AMERICAN BANKRUPTCY INSTITUTE

Bankruptcy 2021: Views from the Bench

Confirmation: The Rest of the Story

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VIEWS FROM THE BENCH

Confirmation Roundtable

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Hon. Janet Baer*

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* The views expressed in this presentation do not necessarily represent the views of the judges. Nothing the judges say today may be construed as binding them to any legal position or commentary on the direction their courts may take in the future.

Today's Topics

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- Merits of Market and Judicial Valuations

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  - **Justifying underlying assumptions**
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CONFIRMATION: THE REST OF THE STORY
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Case Summaries

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I. JUDICIAL VS. MARKET VALUATION

1. *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624 (3d Cir. 2007)

   (a) In 1998, Campbell Soup Co. ("Campbell") completed a leveraged spinoff of its troubled "Specialty Foods Division"[1] into a new entity, Vlasic Foods International, Inc. ("VFI"). Preceding the spinoff, Campbell allegedly engaged in deceptive activities, such as "product loading" (*i.e.*, frontloading sales into retail channels, thereby increasing short-term revenues at the expense of long-term revenue) to mislead investors as to the future prospects of the Specialty Foods Division.[2] VFI "slowly declined" following the transaction and filed for bankruptcy in 2001, ultimately reorganizing as VFB, LLC.[3] Creditor representatives sued Campbell, seeking to avoid the spinoff as a constructively fraudulent transfer.[4]

   (b) The "chief factual dispute" was the valuation of the Specialty Foods Division at the time of the spinoff—was it worth the $500 million VFI paid for it?[5] Affirming judgment in Campbell's favor, the Third Circuit held that the district court properly relied on VFI's market capitalization as the best evidence of value in determining whether VFI received reasonably equivalent value in the transaction.[6] The district court "relied primarily on the price of VFI's stock, reasoning that as private traders seek to pay no more for an asset (and sell an asset for no less) than it is worth, the market price was a rational valuation of VFI in light of all the information available to market participants."[7] The Third Circuit concurred, explaining that "objective evidence from the public equity and debt markets" is, when available, superior to "'the subjective estimates of one or two expert witnesses'" and presumptively the best measure of value.[8] Because "VFI's market capitalization never dropped below $1.1 billion until January 1999," by which time Campbell's allegedly deceptive practices and misleading SEC filings had

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1 *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 626–27 (3d Cir. 2007).

2 *Id.* at 627–28.

3 *Id.* at 628.

4 *Id.* at 628–29.

5 *Id.* at 629.

6 *Id.* at 626, 631–34.

7 *Id.* at 629.

8 *Id.* at 633 (quoting *In re Prince*, 85 F.3d 314, 320 (7th Cir. 1996)).

(cont'd)

come to light, the plaintiffs could not establish the VFI received less than reasonably equivalent value for the $500 million purchase price VFI paid.[9]

2. *Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283 (Bankr. S.D.N.Y. 2007).

    (a) As in *Campbell Soup*, the fraudulent-transfer litigation in *Iridium* turned on the comparative merits of market and judicial valuation. Motorola developed and deployed a constellation of telecommunications satellites for Iridium, collecting approximately $3.7 billion in payments over the life of the contract.[10] Shortly after its system entered service, Iridium failed and filed for bankruptcy.[11] Its creditors' committee sued Motorola for constructively fraudulent transfer.[12]

    (b) The crux of the dispute was Iridium's solvency (or insolvency), or the adequacy (or inadequacy) of its capitalization during the relevant period.[13] "[T]he valuation question posed" by this dispute, the court explained, "comes down to a contest between two fundamentally different valuation theories and methodologies."[14] Does "historical market data" provide more reliable evidence of value than expert DCF analysis?[15]

    (c) Yes, said the *Iridium* court. "[T]he public trading market constitutes an impartial gauge of investor confidence and remains the best and most unbiased measure of fair market value and, when available to the Court, is the preferred standard of valuation."[16] In contrast, the committee's case highlighted the potential shortcomings of expert valuation evidence—most fundamentally, its subjectivity.[17] As examples, the court pointed to the committee's experts failure to consider methodologies other than DCF, reliance on "restated cash flow

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9 *Id.* at 628.

10 *Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 290 (Bankr. S.D.N.Y. 2007).

11 *Id*.

12 *Id.* at 304.

13 *Id*. at 292.

14 *Id*.

15 *Id*.

16 *Id.* at 293 (citing *Campbell Soup Co.*, 482 F.3d at 624).

17 *See id.* at 351 ("[T]he DCF 'methodology has been subject to criticism for its flexibility; a skilled practitioner can come up with just about any value he wants.'" (quoting *To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 953 F. Supp. 987, 996–97 (N.D. Ill. 1997), *aff'd*, 152 F.3d 658 (7th Cir. 1998))).

(cont'd)

projections that were tailored for litigation purposes well after commencement of this adversary proceeding," and similar factors.[18]

(d) The committee's expert valuation evidence was "conspicuously inconsistent" with market data.[19] It was incumbent on the committee's valuation experts, the court said, to "explain[] and overcome" these discrepancies; instead, the committee's experts "treated such data as irrelevant."[20] As such, the court refused to credit the committee's valuation evidence.[21]

3. *In re Emerge Energy Servs. LP*, No. 19-11563 (KBO), 2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019)

(a) Emerge Energy Services LP ("Emerge") and its affiliated debtors, whose core business is the mining, processing, and sale of frac sand, proposed a chapter 11 plan that contemplated the equitization of Emerge's prepetition secured debt, with no recovery for unsecured creditors beyond a small tip under a "deathtrap" provision.[22]

(b) The creditors' committee objected to confirmation on the grounds that (among other things) the plan violated the absolute priority rule by providing the secured noteholders greater than a full recovery.[23] The committee's objection was premised on its assertion that Emerge's post-emergence enterprise value significantly exceeded the face amount of the noteholders' secured claims and, thus, that the equitization of the secured claims and concomitant discharge of the unsecured claims for no recovery violated the absolute priority rule.[24]

(c) The court observed (begrudgingly) that the lack of "market evidence as to value" meant that "the Court's decision must rest on the battle of the parties' valuation experts."[25] The debtors' and the committee's respective bankers furnished midpoint valuation estimates of $200 million and $390 million, respectively.[26] Both bankers relied on DCF and comparable companies analyses, applied to the

18 *Id.* at 293.

19 *Id.*

20 *Id.*

21 *Id.* at 294–96.

22 *Id.* at *1–3.

23 *Id.* at *4.

24 *See id.* at *5.

25 *Id.*

26 *Id.*

(cont'd)

financial projections in the debtors' business plan.[27] The court attributed their "vastly different value conclusions" to differences in "input selections," which the court variously characterized as "'subjective in nature," a "'guess compounded by an estimate,'" and so forth.[28]

(d) The court ultimately concluded that the debtors' valuation evidence was more persuasive than the committee's in several important ways. First, the court concluded that the comparators selection by the committee's banker for his comparable companies analysis was too broad, in that it included companies that competed with, but were significantly more diversified than, Emerge.[29] Second, the court faulted the committee's banker for referencing the face amount of a comparator company's debt in calculating its total enterprise value.[30] The committee's banker opined that the comparator company's material market capitalization demonstrated an expectation that its debt would be repaid (and thus that the face amount of its debt should be deducted in calculating TEV), but the court credited the debtors' banker's response that the positive market value of the comparator's stock could simply reflect option value.[31]

4. *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011), *aff'd sub nom. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012)

(a) The debtors were engaged in the construction and renovation of hotel and event facilities at O'Hare and LAX, which they financed with construction loans secured by mortgages on the applicable properties.[32] The debtors proposed to sell the properties under a plan pursuant to bidding procedures that purported to deny the mortgage lenders the right to credit bid.[33] The debtors argued that, despite denying the lenders the right to credit bid, the plan was "fair and equitable" because it provided the lenders the "indubitable equivalent" of their secured claims.[34] The Seventh Circuit held that, although the three prongs of Bankruptcy Code section 1129(b)(2)(A) are framed disjunctively, a plan proponent that proposes to sell a lender's collateral must proceed under prong (ii)—*i.e.*, must

27 *Id.*

28 *Id.* at *5–6 (first quoting *In re Coram Healthcare Corp.*, 315 B.R. 321, 339 (Bankr. D. Del. 2004); then quoting *In re PTL Holdings LLC*, No. 11-12676 WL 5509031, at *6 (Bankr. D. Del. Nov. 10, 2011)).

29 *Id.* at *7.

30 *Id.* at *8.

31 *Id.*

32 *Id.* at 643–44. *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642,643–44 (7th Cir. 2011), *aff'd sub nom. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012).

33 *Id.* at 644–45.

34 *See id.* at 647–48 (quoting 11 U.S.C. § 1129(b)(2)(A)(iii)).

(cont'd)

permit the lender to credit bid.[35] The Supreme Court granted certiorari and affirmed.[36]

(b) *River Road* is notable for its discussion of the potential shortcomings of market valuations in bankruptcy. Without claiming that judicial valuation is a superior alternative, the Seventh Circuit in *River Road* nonetheless cautioned that the dynamics of bankruptcy mean that it is "usually difficult to discern the current market value of the types of assets that are sold in corporate bankruptcies," creating "a substantial risk that assets sold in bankruptcy auctions will be undervalued."[37] The court attributed this risk to several factors:

> First, the speed and timing of a bankruptcy auction often results in undervaluation. Second, and closely related, is the inability to provide sufficient notice to interested parties. Third, there is an inherent risk of self-dealing on the part of existing management. We have recognized that existing management may have an incentive to favor "white knight" bidders favorably disposed to preserving the existing business over others who might enter higher bids. Fourth, while the credit markets are more recently showing signs of repair, they remain in a state of limited liquidity. Liquidity constraints are likely to keep many potential bidders on the sidelines, greatly reducing the chance that competitive bidding will occur. Finally, the fact that bidders must expend their resources when putting together a bid and are likely to take these costs into consideration when setting the value of their bids increases the chance that the asset's sale price will not reflect its actual value.[38]

35 *Id.* at 651–53.

36 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012).

37 *River Rd. Hotel Partners*, 651 F.3d at 650–51.

38 *Id.* at 650 n.6 (citations omitted).

II. EQUITABLE MOOTNESS

1. *Frito-Lay, Inc. v. LTV Steel Co.* (*In re Chateaugay Corp.*), 10 F.3d 944 (2d Cir. 1993).

   (c) In *In re Chateaugay Corp.*, the Second Circuit considered whether the confirmation and substantial consummation of the debtors' chapter 11 plan rendered equitably moot certain tax lessors' appeals concerning the allowance, classification, and treatment of their claims.

   (d) The court first clarified the standard applicable to a determination of equitable mootness: "[c]onstitutional and equitable considerations dictate that substantial consummation will not moot an appeal if … (a) the court can still order some effective relief; (b) such relief will not affect 'the re-emergence of the debtor as a revitalized corporate entity'; (c) 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'; (d) the 'parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings'; and (e) the appellant 'pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order … if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.'"[39]

   (e) *Prong (a)*: The debtors argued that the revesting of assets free and clear of claims under the plan rendered the creditors' appeal equitably moot, as any judgment following a successful appeal necessarily would be satisfied out of revested cash. The court disagreed, finding that the revesting of assets in the reorganized debtors under the plan was insufficient to moot the appeal. The court clarified that, even though full relief might not be granted (as the debtors may not have retained the full value of the assets), it would still be possible for the court to provide *some* relief. Specifically, the court concluded it "would be able to fashion effective relief to the extent of remanding with instructions to the bankruptcy court to order the return … of any funds … erroneously disbursed … to the extent that can be done … without imperiling [the debtor's] fresh start."[40] The court elaborated that "[a] claimant should not be out of court on grounds of mootness solely because its injury is too great for the debtor to satisfy in full."[41]

   (f) *Prong (b)*: The Second Circuit found that the second factor weighed in favor of the Debtor in light of the fact that the bankruptcy court "made no

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39 *Id.* at 952–53 (citations omitted).

40 *Id.* at 953.

41 *Id.* at 954.

(cont'd)

determination … as to how payment of [the creditor's] claims might affect [the Debtor's] re-emergence as a revitalized entity."[42]

(g) *Prong (e)*:[43] The appellants had sought "to stay confirmation of the [p]lan in urgent applications before the bankruptcy court, the district court and [the Second Circuit]."[44] Although the appellants' stay applications were unsuccessful, the court looked to the creditor's *effort* in seeking other remedies rather than the creditor's success in those efforts in finding that the fifth factor favored the appellant.

2. *GLM DFW, Inc. v. Windstream Holdings, Inc.* (*In re Windstream Holdings, Inc.*), 838 F. App'x 634 (2d Cir. 2021)

(a) In *Windstream Holdings*, the U.S. Bankruptcy Court for the Southern District of New York authorized various first-day relief, including payment of certain critical vendors, lien claimants and creditors holding administrative expenses over the objection of an unsecured creditor, who argued that the bankruptcy court improperly "rubber-stamped" the debtor's requested relief.[45] The unsecured creditor subsequently appealed the orders. While the appeal was pending, the bankruptcy court confirmed, and the debtors substantially consummated, a chapter 11 plan. The Second Circuit concluded that the unsecured creditor could not overcome the presumption of equitable mootness and dismissed the appeal.

(b) The Second Circuit, unlike other Courts of Appeals, holds that a presumption of equitable mootness exists "where … a plan has already been substantially consummated"[46], thus shifting the burden to the appellant to prove the issue was not equitably moot. To determine whether an appellant has overcome the presumption of equitable mootness, the court looks to the *Chateaugay* factors, in light of its prior decision that an appeal is not equitably moot where:

(i) "the court can still order some effective relief;

(ii) such relief will … affect 'the re-emergence of the debtor as a revitalized corporate entity';

(iii) 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'

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[42] *Id*. at 953.

[43] The court did not examine all of the factors in detail.

[44] *Id*. at 954.

[45] *GLM DFW, Inc. v. Windstream Holdings, Inc.* (*In re Windstream Holdings, Inc.*), 838 F. App'x 634, 635–36 (2d Cir 2021).

[46] *In re Windstream Holdings, Inc.*, 838 F. App'x at 636.

(cont'd)

and 'create an unmanageable, uncontrollable situation for the [b]ankruptcy [c]ourt';

(iv) the 'parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings'; and

(v) the appellant 'pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.'"[47]

(c) In concluding that the instant appeal was equitably moot, the court clarified that "an appeal does not need to directly challenge a reorganization plan to impact that plan"[48], indicating that the second and third factors may weigh in favor of a finding of mootness even if the appeal does not directly seek to undo or modify the plan. In this regard, the court emphasized "the important interest of finality that attaches once a reorganization plan is approved and consummated."[49]

(d) Ultimately, the court held that the fifth *Chateaugay* factor was most important, explaining that the appellant's failures to seek a stay of the Bankruptcy Court's order from which it appealed or to seek an expedited appeal, and the appellant's failure to ask the Bankruptcy Court "to hold off on confirming the reorganization plan"[50] until the creditor's dispute was resolved, were determinative in finding that the issue was equitably moot.

(e) Further, the court noted that, on these facts specifically, "[g]ranting [the creditor] the relief it seeks could cause tens of millions of dollars in previously satisfied claims to spring back to life, thereby potentially requiring the bankruptcy court to reopen the plan of organization."[51] While conceding that a successful appeal would not necessarily unleash a "parade of horribles,"[52] the court noted that "it would likely be highly disruptive for the creditors that received … funds [under the plan] to return them more than a year later."[53]

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[47] *Chateaugay*, 10 F.3d at 952-53 (citations omitted).

[48] *In re Windstream Holdings, Inc.*, 838 F. App'x at 637.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

(cont'd)

3. *Search Market Direct, Inc. v. Jubber* (*In re Paige*), 584 F.3d 1327 (10th Cir. 2009)

   (a) In its 2009 decision in *Search Market Direct, Inc. v. Jubber*, Tenth Circuit clarified the difference between constitutional and equitable mootness[54] and officially adopted the doctrine of equitable mootness, laying out six factors for courts to ask related to whether the doctrine should apply to prevent a court from hearing an appeal of a bankruptcy court's decision:

      (i) "(1) Has the appellant sought and/or obtained a stay pending appeal? (2) Has the appealed plan been substantially consummated? (3) Will the rights of innocent third parties be adversely affected by reversal of the confirmed plan? (4) Will the public-policy need for reliance on the confirmed bankruptcy plan—and the need for creditors generally to be able to rely on bankruptcy court decisions—be undermined by reversal of the plan? (5) If appellant's challenge were upheld, what would be the likely impact upon a successful reorganization of the debtor? And (6) based upon a quick look at the merits of the appellant's challenge to the plan, is appellant's challenge legally meritorious or equitably compelling?"[55]

   (b) Before reaching the factors themselves, the court held that the Debtor (or "the party seeking to prevent [a] court from reaching the merits of [an] appeal"[56]) bears the burden of proof, specifically declining to follow the Second Circuit's presumption of equitable mootness and "shift[ing of] the burden to the party seeking to have the court reach the merits"[57] of its challenge.

   (c) *Prong 1*: The court noted that a stay "will … generally be dispositive of other relevant factors";[58] thus the doctrine of equitable mootness would be much less likely to apply where the appellant has obtained a stay. However, like the Second Circuit, the court clarified that it would "examine an appellant's *efforts* to obtain a stay, even if those efforts were unsuccessful."[59] An important consideration was the diligence with which the appellant pursued a stay. The court ultimately found that where a party seeks a stay from the bankruptcy court and district court, "the

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54 The court noted that "an appeal of a bankruptcy court's decision will only be constitutionally moot if the appellee demonstrates that a court could order no meaningful relief to the party seeking reversal of the bankruptcy court's decision." *Search Market Direct, Inc. v. Jubber* (*In re Paige*), 584 F.3d 1327, 1330 (10th Cir. 2009).

55 *Id*. at 1339.

56 *Id*. at 1339-40.

57 *Id*.

58 *Id.* at 1340-41.

59 *Id.* at 1341 (emphasis added).

(cont'd)

party's failure to appeal … to [the appellate] court … will not, without more, render an appeal … moot."[60]

(d) *Prong 2*: The court discussed the utility of using a "'substantial consummation yardstick'"[61] in that it speaks to finality concerns and "reliance interests of third parties" but ultimately held that a concession of substantial consummation "is not dispositive of … whether the doctrine of equitable mootness should [apply]."[62] The court explained that in the instant case "many of the concerns that motivate courts not to decide the merits of an appeal of a substantially consummated bankruptcy plan do not apply."[63] The court also weighted heavily the fact that the parties supporting the plan "accelerated the consummation of the plan despite their knowledge of a pending appeal."[64]

(e) *Prong 3*: The court held that "[t]he effects … reversal will have on non-party creditors is probably the foremost concern,"[65] and "[t]his factor may even implicate the court's jurisdiction, since a court may lack jurisdiction over an appeal where the impact of reversal would fall most heavily on parties not before the court."[66] The court also criticized the district court's practice of placing the burden of proof for the third factor on the appellant, holding that the district court should have required the appellee to affirmatively prove "that [the Debtor] had *insufficient* funds to finance their plan"[67] rather than making its decision based on the appellant's "fail[ure] to [affirmatively] prove that [the Debtor] had *sufficient* funds."[68]

(f) *Prong 4*: The court found that the fourth factor "'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

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60 *Id*.

61 *Id.* (quoting *United States v. In re GWI PCS 1 Inc.* (*In re GWI PCS 1 Inc.*), 230 F.3d 788, 801 (5th Cir. 2000)).

62 *Id*. at 1342.

63 *Id.* The Court discussed the explained that in this case "reversal of the [plan would] not undo any complex transactions," that the transfer of control from the bankruptcy to the liquidating trustee "[did] not … pose a very serious problem, because the bankruptcy trustee and liquidating trustee is the same person," and the fact that "there appear[ed] to be no equitable or technical barrier to th[e] court's ability to order the dissolution of the [l]iquidating [t]rust[]." *Id.* at 1342–43.

64 *Id.* at 1343.

65 *Id*.

66 *Id*.

67 *Id.* at 1343-44.

68 *Id*. at 1344 (emphasis in original).

(cont'd)

him.'"[69] The court sought specifically to avoid "'mak[ing] reconstructive relief extremely improbable'"[70] by creating "'a nightmarish situation for the bankruptcy court on remand.'"[71]

(i) While the court agreed with the district court's determination "that reversal would impact the finality of the bankruptcy court's orders"[72], it found this was less significant than the "troubling allegations of bad-faith dealings between the debtor, [the creditor], and the trustee, and of a lack of disinterestedness of the part of the trustee"[73] in light of public policy concerns.

(ii) Further, in light of the facts of the case, the court concluded that the bankruptcy court could successful manage any practical difficulties posed by reversal, as either resolution would result in payment to the estate of "far more than the aggregate amount of all the estate's debts and expenses in order to acquire the domain name,"[74] *i.e.*, the Debtor's estate would not have to unwind its previously-made payments as either party's success would result in a more-than-sufficient payment to the estate.[75]

(g) *Prong 5*: Finally, the court noted that its resolution of the other factors "suggest[ed] … a substantial likelihood of a new successful reorganization of the debtor even if [the creditor] were partially or wholly to succeed in their appeal."[76]

4. *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012), *as corrected* (Oct. 25, 2012)

(a) In 2012, the Third Circuit issued a decision based on rationale similar to the Tenth Circuit's decision in *In re Paige*. The Third Circuit also declined to impose a presumption of equitable mootness where a plan has been substantially

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69 *Id.* at 1347 (quoting *First Union Real Estate Equity & Mortg. Inv. v. Club Assocs.* (*In re Club Assocs.*), 956 F.2d 1065, 1069 (11th Cir. 1992)).

70 *Id*. (quoting *Rochman v. Ne. Utils. Serv. Grp.* (*In re Pub. Serv. Co. of N.H.*), 963 F.2d 469, 473 (1st Cir. 1992) (citations omitted)).

71 *Id*. (quoting *In re Pub. Serv. Co.*, 963 F.2d at 474).

72 *Id*.

73 *Id*. at 1348.

74 *Id*.

75 The dispute here was over a domain name which the Debtor owned and the appellant claimed it was entitled to. Both parties bid on the domain name and both were willing to pay an amount which exceeded the value of the Debtor's estate at the time.

76 *Id*.

(cont'd)

consummated, and listed five factors (substantially similar to the Tenth Circuit's) as relevant to the application of equitable mootness:

(i) "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested 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 bankruptcy judgments."[77] Notably, the Third Circuit omitted an analysis of the appellant's efforts to seek alternate remedies before requesting reversal or modification of an already-substantially consummated plan.

(b) Breaking from the Second Circuit's emphasis on substantial consummation and the Tenth Circuit's emphasis on the interests of third parties, the Third Circuit noted that the first factor was most important, advising courts to place the most weight on a determination of "whether allowing an appeal to go forward [would] undermine the plan."[78]

(c) The court noted that the second factor "'should only weigh heavily against the appellant if, by a failure to secure a stay, a reorganization plan was confirmed, the existence of which [would] later [be] threatened by the appellant's appeal.'"[79] The court also noted the duplicative nature of the fourth factor ("whether granting the appellant the requested relief would unravel the plan") and the fifth factor ("support[of] the other four [in] encouraging [third parties] to rely on confirmation orders, thereby facilitating successful reorganizations by fostering confidence in finality of confirmed plans.")[80]

(i) Ultimately, the court held that "[t]he doctrine is quite rightly 'limited in scope' and 'cautiously applied'"[81], given its potential to eliminate the prospect of relief for objecting creditors.

(d) The court noted the importance of the fact that "the Debtors [did] not argue that allowance of the requests [would] undermine the [p]lan"[82] in distinguishing the case from prior equitable mootness cases. Thus, in holding that the appeal was not

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77 *In re Phil. Newspapers, LLC*, 690 F.3d 161, 168 (3d Cir. 2012) (quoting *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (en banc) ("*Cont'l I*")).

78 *Id*.

79 *Id*. at 169 (quoting *U.S. Tr. v. Official Comm. of Equity Sec. Holders* (*In re Zenith Elecs. Corp.*), 329 F.3d 338, 346 n.4 (3d Cir. 2003)).

80 *Id*.

81 *Id*. at 170 (quoting *Cont'l I*, 91 F.3d at 565).

82 *Id*.

(cont'd)

equitably moot the court noted that "the first four factors weigh[ed] in favor of allowing the appeal to proceed"[83] and, even "[t]hough the finality of the Bankruptcy Court's decision necessarily [would] be disturbed, because a holding in favor of the [creditors] on appeal [would] not unscramble the [p]lan or upset the rights of other parties,"[84] the creditor retained its "statutory right to review of the [Bankruptcy] Court's decision."[85]

5. *In re Nuverra Environmental Solutions, Inc.*, 834 F. App'x 729, 733 (3d Cir. 2021), as amended (Feb. 2, 2021)

(a) In its 2015 decision in *Tribune I*[86], the Third Circuit attempted to streamline its equitable mootness jurisprudence, condensing the *Philadelphia Newspaper* factors into two. Its recent *Nuverra* decision describes its reformulated test for equitable mootness as comprising two "analytical steps . . . : '(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relief on plan confirmation."[87]

(b) In *Nuverra*, a single holder of unsecured notes appealed confirming, asserting that the separate classification of unsecured notes and unsecured trade claims, and the more generous treatment allotted to the latter, was improper.[88]

(c) The Third Circuit concluded the appeal was equitably moot.[89] The appealing creditor could hardly dispute that undoing the plan's classification scheme would "fatally scramble the Plan."[90] He argued, instead, that a court could award him and him alone payment on his bonds, leaving unaltered the treatment of the non-appealing bondholders.[91] The court's determination rested in part on its finding that the relief sought by the creditor violated another provision of the Bankruptcy Code, namely that the creditor's request for individualized relief was at odds with

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83 *Id.* at 171.

84 *Id*.

85 *Id*.

86 *In re Tribune Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015) ("*Tribune I*").

87 *In re Nuverra Env't Sols., Inc.*, 834 F. App'x 729, 733 (3d Cir. 2021) (quoting *Tribune I*, 799 F.3d at 278), *pet. for cert. docketed sub nom. Hargreaves v, Nuverra Env't Sols., Inc.*, No. 21-17 (U.S. Aug. 28, 2021).

88 *See id.* at 731–32.

89 *See id.* at 733–34.

90 *Id.* at 733.

91 *See id.*

(cont'd)

Section 1123(a)(4)'s requirement that all creditors in a class receive the same treatment.

(d) In a concurring opinion, Judge Krause reiterated the concerns with the doctrine of equitable mootness she had previously articulated in her *In re One2One Communications*[92] concurrence, noting first that she "continue[s] to question the doctrine's wisdom"[93] and second that *Nuverra* represented an "ill-advised expansion of the doctrine."[94] She expressed concern that "courts have allowed the doctrine itself to short-circuit the merits analysis"[95]. As in *One2One*, she reiterated that the doctrine must be narrowly applied and noted her worries that it is becoming so broad as to eliminate all prospects of relief for objecting creditors.

6. *FishDish, LLP v. VeroBlue Farms USA, Inc.* (*In re VeroBlue Farms USA, Inc.*), 6 F.4th 880 (8th Cir. 2021)

(a) Here, Alder Aqua (the plan sponsor) was authorized to lend the debtors $2 million under an interim post-petition financing order. The same order granted Broadmoor (a lender under the debtors' prepetition credit facility) an adequate protection lien and established a challenge period—available solely to the creditors' committee—for objections to the allowance of Broadmoor's claims under the petition credit facility. "No interested party objected to the interim order."[96]

(b) The creditors' committee articulated potential challenges to Broadmoor's claims but eventually settled its potential challenges, and a plan was confirmed. FishDish (a holder of preferred shares) sought to pursue its own challenges, but the bankruptcy court held that such challenges were barred by the DIP order and confirmed the proposed plan FishDish then appealed the confirmation order. The debtors argued that FishDish's appeal was not timely, thus depriving the appellate court of jurisdiction, and that equitable mootness barred consideration of the merits.

(i) On the issue of timeliness, the court held the 14-day time requirement for filing a notice of appeal applied to interim—as well as final—orders and that the requirement was mandatory but not jurisdictional; thus the district court and the appellate court could review the merits of the challenges as

92 *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring).

93 *In re Nuverra Env't Sols., Inc.*, 834 F. App'x at 736 (Krause, J., concurring).

94 *Id.*

95 *Id.*

96 *Fishdish, LLP v. VeroBlue Farms USA, Inc.* (*In re VeroBlue Farms USA, Inc.*), 6 F.4th 880, 882 (8th Cir. 2021).

(cont'd)

the notice of appeal had been filed more than 14 days after the interim order.

(c) Turning to equitable mootness, the court first described "equitable mootness" as a misnomer, noting the difference between a court having no jurisdiction or no ability to provide relief (which renders an issue truly moot) versus a court deciding not to reach the merits of a case in light of the equities of the case.[97]

(d) The court cited approvingly to Judge Krause's *In re One2One* concurrence, which criticized the doctrine of equitable mootness as "intended to promote finality, but … prov[ing] far more likely to promote uncertainty and delay."[98] The court also emphasized Judge Krause's concerns that hearings on equitable mootness increased the time dedicated to equitable mootness litigation rather than on the merits, either delaying or entirely eliminating a review on the merits.

(i) The court found that "[t]he record on appeal suggests that the Chapter 11 proceedings in this case may have followed th[e pattern Judge Krause worries about], yet the district court made no such inquiry." The court further noted that Alder Aqua and Broadmoor were "not third parties that the equitable mootness doctrine is intended to protect."[99] Further, the court emphasized that, if the only reason Alder Aqua's funding commitment was delayed was "because the reorganized Debtors were preparing for a quick asset sale instead of resuming operations," then the case was exactly the type "that Judge Krause defined as one needing review on the merits by an Article III . . . court."[100] Further, the court noted that "the district court may be able to fashion effective relief . . . even if the business assets have been sold to a third party purchaser relying on the confirmed plan,"[101] noting that disgorgement was one such possible solution.

(ii) The court agreed with Judge Krause that "'a quick look at the merits of an appellant's challenge' is also important" and where the issues include "'whether a plan comports with the Bankruptcy Code's cram down provisions . . . or claims involving conflicts of interest or preferential treatment'" – "precisely the kinds of issues FishDish raises in this appeal" – equitable mootness should not be so quickly invoked.[102]

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97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* (citations omitted).

(cont'd)

(e) Finally, the court noted that, in light of the Eighth Circuit having not yet formally adopted the doctrine of equitable mootness, the court was "[w]riting on a clean Eighth Circuit slate" and held "the district court must make at least a preliminary review of the merits of FishDish's appeal to determine the strength of FishDish's claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available—including possible dismissal—to avoid undermining the plan and thereby harming *third parties*."[103]

(f) The court advised: "[w]hen a district court (or a court of appeals reviewing a BAP decision) is asked to invoke equitable mootness to preclude a party whose rights have been impaired by a Chapter 11 confirmation order from obtaining supervisory review of the merits of the plan by an Article III court that has an 'unflagging obligation' to exercise its appellate jurisdiction, the request should be granted only in extremely rare circumstances."[104] The court quoted *Semcrude* in clarifying that "[t]he presumptive position remains that federal courts should hear and decide on the merits cases properly before them."[105]

(g) Finally, the court warned that "[i]f equitable mootness instead becomes the rule of appellate bankruptcy jurisprudence, rather than an exception to the Article III-based rule that jurisdiction should be exercised, we predict the Supreme Court, having up to now denied petitions for certiorari to review the doctrine, will step in and severely curtail—perhaps even abolish—its use . . ."[106]

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[103] *Id*.

[104] *Id*.

[105] *Id*. (quoting *In re Semcrude, L.P.*, 728 F.3d 314, 326 (3d Cir. 2013)).

[106] *Id*.

III. EXCLUSIVITY TERMINATION

1. *In re Adelphia Commc'ns Corp.*, 352 B.R. 578 (Bankr. S.D.N.Y. 2006), *clarified on denial of reconsideration*, No. 02-41729, 2006 WL 2927222 (Bankr. S.D.N.Y. Oct. 10, 2006)

   (a) The bankruptcy court's opinion here first addressed the creditors' assertion that the Debtor jointly filing a plan during the exclusivity period implied that the Debtor had involuntarily waived its period of exclusivity. The court indicated that it was "loath to find inadvertent waiver here. … Because waiver of a right must be proved to be intentional, [he would not] find accidental waivers lightly."[107] The court went on to reference prior case law[108] explicitly rejecting the idea of an inadvertent waiver of exclusivity and noted the lack of case law affirmatively finding a debtor inadvertently waived its right to the exclusivity period.

      (i) In making these findings, the court noted that Chapter 11 is intended to facilitate the debtor's rehabilitation and appease the greatest number of parties. He further noted that effectively penalizing a debtor (by finding an inadvertent waiver of exclusivity) for cooperating with other parties to propose a joint plan would be contrary to the intent of Chapter 11.

   (b) Next, the court turned to the considerations specific to exclusivity termination for cause, laying out the nine factors "courts typically rely on"[109]:

      "(a) the size and complexity of the case;

      (b) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;

      (c) the existence of good faith progress toward reorganization;

      (d) the fact that the debtor is paying its bills as they become due;

      (e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;

      (f) whether the debtor has made progress in negotiations with its creditors;

      (g) the amount of time which has elapsed in the case;

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[107] *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 586 (Bankr. S.D.N.Y. 2006), *clarified on denial of reconsideration*, No. 02-41729, 2006 WL 2927222 (Bankr. S.D.N.Y. Oct. 10, 2006)

[108] *See In re Texaco Inc.*, 81 B.R. 806, 810 (Bankr. S.D.N.Y. 1988).

[109] *In re Adelphia Commc'ns Corp.*, 352 B.R. at 587.

(cont'd)

(h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and

(i) whether an unresolved contingency exists."[110]

(c) The first factor spoke for itself, as the case had been active for years, with the court having issued with more 25 decisions in that case alone to date. The second factor also was quite simple in the court's view: the six or so weeks necessary to solicit votes was "*de minimis*"[111] in light of the four years already spent on the case.

(d) Turning to the third factor, the court highlighted its previously-stated approval of "the Debtors' progress on the operational side, their cooperation with their stakeholders, and their good faith efforts to achieve emergence[,]"[112] noting that the Debtors continued to cooperate in good faith with creditors and clarifying that "[t]he failure to have confirmed a plan up to this point has hardly been the Debtors' fault [but rather] the consequence of the continuing feuding between the Debtors' creditors."[113] This factor weighed heavily in favor of the Debtor, and the court "regard[ed it] as one of the more important factors."[114]

(i) The continuous intercreditor feuds also informed the court's analysis of the sixth factor, finding that an analysis of that factor "overlap[ped] materially"[115] with others and holding that "[i]n light of the contentious nature of [the] case, the Debtors have made tremendous progress in their negotiations"[116], referencing specific creditors whose approval the Debtors had recently obtained after their repeated rejections of prior proposals.

(e) Turning to the fourth factor, Judge Geber held that "the debtor's payment of bills as they become due [] would be more of a factor if it were *not* satisfied here,"[117] (emphasis in original). The eighth factor was similarly resolved, with the court finding that "whether the debtor [was] seeking an extension of exclusivity in order to pressure creditors to submit to [its] reorganization demands … would be

[110] *Id*.

[111] *Id*. at 588.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*. at 589.

[116] *Id*.

[117] *Id*. at 588.

(cont'd)

significant if [it were] present, but [it] ha[d] no material weight"[118] as "[c]reditors at every level in the corporate capital structure … ha[d] expressed support for the [j]oint [p]lan."[119]

(i) The court also noted that throughout the process he had "already taken steps, in connection with the disclosure statement approval process, to ensure that the solicitation for the [j]oint [p]lan [was] *not* coercive."[120]

(f) Turning to the fifth factor, the court clarified the relevant analysis. It emphasized that the question was not whether the currently-proposed plan was viable or likely to be confirmed but rather that "[the fifth] factor requires only that a debtor be able to attain confirmation of at least *some* viable plan[.]"[121]

(g) The court did not discuss the ninth factor but simply stated it did not lean in favor of terminating the exclusivity period.

(h) Importantly, in concluding the factors weighed against terminating exclusivity, the court opined that "[a] competing plans battle might well jeopardize current fragile agreements between various stakeholders, re-ignite intercreditor disputes, and push th[e] process back to square one. A competing plans battle would also likely drag out the solicitation process, subjecting the estate to substantial extra costs that might otherwise be avoided[.]"[122]

2. *In re Dow Corning Corp.*, 208 B.R. 661 (Bankr. E.D. Mich. 1997)

(a) The U.S. Bankruptcy Court for the Eastern District of Michigan had previously used the same nine factors to address exclusivity in a case where it ultimately found no cause to terminate exclusivity. As an initial matter, the court held that the parties requesting exclusivity termination would "bear the burden of establishing sufficiently changed circumstances which warrant[ed] relief from that order."[123] The court noted that, while "passage of time is a changed circumstance[] . . . it is not sufficient in and of itself to be cause to terminate exclusivity."[124]

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[118] *Id*. at 589.

[119] *Id*.

[120] *Id*. (emphasis in original).

[121] *Id*. at 588 (emphasis in original).

[122] *Id*. at 590.

[123] *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997).

[124] *Id*.

(cont'd)

(b) The first and second factor lent themselves to quick resolution, with the court noting that "[the] case [was] unique in its size and complexity"[125] and that "[t]wo years is clearly a long time."[126] However, the court also considered that "so much of that time ha[d] been spent in litigation or in awaiting results of litigation that the period for pure negotiating ha[d] not been nearly as long."[127]

 (i) The fourth factor was also quickly resolved, as it was obvious the debtor was "paying its bills on time and [was] extraordinarily sound financially[]"[128] as was the fifth factor, as "everybody [knew] that the prospects of attaining confirmation of some viable plan [were] excellent[,]"[129] and "[a] company of [the Debtor's] size and evident success will not simply be thrown away."[130]

(c) In terms of the third factor, the court found that, while there had been little real progress, "some progress towards reorganization ha[d] been made and [they were] unquestionably further along than when [they] started"[131]. Thus, the third factor "slightly (because the progress itself was so slight)"[132] weighed in favor of continuing exclusivity.

(d) The sixth factor was the subject of lengthy discussion, concluding with the court's agreement with the movants that the Debtor was using exclusivity as a stalling tactic. The court agreed with the movants that the Debtor was "going through the motions of negotiating a compromise, but giving up nothing in the process[,]"[133] effectively "mak[ing] a show of seeking consensus without making the slightest effort toward that end."[134]

 (i) Ultimately, the court was persuaded by the picture painted by the creditors, noting that "the Debtor ha[d] been stalling until th[e] Court ruled

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[125] *Id*. at 665.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id*.

[133] *Id*. at 667.

[134] *Id*.

(cont'd)

on"[135] other issues, and that "since the Debtor [was] making money hand over fist, delay [was] its friend."[136] Additionally, tort claims similar to those the Debtor was facing were being resolved in other courts, adding to the evidence that the Debtor was effectively waiting until it could use the other cases' resolutions to bolster support for itself in tort litigation while avoiding settling with its claimants in the meantime.

(e) The court reached the opposite conclusion on the eighth factor. In finding that the eighth factor favored the Debtor, the court noted the Debtor had offered multiple proposals, had shown "an extraordinarily thorough and deep understanding of the various avenues to achieving confirmation of a plan which would solve difficult problems in this case,"[137] and that the "[t]he failure to achieve a settlement on [the tort liability could not] be fairly laid solely at the Debtor's door."[138]

(f) Finally, and importantly, the opinion discussed at length the ninth factor – namely the issues of unresolved contingencies. The court held that "generally, the type of unresolved contingency which would be relevant to a motion to extend or to terminate exclusivity is one which is *external to the case itself*."[139]

(g) Near the conclusion of its opinion, the court noted that "[w]hen the Court is determining whether to terminate a debtor's exclusivity, the primary consideration should be whether or not doing so would facilitate moving the case forward. And that is a practical call that can override a mere toting up of the factors."[140]

3. *In re Borders Group, Inc.*, 460 B.R. 818 (Bankr. S.D.N.Y. 2011)

(a) More recently, in *Borders*, the U.S. Bankruptcy Court for the Southern District of New York analyzed the nine exclusivity factors from *Adelphia*, with the court ultimately "conclud[ing], in [its] discretion, that the Debtors … established cause for the extension of exclusivity."[141]

(b) The court discussed at length the ability of the Debtor to file a viable plan when considering whether exclusivity was warranted, noting that "courts have

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135 *Id*. at 667.

136 *Id*.

137 *Id.* at 669.

138 *Id*.

139 *Id*. at 666 (emphasis added).

140 *Id*. at 670.

141 *In re Borders Grp., Inc*., 460 B.R. 818, 824 (Bankr. S.D.N.Y. 2011).

(cont'd)

considered the likelihood of success of a debtor's reorganization activities"[142] in exclusivity determinations. The court cited *In re AMKO Plastics* for the notion that "losses are not inconsistent with an ultimately successful turn-around effort"[143] even after the initial 120-day exclusive period, during which time "bankruptcy courts have applied a lesser standard in determining whether the burden of showing 'a reasonable possibility of a successful reorganization within a reasonable time' has been satisfied."[144]

(c) In looking to the second factor the court noted that, while significant time had passed, the Debtors needed adequate time to "understand the number, nature and amount of valid claims against the estate,"[145] noting further that "[t]he Debtors ha[d] also been reviewing over one thousand executory contracts and unexpired leases"[146] – *i.e.*, the court analyzed the time factor in light of the Debtor's needs, not merely the number of days which had passed.

(i) Specifically, the court noted that "[a]s the Debtors continue[d] to pare down … [executory contract obligations], the Debtors [would] be able to present creditors with a more refined business model and projections for future operations—all of which are necessary for filing both a disclosure statement and a plan."[147]

(d) The court also considered the practical implications of terminating versus extending exclusivity. The primary consideration in *Borders* was "the terms of the Debtors' [DIP loan] … [under which] a termination of exclusivity [would] cause the Debtors to default."[148] The court felt that "[s]uch a result would lead to disastrous consequences for the Debtors and their creditors."[149]

(i) Also of note was the creditors' own admission that they did not intend to file a plan in the near future, merely that they "just want[ed] to be able to

[142] *Id*. at 824.

[143] *Id*. at 825 (citing *In re AMKO Plastics*, 197 B.R. 74 (Bankr. S.D. Ohio 1996)).

[144] *Id*. (quoting *Am. Network Leasing v. APEX Pharms., Inc.* (*In re APEX Pharms., Inc.*), 203 B.R. 432, 442 (N.D. Ind. 1996) (citing cases)).

[145] *Id*. at 826.

[146] *Id*.

[147] *Id*.

[148] *Id*. at 827.

[149] *Id*.

(cont'd)

do so without having to first to make a motion to reduce Debtors' exclusivity period."[150]

(ii) In line with the *Adelphia* court's concern with the potential barrage of competing plans, the court noted that "[t]erminating exclusivity … would … create a situation where the estates could be saddled with multiple and competing plans."[151] The court looked to *United Press* for the notion that "'[o]pening the floodgates' to allow each and every one of [the debtor's creditors] to file a plan … would not serve 'to secure the expeditious and economical administration of' [the] case nor 'to carry out the provisions of' the Bankruptcy Code."[152]

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150 *Id*.

151 *Id*. at 827-28.

152 *Id*. at 828 (alteration in original) (quoting *In re United Press Int'l., Inc.*, 60 B.R. 265, 271 n.12 (Bankr. D. Colo. 1986)).

Faculty

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. She also acts on a regular basis as the presiding judge in the Northern District of Illinois for naturalization ceremonies. Previously, Judge Baer was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is a member of the ABI and NCBJ Boards of Directors, the CARE Advisory Board and the Chicago IWIRC Network Board, as well as several committees. She also is a frequent speaker for ABI, the ABA, the Chicago Bar Association, IWIRC and NCBJ, and she regularly acts as the presiding judge for the Northern District of Illinois in naturalization ceremonies. Judge Baer earned her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Hon. Clifton R. Jessup, Jr. is a U.S. Bankruptcy Judge for the Northern District of Alabama in Decatur, appointed on March 2, 2015. He was formerly a principal shareholder in the Dallas office of the international law firm of Greenburg Traurig, LLP where he concentrated his practice in business reorganization and bankruptcy. During his more than 35 years of bankruptcy-related practice before taking the bench, Judge Jessup represented secured creditors, unsecured creditors, committees, equity-holders, debtors and trustees in federal bankruptcy cases in more than 37 states and Puerto Rico. He also represented purchasers of assets in bankruptcy cases, and served as examiner and mediator in many cases. In 2001, Judge Jessup was selected as the liquidating trustee under the confirmed chapter 11 plan in the Baptist Foundation of Arizona, the largest nonprofit bankruptcy cases filed to date. The cases involved more than 13,000 investors and claims in excess of $600 million. In 2009, he represented the Opus West Corp. in a chapter 11 case involving more than 50 commercial real estate properties in California and Texas with claims in excess of $1.2 billion. Judge Jessup received his J.D. in 1978 from the University of Michigan.

Hon. David R. Jones is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, sworn in on Sept, 30, 2011. Prior to becoming a judge, he was a practicing lawyer in Houston for approximately 19 years specializing in bankruptcy and bankruptcy-related litigation. Judge Jones received his B.S. in electrical engineering from Duke University in 1983, his M.B.A. from Southern Methodist University in 1986, and his J.D. from the University of Houston in 1992, where he served as editor-in-chief of the *Houston Law Review*.

Hon. Sean H. Lane is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Sept. 7, 2010. He clerked for Hon. Edmund V. Ludwig, U.S. District Judge for the Eastern District of Pennsylvania, from 1991-92, as well as for Hon. Charles R. Richey, U.S. District Judge for the District of Columbia, from 1992-93. From 1993-97, he practiced with the law firm of BakerHostetler in Washington, D.C., and thereafter served as a trial attorney in the Department of Justice, Civil Division, National Courts Section, until 2000. From 2000 until he was appointed to the bench, Judge Lane served as an assistant U.S. attorney for the Southern District of New York and was also chief of the Tax & Bankruptcy Unit of that office. During his time in the U.S. Attorney's Office, he was awarded the Attorney General's Distinguished Service Award in 2005 and the Henry L. Stimson Medal by the New York City Bar Association in 2008. Judge Lane is a member of the Federal Bar Council and has served as an adjunct professor at both New York University School of Law and Fordham Law School. He received his B.A. from New York University College of Art & Science in 1987 and his J.D. from New York University School of Law in 1991.

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