267, 269.

<sup>90</sup> See *In re UNR Indus.*, 20 F.3d at 769–70 (“There is a big difference between inability to alter the outcome (‘real mootness’) and unwillingness to alter the outcome (‘equitable mootness’).”).

<sup>91</sup> 283 F.3d 622, 625 (4th Cir. 2002).

The Second Circuit in *In re Chateaugay* provided a concise example of when it is appropriate for a court to dismiss an appeal as moot.<sup>92</sup> The court in *In re Chateaugay* focused on the change in circumstances in the period between the confirmation order and the appellate hearing.<sup>93</sup> Continued implementation of the reorganization plan produced a point in time beyond which an appellate court could order the changes an appellant seeks.<sup>94</sup> The doctrine reflects the belief that finality in bankruptcy proceedings is vital to fashioning an effective reorganization.<sup>95</sup>

The need for finality is crucial because a debtor’s chances of returning to viability upon exiting bankruptcy are tenuous at best.<sup>96</sup> Professor Foteini Teloni took a sample size of 390 large public companies that both filed and exited chapter 11 by confirming a plan.<sup>97</sup> Professor Teloni found that 48% of those companies refiled within five years.<sup>98</sup> While a confirmed plan does not guarantee success, third party reliance on that plan at least gives the reorganized company a fighting chance.<sup>99</sup> Equitable mootness is the “last-ditch . . . device for protecting the finality of an unstayed plan that has been substantially consummated.”<sup>100</sup> The doctrine is essentially a “super-finality rule.”<sup>101</sup>

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<sup>92</sup> 988 F.2d 322, 325 (2d Cir. 1993).

<sup>93</sup> See *id.* at 325 (quoting *In re Crystal Oil Co.*, 854 F.2d 79, 82 (5th Cir. 1988) (quoting *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981))).

<sup>94</sup> See *id.* (citation omitted); see also *United States ex rel. FCC v. GWI PCS 1, Inc.* (*In re GWI PCS 1, Inc.*), 230 F.3d 788, 800 (5th Cir. 2000) (citing *In re Manges*, 29 F.3d 1034, 1038–44 (5th Cir. 1994)); *In re Innovative Clinical Sols., Ltd.*, 302 B.R. 136, 142 (Bankr. D. Del. 2003) (“Confirmation plans eventually reach a point of completion where to reverse the confirmation order would be ‘knock the props out from under the authorization of every action that has taken place’ under the plan.” (quoting *In re Servico, Inc.*, 161 B.R. 297, 301 (S.D. Fla. 1993))).

<sup>95</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 10; see also Lenard Parkins et. al., *Equitable Mootness: Will Surgery Kill the Patient?*, 29 AM. BANKR. INST. J., Sept. 2010, at 40 (“Finality of judgments is important—so important, in fact, that the concept of finality has been described as fundamental to the rule of law.”).

<sup>96</sup> See Foteini Teloni, *Chapter 11 Duration, Pre-Planned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era*, 23 AM. BANKR. INST. L. REV. 571, 571 (2015) (arguing that chapter 11 does not achieve true rehabilitation).

<sup>97</sup> *Id.* at 582.

<sup>98</sup> *Id.* at 589.

<sup>99</sup> See *In re Phila. Newspapers, LLC*, 690 F.3d 161, 170 (3d Cir. 2012).

<sup>100</sup> *In re Tribune Media Co.*, 799 F.3d 272, 289–90 (3d Cir. 2015) (Ambro, J., concurring), *cert. denied*, 136 S. Ct. 1459 (2016).

<sup>101</sup> Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 6.

The doctrine raises controversy because it is one thing for a reorganization plan to bind the parties to a bankruptcy case, but another for a plan “to bind an appellate court tasked with reviewing its validity.”<sup>102</sup> The Eleventh Circuit in *In re Club Associates* identified this issue.<sup>103</sup> The court found “[t]he test for mootness reflects a court’s concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him.”<sup>104</sup> The way in which each circuit balanced these principles and applied the doctrine differed following *In re Roberts Farms*.<sup>105</sup>

#### *D. The Circuits’ Varying Analyses and Subsidiary Considerations*

The circuits have not followed a uniform approach when applying equitable mootness; they cannot even agree on the proper name for the doctrine.<sup>106</sup> Although the circuits intended to apply equitable mootness narrowly, to complex reorganizations,<sup>107</sup> the lack of a uniform approach has prevented its proper application.<sup>108</sup>

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<sup>102</sup> *Id.*; see *In re One2One Commc’ns, LLC*, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring) (“[E]quitable mootness merely serves as part of a blueprint for implementing questionable plans that favor creditors over others without oversight by Article III judges.”); Freeman, *supra* note 7, at 546 (“[T]he problems direct appeals create highlight a tension inherent in bankruptcy law: the need to balance practical considerations such as speed, efficiency, and specialized review, with constitutional values, including fairness, due process, and the right to an appeal.”).

<sup>103</sup> 956 F.2d 1065, 1069 (11th Cir. 1992).

<sup>104</sup> *Id.*

<sup>105</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 7.

<sup>106</sup> See *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1330 n.1 (10th Cir. 2009) (concluding that equitable mootness is a “misnomer” and that the “doctrine more correctly should be called equitable avoidance or equitable bar”); *In re Cont’l Airlines*, 91 F.3d 553, 559 (3d Cir. 1996) (acknowledging that the term “equitable mootness” is an inapt description, but adopting the term nonetheless); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (“Using one word for two different concepts breeds confusion.”).

<sup>107</sup> See, e.g., *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015) (identifying the limited circumstances in which courts should apply the doctrine); *In re Tribune Media Co.*, 799 F.3d 272,279 (3d Cir. 2015) (“[W]e decline to disturb ‘complex transactions undertaken after the Plan was consummated’ that would be most difficult to unravel.”), *cert. denied*, 136 S. Ct. 1459 (2016); *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 485 (2d Cir. 2012) (determining that the relief the appellants requested would require “unraveling complex transactions undertaken after the Plan was consummated”); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 169–70 (3d Cir. 2012) (recognizing that a court only should apply equitable mootness “if doing so will unscramble complex bankruptcy reorganizations”); *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745–46 (9th Cir. 2000) (“The doctrine also turns in part on whether the transactions at issue are complex and would be difficult to unwind.”).

<sup>108</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 7.

### 1. *Application in the Various Circuits*

The circuits’ different equitable mootness analyses attempt to answer the same question: is it prudent to upset the plan of reorganization at this late stage?<sup>109</sup> The circuits attempt to answer this question through a factor-balancing test.<sup>110</sup> The burden of showing an appeal is equitably moot rests with the party seeking dismissal on equitable mootness grounds.<sup>111</sup> The majority of circuits apply a combination of the following five factors when determining whether an appeal is equitably moot:

- (1) whether the reorganization plan has been substantially consummated;
- (2) whether a stay has been sought or obtained;
- (3) whether the requested relief would affect the rights of parties not before the court;
- (4) whether the relief requested would affect the success of the plan; and
- (5) the public policy of affording finality to confirmation orders.<sup>112</sup>

The Second, Seventh, and Eleventh Circuits each have their own specific applications.<sup>113</sup> The circuits generally agree that the first step in the analysis is

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<sup>109</sup> See *Parkins et. al.*, *supra* note 95, at 92.

<sup>110</sup> See generally 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, 697–704 (2007) (outlining each circuits’ equitable mootness analysis).

<sup>111</sup> See, e.g., *In re SemCrude*, L.P., 728 F.3d 314, 321 (3d Cir. 2013) (“[W]e join other Courts of Appeals in placing the burden on the party seeking dismissal.”); *Ala. Dep’t of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett)*, 632 F.3d 1216, 1226 (11th Cir. 2011) (“The party asserting mootness bears the burden of persuasion.”); *In re Paige*, 584 F.3d 1327, 1339–40 (10th Cir. 2009) (“[W]e hold that the party seeking to prevent this court from reaching the merits of the appeal bears the burden of proving that . . . the court should abstain from reaching the merits of the case.”); *Focus Media, Inc. v. NBA (In re Focus Media)*, Inc., 378 F.3d 916, 923 (9th Cir. 2004) (placing the burden on the party asserting the appeal is equitably moot).

<sup>112</sup> See Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRAC., 2010, at 33 (consolidating the circuits’ analyses). The Third Circuit consolidated its analysis into two analytical steps in *In re Semcrude*: (1) whether a confirmed plan has been substantially consummated; and (2) if it has, whether granting the relief requested in the appeal will either (a) fatally scramble the plan, and/or (b) significantly harm third parties who have justifiably relied on plan confirmation. 728 F.3d at 321. The circuits differ on the fifth factor, the public policy of affording finality to confirmation orders. See Rosiek, *supra* note 110, at 697–98. The Fourth, Fifth, and Sixth Circuits leave the public policy of affording finality to bankruptcy confirmations as an additional consideration, whereas the Third and Tenth Circuits formally adopted the public policy consideration as an additional fifth factor. See *id.* at 698.

<sup>113</sup> See Murphy, *supra* note 112, at 33.

to determine whether a plan has been substantially consummated.<sup>114</sup> The Code defines “substantial consummation” as:

- (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 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.<sup>115</sup>

The weight appellate courts give to each factor<sup>116</sup> and the standard of review<sup>117</sup> also differs from circuit to circuit.

Importantly, the Second Circuit’s equitable mootness analysis specifically addresses “intricate transactions” in its third factor.<sup>118</sup> This recognition, however, lies buried in the middle of the analysis. How can the Second Circuit expect to apply the doctrine only to complex reorganizations when “intricate transactions” are a third consideration? The other circuits’ opinions do not contain an express consideration regarding a reorganization’s complexity. Rather, “complexity” is a vague standard surrounding the doctrine.

## 2. *Subsidiary Considerations*

The doctrine’s analysis involves other subsidiary questions.<sup>119</sup> The Eleventh Circuit in *In re Club Associates* identified them as:

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<sup>114</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 11.

<sup>115</sup> 11 U.S.C. § 1101(2) (2012).

<sup>116</sup> Compare *SRE Restructuring, Inc. v. Wooley* (*In re SI Restructuring, Inc.*), 542 F.3d 131, 136 (5th Cir. 2008) (finding that effect on the rights of third parties as the most important factor of the equitable mootness test), and *In re Genesis Health Ventures, Inc.*, 204 F. App’x 144, 146 (3d Cir. 2006) (“[T]he foremost consideration is whether the reorganization plan has been consummated.” (citation omitted)), with *Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)* (*Chateaugay II*), 94 F.3d 772, 776 (2d Cir. 1996) (“Reviewing courts presume that it will be inequitable or impractical to grant relief after substantial consummation of a plan of reorganization.”).

<sup>117</sup> See generally *Pechous*, *supra* note 42, at 551–54 (outlining the different standards of review appellate courts use and arguing for a universal abuse of discretion standard).

<sup>118</sup> See *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 482 (2d Cir. 2012) (“The presumption of equitable mootness can be overcome, however, if all five of the ‘*Chateaugay* factors’ are met: . . . (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.”) (emphasis added).

<sup>119</sup> See *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992).



Has a stay pending appeal been obtained? If not, then why not? Has the plan been substantially consummated? If so, what kind of transactions have been consummated? What type of relief does the appellant seek on appeal? What effect would granting relief have on the interests of third parties not before the court? And, would relief affect the re-emergence of the debtor as a revitalized entity?<sup>120</sup>

These questions are meant to provide the full backdrop against which to apply equitable mootness.<sup>121</sup> The court in *In re Club Associates*, however, did not identify when an appellate court should ask these questions. If these questions are meant to supply the backdrop, why would an appellate court treat the inquiry into the type of transactions involved as a third consideration? The types of transactions would seem to be key in determining if a complex reorganization occurred.<sup>122</sup>

The circuits agree they should apply equitable mootness narrowly to complex reorganizations,<sup>123</sup> yet their analyses outlined above lack a formal assessment of whether a complex reorganization occurred.<sup>124</sup> Even though the

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<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See In re Mortgs., Ltd.*, 771 F.3d 1211, 1215 n.2 (9th Cir. 2014).

<sup>123</sup> *See, e.g.*, *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015) (identifying the limited circumstances in which courts should apply the doctrine); *In re Tribune Media Co.*, 799 F.3d 272, 279 (3d Cir. 2015) (“[W]e decline to disturb ‘complex transactions undertaken after the Plan was consummated’ that would be most difficult to unravel.”), *cert. denied*, 136 S. Ct. 1459 (2016); *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 485 (2d Cir. 2012) (determining that the relief the appellants requested would require “unraveling complex transactions undertaken after the Plan was consummated”); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 169–70 (3d Cir. 2012) (recognizing that a court only should apply equitable mootness “if doing so will unscramble complex bankruptcy reorganizations”); *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 745–46 (9th Cir. 2000) (“The doctrine also turns in part on whether the transactions at issue are complex and would be difficult to unwind.”).

<sup>124</sup> *See, e.g.*, *Quad/Graphics, Inc. v. One2One Commc’ns, LLC* (*In re One2One Commc’ns, LLC*), No. 13-1675 (JLL), 2013 U.S. Dist. LEXIS 103409, at \*4–5 (D.N.J. July 24, 2013) (discussing the doctrine’s basis in the Third Circuit and then beginning the analysis), *rev’d*, 805 F.3d 428, 434 (3d Cir. 2015); *Unarco Bloomington Factory Workers v. UNR Indus.*, 165 B.R. 198, 200 (N.D. Ill. 1993) (beginning its analysis without addressing the reorganization plan and its transactions complexity); *United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 62 (N.D. Tex. 1999) (lacking even a mention of complexity before the court began its analysis); *Virginia Panel Corp. v. Mac Panel Co.* (*In re Mac Panel Co.*) (*Mac Panel I*), 257 B.R. 773, 775 (M.D.N.C. 2000) (discussing the monetary provisions of the plan, but not assessing whether the plan was complex); *Alta. Energy Partners v. Blast Energy Servs., Inc.* (*In re Blast Energy Servs., Inc.*), No. H-08-00750, 2008 U.S. Dist. LEXIS 33819, at \*1–2 (S.D. Tex. 2008) (beginning its equitable mootness analysis without discussing complexity), *vacated*, 593 F.3d 418, 424–25 (5th Cir. 2010); *Cadle Co. II v. PC Liquidation Corp.* (*In re PC Liquidation Corp.*), 383 B.R. 856, 862–63 (E.D.N.Y. 2008) (beginning its equitable mootness analysis without discussing complexity).

Second Circuit considers “intricate transactions” in its third factor, this consideration lies buried in the middle of the analysis.<sup>125</sup>

If appellate courts are concerned with applying the doctrine to a narrow set of circumstances—complex reorganizations—then why do they not engage in an assessment of “complexity” that could help them eliminate appeals that do not warrant the analysis? The Third Circuit confronted this issue in *In re One2One* and demonstrated an effective way to formally assess complexity before turning to an equitable mootness analysis.<sup>126</sup>

## II. ANALYSIS

This Comment will argue that to apply equitable mootness to its proper scope, appellate courts should determine whether a complex reorganization occurred as a threshold matter. Even though this judicially-created doctrine is a “super-finality” rule,<sup>127</sup> it is consistent with the Code because the Code itself reflects a similar principle regarding the high standards for revoking chapter 11 confirmation orders.<sup>128</sup> This Comment will then provide a positive approach to “complexity” in light of *In re One2One*, followed by a normative approach appellate courts should adopt that would determine whether a complex reorganization occurred.

### A. *The Code and an Elevated Sense of Finality: § 1144*

Equitable mootness drives forward the principle of affording finality to chapter 11 confirmation orders,<sup>129</sup> an inherent goal in the chapter 11 confirmation process.<sup>130</sup> While this “super-finality” doctrine raises controversy, the Code itself actually reflects an elevated sense of finality in § 1144.<sup>131</sup>

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<sup>125</sup> See *In re Charter Commc'ns*, 691 F.3d at 482.

<sup>126</sup> See *In re One2One Commc'ns, LLC*, 805 F.3d 428, 434–36 (3d Cir. 2015).

<sup>127</sup> See Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 6.

<sup>128</sup> See 11 U.S.C. § 1144 (2012).

<sup>129</sup> See *In re Age Ref., Inc.*, 537 F. App'x 393, 397 (5th Cir. 2013) (quoting *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009)), *aff'd*, 801 F.3d 530 (5th Cir. 2015); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 169 (3d Cir. 2012); *United Steelworks of Am. v. Ormet Corp. (In re Ormet Corp.)*, 355 B.R. 37, 40–41 (S.D. Ohio 2006) (“It is a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality.”).

<sup>130</sup> See 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.02; see also Freeman *supra* note 7, at 572 (“It is central to bankruptcy that parties can rely on final orders so that they may continue with their business.”).

<sup>131</sup> See 11 U.S.C. § 1144; 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.02 (“Section 1144 creates a high standard for overturning confirmation consistent with the policy of finality with respect to chapter 11 plans.”).

Two ways exist to directly attack a chapter 11 plan confirmation order.<sup>132</sup> First, a party can file an appeal.<sup>133</sup> Second, a party can seek revocation of the confirmation order through § 1144 of the Code.<sup>134</sup> Section 1144 provides that the only way for a court to revoke a confirmation order is if two things occur: (1) a party in interest files a motion to revoke the plan within 180 days of confirmation; and (2) the confirmation order was procured by fraud.<sup>135</sup> This provision is the sole way a court can revoke a chapter 11 confirmation order.<sup>136</sup>

Section 1144 creates a high standard for overturning a confirmation order because of the provision’s two stringent requirements.<sup>137</sup> The party in interest must file its motion within 180 days of the date confirming the order.<sup>138</sup> Furthermore, the court must find that the debtor or plan proponent procured the confirmation order through fraud.<sup>139</sup>

These requirements are consistent with the policy of finality with respect to chapter 11 plans by providing a narrow way to revoke a confirmation order.<sup>140</sup> Collier on Bankruptcy explains that “[i]f plans could be overturned or rescinded except in the most extreme of circumstances, the reliability of the plan process would be undermined.”<sup>141</sup>

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<sup>132</sup> See 28 U.S.C. § 158(a)(1) (2012); 11 U.S.C. § 1144. Orders confirming chapter 11 plans are final judgments. See *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (citations omitted). A final judgment is one that ends litigation on the merits and leaves nothing for the court to do but execute judgment. See *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of Newark*, 344 F.3d 335, 343 (3d Cir. 2003) (citing *Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198, 204 (1999)). Although Federal Rule of Bankruptcy Procedure 9024 might provide an additional avenue of attack on such orders, that issue is still an open one and beyond the scope of this Comment. See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 n.9 (2010).

<sup>133</sup> See 28 U.S.C. § 158(a)(1).

<sup>134</sup> See 11 U.S.C. § 1144.

<sup>135</sup> *Id.*

<sup>136</sup> See FED. R. BANKR. P. 9024; 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.02 (noting that while Federal Rule of Bankruptcy Procedure 9024 provides that Federal Rule of Civil Procedure Rule 60 applies in bankruptcy, Bankruptcy Rule 9024 specifically provides that that Federal Rule 60 may not be used as a basis for revoking an order of confirmation); see also *In re Delta Air Lines, Inc.*, 386 B.R. 518, 531 (Bankr. S.D.N.Y. 2008).

<sup>137</sup> See 11 U.S.C. § 1144.

<sup>138</sup> *Id.* The Federal Rules of Bankruptcy Procedure reinforce this strict timeline. See FED. R. BANKR. P. 9024(3).

<sup>139</sup> 11 U.S.C. § 1144; 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.01.

<sup>140</sup> See 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.02.

<sup>141</sup> *Id.* ¶ 1144.01.

Yet even if a party in interest does satisfy these two requirements, an important aspect of § 1144 is that relief is discretionary.<sup>142</sup> The decision to revoke the order is in the court's discretion because of the statute's use of the word "may" and the conditions to revocation.<sup>143</sup>

Section 1144(1) requires the order revoking confirmation to include "such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation."<sup>144</sup> Therefore, an appellate court must look at all the circumstances and determine "whether revocation of the confirmation can or would lead to an outcome that is more equitable than leaving the order intact."<sup>145</sup> If it cannot find such relief, the court will dismiss the challenge.

In the context of a Code provision illustrating elevated finality, courts also take into account equity considerations because of the narrow relief requirements.<sup>146</sup> This approach serves bankruptcy courts' role as courts of equity.<sup>147</sup> The Code, through § 1144, provides a way to think about equitable mootness and its "super-finality" nature.<sup>148</sup>

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<sup>142</sup> See *Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.) (Trico I)*, 337 B.R. 811, 814 (Bankr. S.D.N.Y. 2006) (citing 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.03). In an adversary proceeding seeking reversal of the court's plan confirmation order, the debtor initially filed a motion to dismiss the complaint on equitable mootness grounds. At oral argument, the court announced that the debtor's motion to dismiss would be treated instead as a motion for summary judgment. *Trico I*, 337 B.R. at 815. See generally *Salsberg v. Trico Marine Servs., Inc. (In re Trico Marine Servs., Inc.) (Trico II)*, 343 B.R. 68 (Bankr. S.D.N.Y. 2006) (providing the final resolution of the adversary proceeding in *Trico I* and comparing the court's reasoning in *Trico I* to the analysis of similar issues by courts dismissing revocation complaints "on equitable mootness grounds").

<sup>143</sup> See *In re Delta Air Lines, Inc.*, 386 B.R. 518, 532 (Bankr. S.D.N.Y. 2008); *Trico II*, 343 B.R. at 75 (dismissing an action brought under § 1144 because even if the plaintiff could prove fraud, the court could not fashion a remedy that met the requirements of § 1144).

<sup>144</sup> 11 U.S.C. § 1144(1).

<sup>145</sup> See *Trico I*, 337 B.R. at 814 (quoting 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.03); see also *In re Delta*, 386 B.R. at 522 ("[I]f a court cannot fashion a revocation order that protects innocent parties who acquired rights in reliance on the confirmation order, the court is *barred* from revoking the confirmation order—even if the order was procured by fraud.").

<sup>146</sup> See 11 U.S.C. § 1144(1).

<sup>147</sup> See *Young v. United States*, 535 U.S. 43, 50 (2002) (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)); *In re Tribune Media Co.*, 799 F.3d 272, 287 (3d Cir. 2015) (Ambro, J., concurring), *cert. denied*, 136 S. Ct. 1459 (2016). While the common understanding is that bankruptcy courts are courts of equity, this proposition is contested. See generally Alan M. Ahart, *A Stern Reminder That the Bankruptcy Court Is Not A Court of Equity*, 86 AM. BANKR. L.J. 191 (2012) [hereinafter Ahart, *A Stern Reminder*]; Ahart, *The Limited Scope*, *supra* note 22, at 1; Adam J. Levitin, *Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in A Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006).

<sup>148</sup> See 8 COLLIER (16th ed.), *supra* note 2, ¶ 1144.03.

Equitable mootness’s misapplication resulted in criticisms and limitations.<sup>149</sup> The criticisms and limitations culminated in three decisions issued within 10 weeks of each other: *In re Transwest*<sup>150</sup> in the Ninth Circuit, and *In re One2One*<sup>151</sup> and *In re Tribune Media*,<sup>152</sup> both in the Third Circuit.

Of these three opinions, the one that demonstrated the most effective way to apply equitable mootness properly was *In re One2One*.<sup>153</sup> The Third Circuit’s approach first assessed whether a complex reorganization occurred before the court proceeded to its equitable mootness analysis.<sup>154</sup> With *In re One2One* serving as a case study, appellate courts can discern what factors make up a “complex” reorganization and how to properly apply the doctrine.

#### B. *In re One2One Communications: Guidance on How to Assess Whether a Complex Reorganization Occurred*

In *In re One2One*, the Third Circuit demonstrated the effective way to assess whether a complex reorganization occurred, as a threshold matter, before proceeding to its equitable mootness analysis.<sup>155</sup> In *In re One2One*, the debtor sought chapter 11 protection after the District Court for the Eastern District of Wisconsin levied a \$9 million judgment against the company.<sup>156</sup> Other than the \$9 million judgment, the debtor had one secured creditor owed less than \$100,000 with a blanket lien on all of its assets.<sup>157</sup> Additionally, the debtor had seventeen unsecured creditors, excluding insiders.<sup>158</sup>

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<sup>149</sup> See *In re SemCrude, L.P.*, 728 F.3d 314, 326–27 (3d Cir. 2013) (narrowing the doctrine); *In re Pac. Lumber Co.*, 584 F.3d 229, 240–41 (5th Cir. 2009) (narrowing the scope of equitable mootness); see also *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 191–92 (3d Cir. 2001) (Alito, J., concurring); *In re Cont’l Airlines*, 91 F.3d 553, 569 (3d Cir. 1996) (Alito, J., dissenting) (questioning the doctrine’s basis in law and whether the goal of furthering the Code was enough authority to refuse to entertain a viable appeal); *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (“[W]e banish ‘equitable mootness’ from the (local) lexicon. We ask not whether the case is moot, ‘equitably’ or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.”).

<sup>150</sup> 801 F.3d 1161 (9th Cir. 2015).

<sup>151</sup> 805 F.3d 428 (3d Cir. 2015).

<sup>152</sup> 799 F.3d 272, 289 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016).

<sup>153</sup> See *In re One2One*, 805 F.3d at 434–36. This decision also contained a concurrence described as “a full blown, no[-]page[-]limit[] attack on equitable mootness.” Markell, *supra* note 27.

<sup>154</sup> *In re One2One*, 805 F.3d at 435–36.

<sup>155</sup> See *id.*

<sup>156</sup> See *Quad/Graphics, Inc. v. One2One Commc’ns, LLC*, 529 F. App’x 784, 787 (7th Cir. 2013). The Court of Appeals for the Seventh Circuit affirmed that judgment during the bankruptcy appeal. *Id.* at 793.

<sup>157</sup> See *In re One2One*, 805 F.3d at 435.

<sup>158</sup> See *id.*

Under the reorganization plan, a third party, the Plan Sponsor, acquired a membership interest in the debtor.<sup>159</sup> The plan incorporated an additional agreement that provided the Plan Sponsor with the exclusive right to purchase 100% of the debtor's equity for \$200,000.<sup>160</sup> Neither the Plan Sponsor nor any third party would contribute any additional capital to fund the reorganization plan.<sup>161</sup> The bankruptcy court confirmed the plan over the appellant's objection, and the district court granted the debtor's motion to dismiss the appeal as equitably moot.<sup>162</sup>

On appeal, the Third Circuit, instead of delving into the circuit's equitable mootness analysis, began its discussion by stating that in a prior decision, "this Court emphasized 'that a court only should apply the equitable mootness doctrine . . . [in] complex bankruptcy reorganizations.'"<sup>163</sup> The court contrasted prior equitable mootness dismissals with the appeal at hand.<sup>164</sup> The court determined those appeals warranted the doctrine's application because they were "complex bankruptcy reorganizations that included multiple related debtors, hundreds of millions of dollars in assets, liabilities, and claims, and hundreds or thousands of creditors."<sup>165</sup>

The reorganization plan at hand, however, did not contain any of those characteristics.<sup>166</sup> The court found the plan "did not provide for new financing, mergers or dissolutions of entities, issuance of stock or bonds, name change, change of business location, change in management or any other significant transactions."<sup>167</sup> The court determined that the transactions the debtor identified in support of its equitable mootness dismissal motion were "routine transactions . . . likely to transpire in almost every bankruptcy reorganization."<sup>168</sup> Importantly, the court highlighted that the plan did not involve the issuance of any publicly traded securities or mergers.<sup>169</sup> As a result, the court determined that "this case did not involve a sufficiently complex

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<sup>159</sup> *Id.* at 431.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 431–32.

<sup>162</sup> *Id.* at 432.

<sup>163</sup> *Id.* at 435 (citing *In re Phila. Newspapers, LLC*, 690 F.3d 161, 169 (3d Cir. 2012)).

<sup>164</sup> *See id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 435–36.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 436.

<sup>169</sup> *Id.* at 437.

bankruptcy reorganization such that dismissal on the basis of equitable mootness would be appropriate” and remanded the case to the district court.<sup>170</sup>

The court’s assessment of whether a complex reorganization occurred in *In re One2One* demonstrated the most effective way to determine when *not* to apply equitable mootness. Instead of delving right into its factor test, the court began by looking at the transactions involved in the reorganization, the size of the bankruptcy, and the number of claimants.<sup>171</sup> Although the court went on to apply its test, it was clear from its discussion that it would remand the appeal because this reorganization plan was not the type that warranted the doctrine’s analysis. The lingering question from *In re One2One* is why should an appellate court proceed to its equitable mootness analysis when it already determined a complex reorganization did not occur? It should not.

### C. What Constitutes a “Complex” Reorganization?

While *In re One2One* illustrated an effective way to use “complexity” as the gatekeeper to the doctrine, the fact still remains that appellate courts do not formally determine whether a complex reorganization occurred.<sup>172</sup> The result is the doctrine’s misapplication to relatively simple bankruptcies.<sup>173</sup> But when looking at the landscape of first- and second-level appellate decisions, some guiding factors come to light that help determine what constitutes a “complex” reorganization. The four factors appellate courts typically identify are: (1) size of the bankruptcy; (2) whether the plan was a liquidation or reorganization plan; (3) types of transactions involved; and (4) whether a settlement agreement was the fulcrum of the plan.

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<sup>170</sup> *Id.* at 437–38.

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., *Quad/Graphics, Inc. v. One2One Commc’ns, LLC*, No. 13-1675 (JLL), 2013 U.S. Dist. LEXIS 103409, at \*11–13 (D.N.J. July 24, 2013), (discussing the doctrine’s basis in the Third Circuit and then beginning the analysis), *rev’d* 805 F.3d 428 (3d Cir. 2015); *In re Delta Air Lines, Inc.*, 386 B.R. 518, 534–35 (Bankr. S.D.N.Y. 2008) (discussing complexity in the context of the appellant’s § 1144 argument, then giving substantial consummation the most weight in the analysis); *In re Blast Energy Servs., Inc.*, No. H-08-00750, 2008 U.S. Dist LEXIS 33819, at \*1–2 (S.D. Tex. Apr. 24, 2008) (beginning its equitable mootness analysis without discussing complexity); *In re PC Liquidation Corp.*, 383 B.R. 856, 862–63 (E.D. N.Y. 2008) (beginning its equitable mootness analysis without discussing complexity); *MAC Panel I*, 257 B.R. 773, 775 (M.D. N.C. 2000) (discussing the monetary provisions of the plan, but not assessing whether the plan was complex); *United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 62 (N.D. Tex. 1999) (lacking even a mention of complexity before the court began its analysis); *Unarco Bloomington Factory Workers v. UNR Indus.*, 165 B.R. 198, 200 (N.D. Ill. 1993) (beginning its analysis without addressing the reorganization plan and its transactions complexity).

<sup>173</sup> See *In re One2One*, 805 F.3d at 446 (Krause, J., concurring); see also Markell, *supra* note 27 (“[Litigants] pressed equitable mootness in all cases, even ones that were small and simple.”).

### 1. *The Size of the Bankruptcy*

One major aspect of a reorganization plan appellate courts associate with “complexity” is the size of the bankruptcy. Size involves the debtor’s assets, liabilities, and number of parties involved in a case.<sup>174</sup> The clearest instances where courts associate size with complexity are the so-called “mega bankruptcies,” with large, publicly traded companies.<sup>175</sup> For example, in *ACC Bondholder Group v. Adelphia Communications Corp. (In re Adelphia Communications Corp.)*, the debtor had over \$28 billion in pre-filing assets and over one thousand creditors.<sup>176</sup> Similarly, in *Korth v. Dura Auto. Sys. (In re Dura Auto. Sys.)*, the debtor had over \$2 billion dollars in pre-filing assets and over 100,000 creditors.<sup>177</sup> In those cases, the appellate courts considered the debtors’ reorganization plans complex because the plans involved billions of dollars in distributions and redefined thousands of creditors’ rights.<sup>178</sup>

In contrast are the “garden-variety” bankruptcies that typically involve small, privately held businesses with few claims against them.<sup>179</sup> These types

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<sup>174</sup> See, e.g., *In re One2One*, 805 F.3d at 435–36 (stating that the court’s prior equitable mootness decisions were inapposite here because the debtor’s reorganization involved a \$200,000 investment in the reorganized debtor, one secured creditor, and only seventeen unsecured creditors); *In re Delta*, 386 B.R. at 533 (“This case, in contrast, was one of the more complex Chapter 11 cases—at the time of filing, the case was the tenth largest bankruptcy ever filed in the United States.”); see also *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 186 (3d Cir. 2001) (“Although the plan here is not as complex as the plan in *Continental Airlines*, it is hardly simple. The plan required eighteen months of negotiation between several parties regarding hundreds of millions of dollars, restructured the debt, assets, and management of a major corporation, and successfully rejuvenated Zenith.”).

<sup>175</sup> See, e.g., *In re Charter Commc’ns, Inc.*, 691 F.3d 476 (2d Cir. 2012); *In re Cont’l Airlines*, 91 F.3d 553 (3d Cir. 1996); *Ad Hoc Comm. of Convertible Noteholders v. Spansion Inc. (In re Spansion, Inc.)*, Nos. 10-369, 10-385, 2011 U.S. Dist. LEXIS 86152 (D. Del. Aug. 4, 2011); *Korth v. Dura Auto. Sys. (In re Dura Auto. Sys.)*, 403 B.R. 300 (D. Del. 2009); *Compania Internacional Financiera S.A. v. Calpine Corp. (In re Calpine Corp.)*, 390 B.R. 508 (S.D.N.Y. 2008); *ACC Bondholder Group v. Adelphia Commc’ns Corp. (In re Adelphia Commc’ns Corp.)*, 367 B.R. 84 (S.D.N.Y. 2007).

<sup>176</sup> See Lynn M. LoPucki, *Adelphia Communications Corp.*, UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, <http://lopucki.law.ucla.edu/companyinfo.asp?name=Adelphia+Communications+Corp%2E> (last visited Aug. 30, 2016).

<sup>177</sup> See Lynn M. LoPucki, *Dura Automotive Systems, Inc.*, UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, <http://lopucki.law.ucla.edu/companyinfo.asp?name=Dura+Automotive+Systems%2C+Inc%2E> (last visited Aug. 30, 2016).

<sup>178</sup> See Brief and Appendix Volume I of VII (Pages A1 to A22) on Behalf of Appellant Quad/Graphics, Inc. at 26–29, *In re One2One Commc’ns, LLC*, 805 F.3d 428 (3d Cir. 2015) (No. 13-3410), 2014 WL 2047703, at \*26–29 (listing bankruptcies of large publicly traded companies and the contents of their plans).

<sup>179</sup> See *In re One2One*, 805 F.3d at 434–35 (3d Cir. 2015); *PVP Indus. v. Millburn Peat Co. (In re Millburn Peat Co.)*, 384 B.R. 510, 514 (N.D. Ind. 2008); *In re Club Assocs.*, 956 F.2d 1065, 1066–67 (11th Cir. 1992).



of businesses make up 85-90% of chapter 11 filings each year.<sup>180</sup> A great example is the debtor in *In re One2One*, where the bankruptcy involved one closely held corporate debtor with assets valued at less than \$500,000 and total unsecured claims of less than \$1.3 million.<sup>181</sup> Similarly, in *PVP Indus. v. Millburn Peat Co. (In re Millburn Peat Co., Inc.)*, the chapter 11 case consisted of four entities owned by one individual and the debtor’s primary creditor had one secured claim totaling \$5,903,669.20.<sup>182</sup> As the District Court for the Northern District of Indiana noted, the debtors involved were relatively simple companies and had few other claims apart from the primary creditor.<sup>183</sup>

These examples show the two opposite ends of the spectrum when it comes to the size of a bankruptcy. While it may not seem fair to compare a large, publicly held corporation like the debtor in *In re Adelphia* to the closely held limited liability company in *In re One2One*, the “size” of a bankruptcy is a necessary part of determining what constitutes a “complex” chapter 11 reorganization. The size of the case provides the backdrop against which to examine the reorganization plan.

## 2. Liquidation v. Reorganization

Appellate courts also look at whether a chapter 11 plan was a liquidation or reorganization plan.<sup>184</sup> Although the doctrine is most associated with reorganization plans, appellate courts have addressed, and applied, equitable mootness in the liquidation context.<sup>185</sup> The most notable decision applying equitable mootness to chapter 11 liquidations is the Second Circuit’s decision in *Beeman v. BGI Creditors’ Liquidating Trust (In re BGI, Inc.)*. In *In re BGI*,

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<sup>180</sup> COMM’N TO STUDY THE REFORM OF CHAPTER 11, AM. BANKR. INST., FINAL REPORT AND RECOMMENDATIONS 288 (2014).

<sup>181</sup> See Brief and Appendix Volume I of VII (Pages A1 to A22) on Behalf of Appellant Quad/Graphics, Inc., *supra* note 178, at 29.

<sup>182</sup> *In re Millburn Peat*, 384 B.R. at 512. Under the plan, this creditor would receive \$3,653,000. *Id.* at 513.

<sup>183</sup> See *id.* at 514.

<sup>184</sup> George Kildonas, *Liquidating Plans Are Also Subject to Equitable Mootness Dismissal*, AM. BANKR. INST. J., Mar. 24, 2015, at 22–23. At least one appellate court has discussed equitable mootness and its application to receiverships. See *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840–41 (7th Cir. 2015).

<sup>185</sup> See, e.g., *Zegeer v. President Casinos, Inc. (In re President Casinos, Inc.)*, 409 Fed. App’x 31 (8th Cir. 2010) (dismissing an appeal related to a chapter 11 liquidation proceeding as equitably moot); *Schaefer v. Superior Offshore Int’l, Inc. (In re Superior Offshore Int’l, Inc.)*, 591 F.3d 350, 353–54 (5th Cir. 2009) (applying equitable mootness analysis to appeal of order confirming a chapter 11 liquidation plan); *Sutton v. Weinman (In re Centrix Fin. LLC)*, 355 Fed. Appx. 199, 201–02 (10th Cir. 2009) (remanding appeal to district court in a chapter 11 liquidation proceeding to apply equitable mootness analysis).

the Second Circuit held that equitable mootness also applied to chapter 11 liquidations.<sup>186</sup>

In *In re BGI*, the liquidation plan provided that the debtors would dissolve, and a liquidating trust would liquidate the Debtors' remaining assets and make distributions to unsecured creditors after paying administrative, secured, and unsecured priority claims.<sup>187</sup> The appellants filed late proofs claims for their gift cards to the debtor's business and asked the bankruptcy court to certify a new class of gift card holders.<sup>188</sup>

In holding that the doctrine applied to chapter 11 liquidations, the Second Circuit reasoned that in liquidation plans, parties still expend considerable time and effort toward developing an emergence from bankruptcy.<sup>189</sup> The court also considered the effect on creditors by finding that "creditors with urgent needs may have been stayed from accessing assets and funds to which they are entitled."<sup>190</sup> In support of its conclusion, the Second Circuit cited examples from other circuits that applied equitable mootness to liquidation plans.<sup>191</sup> Based on the court's decision in *In re BGI* and other circuits' applications, whether a plan involved liquidation or reorganization is therefore a factor in determining "complexity."

### 3. *The Type of Transactions Involved in a Chapter 11 Reorganization*

Another aspect appellate courts assess when determining "complexity" are the types of transaction involved in a reorganization.<sup>192</sup> These transactions, depending on the bankruptcy case, include: issuing publicly traded securities in

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<sup>186</sup> *Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.)*, 772 F.3d 102, 104 (2d Cir. 2014) ("[W]e hold that the analysis outlined in *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944 (2d Cir. 1993) . . . also governs our mootness analysis in Chapter 11 liquidations."), *cert. denied sub nom. Beeman v. BGI Creditor's Liquidating Tr.*, 136 S. Ct. 155 (2015). *See generally* Klidonas, *supra* note 185, at 22.

<sup>187</sup> *In re BGI*, 772 F.3d at 105 n.4.

<sup>188</sup> *See id.* at 106.

<sup>189</sup> *See id.* at 108–09.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 109 n.10.

<sup>192</sup> *See, e.g., Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 186 (3d Cir. 2001); *Little v. Amber Hotel Corp. (In re Amber Hotel Corp.)*, No. CV 14-9254 FMO, 2015 WL 5104678, at \*8 (C.D. Cal. Aug. 31, 2015) ("An appeal is equitably moot if the case presents transactions that are so complex or difficult to unwind that debtors, creditors, and third parties are entitled to rely on the final bankruptcy court order."); *Schroeder v. New Century Liquidating Tr. (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 587 (D. Del. 2009) ("[U]n unraveling a substantially consummated plan can be difficult and inequitable . . . [I]t requires reversing multiple, often complex, future looking transactions (securing financing, issuing equity, contracting with producers and/or suppliers, etc.).").

a reorganized debtor;<sup>193</sup> swapping debt for equity in a reorganized debtor, or vice versa;<sup>194</sup> merging or dissolving the debtor and other entities into a new, rejuvenated one;<sup>195</sup> public offerings;<sup>196</sup> bond or stock cancellations;<sup>197</sup> working out new contracts for leases, sales, and other options;<sup>198</sup> and post-petition financing.<sup>199</sup> This list is by no means exhaustive because plans often involve other complex transactions that are tied specifically to the debtor’s industry, such as contracting for new flight routes in *In re Continental Airlines*.<sup>200</sup>

The types of transactions under a plan are a seminal consideration for appellate courts in equitable mootness appeals.<sup>201</sup> Identifying the transactions in a plan goes back to the foundational opinion in *In re Roberts Farms*<sup>202</sup> and is the third consideration in the Second Circuit’s equitable mootness analysis.<sup>203</sup> The types of transactions involved are therefore a necessary factor when determining whether a complex reorganization occurred.<sup>204</sup>

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<sup>193</sup> See, e.g., *In re Combined Metals Reduction Co.*, 557 F.2d 179, 194 (9th Cir. 1977); *Alsohaibi v. Arcapita Bank B.S.C.(c) (In re Arcapita Bank B.S.C.(C))*, No. 13 CIV. 5755 SAS, 2014 WL 46552, at \*2 (S.D.N.Y. Jan. 6, 2014); *In re Delta Air Lines, Inc.*, 386 B.R. 518, 534–35 (Bankr. S.D.N.Y. 2008); *Trico II*, 343 B.R. 68, 69–70 (Bankr. S.D.N.Y. 2006). See generally Markell, *supra* note 27.

<sup>194</sup> See *In re Innovative Clinical Sols., Ltd.*, 302 B.R. 136, 138 (Bankr. D. Del. 2003).

<sup>195</sup> See, e.g., *In re Cont’l Airlines*, 91 F.3d 553, 567 (3d. Cir. 1996); *In re Arcapita Bank*, 2014 WL 46552, at \*12; *In re Delta*, 386 B.R. at 534–35 (Bankr. S.D.N.Y. 2008); *CIRCLE K CORP. v. CIRCLE K CORP.*, 171 B.R. 666, 669–70 (Bankr. D. Ariz. 1994); Petition for Rehearing En Banc at 2 n.1, *In re Transwest Resort Props., Inc.*, 801 F.3d 1161 (9th Cir. 2015) (No. 12-17176).

<sup>196</sup> See, e.g., *In re Delta*, 386 B.R. 518, 534–35 (Bankr. S.D.N.Y. 2008); *Trico II*, 343 B.R. at 69–70; *In re Innovative Clinical Sols.*, 302 B.R. at 141; *In re Servico, Inc.*, 161 B.R. 297, 300 (S.D. Fla. 1993).

<sup>197</sup> See, e.g., *Perez v. Terrestar (In re Terrestar Corp.)*, No. 11-10612 (SHL), 2015 Bankr. LEXIS 3298, at \*8–9 (Bankr. S.D.N.Y. Sept. 29, 2015) *reconsideration denied*, 2015 Bankr. LEXIS 3298 (Bankr. S.D.N.Y. Jan. 15, 2016); *Trico II*, 343 B.R. at 71; *CIRCLE K CORP.*, 171 B.R. at 669.

<sup>198</sup> See, e.g., *In re Delta*, 386 B.R. at 534–35 (Bankr. S.D.N.Y. 2008); Petition for Rehearing En Banc, *supra* note 195, at 7.

<sup>199</sup> See, e.g., *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 145 (2d Cir. 2005); *In re Arcapita Bank*, 2014 WL 46552, at \*7 (discussing the post-petition financing the debtor obtained, which included: \$150 million from one creditor, \$350 million in replacement DIP financing from Goldman Sachs International, and an additional \$175 million from another creditor); *In re Mi Pueblo San Jose, Inc.*, No. 13-53893-ASW, 2014 WL 2219040, at \*2 (Bankr. N.D. Cal. May 29, 2014); *In re Delta*, 386 B.R. at 534–35 (Bankr. S.D.N.Y. 2008); see also *In re Cont’l Airlines*, 91 F.3d at 567.

<sup>200</sup> *In re Cont’l Airlines*, 91 F.3d at 567; see also *In re Paige*, 584 F.3d 1327, 1332 (10th Cir. 2009).

<sup>201</sup> See *In re Mortgcs. Ltd.*, 1211, 1215 (9th Cir. 2014); *In re Delta*, 386 B.R. at 537.

<sup>202</sup> 652 F. 2d 793, 797 (9th Cir. 1981) (noting plan involved “many intricate and involved transactions”).

<sup>203</sup> See *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 482 (2d Cir. 2012) (“(3) ‘The presumption of equitable mootness can be overcome, however, if all five of the “Chateaugay factors” are met: . . . (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.” (internal citations omitted)) (emphasis added).

<sup>204</sup> See *In re Mortgcs.*, 771 F.3d at 1215.

#### 4. Settlement Agreements

The final aspect appellate courts look at is if the reorganization plan contained a settlement agreement, whether that agreement served as the centerpiece of the reorganization plan.<sup>205</sup> Although settlement agreements may seem like another type of transaction, they are different in that they are backwards-looking,<sup>206</sup> whereas other post-petition transactions tend to be forward-looking.<sup>207</sup> Settlement agreements can be a compromise on any number of issues.<sup>208</sup> They represent efforts at comprehensive negotiations that attempt to satisfy the differing interests of parties and settle complicated disputes threatening the debtor.<sup>209</sup> The settlement agreement in *Musilino v. Alabama Marble Co.* demonstrated how several, unrelated third parties can infringe on each other's rights through their own disputes with the debtor.<sup>210</sup>

In *Alabama Marble*, the debtor and four parties, through a series of complicated events, became entangled in several different disputes.<sup>211</sup> One

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<sup>205</sup> See, e.g., *In re Tribune Media Co.*, 799 F.3d 272, 276 (3d Cir. 2015) (discussing the \$1 billion dollar settlement plan which drove the reorganization), *cert. denied*, 136 S. Ct. 1459 (2016); *Musilino v. Ala. Marble Co.*, 534 B.R. 820, 831–32 (N.D. Ala. 2015) (“A review of the record demonstrates that Appellants’ proposed partial relief would be ineffective because it would necessarily reform the parties’ Settlement Agreement to reflect an agreement that no party intended or contemplated.”), *aff’d sub nom. In re Ala. Marble Co., Inc.*, No. 15-13733, 628 Fed. App’x 746 (11th Cir. Jan. 19, 2016); *In re Arcapita Bank B.S.C.(C)*, No. 13 CIV. 5755 SAS, 2014 WL 46552, at \*7 (S.D.N.Y. Jan. 6, 2014) (“Numerous settlements were reached and implemented, including the payment of millions of dollars in severance payments made to former employees.”); *In re Coll. Props., Ltd. v. Depetris (In re Coll. Props., Ltd.)*, No. BAP AZ-07-1075-PAAK, 2007 WL 7540957, at \*1 (B.A.P. 9th Cir. Aug. 14, 2007) (“The settlement agreement at issue in this appeal involves complex interactions and transactions among numerous parties.”).

<sup>206</sup> See, e.g., *Perez v. Terrestar (In re Terrestar Corp.)*, 2013 U.S. Dist. LEXIS 118918, at \*15, \*16 (S.D.N.Y. Aug. 16, 2013) (noting the release settlements freed the debtor from its pre-petition past).

<sup>207</sup> See *In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 587 (D. Del. 2009).

<sup>208</sup> See, e.g., *In re Combined Metals Reduction Co.*, 557 F.2d 179, 194 (9th Cir. 1977); *In re Arcapita Bank*, 2014 WL 46552, at \*2 (“Numerous settlements were reached and implemented, including the payment of millions of dollars in severance payments made to former employees.”); *In re Coll. Props.*, 2007 Bankr. LEXIS 4862, at \*9–12 (discussing the settlement agreement between the two parties that was the focal point of the reorganization plan).

<sup>209</sup> See, e.g., *Ala. Marble Co.*, 534 B.R. at 831–32 (“When approving the Settlement Agreement, the Bankruptcy Court faced a complex multiparty bankruptcy dispute. The Settlement Agreement represented a comprehensive compromise that satisfied various parties with distinct . . . interests.”); *In re Arcapita Bank*, 2014 WL 46552, at \*2; *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 480–81 (2d Cir. 2012) (outlining key aspects of the Allen Settlement that served as the focal point of the reorganization); *In re Coll. Props.*, 2007 Bankr. LEXIS 4862, at \*1–2 (“The settlement agreement at issue in this appeal involves complex interactions and transactions among numerous parties.”).

<sup>210</sup> 534 B.R. at 823–25.

<sup>211</sup> See *id.* (recounting the facts of the case and the events that led to the different disputes). The other involved the validity of the lease that allowed the debtor, a marble-quarrier, to access a quarry to operate its business. *Id.* at 825.

dispute involved bond and security interest holders suing the debtor to enforce their notes and interests.<sup>212</sup> The other dispute involved the validity of the lease that allowed the debtor, a marble-quarrier, to access a quarry to operate its business.<sup>213</sup>

The parties eventually reached an agreement to settle the disputes, which included both financial and non-financial terms.<sup>214</sup> The District Court for the Northern District of Alabama determined that the settlement agreement “represented a comprehensive compromise that satisfied parties with distinct (and often conflicting) interests.”<sup>215</sup> The reorganization plan and subsequent transactions stemmed from this agreement.<sup>216</sup>

Although first- and second-level appellate courts have not formally articulated a way to assess “complexity,” they have demonstrated what aspects of a plan at which they do look. If an appellate court considered these factors before turning to its equitable mootness analysis, it could discern which appeals actually warranted an equitable mootness analysis.<sup>217</sup>

#### *D. A Normative Approach to “Complexity”*

Appellate courts can employ equitable mootness as intended—to complex reorganizations—by determining whether a complex reorganization occurred as a threshold matter. Appellate courts recognize that they should only apply the doctrine to complex reorganizations.<sup>218</sup> Litigants are starting to recognize that complexity is almost a prerequisite to an equitable mootness analysis.<sup>219</sup> Appellate courts should therefore determine whether a complex reorganization occurred when a party asserts the appeal is equitably moot. Appellate courts

<sup>212</sup> *Id.* at 824.

<sup>213</sup> *Id.* at 825.

<sup>214</sup> *Id.* at 825–26 (outlining the details of the parties’ agreement).

<sup>215</sup> *Id.* 831–32.

<sup>216</sup> *See id.*

<sup>217</sup> *See In re Tribune Media Co.*, 799 F.3d 272, 279 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016); *In re Mortgs. Ltd.*, 771 F.3d 1211, 1215 n.2 (9th Cir. 2014).

<sup>218</sup> *See, e.g., In re Tribune Media*, 799 F.3d at 279 (“[W]e decline to disturb complex transactions undertaken after the Plan was consummated that would be most difficult to unravel.”); *In re Mortgs.*, 771 F.3d at 1215 n.2; *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 485 (2d Cir. 2012); *In re Phila. Newspapers, LLC*, 690 F.3d 161, 168–69 (3d Cir. 2012); *SEC. v. Capital Consultants, LLC*, 397 F.3d 733, 745–46 (9th Cir. 2000) (“The doctrine also turns in part on whether the transactions at issue are complex and would be difficult to unwind.”).

<sup>219</sup> *See* Brief and Appendix Volume I of VII (Pages A1 to A22) on Behalf of Appellant Quad/Graphics, Inc., *supra* note 178, at 25 (“Determining whether a reorganization is complex is arguably a prerequisite to applying the doctrine of equitable mootness.”).

should remand or hear the appeal if a reorganization does not meet this standard.<sup>220</sup>

While defining such a standard is difficult because each chapter 11 case is unique,<sup>221</sup> appellate courts can set the standard by engaging in a case-by-case assessment balancing four factors: (1) the size of the bankruptcy; (2) whether the plan is a liquidation or reorganization; (3) the types of transactions; and (4) if a reorganization plan contained a settlement agreement, whether that agreement served as the plan's centerpiece. Although appellate courts should balance these factors, the factor that carries the most weight is the types of transactions if the transactions involved issuing publicly traded securities.<sup>222</sup>

If a court determined a complex reorganization occurred after assessing these factors, then it should proceed to its equitable mootness analysis. If not, then it should remand the case or proceed to the merits of the appeal. Appellate courts can better determine when equitable mootness should *not* apply by adopting this approach.

### *1. Size Is Not Dispositive*

The first aspect an appellate court should look at when determining whether a complex reorganization occurred is the size of the chapter 11 debtor based on its assets and liabilities. However, an appellate court should not consider the size of a debtor's assets or liabilities dispositive. Drawing a line at a certain value would violate the principles of equity jurisprudence by not balancing interests between parties.<sup>223</sup>

The American Bankruptcy Institute Commission to Study the Reform of Chapter 11 found that companies without publicly traded securities and less than \$10 million in assets or liabilities accounted for 85-90% of chapter 11 filings in 2007.<sup>224</sup> The Commission's findings also showed that debtors with assets and liabilities over \$50 million accounted for 1.7% and 2.9%,

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<sup>220</sup> See *In re Mortgs.*, 771 F.3d at 1215.

<sup>221</sup> See *In re Scrub Island Dev. Grp. Ltd.*, 523 B.R. 862, 874 (Bankr. M.D. Fla. 2015) ("Each chapter 11 case is unique. Chapter 11 cases—whether individual or corporate—run the gamut from simple to exceedingly complex.").

<sup>222</sup> *Trico II*, 343 B.R. 68, 71 (Bankr. S.D.N.Y. 2006).

<sup>223</sup> See *Wheeling Steel Corp. v. Am. Rolling Mill Co.*, 82 F.2d 97, 100 (6th Cir. 1936) ("[Equity] will always seek to strike a balance of convenience as between litigants."); Motion for Leave to File and Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Granting the Petition, *supra* note 23, at 10.

<sup>224</sup> COMM'N TO STUDY THE REFORM OF CHAPTER 11, *supra* note 180, at 288.

respectively, of total filings.<sup>225</sup> The Commission also found that companies with over \$10 million but less than \$50 million in assets or liabilities tend to have simple business and capital structures.<sup>226</sup> The Commission relied on this data in formulating its definition of a “small- or medium-sized enterprise” because it found this data comprehensive, with adjustments, for filings in subsequent years.<sup>227</sup>

Equitable mootness would seemingly not apply to these debtors because their plan would not present “[reorganizations or] transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply.”<sup>228</sup> But drawing a line somewhere between \$10 and \$50 million in assets and liabilities would produce two effects. First, it would fail to consider the effect on the innocent third parties equitable mootness was meant to protect.<sup>229</sup> An investor who invested in a reorganized small business should not receive less protection than one who invested in a large, publicly traded company.<sup>230</sup>

Second, drawing a line would remove the balancing “between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him.”<sup>231</sup> Bankruptcy courts are courts of equity, and equity requires a court to look at an entire matter.<sup>232</sup> Judge Ambro noted in *In re Tribune Media* that bankruptcy courts, as courts of equity, must look at the “stark circumstances to grant relief.”<sup>233</sup> Dismissing an equitable

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<sup>225</sup> *Id.* at 287.

<sup>226</sup> *Id.* at 288.

<sup>227</sup> *Id.* at 279.

<sup>228</sup> *Lowenschuss v. Selnick*, 170 F.3d 923, 933 (9th Cir. 1999).

<sup>229</sup> *See, e.g., In re Cont'l Airlines*, 91 F.3d 553, 560–61, 567 (3d Cir. 1996) (citing *In re Manges*, 29 F.3d 1034, 1043 (5th Cir. 1994)); *In re UNR Indus.*, 20 F.3d 766, 777 (7th Cir. 1994) (“By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate.”); *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992) (“[A] number of investors, who were not parties to this case, had committed new funds to the ‘reemerged Club’ with the expectation of receiving a preferred return on their investments.”).

<sup>230</sup> *Compare In re Cont'l Airlines*, 91 F.3d at 564 (noting the importance of the \$450 million investment in the reorganization), with *In re Club Assocs.*, 956 F.2d at 1069 (discussing the importance of a less than \$500,000 investment by numerous parties to the reorganization plan).

<sup>231</sup> *In re Club Assocs.*, 956 F.2d at 1069.

<sup>232</sup> *See Young v. United States*, 535 U.S. 43, 50 (2002); *In re Tribune Media Co.*, 799 F.3d 272, 288 (3d Cir. 2015) (Ambro, J., concurring), *cert. denied*, 136 S. Ct. 1459 (2016). While the common understanding is that bankruptcy courts are courts of equity, this proposition is contested. *See generally* Ahart, *A Stern Reminder*, *supra* note 147, at 191; Ahart, *The Limited Scope*, *supra* note 22, at 1; Levitin, *supra* note 147, at 85 (2006).

<sup>233</sup> *In re Tribune Media*, 799 F.3d at 288 (Ambro, J., concurring).

mootness argument at a certain dollar amount would violate this proposition because a court would no longer be looking at the matter *in toto*.

The court in *In re One2One* implied that even though the debtor in the case was not as large as other debtors in Third Circuit equitable mootness dismissals, that fact was not dispositive.<sup>234</sup> The reason the appeal was not equitably moot was because the plan did not present intricate transactions like issuing publicly traded securities, mergers, or changes in management that would make the plan difficult to retract.<sup>235</sup>

Appellate courts should only look at “size” to determine the backdrop against which to proceed. The size of the debtor’s assets and liabilities is therefore not dispositive in a complexity analysis because courts must look at all aspects of a reorganization plan.<sup>236</sup>

## 2. *Liquidation or Reorganization: The First Roadblock to Equitable Mootness*

After assessing the size of the case, the next factor appellate courts should determine is whether the chapter 11 plan is a liquidation or reorganization plan.<sup>237</sup> Appellate courts should not proceed to the doctrine’s analysis in liquidation plans; they should either remand or hear the appeal on its merits. Liquidation plans do not invoke third party reliance or a need for finality, the pillars upon which equitable mootness rests.

In liquidation plans, “transactions tend to be discrete and relatively simple transactions aimed at disposing of the debtor’s assets in the short term.”<sup>238</sup> They tend to be the type of one-off transactions that bankruptcy courts can void.<sup>239</sup> Despite this fact, the Second Circuit in *In re BGI* did not assess the complexity of the liquidation plan’s transactions.<sup>240</sup>

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<sup>234</sup> 805 F.3d 428, 435 (3d Cir. 2015).

<sup>235</sup> *Id.* at 436–37.

<sup>236</sup> See *In re Mortgs. Ltd.*, 771 F.3d 1211, 1215 n.2 (9th Cir. 2014).

<sup>237</sup> *In re BGI, Inc.*, 772 F.3d 102, 104 (2d Cir. 2014), *cert. denied sub nom. Beeman v. BGI Creditors’ Liquidating Tr.*, 136 S. Ct. 155 (2015). See generally Kildonas, *supra* note 184, at 22.

<sup>238</sup> *In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 588 (D. Del. 2009); see also *In re Age Ref., Inc.*, 537 F. App’x 393, 398 (5th Cir. 2013) (“In this liquidating plan scenario, under the particular facts of this case, ‘overturning the Plan’ functionally would mean no more than re-allocation of money from Chase to other parties in interest.”), *aff’d*, 801 F.3d 530 (5th Cir. 2015).

<sup>239</sup> See *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004) (Easterbrook, J.) (citation omitted) (“Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization.”); see also



The Second Circuit dismissed the appeal as equitably moot because the appellants failed to satisfy the fourth (adequate process for adversely affected parties) and fifth (pursuing the claims with all diligence) factors in the circuit’s equitable mootness analysis.<sup>241</sup> Notably absent from the opinion was a discussion of the third factor regarding “intricate transactions.” Instead, the court relegated this discussion to a footnote, where it recognized that complex transactions typically do not arise in liquidation plans.<sup>242</sup> However, the court still went on to hold that the appeal was equitably moot because other parties devoted time and energy towards developing an acceptable liquidation plan.<sup>243</sup> The court’s failure to look at intricate transactions represented a major point of departure from Second Circuit precedent and the doctrine’s foundation in *In re Roberts Farms*.<sup>244</sup>

The decisions from some of the other circuits the court in *In re BGI* relied on also seemed to depart from the foundation in *In re Roberts Farms*.<sup>245</sup> Two of those decisions and the transactions therein, *In re Casinos, Inc. v. President Casinos, Inc.*, and *Schaefer v. Superior Offshore International, Inc. (In re Superior Offshore International, Inc.)*, illustrate why equitable mootness should not apply to liquidation plans because of the transactions’ simplicity.<sup>246</sup>

In *President Casinos*, the District Court for the Eastern District of Missouri found the appeal from a liquidation plan equitably moot, relying heavily on the fact that the plan was substantially consummated.<sup>247</sup> The liquidation plan involved the liquidation of several wholly-owned subsidiaries and the principal

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*In re Res. Tech. Corp.*, 430 F.3d 884, 886–87 (7th Cir. 2005) (Easterbrook, J.) (“Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations.”).

<sup>240</sup> See *In re BGI*, 772 F.3d at 110–11.

<sup>241</sup> *Id.* (listing cases where other circuits discussed equitable mootness in the liquidation context).

<sup>242</sup> *Id.* at 110 n.15 (citing *In re BGI, Inc.*, 476 B.R. 812, 825 (Bankr. S.D.N.Y. 2012)).

<sup>243</sup> *Id.* at 110–11 (listing cases where other circuits discussed equitable mootness in the liquidation context).

<sup>244</sup> See *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 482 (2d Cir. 2012); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981).

<sup>245</sup> See *In re BGI*, 772 F.3d at 110–11 & n.15 (2d Cir. 2014) (listing cases where other circuits discussed equitable mootness in the liquidation context).

<sup>246</sup> See *In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 588 (D. Del. 2009); see also *In re Age Ref., Inc.*, 537 F. App’x 393, 398 (5th Cir. 2013) (“In this liquidating plan scenario, under the particular facts of this case, ‘overturning the Plan’ functionally would mean no more than re-allocation of money from Chase to other parties in interest.”), *aff’d*, 801 F.3d 530 (5th Cir. 2015).

<sup>247</sup> See *In re Casinos, Inc. v. President Casinos, Inc.*, No. 4:08CV1976 CDP, 2010 WL 582794, at \*7 (E.D. Mo. Feb. 16, 2010), *aff’d*, 409 F. App’x 31 (8th Cir. 2010).

company itself.<sup>248</sup> The dispute arose because the appellant believed the liquidation plan improperly subordinated her rights to the holder of several larger claims.<sup>249</sup> As a result, the appellant believed she received considerably less in the distribution than she would have otherwise.<sup>250</sup>

The court determined the plan was substantially consummated because “the Debtors paid all non-disputed, allowed claims as provided for under the Plan, including the JECA claims’ on December 8, 2008 or as soon thereafter as was reasonably practicable.”<sup>251</sup> It stated that other sales and distributions occurred that the court could not undo to reallocate the funds.<sup>252</sup> The court therefore affirmed the lower court’s finding that this appeal was equitably moot.<sup>253</sup>

In *In re Superior Offshore*, the Fifth Circuit reached the opposite result and held the appeal was not equitably moot because of the simplicity of the transactions.<sup>254</sup> The debtor filed a plan that created a liquidation waterfall,<sup>255</sup> which would pay additional classes of claims and interests if the sale of assets produced additional proceeds.<sup>256</sup>

On appeal, the Fifth Circuit briefly addressed equitable mootness.<sup>257</sup> The court determined the appellants’ complaints centered on the “specificity about how Class 7 and Class 8 will share in any money available for equity-level interests.”<sup>258</sup> Because the issue concerned distribution allocations between

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<sup>248</sup> See Brief of Appellee President Casinos, Inc., at 6–11, *In re Casinos, Inc. v. President Casinos, Inc.*, No. 4:08CV1976 CDP, 2010 WL 582794 (E.D. Mo. Feb. 16, 2010) (No. 10-2325), 2010 WL 3693550, at \*6–11.

<sup>249</sup> See *id.*

<sup>250</sup> See *President Casinos*, 2010 U.S. Dist. LEXIS 12901, at \*4.

<sup>251</sup> *Id.* at \*6.

<sup>252</sup> *Id.* at \*7.

<sup>253</sup> *Id.* at \*20–22.

<sup>254</sup> 591 F.3d 350, 354 (5th Cir. 2009).

<sup>255</sup> “A waterfall payment is a repayment system by which senior lenders receive principal and interest payments from a borrower first, and subordinate lenders receive principal and interest payments after.” *Waterfall Payment*, INVESTINGANSWERS.COM, <http://www.investinganswers.com/financial-dictionary/debt-bankruptcy/waterfall-payment-4618> (last visited Aug. 30, 2016).

<sup>256</sup> See *In re Superior Offshore*, 591 F.3d at 352–53 (“[T]he Plan stated that unsecured claims (Class 5) would be paid first. If liquidating the intangible assets generated additional proceeds, then subordinated unsecured claims (Class 6) would receive value. If Class 6 received 100% of its claims, then equity interests (Classes 7 and 8) would receive any additional value.”).

<sup>257</sup> *Id.* at 353–54.

<sup>258</sup> *Id.*

classes, the court found that equitable mootness did not apply to this situation since the plan did not present transactions that would be difficult to unwind.<sup>259</sup>

These two decisions and the simple distributions therein demonstrate why equitable mootness should not apply in the liquidation context. Both these appeals sought reallocation of funds from one class to another.<sup>260</sup> The court in *In re Superior Offshore* correctly determined that equitable mootness was not intended to apply to these types of simple transactions, even upon substantial consummation.<sup>261</sup> Despite the presence of similar transactions, the court in *President Casinos* dismissed the appeal as equitably moot because the transactions were substantially consummated.<sup>262</sup> The appellate court’s decision placed far too much emphasis on substantial consummation, even though the transactions were one-off transactions between two parties.<sup>263</sup>

Appellate courts have determined equitable mootness should not apply “when taking a payment to which one class is not contractually entitled, and giving it to the party contractually entitled to those funds, would not undermine the basis for other parties’ reliance on the finality of confirmation.”<sup>264</sup> One academic noted, “[I]f an appeal simply reallocates consideration from one class of creditors to another, it is less likely to be equitably moot.”<sup>265</sup> The transactions in liquidation plans tend to be distributions aimed at settling claims; the disputes that arise involve reallocating distributions from one class to another.<sup>266</sup> Liquidation plans do not trigger third party reliance because the

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<sup>259</sup> *Id.* at 354.

<sup>260</sup> See *In re Casinos, Inc. v. President Casinos, Inc.*, No. 4:08CV1976 CDP, 2010 U.S. Dist. LEXIS 12901, at \*18 (E.D. Mo. Feb. 16, 2010), *aff’d*, 409 F. App’x 31 (8th Cir. 2010); *In re Superior Offshore*, 591 F.3d at 353–54.

<sup>261</sup> See *In re Superior Offshore*, 591 F.3d at 354.

<sup>262</sup> See *President Casinos*, 2010 U.S. Dist. LEXIS 12901, at \*15–17.

<sup>263</sup> See *id.* at \*17.

<sup>264</sup> *In re Tribune Media Co.*, 799 F.3d 272, 280 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016); see *In re Pac. Lumber Co.*, 584 F.3d 229, 250 (5th Cir. 2009) (remanding an issue of administrative priority claims); *In re PWS Holding Corp.*, 228 F.3d 224, 236–37 (3d Cir. 2000).

<sup>265</sup> Markell, *supra* note 27; see *In re Age Ref., Inc.*, 537 F. App’x 393, 398 (5th Cir. 2013), *aff’d*, 801 F.3d 530 (5th Cir. 2015).

<sup>266</sup> See, e.g., *SCH Corp. v. CFI Class Action Claimants*, 569 F. App’x 119, 120, 122 (3d Cir. 2014) (discussing the liquidation plan and holding the appeal was not equitably moot); *In re Age Ref.*, 537 F. App’x at 398; *Thurner Indus. v. Gunnison Energy Corp. (In re Riviera Drilling & Expl. Co.)*, 502 B.R. 863, 870 (B.A.P. 10th Cir. 2013) (“The rights of third parties have been affected in that creditors have received some minimal payment, a small receivable (\$10,000) has been transferred to GEC for value, and GEC has committed funds to the plan administrator who has incurred administrative expense. But none of these are effects that could not be remedied were we to reverse the Confirmation Order.”); Appellee’s Response Brief at 9–10, *In re Centrix Fin. LLC*, 355 F. App’x 199 (10th Cir. 2009) (No. 09-1266), 2009 WL 2955243, at \*9–10 (outlining the post-confirmation distributions in the liquidation plan).

business does not exist anymore—the debtor does not need to attract new investors or enter into new contracts with third parties, the individuals or entities equitable mootness is supposed to protect.<sup>267</sup> “Because there is nothing left of [the debtor], there are no investors in a reorganized business whose interests would be negatively affected.”<sup>268</sup>

Even if money is exchanged in a liquidation context, courts could reverse the transfer.<sup>269</sup> In *In re Resource Technology*, Judge Easterbrook noted that undoing transactions is difficult, “but it can be done.”<sup>270</sup> Similarly, in *In re Kmart*, the Seventh Circuit, speaking through Judge Easterbrook again, dismissed the debtor’s equitable mootness argument because the transactions at issue were simple cash distributions from the debtor to its pre-petition supplier.<sup>271</sup> The court opined, “Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization.”<sup>272</sup> Reallocating one-off distributions from one party to another after a liquidation is a situation where courts can unwind a transaction.<sup>273</sup> Courts should therefore not apply equitable mootness to liquidation plans.

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<sup>267</sup> See, e.g., *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015); *In re Cont’l Airlines*, 91 F.3d 553, 560–61, 567 (3d Cir. 1996) (citing *In re Manges*, 29 F.3d 1034, 1043 (5th Cir. 1994)); *In re UNR Indus.*, 20 F.3d 766, 770 (7th Cir. 1994) (“By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate.”); *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992) (“[A] number of investors, who were not parties to this case, had committed new funds to the ‘reemerged Club’ with the expectation of receiving a preferred return on their investments.”).

<sup>268</sup> *Cent. Sleep Diagnostics*, 801 F.3d at 840; *In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004) (Easterbrook, J.) (“Money had changed hands and, we are told, cannot be refunded. But why not? Reversing preferential transfers is an ordinary feature of bankruptcy practice, often continuing under a confirmed plan of reorganization.”).

<sup>269</sup> See *In re Kmart*, 359 F.3d 866 at 869 (Easterbrook, J.) (explaining that a district judge “reversed the order authorizing payment” to K Mart’s “critical vendors” because “neither § 105(a) nor ‘doctrine of necessity’ support[ed] the order”).

<sup>270</sup> 430 F.3d 884, 886–87 (7th Cir. 2005) (Easterbrook, J.).

<sup>271</sup> 359 F.3d at 869–70. Technically, Judge Easterbrook only noted that the Seventh Circuit has “recognized the existence of a longstanding doctrine . . .” *Id.* at 869.

<sup>272</sup> *Id.*

<sup>273</sup> *Cent. Sleep Diagnostics*, 801 F.3d at 840 (“[T]his plan involved distribution of cash, which is easy to count and value.”).

### 3. *The Types of Transaction Involved in a Reorganization Plan*

After determining whether a chapter 11 plan was a reorganization or a liquidation plan, appellate courts should then look at the types of transactions involved in the plan. Transaction type is already a seminal consideration for appellate courts in equitable mootness appeals.<sup>274</sup> This factor should carry the most weight when the plan required issuing publicly traded securities, either in satisfaction of claims<sup>275</sup> or public issuances.<sup>276</sup>

Transactions within a chapter 11 plan that involve publicly traded securities<sup>277</sup> can exponentially increase the number of third parties with an interest in the debtor.<sup>278</sup> While this same scenario is possible with private companies and non-publicly traded securities, the risk is heightened when reorganization plans involve publicly traded securities. If transactions involving publicly traded securities are present, appellate courts should conclude a complex reorganization occurred. If these transactions are not present, appellate courts must engage in a deeper analysis of the transactions. They must determine whether the transactions produced fundamental changes in the debtor, such as through a merger or changes in the debtor’s corporate structure.

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<sup>274</sup> See *id.*; see also *In re Mortgs. Ltd.*, 771 F.3d 1211, 1215 n.2 (9th Cir. 2014); *Trico II*, 343 B.R. 68, 71 (Bankr. S.D.N.Y. 2006).

<sup>275</sup> See *In re Dura Auto. Sys., Inc.*, 403 B.R. 300, 304–05 (D. Del. 2009) (stating that the plan provided for the issuance of tens of millions shares of stock to various creditor classes); *In re Adelphia Commc’ns Corp.*, 367 B.R. 84, 90 (S.D.N.Y. 2007) (noting that the plan provided that over 117 million shares of publicly traded stock would be distributed to over 13,500 creditors); *Trico II*, 343 B.R. at 71; *In re Innovative Clinical Sols., Ltd.*, 302 B.R. 136, 138 (Bankr. D. Del. 2003). Securities received pursuant to a Code proceeding under the circumstances described in § 1145(a) of the Code would not be deemed restricted securities because they would have been received in a “public offering” under § 1145(c). See 11 U.S.C. § 1145(a), (c) (2012). *But see* William M. Prifti, 24A SECURITIES PUB. & PRIV. OFFERINGS § 7:61 (2d ed.).

<sup>276</sup> *In re Spansion, Inc.*, Nos. 10-369, 10-385, 2011 U.S. Dist. LEXIS 86152, at \*15, 16 (D. Del. Aug. 4, 2011) (noting that the plan provided for a public offering of 6.75 million shares of new common stock); *In re Calpine Corp.*, 390 B.R. 508, 521–22 (S.D.N.Y. 2008) (noting that the plan provided for stock of the reorganized debtor to be traded on the NYSE); *In re Delta Air Lines, Inc.*, 386 B.R. 518, 534–35 (Bankr. S.D.N.Y. 2008) (noting that the stock appeared on the NYSE); *In re Adelphia*, 367 B.R. at 96–97.

<sup>277</sup> A security is a financial instrument that represents an ownership position in a corporation (stock), a creditor relationship an entity (bond), or rights to ownership represented by an option. A security is a negotiable financial instrument that represents some type of financial value. *Security*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/s/security.asp> (last visited March 11, 2016).

<sup>278</sup> See *Trico II*, 343 B.R. 68, 71 (Bankr. S.D.N.Y. 2006); see also *In re UNR Indus.*, 20 F.3d 766, 770 (7th Cir. 1994) (“By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate.”).

a. *Transactions Involving Publicly Traded Securities*

An appellate court should conclude a complex reorganization occurred when the reorganization plan involved issuing publicly traded securities. These types of transactions have proven critical in determining whether a complex reorganization occurred in a chapter 11 reorganization plan.<sup>279</sup> Publicly traded securities create heightened difficulties for an appellate court; the securities at issue may not be held by the same bond or stockholder that received them pursuant to the reorganization.<sup>280</sup> The Bankruptcy Court for the Southern District of New York determined that a complex reorganizations occurred in both *Varde Investment Partners, L.P. v. Comair, Inc. (In re Delta Airlines, Inc.)*<sup>281</sup> and *Salsberg v. Trico Marine Services (In re Trico Marine Services)*,<sup>282</sup> when the reorganized public debtors issued securities both in satisfaction of claims and in a public offering.

In *In re Delta Air Lines*, the court determined a complex reorganization occurred in Delta's chapter 11 case.<sup>283</sup> The plan provided for two stock issuances.<sup>284</sup> First, Comair's unsecured creditors would receive "New Delta Common Stock" to satisfy their claims, valued at \$800 million.<sup>285</sup> The second stock issuance, a public offering on either the New York Stock Exchange or NASDAQ, would occur after the bankruptcy court confirmed the plan.<sup>286</sup>

"New Delta Common Stock" appeared on the New York Stock Exchange three days after the effective date of the plan.<sup>287</sup> Nearly 290 million shares of stock and three million stock purchase options were distributed to creditors and eligible employees.<sup>288</sup> By the same date one year later, over 820 million trades

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<sup>279</sup> See, e.g., *In re Arcapita Bank B.S.C.(C)*, No. 13 CIV. 5755 SAS, 2014 WL 46552, at \*2 (S.D.N.Y. Jan. 6, 2014); *In re Delta*, 386 B.R. at 534–35 (finding the case equitably moot and giving heavy consideration to the issuance of new Delta stock on the New York Stock Exchange); *Trico II*, 343 B.R. at 71 (finding the case equitably moot because, in large part, "[i]f stock is issued under a plan to creditors in satisfaction of their debts, restoration of the *status quo* requires the reinstatement of the debts and the cancellation of the stock").

<sup>280</sup> See *Nordhoff Invs., Inc. v. Zenith Elecs. Corp (In re Zenith Elecs. Corp)*, 250 B.R. 207, 217 (D. Del. 2000), *aff'd sub nom. Nordhoff Investments, Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180 (3d Cir. 2001).

<sup>281</sup> 386 B.R. 518 (Bankr. S.D.N.Y. 2008).

<sup>282</sup> 343 B.R. 68 (Bankr. S.D.N.Y. 2006).

<sup>283</sup> 386 B.R. at 534–35. The reorganization plan involved two entities: Delta and Comair, a regional airline wholly-owned by Delta. *Id.* at 523.

<sup>284</sup> *Id.* at 522.

<sup>285</sup> *Id.* at 522–23. The estimated value of the claims was later increased to \$1.05 billion. *Id.* at 524.

<sup>286</sup> *Id.* at 522–23; Disclosure Statement for Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code at 86, *In re Delta*, 386 B.R. 518 (No. 1:05BK17923 4201).

<sup>287</sup> *In re Delta*, 386 B.R. at 534.

<sup>288</sup> *Id.*

had taken place involving the New Delta Common Stock.<sup>289</sup> The court found that a complex reorganization took place, explaining “no one could possibly trace and cancel all of the trades that have taken place since the issuance of the stock.”<sup>290</sup>

*In re Trico Marine*, a pseudo-equitable mootness decision,<sup>291</sup> also demonstrated that transactions involving publicly traded securities are indicative of a complex reorganization.<sup>292</sup> Under the plan, the debtor cancelled promissory notes with an approximate value of \$275 million and initially issued ten million shares of “New Common Stock” to those noteholders.<sup>293</sup> Six months later, the debtor issued an additional 4.273 million shares of “New Common Stock” through a public offering.<sup>294</sup> The stock was actively traded through NASDAQ as of the date of the revocation complaint over a year later.<sup>295</sup>

The court emphasized that revoking confirmation orders for plans involving complex transactions, such as stock issuances, is much more problematic than revoking plan confirmation orders generally: “If stock is issued under a plan to creditors in satisfaction of their debts, restoration of the *status quo* requires the reinstatement of the debts and the cancellation of the stock.”<sup>296</sup> The “substantial trading activity” of the stock issued in connection with the plan made restoration of the pre-plan status quo untenable.<sup>297</sup> The debtor’s issuance of publicly traded securities through a series of plan transactions transformed the debtor’s chapter 11 case into a complex reorganization.<sup>298</sup>

Appellate courts have dismissed appeals in cases dealing with smaller monetary values. In *Nordhoff Investments, Inc. v. Zenith Electronics Corp.* (*In re Zenith Electronics Corp.*), the District Court for the District of Delaware found a complex reorganization occurred because of a \$50 million publicly

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 535.

<sup>291</sup> See *supra* note 142 and accompanying text.

<sup>292</sup> *Trico II*, 343 B.R. 68, 71 (Bankr. S.D.N.Y. 2006).

<sup>293</sup> *Id.* at 70. Under another provision in the plan, the holders of “Old Common Stock,” which was cancelled under the plan, received warrants exercisable for up to 10% of the “New Common Stock” issued under the plan. *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 71.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

traded bond issuance.<sup>299</sup> The debtor's plan included, in relevant part, replacing bonds with an aggregate principal amount of \$103.5 million with new bonds with a reduced aggregate principal amount of \$50 million, but bearing interest at a slightly increased rate.<sup>300</sup> The appellant argued that the appeal was not equitably moot because the value of the bonds at issue (as well as the overall size of the case) was much smaller than the situations in other Third Circuit equitable mootness dismissals.<sup>301</sup>

While the court agreed that the case at hand was much smaller than the court's previous equitable mootness applications, the court dismissed the appellant's revocation complaint anyway because the transactions under the plan relating to the publicly traded bonds still produced a complex reorganization.<sup>302</sup>

The court recognized that most of the plan's transactions, such as the largest creditor's cancellation of \$200 million of debt in exchange for stock or another creditor's refinancing of certain debts, could be reversed.<sup>303</sup> The court found that the bonds, however, presented posed significant challenges.<sup>304</sup> The bonds were publicly traded, and the court specifically noted that "the bondholders today may not be the same investors as the bondholders at the time of [the debtor's] bankruptcy filing or the [p]lan's confirmation."<sup>305</sup> The court determined "such 'reversal' would almost certainly impact the rights of investors that were not involved in the bankruptcy proceeding"—it would be too difficult to reverse the bond exchange because the bonds were publicly traded, which exponentially increased the number of parties with an interest in the debtor.<sup>306</sup>

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<sup>299</sup> 250 B.R. 207, 218 (D. Del. 2000), *aff'd*, 258 F.3d 180 (3d Cir. 2001).

<sup>300</sup> *Id.* at 209 (explaining that the plan involved exchanging \$103.5 million of bonds bearing interest at 6.25% with \$50 million of bonds bearing interest at 8.19%); *see* Brief of Appellee Zenith Elec. Corp., at 7–8, *In re Zenith*, 250 B.R. 207 (D. Del. 2000) (Nos. 00-2250, 00-2249), 2000 WL 33988513, at \*7–8. The reorganization plan also included an exchange between the debtor and its largest creditor that would eliminate \$200 million in debt and other liabilities in exchange for all the remaining stock in the reorganized company.

*Id.*

<sup>301</sup> *See In re Zenith*, 250 B.R. at 214.

<sup>302</sup> *See id.* at 217; *see also* Nordhoff Investments, Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 186 (3d Cir. 2001) ("Although the plan here is not as complex as the plan in *Continental Airlines*, it is hardly simple.").

<sup>303</sup> *In re Zenith*, 250 B.R. at 217.

<sup>304</sup> *See id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*



Transactions involving publicly traded securities result in complex reorganizations because the number of third parties relying on the finality of the reorganization plan drastically increases.<sup>307</sup> Courts cannot trace all of the transactions that occur after a party receives a publicly traded security.<sup>308</sup> Courts would have to track and cancel all of the trades that happened for any given security. Such a reversal would be unfair to all of the third parties that were not parties to the bankruptcy case. The court in *In re Trico Marine*, for example, recognized that no basis in law existed for it to cancel the secondary offering.<sup>309</sup>

An appellate court could order those parties that sold their securities to turn over some or all of the proceeds to appellants, thereby providing partial relief.<sup>310</sup> Judge Posner addressed this possibility in *In re Envirodyne Industries*.<sup>311</sup> Finding that some members of a class who received stock in satisfaction of their claims had already sold their stock, Judge Posner posited that the court could order these members to turn over all or some of the proceeds to the appellants.<sup>312</sup> While the Seventh Circuit ultimately did not reach the issue of plan modification, Judge Posner’s reasoning from *In re Envirodyne* is helpful in analyzing other cases that involve reorganized debtors issuing securities.<sup>313</sup>

Judge Easterbrook recognized the negative consequences that “undoing” transactions involving publicly traded securities could have on a debtor’s survival post-bankruptcy.<sup>314</sup> In *In re UNR Industries*, the court determined that reliance on a reorganization plan’s finality was crucial to the value of a reorganized debtor’s assets:

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<sup>307</sup> See *In re Texaco Inc.*, 92 B.R. 38, 45–46 (S.D.N.Y. 1988); see also *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) (noting how fifteen million shares of stock traded in public markets drastically increased the number of potential third parties).

<sup>308</sup> See *In re Delta Air Lines, Inc.*, 386 B.R. 518, 535 (Bankr. S.D.N.Y. 2008); *In re Zenith*, 250 B.R. at 217 (“[B]ecause the bonds are publicly traded, the bondholders today may not be the same investors as the bondholders at the time of Zenith’s bankruptcy filing or the Plan’s confirmation.”).

<sup>309</sup> See *Trico II*, 343 B.R. 68, 72 (Bankr. S.D.N.Y. 2006); see also *In re Delta*, 386 B.R. at 534–35 (“No one could possibly trace and cancel all of the trades that have taken place since the issuance of the Stock.”); *In re Texaco*, 92 B.R. at 46–45.

<sup>310</sup> See *In re Envirodyne Indus.*, 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.) (“Some of the 14% noteholders, it is true, have already sold their stock, but they could be ordered to surrender some or all of the proceeds to the appellants.”).

<sup>311</sup> See *id.*

<sup>312</sup> See *id.*

<sup>313</sup> See *id.*

<sup>314</sup> *In re UNR Indus.*, 20 F.3d 766 (7th Cir. 1994).

Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events . . . By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate.<sup>315</sup>

Protecting innocent third parties through finality is good for debtors, creditors, and third parties.<sup>316</sup> Dismissing an appellant's appeal does substantially less harm than reallocating proceeds several years after the fact in situations that present such a delicate balancing of fairness.<sup>317</sup>

Courts are beginning to look to whether a reorganization plan involved publicly traded securities as a way to limit the doctrine of equitable mootness.<sup>318</sup> The lack of publicly traded securities was a major factor in the court's determination that a complex reorganization had not occurred in *In re One2One*.<sup>319</sup> Because of the potentially significant effects on third parties caused by issuing publicly traded securities in a reorganization plan, appellate courts should give this factor the most weight when determining whether a complex reorganization occurred.

#### *b. Transactions Resulting in Fundamental Changes to the Debtor*

Absent transactions involving publicly traded securities, appellate courts should determine whether a reorganization plan involved transactions that resulted in a debtor's "comprehensive change of circumstances."<sup>320</sup> These types of transactions are most often fundamental changes to the corporate debtor, such as a merger of one or more entities<sup>321</sup> or changes in the debtor's corporate structure.<sup>322</sup> The reorganization plan in *Perez v. Terrestar Corp. (In re*

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<sup>315</sup> *Id.* at 770.

<sup>316</sup> See *In re Tribune Media Co.*, 799 F.3d 272, 289 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016).

<sup>317</sup> See *id.* ("In very few cases, shutting an appellant out of the courthouse does substantially less harm than locking a debtor inside.").

<sup>318</sup> See Markell, *supra* note 27.

<sup>319</sup> See *In re One2One Commc'ns, LLC*, 805 F.3d 428, 437 (3d Cir. 2015).

<sup>320</sup> *Chateaugay I*, 988 F.2d 322, 325 (2d Cir. 1993) (quoting *In re Crystal Oil Co.*, 854 F.2d 79, 82 (5th Cir. 1988) (quoting *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981))).

<sup>321</sup> See, e.g., *In re Arcapita Bank B.S.C.(C)*, No. 13 CIV. 5755 SAS, 2014 WL 46552, at \*7 (S.D.N.Y. Jan. 6, 2014) ("The new holding companies were created, and a complex series of mergers and dissolutions have been consummated.").

<sup>322</sup> See *In re Innovative Clinical Sols., Ltd.*, 302 B.R. 136, 141 (Bankr. D. Del. 2003) (outlining the changes the debtor underwent since plan confirmation).

*Terrestar Corp.*) illustrates how these changes produce a complex reorganization.

In *In re Terrestar*, the District Court for the Southern District of New York determined that a complex reorganization occurred, despite the absence of transactions involving publicly traded securities, because the debtor underwent fundamental changes as a result of the plan.<sup>323</sup> The debtor’s plan of reorganization required: the unlisting of formerly public common shares; the company’s reorganization as a new, privately held corporation with new bylaws and a new certificate of incorporation; a merger of several of the debtor’s subsidiaries; and an election of all new members to the board of directors.<sup>324</sup>

Turning to the third factor of the Second Circuit’s equitable mootness analysis, the court determined that “overturning the confirmation order would require vacatur of the entire plan.”<sup>325</sup> The court found that the appellant could not offer a legitimate means through which the court or the corporate debtor could reinstate its old bylaws and certificate of incorporation.<sup>326</sup> The fundamental changes the debtor went through allowed it to obtain exit financing and shed pre-petition liability.<sup>327</sup> The court was not willing to undo those changes because reversing those fundamental changes would undermine the third party reliance those changes produced.<sup>328</sup>

While a company may have the same name upon exiting chapter 11, mergers and other changes to the corporate structure result in a comprehensive change of circumstances that induce reliance by third parties, whom the doctrine is meant to protect.<sup>329</sup> The entity that entered chapter 11 is fundamentally different than the one that exited.<sup>330</sup> Whereas unwinding transfers is a regular practice in bankruptcy, “unmerging” a debtor business entity would be a daunting task for an appellate court.<sup>331</sup> Doing so would

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<sup>323</sup> No. 13 Civ. 562 (GBD), 2013 U.S. Dist. LEXIS 118918, at \*14–17 (S.D.N.Y. Aug. 16, 2013).

<sup>324</sup> *See id.* at \*10–12.

<sup>325</sup> *Id.* at \*14.

<sup>326</sup> *See id.* at \*15.

<sup>327</sup> *See id.* at \*15–16.

<sup>328</sup> *See id.* at \*17.

<sup>329</sup> *See* Petition for Rehearing En Banc, *supra* note 195, at 2 n.1.

<sup>330</sup> *See In re Innovative Clinical Sols., Ltd.*, 302 B.R. 136, 141 (Bankr. D. Del. 2003) (“In essence, old ICSL no longer exists.”).

<sup>331</sup> *See In re Zenith Elecs. Corp.*, 250 B.R. 207, 217 (D. Del. 2000) (“[R]eversal of these transactions would not likely be quite as daunting a task as the ‘unmerging’ of 54 debtors . . . in *Continental*.”), *aff’d sub nom.* *Nordhoff Investments, Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180 (3d Cir. 2001).

involve returning a debtor to its pre-petition past.<sup>332</sup> These types of transactions, which fundamentally change the corporate debtor, produce complex reorganizations.

The *types* of transactions that occur under a chapter 11 reorganization plan will be the indicators that carry the most weight for courts when determining whether a complex reorganization occurred.<sup>333</sup> Transactions involving publicly traded securities and transactions that result in a “comprehensive change” of the debtor’s circumstances are both strong indicators that a complex reorganization has occurred in a chapter 11 bankruptcy case.<sup>334</sup> If the plan does not call for the issuance of publicly traded securities *or* transactions that fundamentally change the debtor’s corporate structure, courts should next determine whether a settlement agreement served as the centerpiece of the plan.

#### 4. *Settlement Agreements as the Centerpiece of a Reorganization Plan*

The final factor appellate courts must assess to determine whether a complex reorganization occurred in a chapter 11 case is whether a settlement agreement served as the centerpiece of the plan. A settlement as the centerpiece of a reorganization plan results in a complex reorganization because those agreements are the result of intense, multi-party negotiations that redefine numerous creditors rights; they allow the debtor to enter into transactions with third parties who are relying on the results the settlement agreement produced.<sup>335</sup> Settlement agreements operate as the driving force behind the plan, as was the case in *In re Tribune Media*<sup>336</sup> and *R<2> Invs., LDC v. Charter Communications, Inc. (In re Charter Communications, Inc.)*.<sup>337</sup>

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<sup>332</sup> See *In re Terrestar*, 2013 U.S. Dist. LEXIS 118918, at \*17.

<sup>333</sup> See *In re Mortgs. Ltd.*, 771 F.3d 1211, 1215 n.2 (9th Cir. 2014); *Trico II*, 343 B.R. 68, 71 (Bankr. S.D.N.Y. 2006).

<sup>334</sup> See *Trico II*, 343 B.R. at 71; *In re Zenith*, 250 B.R. at 217 (“[B]ecause the bonds are publicly traded, the bondholders today may not be the same investors as the bondholders at the time of Zenith’s bankruptcy filing or the Plan’s confirmation.”).

<sup>335</sup> See *In re Charter Commc’ns, Inc.*, 691 F.3d 476, 485 (2d Cir. 2012); *In re Mal Dunn Assocs., Inc.*, 406 B.R. 622, 626 (Bankr. S.D.N.Y. 2009).

<sup>336</sup> 799 F.3d 272 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016).

<sup>337</sup> 691 F.3d 476, 485 (2d Cir. 2012) (“[R]emoving a critical piece of the Allen Settlement . . . would impact other terms of the agreement and throw into doubt the viability of the entire Plan.”); see also *In re Mal Dunn Assocs.*, 406 B.R. at 626; *In re Coll. Properties, Ltd.*, No. BAP AZ-07-1075-PAAK, 2007 Bankr. LEXIS 4862, at \*9 (B.A.P. 9th Cir. Aug. 14, 2007) (holding that the SACR settlement agreement was the crux of the reorganization);

*In re Tribune* illustrated how a settlement agreement can operate as the centerpiece of a reorganization plan and result in a complex reorganization.<sup>338</sup> There, the debtor’s reorganization plan included a settlement of claims for \$369 million, which resulted from the debtor’s disastrous leveraged buy-out.<sup>339</sup> The settlement agreement also settled claims against the debtor not tied to the leveraged buy-out by assigning those claims to a litigation trust that would continue to pursue them and pay out any proceeds according to a waterfall structure.<sup>340</sup>

The Third Circuit determined that the settlement agreement was the focal point of the reorganization plan, emphasizing the substantial weight the bankruptcy court gave the agreement in confirming the plan.<sup>341</sup> The court determined that the hundreds of transactions the debtor entered into post-confirmation were done in reliance on the settlement agreement as the centerpiece of the plan.<sup>342</sup> Of particular importance was the fact that the settlement agreement induced a large equity investment in the debtor.<sup>343</sup> The court found “[t]hat investment no doubt was in reliance on the [s]ettlement.”<sup>344</sup>

In *In re Charter Communications*, two provisions of the settlement agreement distributed consideration to a principal shareholder and allowed the debtor to obtain third party liability releases from other claims.<sup>345</sup> The Second Circuit determined that removing these two provisions would “impact other terms of the agreement and throw into doubt the viability of the . . . [p]lan.”<sup>346</sup>

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<sup>338</sup> See *In re Tribune Media*, 799 F.3d at 281.

<sup>339</sup> *Id.* at 276. For a discussion of the events that led to Tribune’s bankruptcy, see generally Markell, *supra* note 27 (discussing the details of the case). “A leveraged buyout (LBO) is the acquisition of another company using a significant amount of borrowed money (bonds or loans) to meet the cost of acquisition. The assets of the company being acquired are often used as collateral for the loans, along with the assets of the acquiring company.” *Leveraged Buyout–LBO*, INVESTOPEDIA, <http://www.investopedia.com/terms/l/leveragedbuyout.asp> (last visited March 11, 2016).

<sup>340</sup> See *In re Tribune Media*, 799 F.3d at 276; see also Brief for the Appellees, *supra* note 21, at 14 n.26. Aurelius, the holder of \$2 billion of company’s debt, objected to the plan because it believed the settlement agreement was too small, but the bankruptcy court approved the plan over this objection. See *In re Tribune Media*, 799 F.3d at 276.

<sup>341</sup> *In re Tribune Media*, 799 F.3d at 280 (quoting *In re Tribune Co.*, 464 B.R. 126, 142 (Bankr. D. Del. 2011)).

<sup>342</sup> *Id.* at 280–81 (quoting *In re Tribune Co.*, 464 B.R. at 142).

<sup>343</sup> See *id.* at 281.

<sup>344</sup> See *id.*

<sup>345</sup> 691 F.3d 476, 480 (2d Cir. 2012).

<sup>346</sup> *Id.* at 485.

The presence of a settlement agreement as the fulcrum greatly increases the complexity of a reorganization plan. The agreement becomes the vehicle that drives the reorganization. The agreement allows the debtor to settle claims with other parties and induces transactions with third parties not otherwise involved in the debtor's bankruptcy case, as was the situation in *In re Tribune*. The agreement in *In re Tribune* induced a large equity investment and removing the agreement would "require returning to the drawing board," thus jeopardizing the debtor's chance at successfully reorganizing.<sup>347</sup> Similar to transactions involving publicly traded securities or transactions that cause a comprehensive change in the debtor's circumstances, settlement agreements that are central to a reorganization plan increase the number of parties with an interest in the reorganized debtor, producing a complex reorganization.

An assessment of these four factors will answer the question, "Has a complex reorganization occurred?" Ideally, this approach will eliminate the doctrine's unwarranted application to smaller, relatively simple bankruptcies and ensure that equitable mootness remains the exception rather than the rule.<sup>348</sup>

## CONCLUSION

The future of equitable mootness is unclear. One observer noted that some room for the doctrine still exists, but "whether that room is a large or small . . . is still up for debate."<sup>349</sup> Judge Krause's concurrence in *In re One2One* opened the legal community's eyes to the doctrine's misapplication. Moving forward, appellate courts must determine, as a threshold matter, whether a complex reorganization occurred before deciding whether to proceed to their equitable mootness analyses. This approach ideally will keep the doctrine limited to complex reorganizations. Through this Comment's proposed four-factor approach, complexity will serve as the gatekeeper to equitable mootness.

R. JAKE JUMBECK\*

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<sup>347</sup> *In re Tribune Media*, 799 F.3d at 281.

<sup>348</sup> *See id.* at 288 (Ambro, J., concurring).

<sup>349</sup> Markell, *supra* note 27.

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