



Hooked on the Horns of a Legal Dilemma: Can “Moo”tness Be Equitable?

Tuesday, October 30 | 10:30 AM – 11:30 AM

Program Participants

- Hon. Bernice B. Donald (U.S. Court of Appeals for the Sixth Circuit)
- Hon. Michael J. Melloy (U.S. Court of Appeals for the Eighth Circuit)
- Hon. Richard A. Paez (U.S. Court of Appeals for the Ninth Circuit)
- Susan Freeman (Counsel for Appellee)
- Danielle Spinelli (Counsel for Appellant)
- Hon. William J. Lafferty, III (Moderator)

Parties to the Appeal

- Bunnyslope Limited Partnership
 - Operated a housing development subject to affordable housing covenants as set forth in loan documents in favor of governmental lender
 - Confirmed a Chapter 11 plan using value of the property with operative affordable housing restrictions (which was less than foreclosure value because foreclosure would have terminated the covenants)
- Arbitrage National Bank (ANB)
 - Holder of first priority lien
 - Attempted to foreclose pre-petition, but was stayed when creditors placed Bunnyslope into an involuntary bankruptcy, later converted to Chapter 11
 - Objected to plan confirmation on the theory that its collateral should be valued based on its foreclosure value

Procedural Posture

- ANB appealed the order confirming plan
- The district court affirmed the bankruptcy court
- The Fourteenth Circuit reversed, holding for ANB on the § 506 valuation issue and finding that the appeal was not equitably moot
- The Fourteenth Circuit subsequently accepted Bunnyslope's petition for *en banc* rehearing on the issue of equitable mootness only

Equitable Mootness

- The initial Fourteenth Circuit panel adopted the Ninth Circuit's standard for finding that an appeal is equitably moot
- The Ninth Circuit considers:
 1. "[W]hether a stay was sought, for absent that a party has not fully pursued its rights"
 2. "[I]f a stay was sought and not gained, [the court] then will look to whether substantial consummation of the plan has occurred"
 3. "[T]he effect that a remedy may have on third parties not before the court"
 4. "[W]hether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation before the bankruptcy court."
- See *In re Transwest Resort Properties, Inc.*, 801 F.3d 1161, 1167-68 (9th Cir. 2015), quoting *In re Thorpe Insulation*, 677 F.3d 869, 881 (9th Cir. 2012)

Equitable Mootness

- Of the four *Transwest* factors, ANB and Bunnyslope primarily dispute:
 - The effect a remedy may have on third parties not before the court
 - Whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan
- The doctrine of equitable mootness also raises prudential and constitutional issues regarding when it is appropriate for an appellate court to abstain from unwinding a plan

Issue to be Argued

- Whether ANB's appeal of the bankruptcy court's order valuing its collateral and confirming the Chapter 11 plan should be dismissed as equitably moot