

Bankruptcy Appeals: Finality, Standing and Mootness

Bankruptcy appeals present complex legal issues that oftentimes trip up practitioners. To make matters particularly difficult, many of these complex issues have been created or developed in the case law and are not reflected in the statutes, the Federal Rules of Bankruptcy Procedure or in the appellate rules. However, according to the Brennan Center for Justice, “Americans are more likely to appear in bankruptcy court than in any other federal court.” Accordingly, bankruptcy appeal issues are of critical importance, not only to the lawyer who regularly practices in bankruptcy court, but also to the less-specialized practitioner, who may be handling an appeal of the determination of a claim, an objection to confirmation of a Chapter 11, 12, or 13 plan, or defending an adversary proceeding, such as a preference action or a fraudulent transfer case. This outline will give an overview of three difficult issues that arise in bankruptcy appeals: finality of an order, standing to appeal, and the judicially-created doctrine of equitable mootness.

A. Finality

During a large Chapter 11 bankruptcy case, thousands of orders may be entered. Even in a smaller Chapter 13 case a great many orders may be entered. Although there are some limited exceptions for interlocutory appeals, generally orders may only be appealed when they are “final.” Moreover, if an order is final, there is a limited time period to appeal from the order. To make matters complicated, an entire case does not have to be concluded for any particular order entered in the case to be subject to appeal. *See Perry v. First Citizens Fed. Credit Union (In re Perry)*, 391 F.3d 282, 285 (1st Cir. 2004) (“[t]o be final, a bankruptcy order need not resolve all of the issues in the proceeding, but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding.”). What does the case law establish about finality for appeals?

1. The leading cases from the Supreme Court are *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35 (2020) (order denying relief from the automatic stay was final order) and *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015) (order denying confirmation of Chapter 13 repayment plan was not final when order was entered without prejudice to refile another plan).
 - i. Leading cases from the courts of appeal include *Kiviti v. Bhatt*, 80 F.4th 520 (4th Cir. 2023) (parties may not use subterfuge to create finality; suggesting bankruptcy courts may hear matters that are Constitutionally moot); *Esteve v.*

Ubs Fin. Servs. Inc. (In re Esteva), 60 F.4th 664 (11th Cir. 2023) (order appealed from was not final); *COR Route 5 Co. v. Penn Traffic Co. (In re Penn Traffic Co.)*, 466 F.3d 75 (2d Cir. 2006) (appeal from district court order reversing bankruptcy court order was not final when district court had remanded matter to the bankruptcy court to take further action; noting that district court's disposition of the matter can make an otherwise final order non-final).

B. Standing

Standing to appeal from a bankruptcy court order is a complex issue. May all creditors appeal every order? May an entity that is not a creditor appeal a bankruptcy court order? May an entity that may be "out of the money" (that is, not clearly be able to recovery anything in a Chapter 11 case given the priority rule) have standing to appeal? May an entity that is indirectly harmed by a bankruptcy court order have standing to appeal?

1. Standing is a threshold constitutional requirement. This term, in holding that plaintiffs had no standing to challenge social media platforms for limiting certain content, the Supreme Court explained in *Murthy v. Missouri*, No. 23-411, 2024 U.S. LEXIS 2842 (June 26, 2024) at *21:

A proper case or controversy exists only when at least one plaintiff "establish[es] that [she] ha[s] standing to sue." She must show that she has suffered, or will suffer, an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." These requirements help ensure that the plaintiff has "such a personal stake in the outcome of the controversy as to warrant [her] invocation of federal-court jurisdiction."

(internal citations omitted).

See also Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016), explaining that, to have standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision").

2. Theoretically, the first issue in determining whether an entity has standing to appeal a bankruptcy court order will be whether the entity seeking to appeal had standing in the bankruptcy court. Bankruptcy Code section 1109(b) addresses who has standing in a Chapter 11 case:

A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

The Supreme Court has addressed the question of bankruptcy court standing twice in the last decade. It has held that “for standing purposes, a loss of even a small amount of money is ordinarily an “injury.” *Czyzewski v. Jevic Holding Corp.*, 589 U.S. 451, 464 (2017).

The Supreme Court took a liberal approach to the requirement for standing. In *Jevic* the Court held that certain priority claimants—former truck drivers who had Worker Adjustment and Retraining Notification (WARN) Act Claims--had standing.

Jevic was a Chapter 11 case, but it was terminated in a manner that had become increasingly popular, in what is dismissal order. Rather than merely dismissing the case, the dismissal order may provide for settlements, liquidating trusts, and, before the *Jevic* decision, distributions of estate property that does not comply with the statutory priorities set forth in the Code.¹⁷

In *Jevic*, the former employee's claims were entitled to priority. However, the secured creditor appeared to be undersecured. Given the rules of priority, that generally would mean that there was no money to pay the individuals who held the WARN Act claims.

The bankruptcy estate did, however, have another asset: an unliquidated fraudulent conveyance cause of action that skipped the WARN Act claimants and paid more junior creditors. The Defendants argued that they would never settle with the priority WARN Act claimants, the WARN Act claimants had therefore suffered no loss, and thus the Warn Act claimants had no standing to appeal from an order approving the settlement and the distribution of the settlement's proceeds.

The stated reason for the priority-skipping settlement was that the potential equity holder defendant wanted to deprive the truck drivers of a war chest they could use in a different suit against the owners that the truckdrivers had brought to recover on their WARN Act claims. That suit was based on an alter ego theory. In fact, the bankruptcy court had found that the truck drivers had no money to bring the fraudulent conveyance suit, and that the private equity group that had owned the debtor and the lender were well-funded. For that reason, the court had concluded, a lawyer would be highly unlikely to take the case on a contingency basis. For that reason, the bankruptcy judge had approved

¹⁷For a discussion of structured dismissals prior to the *Jevic* decision, see Sally McDonald Henry, *Chapter 11 Zombies*, 50 Ind. L. Rev. 579 (2017).

the priority-skipping settlement because he had concluded that there was “no realistic prospect” of any distribution to the drivers. *Id.* at 462-64.

More recently, the Court held, in *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414 (2024), that an insurance company that was not a creditor of the debtor had standing in a Chapter 11 case, overturning a court of appeals decision that the insurance company did not have standing.

The creditor, Truck Insurance Exchange (“Truck”) was a primary insurer of the debtor, which had entered Chapter 11 to address its huge asbestos liabilities. Under the debtor’s insurance policy, Truck had an obligation to pay up to \$500,000 for insurance claims, and Kaiser had certain duties of cooperation to Truck. The Kaiser Chapter 11 plan had “required the Bankruptcy Court to make a finding that the Debtors’ conduct in the bankruptcy proceedings neither violated [its] assistance and cooperation duty nor breached any implied covenant of good faith and fair dealing.” (*Id.* at *11-12). Moreover, the plan provided for a difference in the manner that insured and uninsured claims were to be liquidated. Uninsured claims would be liquidated in a novel claims-processing forum, while insured claims would have to be liquidated in the usual forums. Nevertheless, the courts below had held that the Kaiser Chapter 11 plan was insurance neutral, and that Truck had no standing to appeal. *Hanson Permanente Cement, Inc. v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 60 F.4th 73 (4th Cir. 2023). The Supreme Court did not agree because the debtor’s reorganization plan did affect the insurer.

In her decision, Justice Sotomayor emphasized the importance of broad participation in bankruptcy cases. She explained:

Broad participation promotes a fair and equitable reorganization process. The Bankruptcy Code seeks to prevent “the danger inherent in any reorganization plan proposed by the debtor” that “the plan will simply turn out to be too good a deal for the debtor’s owners.” . . . Section 1109(b) addresses this concern “[D]rafters and early commentators hoped that an expansive definition [of “party in interest” in § 1109(b)] would allow a broad range of individual and minority interests to intervene in Chapter 11 cases, and expressly warned that undue restrictions on who may be a party in interest might enable dominant interests to control the reorganization process.”

Id. at * 18-19 (citations omitted).

While Justice Sotomayor put great weight on the risk to Truck given the plan injunctions and the structure of liquidating the claims, she also agreed with the

government's argument that Truck being a party to an executory contract with the debtor was important. She explained

[t]his being a party to an executory contract) is just another side of the same coin. Those executory contracts are the ones that give insurers an interest in the proceedings and, in this case, make Truck financially responsible for the bankruptcy claims. . . . Where a proposed plan “allows a party to put its hands into other people’s pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed.” *In re Global Indus. Technologies, Inc.*, 645 F.3d 201, 204 (CA3 2011).

Interestingly, the Court has not directly addressed a non-statutory bar that courts have placed on appeals from bankruptcy court orders: the doctrine of “prudential standing.” This doctrine requires not only that an appellant be affected by the bankruptcy court’s order, but that it be affected directly in a pecuniary manner. While the Supreme Court has not addressed the doctrine of prudential standing in bankruptcy appeals, it has been hostile to related doctrines in dicta in other appeals. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 246 (2014). (“sufficient imminent injury for Article III purposes . . . because threat of future enforcement was substantial”). Addressing the argument that the appeal should be dismissed because it was not “prudentially ripe, the Court explained

To the extent respondents would have us deem petitioners’ claims nonjusticiable “on grounds that are ‘prudential,’ rather than constitutional,” “[t]hat request is in some tension with our recent reaffirmation of the principle that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.”

Id. at 167 (citations omitted).

3. In any event, here are a few of the more interesting decisions from the courts of appeal:

a. The “Out of the Money” Creditor.

i. *DISH Network Corp. v. DBSD North America Inc. (In re DBSD North America Inc)*, 634 F.3d 79, 89-91 (2d Cir. 2010). Here, the Second Circuit held that even a creditor that is “out of the money” has standing to contest a plan and appeal from confirmation of a Chapter 11 plan so long as it has a valid claim; otherwise, it could be denied its rights in a bankruptcy case, such as the right to vote.

b. Asset Purchasers

Everex Systems, Inc. v. Cadtrack Corp. (In re CFLC, Inc.), 89 F.3d 673 (9th Cir. 1996) (purchaser of debtor's assets had standing to appeal order regarding assignment of one of the contracts it sought to have assigned to it even though the debtor did not appeal the order).

c. An Entity Harmed Only Indirectly.

- i. *Thankakur v. DCT Sys. Grp., LLC (In re Bay Circle Prop.)*, 955 F.3d 874 (11th Cir. 2020) (any injury the appellant suffered was the result of indirect ownership in LLC and for that reason individual had no standing to appeal; adopting "person aggrieved" standard that was set forth in the prior Bankruptcy Act).
- ii. *Wigley v. Wigley (In re Wigley)*, 886 F.3d 681 (8th Cir. 2018) (debtor's wife who was target of fraudulent transfer claim was not person aggrieved who had standing to appeal from order confirming reorganization plan).

d. A Creditor Not Harmed by a Particular Order it Seeks to Appeal.

- i. *Kane v. Johns Mansville Corp.*, 843 F.2d 636, 541-42 (2d Cir. 1988) (party cannot assert alleged wrongdoing to others on appeal; party that was not a "future creditor" of Manville could not appeal on the basis that future creditors' were wrongfully treated under the reorganization plan).
- ii. *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones, L.L.P. (In re Highland Capital Mgmt., L.P.)*, 74 F.4th 361 (5th Cir. 2023) (defendant in pending adversary proceeding was not a person aggrieved that had standing to appeal from award of attorney's fees).
- iii. *In re Helmstetter*, 44 F.4th 676 (7th Cir. 2022) (entity that could not show personal benefit from appeal had no standing to appeal).
- iv. *Clifton Cap. Grp., LLC v. Shrp (In re E. Coast Foods, Inc.)*, 80 F. 4th 901 (9th Cir. 2023) (entity not harmed by order could not appeal from that order; appellant could not show that enhanced fee award would affect its recovery).

C. Mootness

1. **Constitutional mootness** applies to cases coming from federal courts, because of the Constitution's requirement that the federal courts hear "cases and controversies." Appeals can therefore be dismissed when they are Constitutionally

moot. *Lynch v. Deutsche Bank Nat'l Tr. Co. (In re Lynch)*, Nos. 22-1494, 22-1495, 2024 U.S. App. LEXIS 4186 (2d Cir. Feb. 23, 2024) (appeals were moot when underlying bankruptcy case had been closed); *Bailey v. Worthington Cylinder Corp.*, 90 F.4th 1193 (7th Cir. 2024) (appeal was constitutionally moot); *Taleb v. Miller, Canfield, Paddock & Stone, P.L.C. (In re Kramer)*, 71 F.4th 428 (6th Cir. 2023) (objection to trustee's final report was not constitutionally moot because appellate court could have ordered that the underlying bankruptcy case be opened). See generally, *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (contrasting Constitutional and equitable mootness).

2. But wait—appeals from Bankruptcy Court orders are also subject—in every circuit—to the doctrine of “**equitable mootness.**” What is that? In short, it is a judicially-crafted doctrine that requires the dismissal of an appeal when it is too late “to unscramble to the eggs.” That being recognized, the doctrine takes different forms in different circuits and the Seventh Circuit Court of Appeals even refuses to use the term--equitable mootness--recognized in all the other circuits. There, it is “the doctrine that has no name.” Here are a few of the relevant cases:
 - a. *United Sur. & Indem. Co. v. López-Muñoz (In re Lopez-Muñoz)*, 983 F. 3d 69 (1st Cir 2020) (appeal from order was equitably moot; appellant had not sought to obtain a stay and the plan had been confirmed two years before the appeal was heard and was substantially consummated).
 - b. *R2 Invs. v. Charter Communications, Inc. (In re Charter Communications)*, 691 F.3d 476 (2^d Cir. 2012) (totality of circumstances led to conclusion appeal was equitably moot; under the circumstances, court gave little weight to failure to seek a stay or to non-severability provision in the reorganization plan); *Beeman v. BGI Creditors Liquidating Trust (In re BGI)*, 772 F. 3d 102 (2^d Cir. 2014) (appeal from order confirming liquidating plan was equitably moot).
 - c. *United Sur. & Indem. Co. v. Lopez-Muñoz (In re Lopez-Muñoz)*, 983 F. 3d 69 (1st Cir. 2020) (appeal from order was equitably moot; appellant had not sought to obtain a stay and the plan had been confirmed two years before the appeal was heard and had been substantially consummated).
 - d. *One2One Communications LLC v. Onad Graphics, Inc.*, 805 F.3d 428, 438-53 (3d Cir. 2015) (given simplicity of plan, appeal was not equitably moot; majority declines to hold doctrine of equitable mootness no longer valid noting that only an *en banc* court could make that determination; arguing, nevertheless, that the equitable mootness doctrine should be applied with caution); *In re ICL Holding, Inc.*, 802 F.3d 547, 554-55 (3d Cir. 2015) (appeal from sale order that distributed

proceeds in a manner inconsistent with priorities was not moot: “[o]utside the plan context, we have yet to hold that equitable mootness would cut off our authority to hear an appeal, and do not do so here.”); *Tribune Media Co. v. Aurelius Capital Mgmt., L.P.*, 799 F.3d 272 (3d Cir. 2015) (appeal from order confirming plan was equitably moot; articulating two-part test adopted by many courts).

- e. *Mac Panel Co. v. Virginia Panel Corp.*, 282 F. 3d 622 (4th Cir. 2002) (given the many events that had occurred since the confirmation date, appeal was equitably moot). *See also Behrmann v Nat’l Heritage Found Inc.*, 663 F.3d 704, 714 (4th Cir. 2011) (appeal not equitably moot; appellant had obtained stay and plan had severability clause); *Retired Pilots Assoc. of US Airways, Inc. v. US Airways Group, Inc. (In re US Airways Group, Inc)*, 369 F.3d 806, 810 (4th Cir. 2004) (failure to seek a stay weighs heavily in favor of finding that an appeal is equitably moot; dismissing appeal as equitably moot).
- f. *Bank of New York Co., N.A. v. Official Unsecured Creditors’ Committee (In re Pacific Lumber Co)*, 548 F.2d 229 (5th Cir. 2009) (emphasizing that doctrine should be used “like a scalpel, not an ax” and determining that some claims on appeal were moot, particularly when they affected innocent third parties, but others were not moot). *See also Nexpoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419 (5th Cir. 2022) (denying motion to dismiss appeal on the grounds that appeal was equitably moot; emphasizing court should use scalpel and not ax); *Scotia Dev. LLC v. Marathon Structured Fin. Fund L.P. (In re Scopac)*, 624 F.3d 274, 282 (5th Cir, 2010) (effect of appeal on sophisticated creditor unimportant in determining mootness; creditor could have anticipated effect of appeal); *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 to a liquidating case).
- g. *In re UNR Industries, Inc*, 20 F.3d 766, 769 (7th Cir. 1994) (Judge Easterbrook opines that the term “equitable mootness is misleading,” but declines to “upend the plan”); *see also S.E.C. v. Wealth Mgmt., LLC*, 628 F.3d 323, 332 (7th Cir. 2010).
- h. *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880 (8th Cir. 2021) (remanding for consideration of equitable mootness issue; declining to articulate test); *In re President Casinos, Inc*, 691 F.3d 476, 4409 F. App’x 31, 31-32 (8th Cir. 2010) (dismissing appeal as being equitably moot).

- i. *Grasslawn Lodging, LLC v. Transwest Resort Props.*, 801 F.3d 1161 (9th Cir. 2015) (appeal from order confirming reorganization plan of debtor in real estate business not equitably moot even though stay had been denied).
- j. *Search Mkt. Direct, Inc v. Jubber (In re Paige)*, 584 F.3d 1327 (10th Cir. 2009) (applying six-factor test to determine that appeal from confirmation order was not constitutionally or equitably moot).
- k. *NLG LLC v. Horizon Hosp. Grp. LLC (In re Hazan)*, 10 F 4th 1244 (11th Cir, 2021) (appeal from order confirming individual's reorganization plan was equitably moot; doctrine not limited to complex reorganization plans). *Compare Alabama Dep't of Econ. & Cmty Affairs v, Ball Healthcare-Dallas LLC (In re Lett)*, 632 F.3d 1216 (11th Cir. 2011) (recognizing doctrine but not applying it in the case before it).
- l. *In re AOV Industries*, 792 F.2d 1140 (D.S. Cir.1986) (recognizing doctrine but applying doctrine only to some of the claims before it).
3. Putting aside issues of Constitutional or equitable mootness, **statutory mootness** is provided for in 11 U.S.C. § 363(m), which provides that:

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Cases interpreting this section include *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 143 S. Ct. 927 (2023) (Code § 363(m) is not jurisdictional and therefore it can be waived); *Swiss Re Corp. Sols. Am. Ins. Co. v. Fieldwood Energy III, L.L.C. (In re Fieldwood Energy LLC)*, 93 F.4th 817 (5th Cir. 2024) (compliance with § 363(m) is mandatory); *Reynolds v. Servisfirst Bank (In re Stanford)*, 17 F.4th 116 (11th Cir. 2021) (appeal had to be dismissed because it was moot under Code section 363(m); appellant had not sought a stay); *River W. Plaza-Chic. LLC*, 664 F.3d 668 (7th Cir. 2011) (appeal of sale order moot because appellant had not obtained a stay); *Anderson Senior Living Prop. LLC v. Official Comm. of Unsecured Creditors (In re Nashville Senior Living, LLC)*, 620 F. 3d 584 (6th Cir. 2010) (appeal of sale order moot); *Asset Based Res. Grp. L.L.C. v. U.S. Tr. (In re Polaroid Corp.)*, 611 F.3d 438 (8th Cir 2010) (appeal of sale order moot).

Bankruptcy Code section 364(e), which relates to post-petition financing, also provides for statutory mootness. That section provides:

The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

That section was explored, for example, in *Weinstein, Eisen & Weiss, LLP v. Gill (In re Cooper Commons, LLC)*, 430 F.3d 1215 (9th Cir 2005), in which the Ninth Circuit Court of Appeals carefully examined each type of relief the appellant sought in determining whether Code section 363(e) barred the appeal. *See also Resolution Trust Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc.)*, 16 F.3d 552, 559 (3d Cir. 1994) (§ 364(e) does not by its terms require the dismissal of an appeal if the appellant does not obtain a stay).