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SLIPPING INTO MOOTNESS

By George W. Kuney[*]

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INTRODUCTION

There is said to be a strong public policy in favor of protecting third parties who act in good faith on a bankruptcy court's decisions. Although an objecting and appealing party can protect itself by obtaining a stay of the order involved, this often requires posting substantial security.[1] If a stay is not obtained, third parties will rely on the order or judgment, the sale will close, the lessee will take possession, the loan will be drawn down, or the plan will be substantially consummated. At that point, the reviewing court is said to be unable to provide effective relief and any appeal of the order or judgment may be dismissed as moot. The doctrines of statutory, constitutional, and equitable moot-

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ness in bankruptcy proceedings govern whether an appeal will be considered moot and thus dismissed. The first three sections of this article discuss each of these doctrines, while the fourth presents important exceptions to them. The fifth section examines the process of a court making a good faith finding in connection with statutory mootness under section 363(m). The article concludes that the mootness doctrines are broad—perhaps broader than is desirable—and can be subject to both aggressive use and abuse in practice.

I. *CONSTITUTIONAL MOOTNESS*

Constitutional mootness is derived from "Article III's prohibition against courts issuing advisory opinions."[2] Article III's "case or controversy" requirement "dictates that federal courts refrain from rendering judgments in expired disputes that would amount to mere advisory opinions."[3] The doctrine ensures that a litigant has an interest in the outcome throughout the entire lawsuit, including while the appeal is pending.[4] If the court cannot provide the relief requested, the case is considered constitutionally moot.[5]

To avoid mootness, a claim must: (1) present a real legal controversy, (2) genuinely affect an individual, and (3) have sufficiently adverse parties.[6] A live case or controversy exists if the parties have an interest in the outcome of the litigation.[7]

The threshold for judging an appeal as constitutionally moot is high.[8] An appeal "is moot in the constitutional sense only if events have taken place that makes it impossible for the court to grant any effectual relief whatever."[9] The inability to restore the parties to the state in which they were before (status quo ante) is not grounds for rendering an appeal constitutionally moot.[10] If any meaningful relief can be granted, "even if it only partially redresses the grievances of the prevailing party, the appeal is not moot."[11]

One type of event that may make an appeal constitutionally moot is "[t]he sale of a debtor's property to a non-party if the debtor seeks only a return of its property."[12] Constitutional mootness focuses solely on the court's ability (or inability) to provide effective relief; therefore, the conduct of the parties is irrelevant.[13]

Determination of constitutional mootness is an intensely factual inquiry.[14] There is no precise test for determining whether a case is moot; instead, mootness is a matter of degree and the focus is on whether all or a part of the requested relief is still available or whether an event during the pendency of the appeal has rendered it impossible for such relief to be granted.[15]

II. EQUITABLE MOOTNESS

Equitable mootness is broader than constitutional mootness.[16] Under this doctrine, an appeal is to be dismissed as moot even though effective relief could conceivably be granted if such relief would be inequitable.[17] "[C]onstitutional mootness is characterized by an '*inability* to alter the outcome' while equitable mootness involves an '*unwillingness* to alter the outcome.'"[18] Equitable mootness involves a court's recognition that "there is a point beyond which they cannot order fundamental changes in reorganization cases."[19] However, the Third Circuit has noted that "the doctrine is limited in scope and should be cautiously applied."[20]

Equitable Mootness "is a pragmatic principle, grounded in the notion that, with passage of time after a judgment in equity and implementation of that judgment effective relief on appeal becomes impracticable, imprudent, and therefore inequitable."[21] It has been held that "dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modified rights, particularly of persons not before the court, to such an extent that effective judicial relief is no longer practically available."[22] Equitable mootness is most likely to be applied when the party seeking redress does not take any action until the reorganization plan is substantially consummated and has been relied upon by third parties.[23]

Courts have held that compelling reasons must exist before a plan of reorganization that has already been substantially consummated should be disturbed.[24] The doctrine involves a balancing act between the desire for finality and good faith reliance on the bankruptcy decisions and the right of a party to appeal an adverse judgment.[25]

The Fourth Circuit has adopted a totality of the circumstances test in which four factors are evaluated to determine if dismissal on grounds of equitable mootness is warranted. The factors are:[26]

(1) whether the appellants sought and obtained a stay;
(2) whether the reorganization plan or other equitable relief order has been substantially consummated;
(3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and
(4) the extent to which the relief requested on appeal would affect the interest of third parties.

The Sixth Circuit has adopted a similar approach where only three factors are analyzed to determine whether an appeal is equitably moot: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would

affect either the rights of parties not before the court or the success of the plan.[27] This approach essentially combines the third and fourth factors from the Fourth Circuit's totality of the circumstances approach into a single factor. This test was derived from the same three-factor approach used by the Fifth Circuit.[28]

The Third Circuit adopted the equitable mootness doctrine in *In re Continental* and listed a fifth factor that should be considered in addition to the four noted in the totality of the circumstances approach: the public policy of affording finality to bankruptcy judgments.[29] This additional factor has been described as 'the lens through which the other factors should be viewed."[30] The public policy factor involves an inquiry into "whether we want to encourage or discourage reliance of investors and others on the finality of a bankruptcy confirmation order."[31] As is evident from its phrasing, this public policy factor will most often militate toward a finding of equitable mootness, especially in larger and public company bankruptcies that affect the interests of many third parties.

In all circuits, the factors are given varying weight depending on the circumstances; however, the primary factor when dealing with an appeal of a confirmation order is whether the reorganization plan has been substantially consummated.[32] Substantial consummation is defined in section 1101(2) of the Bankruptcy Code 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) the commencement of distribution under the plan."[33] Thus, although the term may seem to suggest major progress in carrying out the plan, actually only the first step is needed in order to reach "substantial consummation." It has been recognized as the "statutory measure for determining whether a reorganization plan can be amended or modified by the bankruptcy court"—it is the point of no return in Chapter 11 and if the pertinent parties are organized, this point can be reached with surprising speed.

Substantial consummation, although it may be the primary factor, is still only a factor and is not dispositive of whether the court will consider the case equitably moot.[34] As enunciated by the Second Circuit, substantial consummation creates a presumption of mootness that can be rebutted.[35]

Substantial consummation will not make an appeal moot 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 pursued 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.[36]

Like other exceptions to mootness, this exception is a narrow one and one that can be overcome by the prevailing parties' rapid "scrambling of the egg" to prevent review.

III. STATUTORY MOOTNESS

A. 11 U.S.C.A. § 363(M)

i. The Basic Standard

Statutory mootness under section 363(m) is broader in scope than constitutional or equitable mootness as it requires appeals to be considered moot, absent a stay, even when they are not constitutionally or equitably moot.[37] A purchaser who, in good faith, enters into a purchase or lease agreement with a trustee will not be affected by the reversal or modification on appeal whether or not the purchaser knew of the pendency of the appeal. The statute specifically provides that:

> 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.[38]

Similar protections exist for court approved financing transactions under 11 U.S.C.A. § 364(e), discussed below.

Section 363(m) creates a rule of statutory mootness.[39] For section 363(m) to apply, the bankruptcy debtor's asset must have been sold under section 363(a) or (b).[40] The statue is inapplicable if the appellant has obtained a stay pending appeal of an order that permits the sale of a debtor's assets.[41] When a good faith purchaser enters into a sale and a stay of that sale order is not obtained, then § 363(m) will moot the appeal and makes that sale final.[42]

The statute's primary purpose is to encourage participation in bankruptcy asset sales and increase the value of the estate's property by protecting third party purchasers who have acted in good faith in making the purchase.[43] This section "codifies Congress's strong preference for finality

and efficiency in the bankruptcy context, particularly where 3rd parties are involved."[44] Section 363(m), it is said, does not affect a claimant's ability to adjudicate her claim in bankruptcy court or on appeal; it merely serves to require a stay of the sale pending appeal in order to protect the interests of third parties who are acting in good faith.[45] Given the size of the bond that may be required to stay an order approving a transaction of any real size or import, this characterization is, at best, merely glib and, at worst, a cynical characterization meant to cover up the sweeping breadth of 363(m)'s effects on objecting parties right to be heard.

The Sixth Circuit in *Weingarten Nostat Inc. v. Service Merchandise Co., Inc.* refused to determine whether § 363(m) creates a per se rule mooting appeals absent a stay of the sale.[46] However, the court noted a "split" in the circuits on the issue—although this may be better characterized as small variances in narrow exceptions to 363(m) mootness.[47] The Third Circuit—an important one for business bankruptcy professionals as it includes the district of Delaware within its ambit—has not adopted a per se rule and instead has held that "the failure to obtain a stay pending appeal does not dispose of the case so long as a remedy can be fashioned that does not disturb the validity of the § 363 sale at issue."[48] Notwithstanding this potentially hope-inducing standard, it does not appear that this "exception" to mootness is found in many fact patterns and one is left to wonder what remedy an objecting party to a section 363 sale would be seeking that "did not distort" the validity of the section 363 sale. One answer could be an objection to a particular, probably collateral, finding of fact or conclusion of law in the sale order that has been appealed.[49] Given the narrowness of this exception, for most practical purposes the Third Circuit should be viewed as having adopted a de facto per se rule.

The majority of courts, however, have explicitly adopted a per se rule, "automatically mooting appeals absent a stay of the sale or lease at issue."[50] The Fourth Circuit has adopted this rule, stating that, without a stay, a challenge of the sale's validity is moot because there is no remedy available.[51] The Ninth Circuit generally follows a per se rule,[52] but has recognized two exceptions: (1) where real property is sold subject to a statutory right of redemption, and (2) where state law otherwise would permit the transaction to be set aside.[53] The Tenth Circuit follows a rule similar to the Third Circuit in that section 363(m) is said to only moot the appeal "if the remedy being sought by the appellant affects the validity of the bankruptcy sale at issue. Stated differently, even if § 363(m) applies, it will not moot an appeal if state law or the Bankruptcy Code itself provides a remedy which does not affect the validity of the bankruptcy sale at issue."[54] Again, this exception appears to be a narrow one indeed.

ii. 363(m)'s Lack of Protection If a Stay is Obtained

The last sentence of the statute indicates that if a stay were obtained, a purchaser, even one in good faith, is not protected.[55] The cost of a bond necessary to secure the stay pending appeal, however, makes this provision practically unavailable in the context of major transactions. It also creates a strong incentive for the buyer and seller to close and consummate the approved transaction before a stay can be obtained.

iii. Section 363(m)'s Good Faith Finding Requirement

If a stay has not been obtained, a good faith purchaser is protected; however, the absence of good faith is grounds to allow the asset sale to be challenged.[56] The burden of proof falls on the party alleging bad faith which is made difficult by the absence of the definition of good faith in the Bankruptcy Code.[57] The traditional, somewhat circular equitable definition of a good faith purchaser defines a good faith purchaser as "one who purchase the assets for value, in good faith, and without notice of adverse claims."[58] A purchase for value can be shown when the purchaser pays 75% of the appraised value for the assets.[59]

Most courts have stated that the "requirement that a purchaser act in good faith... speaks to the *integrity of his conduct in the course of the sale proceedings*" and that "[t]ypically, the misconduct that would destroy a purchaser's good faith status... involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of the other bidders."[60] The purchaser's intended use of the assets purchased is irrelevant to whether he acted in good faith.[61] The bankruptcy court that authorizes the sale of assets "is required to make a finding with respect to the 'good faith' of the purchaser" as they are in the best position and are most familiar with the parties and proceedings to make such a determination.[62]

Courts have declined to hold that a court-appointed agent of the debtor who has an interest in the purchase of the debtor[63] or an insider who has made full disclosure of his involvement[64] is bad faith per se. In adopting the majority rule that the sale of assets to a fiduciary or insider is not bad faith per se, courts have looked, instead, primarily at three factors to test for good faith: (1) whether the insider gave full disclosure to both the court and the parties involved; (2) whether the debtor sought other buyers and whether the insider paid an adequate price; and (3) the nature of the relationship between the debtor and the insider-buyer.[65] It is hard to distinguish this test from a "full disclosure and totality of the circumstances" test.

B. 11 U.S.C.A. § 364(E)

i. The Basic Standard

The same protections that exists for good faith purchasers under section 363(m) exist for those extending credit pending an appeal of an authorization to incur debt.[66] The statute specifically provides that:

> 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.[67]

Section 364(e) is modeled after section 363(m).[68] The legislative history of section 364(e) indicates that "the credit is not affected on appeal by reversal of the authorization unless the authorization and the incurring of the debt were stayed pending appeal. The protection runs to a good faith lender, whether or not he knew of the pendency of the appeal."[69] The purpose of section 364(e) is "to encourage the extension of credit to debtors in bankruptcy by eliminating the risk that any lien securing the loan will be modified on appeal."[70] It provides the "debtor a means to obtain credit after filing bankruptcy."[71]

Section 364(e) allows a good-faith lender "that extends credit in reliance on a financing order [to be] entitled to the benefit of that order, even if it turns out to be legally or factually erroneous."[72] As is the case with section 363(m)'s protections, two questions arise in determining whether section 364(e) will protect a creditor: (1) whether the objecting party attempting to challenge an authorization of credit obtains a stay pending an appeal; and (2) whether the lender or group of lenders acts in good faith in extending the new credit.[73] Only a good faith lender is protected.[74] Good faith is considered a mixed question of fact and law and is not presumed.[75]

If statutory mootness under section 364(e) applies, the claim is considered moot "as soon as the lender has relied on that authorization."[76] As with section 363(m), this creates a strong incentive to fund the loan in question as soon as an order approving the financing with the requisite good faith finding is entered.

ii. The Scope of § 363(e)'s Protections

There is a disagreement among courts as to whether the statute applies to cross-collateralization clauses. The Ninth Circuit has stated

that "[s]ince protecting the validity of any clause of the debt agreement that might have motivated the creditor to extend the credit" serves the purpose of the statute, section 364(e) also protects cross-collateralization clauses.[77] The Tenth Circuit has stated that section 364(e) "prohibits not only outright invalidation of a lien or priority where the challenging party has failed to seek a stay, but also modification of the terms of a post-petition lender's bargained for collateral."[78] Thus, section 364(e) is read "to apply not just to the validity of financing itself, but also to the terms of collateralization.[79] The Eleventh Circuit criticized the holdings of the Ninth Circuit in *In re Adams Apple, Inc.*[80] and the Sixth Circuit in *In re Ellingsen MacLean Oil Co.*[81] that extended section 364(e) to cross-collateralization.[82] The court concluded that cross-collateralization is "inconsistent with bankruptcy law" because it is "not authorized as a method of post-petition financing under section 364" and it "is beyond the scope of the bankruptcy court's inherent equitable power because it is directly contrary to the fundamental priority scheme of the Bankruptcy Code."[83] The court thus held that section 364 is inapplicable to cross-collateralization.[84]

The Sixth Circuit adopted a "whole-package" approach stating that if a provision (such as waiver) does not fit precisely in section 364, if it is part of the "whole-package authorized under § 364(c)," it will be afforded the protection of § 364(e).[85] This is due to the reluctance "to sever individual provisions, whether legal or not, in the absence of a stay pending appeal."

The Third Circuit has held that section 364(e) does not "protect a lender with respect to money it has not distributed."[86] The court stated that "if a section 364(d) order is reversed and thereafter the lender makes no further disbursements, the lender does not need protection for the funds it has retained. At most, the lender has lost the expectation of making a loan on terms which it found acceptable."

Similar to its treatment of section 363(m), the Third Circuit has said that it refuses to adopt a per se rule of statutory mootness under section 364(e) absent a stay.[87] The court stated that section 364(e) "does not require dismissal of an appeal if the appellant does not obtain a stay" and "does not preclude a court from reversing an authorization absent a stay. What it limits is the effect of the reversal."[88] Although section 364(e) "standing alone does not require dismissal of an appeal when a stay is not granted, it might establish circumstances which under law other than section 364(e) require dismissal of the appeal."[89] Thinking critically about these pronouncements, one may question the meaningful nature of a right stripped of any remedy.

IV. EXCEPTIONS TO THE MOOTNESS DOCTRINES

While the doctrines of constitutional, statutory, and equitable mootness support the policy of finality and certainty, in bankruptcy proceedings, an exception to the mootness doctrines may be made if there is an important question of law that will likely recur. Courts have articulated four exceptions to the mootness doctrine:[90]

(1) the issue is a wrong capable of repetition yet evading review;
(2) there are secondary or collateral injuries;
(3) the defendant voluntarily stops the allegedly illegal practice but is free to resume it at any time; and
(4) the action is a properly certified class action suit.

A. Capable of Repetition, Yet Evading Review

The Supreme Court has repeatedly recognized the "capable of repetition, yet evading review doctrine."[91] The doctrine applies when "the duration of litigation invariably exceeds the life of the underlying dispute and an exception to traditional mootness analysis is necessary to afford the complaining party an opportunity to litigate its rights."[92] The Court further clarified this doctrine in its decision in *Weinstein v. Bradford*,[93] which is heavily cited by parties seeking to rely on this doctrine to avoid mootness.[94] In *Weinstein*, the court held that the "capable of repetition, yet evading review" doctrine is limited to situations in which the following two circumstances were simultaneously present: "(1) challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."[95] Unless both prongs of the test are met, the case will not escape mootness on this ground.

The courts have required compelling circumstances to avoid mootness.[96] The mere existence of an important legal question is insufficient.[97]

The Eighth Circuit has held that, in cases where a "stay pending appeal could have preserved the issue for appeal," the case will not fall within the capable of repetition, yet evading review doctrine. [98] Similarly, the Second Circuit refused to grant an exception to the mootness doctrine by focusing on "the order at issue and whether 'the elapsed time that gave rise to mootness' would always limit judicial review of the question presented on appeal."[99] The court went on to state that "[b]ecause the Trustee has the ability to seek a stay and an expedited appeal, the retention issue presented by this appeal did not inevitably–and, if it arises again, will not inevitably–lapse into mootness prior to review."[100]

The case law typically surrounds the application of the "capable of repetition yet evading review" doctrine in constitutionally moot cases; however, it has been applied to a section 363(m) case as well.[101] In one case, the court held that the prongs were not satisfied because the "Appellants failure to obtain a stay from this Court, pursuant to Bankruptcy Rule 8005, prevents it from establishing that the legal issue raised on appeal evaded review because of 'the intrinsically elusive nature of the action,' as required to avoid a finding of mootness."[102] The court also stated that "an issue does not evade review where legal avenues are available, including the ability to obtain a stay, but a party fails to utilize them."[103]

The "classic scenario of an issue 'capable of repetition, yet evading review'" occurred in the context of FIRREA[104] in *Marc Development, Inc. v. Federal Deposit Insurance Corp.*[105] There the court applied the doctrine stating that "any appeal of the 180 stay issue will always take longer than the FDIC's claims procedure, and there is a reasonable expectation that the FDIC will be placed in the same situation again."[106] Cases where courts have refused to apply the "capable of repetition, yet evading review" doctrine include *U.S. v. Arthur Andersen & Co.*, where the court stated that the "exception is not available to a litigant aggrieved by a summons or subpoena who could have avoided mootness by refusing to comply"[107] and *In re Campbell*, where the court stated that "[t]he application of a particular [interest] rate in Chapter 13 proceedings is not an event of inherently limited duration such that it will always evade review."[108] The "capable of repetition, yet evading review" doctrine cannot be applied when a person lacks standing at the time the action commences.[109]

B. *Other Exceptions*

An additional exception to mootness exists when the defendant voluntarily stops the allegedly illegal practice but is free to resume it at any time. This category stands "for the proposition that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'"[110]

An exception also exists if there are secondary or collateral injuries as a consequence of rendering the case moot. This exception requires that the "continuing legal harm from res judicata or collateral estoppel" be more than "merely hypothetical and speculative.[111] In order for this exception to apply, there must be "a substantial controversy, between parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of [what is essentially] a declaratory judgment."[112]

V. THE PROBLEMATIC FINDING OF GOOD FAITH

The determination of good faith necessary to invoke the statutory mootness projections of section 363(m) or 364(e) is the province of the trial court.[113] A finding of good faith is a factual inquiry that is said to require an evidentiary foundation rather than merely a boilerplate good faith finding in an order.[114] Courts have agreed that due to the fact-intensive nature of the good-faith inquiry, the finding should be made by the bankruptcy court.[115] In order to make such determination, "the court must examine 'the totality of the circumstances' and determine where a 'petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.'"[116] When there has been a challenge to the bankruptcy court's finding of good faith, the focus has often been on whether all facts were properly disclosed to the bankruptcy court to enable it to adequately make its determination.[117]

The dispute among the circuits is whether the bankruptcy court is required to make such a finding at the time of sale. The Third Circuit has held that the bankruptcy court that authorized the sale of assets "is required to make a finding with respect to the 'good faith' purchaser" as they are in the best position and are most familiar with the parties and proceedings to make such a determination.[118] Other courts have held that the "bankruptcy court may, but is not required to make a finding of good-faith purchaser."[119] Practitioners often advise their clients in a section 363 sale to "condition their offer to purchase on the bankruptcy court's including in its order approving the sale a specific finding of the purchaser's good faith."[120]

As a practical matter, this is a critical question. If an objecting party raises the specter of improper conduct but is unable to marshal sufficient evidence in support of the objection by the time of the sale hearing, a good faith finding may be made and, if the majority per se section 363(m) mootness rule is followed, the objector's appeal will be dismissed. To put the matter bluntly, if the parties proposing the transaction move ahead with alacrity, proposing it on minimum notice or even on shortened time (obtained through an ex parte application in many courts), and the objecting party cannot convince the bankruptcy court to deny—or at least delay—the motion, a finding of good faith will enable the parties to close the transaction moments after the order is entered, before a stay pending appeal can be obtained or even applied for! Sections 363(m) and 364(e) may, then, not be optimal procedural mechanisms to protect the rights of objecting parties—parties that may be represented by counsel outside the local bankruptcy bar or unrepresented by counsel at all. Perhaps an explicit 10-day stay along with the opportunity to later challenge the good faith finding for, say, 180 days—as is the case with plan confirmation orders that may be fraudulently obtained—would be better espe-

cially as section 363 sales are being used as the functional, de facto equivalent of plans of reorganization in many cases.[121]

Most courts seem to assume, without addressing the issue in their opinions, that the timing of the bankruptcy court's determination of good faith—generally at the hearing to approve the subject transaction—is adequate and should be only reviewed for clear error on appeal. One of the few cases to address this issue was *In re Thomas*.[122] The *In re Thomas* court recognized that "[t]he difficulty with the factual determination is that evidence genuinely probative of 'good faith' is not commonly introduced, or even reasonably available, at the time a bankruptcy court approves a sale."[123] In fact, that evidence, such as evidence of collusive bidding, tends to emerge, if ever, after the sale.[124] The Code thus allows a bankruptcy court to either refuse to make a good faith finding or to limit its remarks about good faith to stating it has no reason to believe the parties did not act in good faith if the court feels that the factual record is insufficient to make a proper determination.[125] Of course, the court is free to make the determination if the record is proper.[126]

Although the courts may disagree as to whether the finding of good faith must be made at the time of the sale, all seem to agree that the determination should be made by the bankruptcy court. If the bankruptcy court does not make finding of good faith and the issue is first brought to the attention of the court on appeal, courts remand the matter to the bankruptcy court to make a good faith finding.[127] Arguably, there may be some merit to remanding the matter to a *different* bankruptcy judge than the one that approved the transaction at issue. There is a natural tendency to protect one's prior decisions and to avoid finding that a mistake—like a non-good faith transaction—has taken place in one's own courtroom. Bankruptcy judges are people too.

In *In re Second Grand Traverse School*, the court held that "where [the] bankruptcy court had specifically found that the purchase was in good faith" the district court was not required to hold an additional hearing to readdress the good faith issue before dismissing the challenge as moot.[128] In this case, the appellant argued that the issue of good faith was not ripe for review at the time the bankruptcy court and the district court made their determination; however, the court rejected this by simply stating that there was no reason why it could not be decided earlier when the appellants had ample time and resources to respond to the good faith issues at the time they were initially raised.[129]

CONCLUSION

Constitutional, equitable, and statutory mootness promote finality and reliance upon the orders of a bankruptcy court regarding matters such

as financing; use, sale or lease of property of the estate; and plan confirmation. They do this by effectively squelching the objecting party's ability to obtain appellate review of the bankruptcy court's rulings without posting often substantial security. In 1978 when the code was enacted with enthusiastic praise for its laudatory goals of promoting reorganization preserving going concern value and maximizing payouts to unsecured creditors there were few that questioned the need for such finality.

Recent legislative reform has focused on providing a route for a direct appeal to the Circuit Courts of Appeal, by passing the district court or Bankruptcy Appellate Panel.[130] Perhaps these reforms will have the beneficial effect of speeding resolution of questions of law on a circuit-wide basis. However, they miss the point entirely in terms of most use, sale, or lease; financing; or plan confirmation orders where a quick cell phone call from the courthouse—"the order has been entered"—triggers a closing or loan funding—"pull the trigger"—that itself moots the appeal of the order, authorizing the transaction. Give any good lawyer a tool like that and she will use it. While there is no need to end the bankruptcy and reorganization party, a mandatory 10-day stay pending appeal to allow parties a meaningful opportunity to gain a stay from a reviewing court coupled with the ability to conduct postclosing or postfunding discovery to attack a cursory good faith finding would go a long way to keeping the party going at a manageable level and avoid excesses that can lead to perceptions of abuse and perhaps an overcorrection if the party gets too wild.

Research References:

Bankr. Serv., L Ed §§ 20:404 to 20:424; Norton Bankr. L. & Prac. 2d §§ 37:27, 87:24, 148:61; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. § 363; 9 Norton Bankr. L. & Prac. 2d Fed. R. Bankr. P. 7062, 8005

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Notes

1. Fed. R. Bankr. P. 8005 ("The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required").

2. Cinicola v. Scharffenberger, 248 F.3d 110, 118, 17 I.E.R. Cas. (BNA) 1089, Bankr. L. Rep. (CCH) P 78396 (3d Cir. 2001).

3. In re Carr, 321 B.R. 702, 706 (E.D. Va. 2005).

4. In re 455 CPW Associates, 2000 WL 1340569, *2 (2d Cir. 2000).

5. In re Carr, 321 B.R. at 705. The leading case on constitutional mootness is Church of Scientology of California v. U.S., 506 U.S. 9, 113 S. Ct. 447, 121 L. Ed. 2d 313, 92-2 U.S. Tax Cas. (CCH) P 50562, 70 A.F.T.R.2d 92-6055 (1992). In that case, the Supreme Court stated

that "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of Scientology of California v. U.S., 506 U.S. at 12 (quoting Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)). Thus, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." Church of Scientology of California v. U.S., 506 U.S. at 12; see also Cinicola v. Scharffenberger, 248 F.3d 110, 118-119, 17 I.E.R. Cas. (BNA) 1089, Bankr. L. Rep. (CCH) P 78396 (3d Cir. 2001); In re Continental Airlines, 91 F.3d 553, 558, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996).

6. Cinicola v. Scharffenberger, 248 F.3d at 118-119 (citations omitted).

7. Cinicola v. Scharffenberger, 248 F.3d at 118-119.

8. United Artists Theatre Co. v. Walton, 315 F.3d 217, 226, 40 Bankr. Ct. Dec. (CRR) 182, 49 Collier Bankr. Cas. 2d (MB) 1434, Bankr. L. Rep. (CCH) P 78777 (3d Cir. 2003).

9. United Artists Theatre Co. v. Walton, 315 F.3d at 226.

10. United Artists Theatre Co. v. Walton, 315 F.3d at 226.

11. United Artists Theatre Co. v. Walton, 315 F.3d at 226.

12. In re National Mass Media Telecommunication Systems, Inc., 152 F.3d 1178, 1180 (9th Cir. 1998); see also In re Quality Spice Corp., 107 B.R. 843, 848 (N.J. 1989).

13. In re National Mass Media Telecommunication Systems, Inc., 152 F.3d at 1180.

14. Matter of Quality Spice Corp., 107 B.R. 843, 848 (D.N.J. 1989), judgment aff'd, 908 F.2d 963 (3d Cir. 1990) and judgment aff'd, 908 F.2d 964 (3d Cir. 1990) and judgment aff'd, 908 F.2d 962 (3d Cir. 1990) and judgment aff'd, 908 F.2d 961 (3d Cir. 1990).

15. Matter of Quality Spice Corp., 107 B.R. at 848.

16. In re Zenith Electronics Corp., 2002 WL 226242, *3 (D. Del. 2002), judgment rev'd on other grounds, 329 F.3d 338, 41 Bankr. Ct. Dec. (CRR) 97, 50 Collier Bankr. Cas. 2d (MB) 440, Bankr. L. Rep. (CCH) P 78853 (3d Cir. 2003).

17. Bruce H. White and William L. Medford, Equitable Mootness and Substantial Consummation: Are You Losing Your Appeal?, 20-1, A.B.I. J. 26 (February 2006)(collecting cases).

18. In re Carr, 321 B.R. at 705 (italics in original).

19. In re HNRC Dissolution Co., 2006 WL 782837, *4 (E.D. Ky. 2006) (quoting GWI PCS Inc. v United States, 230 F.3d 788, 800 (5th Cir. 2000)).

20. Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d 180, 185, 38 Bankr. Ct. Dec. (CRR) 3, 46 Collier Bankr. Cas. 2d (MB) 802 (3d Cir. 2001) (quoting In re PWS Holding, 228 F.3d 224, 236 (3rd Cir. 2000)).

21. Mac Panel Co. v. Virginia Panel Corp., 283 F.3d 622, 625, 39 Bankr. Ct. Dec. (CRR) 51, 48 Collier Bankr. Cas. 2d (MB) 82 (4th Cir. 2002); see also In re Xact Telesolutions, Inc., 2006 WL 66665, *8 (D. Md. 2006).

22. In re Xact Telesolutions, Inc., 2006 WL 66665, *8 (quoting Cent. States, Southeast and Southwest Areas Pension Fund v. Cent. Transp., Inc. 841 F.2d 92, 96 (4th Cir. 1988)).

23. See Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d at 185 (3rd Cir. 2001) (stating that "[t]he equitable mootness doctrine 'prevents a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract.'"); In re Carr, 321 B.R. at 706 (citing Mac Panel Co. v. Virginia Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002)) (stating that "this principle applies with particular force when 'a party, seeking a return to the status quo ante, sits idly by and permits intervening events to extinguish old rights and create new ones.'").

24. Matter of UNR Industries, Inc., 20 F.3d 766, 769, 30 Collier Bankr. Cas. 2d (MB) 1547, Bankr. L. Rep. (CCH) P 75800 (7th Cir. 1994); In re HNRC Dissolution Co., 2006 WL 782837, *4 (E.D. Ky. 2006) (citing City of Covington v. Covington Landing Ltd. Partnership, 71 F.3d 1221, 1225 (6th Cir. 1995)).

25. Matter of Manges, 29 F.3d 1034, 1039, 25 Bankr. Ct. Dec. (CRR) 1684, 31 Collier Bankr. Cas. 2d (MB) 1247, Bankr. L. Rep. (CCH) P 76072 (5th Cir. 1994).

26. In re Xact Telesolutions, Inc., 2006 WL 66665, *8 (quoting Mac Panel Co. v. Va. Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002).

27. In re HNRC Dissolution Co., 2006 WL 782837, *4 (citing In re American Homepatient, Inc., 420 F.3d 559, 564 (6th Cir. 2005).

28. In re American HomePatient, Inc., 420 F.3d 559, 563, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005), cert. denied, 127 S. Ct. 55, 166 L. Ed. 2d 251 (U.S. 2006); Matter of Manges, 29 F.3d at 1039.

29. In re Continental Airlines, 91 F.3d 553, 558, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996)).

30. Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d 180, 190, 38 Bankr. Ct. Dec. (CRR) 3, 46 Collier Bankr. Cas. 2d (MB) 802 (3d Cir. 2001); In re Genesis Health Ventures, Inc., 2006 WL 2846259, *1 (3d Cir. 2006)).

31. Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d at 190.

32. Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d at 180; see also, In re Continental Airlines, 91 F.3d at 558; In re Genesis Health Ventures, Inc., 2006 WL 2846259, *1; Matter of Manges, 29 F.3d at 1041.

33. 11 U.S.C.A. § 1101(2).

34. In re Chateaugay Corp., 10 F.3d 944, 952, 24 Bankr. Ct. Dec. (CRR) 1625, Bankr. L. Rep. (CCH) P 75617 (2d Cir. 1993) (stating that "[s]ubstantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief.").

35. In re 455 CPW Associates, 2000 WL 1340569, *3 (2d Cir. 2000).

36. In re Chateaugay Corp., 10 F.3d at 952-53 (citations omitted).

37. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d 737, 742, 44 Bankr. Ct. Dec. (CRR) 45, Bankr. L. Rep. (CCH) P 80227, 2005 FED App. 0038P (6th Cir. 2005).

38. 11 U.S.C.A. § 363(m).

39. In re Rare Earth Minerals, 445 F.3d 359, 46 Bankr. Ct. Dec. (CRR) 101, Bankr. L. Rep. (CCH) P 80501 (4th Cir. 2006).

40. Raskin v. Malloy, 231 B.R. 809, 813 (N.D. Okla. 1997), aff'd, 172 F.3d 63, Bankr. L. Rep. (CCH) P 77897 (10th Cir. 1999).

41. In re Made in Detroit, Inc., 414 F.3d 576, 580, 44 Bankr. Ct. Dec. (CRR) 257, 54 Collier Bankr. Cas. 2d (MB) 743, Bankr. L. Rep. (CCH) P 80311, 2005 FED App. 0286P (6th Cir. 2005) (quoting Onouli-Kona Land Co. v. Estate of Richards, 846 F.2d 1170, 1171 (9th Cir. 1988).

42. In re Stadium Management Corp., 895 F.2d 845, 847, 20 Bankr. Ct. Dec. (CRR) 341, Bankr. L. Rep. (CCH) P 73229 (1st Cir. 1990).

43. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d 737, 741, 44 Bankr. Ct. Dec. (CRR) 45, Bankr. L. Rep. (CCH) P 80227, 2005 FED App. 0038P (6th Cir. 2005); In re Stadium Management Corp., 895 F.2d at 847.

44. In re Rare Earth Minerals, 445 F.3d at 363.

45. In re Rare Earth Minerals, 445 F.3d at 363.

46. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d at 741 n.3.

47. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d at 741 n.3.

48. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d at 741 n. 3 (citing Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc., 141 F.3d 490, 499-500 (3d Cir.1998); In re Rickel Home Centers, Inc., 209 F.3d 291,298 (3rd Cir. 2000)).

49. See, e.g., In re Automationsolutions Intern., LLC., 274 B.R. 527, 47 Collier Bankr. Cas. 2d (MB) 1505 (Bankr. N.D. Cal. 2002) (discussing and disapproving of practice of including unsupported collateral findings and conclusions and similar provisions in sale order).

50. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d at 741 n.3 (citing Pittsburgh Food & Beverage, Inc. v. Ranallo, 112 F.3d 645, 650-51 (3d Cir.1997) (citing decisions of the 1st, 2d, 5th, 7th, 11th and D.C. Circuits adopting such a per se rule)).

51. In re Rare Earth Minerals, 445 F.3d at 363.

52. Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d at 741 n.3 (citing Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172-73 (9th Cir.1988)).

53. In re Ewell, 958 F.2d 276, 280, 22 Bankr. Ct. Dec. (CRR) 1185, 26 Collier Bankr. Cas. 2d (MB) 857, Bankr. L. Rep. (CCH) P 74490, 22 Fed. R. Serv. 3d 225 (9th Cir. 1992).

54. Raskin v. Malloy, 231 B.R. 809, 813 (N.D. Okla. 1997), aff'd, 172 F.3d 63, Bankr. L. Rep. (CCH) P 77897 (10th Cir. 1999)).

55. Matter of Andy Frain Services, Inc., 798 F.2d 1113, 1125, Bankr. L. Rep. (CCH) P 71428 (7th Cir. 1986) ("a would-be appellant's failure to obtain a stay of a sale to a good faith purchaser renders an appeal from the order authorizing and confirming the sale moot."); *see also,* In re Vetter Corp., 724 F.2d 52, 11 Bankr. Ct. Dec. (CRR) 539, Bankr. L. Rep. (CCH) P 69544 (7th Cir. 1983) ("[I]f a party appeals a bankruptcy judge's order, authorizing and confirming a sale to a good faith purchaser, the order must be stayed pending appeal, otherwise the issue becomes moot on appeal.").

56. Hower v. Molding Systems Engineering Corp., 445 F.3d 935, 938, 46 Bankr. Ct. Dec. (CRR) 102, Bankr. L. Rep. (CCH) P 80512 (7th Cir. 2006).

57. Hower v. Molding Systems Engineering Corp., 445 F.3d at 939.

58. In re Made in Detroit, Inc., 414 F.3d at 581.

59. In re Made in Detroit, Inc., 414 F.3d at 583.

60. Matter of Andy Frain Services, Inc., 798 F.2d at 1125 (quoting In re Rock Industries Machinery Corp., 572 F.2d 1195, 1198 (7th Cir.1978)); see also, In re Made in Detroit, Inc., 414 F.3d at 581; In re Ewell, 958 F.2d at 281.

61. In re Made in Detroit, Inc., 414 F.3d at 581.

62. In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150-51, 14 Bankr. Ct. Dec. (CRR) 606, 14 Collier Bankr. Cas. 2d (MB) 811, Bankr. L. Rep. (CCH) P 71136 (3d Cir. 1986).

63. Matter of Andy Frain Services, Inc., 798 F.2d at 1125.

64. Hower v. Molding Systems Engineering Corp., 445 F.3d at 939.

65. In re Xact Telesolutions, Inc., 2006 WL 66665, *6-7.

66. *See* 11 U.S.C.A. § 364(e).

67. 11 U.S.C.A. § 364(e).

68. In re Adams Apple, Inc., 829 F.2d 1484, 1489, 17 Collier Bankr. Cas. 2d (MB) 1132, Bankr. L. Rep. (CCH) P 71995, 9 Fed. R. Serv. 3d 602 (9th Cir. 1987) (rejected by, Matter of Saybrook Mfg. Co., Inc., 963 F.2d 1490, 23 Bankr. Ct. Dec. (CRR) 355, 27 Collier Bankr. Cas. 2d (MB) 277, Bankr. L. Rep. (CCH) P 74692 (11th Cir. 1992)); see also In re Revco D.S., Inc., 901 F.2d 1359, 1364, 20 Bankr. Ct. Dec. (CRR) 716, 22 Collier Bankr. Cas. 2d (MB) 1263, Bankr. L. Rep. (CCH) P 73345 (6th Cir. 1990).

69. In re Revco D.S., Inc., 901 F.2d at 1364 (citing H.R.Rep. No. 595 reprinted in 1978 U.S. Code Cong. & Admin. News 5987, 6303).

70. Matter of Saybrook Mfg. Co., Inc., 963 F.2d 1490, 1492, 23 Bankr. Ct. Dec. (CRR) 355, 27 Collier Bankr. Cas. 2d (MB) 277, Bankr. L. Rep. (CCH) P 74692 (11th Cir. 1992); see also In re Swedeland Development Group, Inc., 16 F.3d 552, 561, 25 Bankr. Ct. Dec. (CRR) 486, 30 Collier Bankr. Cas. 2d (MB) 1034, Bankr. L. Rep. (CCH) P 75803 (3d Cir. 1994) (stating that § 364(e) "seeks[s] to overcome people's natural reluctance to deal with a bankrupt firm whether as purchaser or lender by assuring them that so long as they are relying in good faith on a bankruptcy judge's approval of the transaction, they need not worry about their priority merely because [an appeal has been filed]").

71. In re Cooper Commons, LLC, 430 F.3d 1215, 1219 (9th Cir. 2005), cert. denied, 126 S. Ct. 1340, 164 L. Ed. 2d 55 (U.S. 2006)).

72. Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1355, 20 Bankr. Ct. Dec. (CRR) 1305, 23 Collier Bankr. Cas. 2d (MB) 1118, Bankr. L. Rep. (CCH) P 73565 (7th Cir. 1990).

73. In re Revco D.S., Inc., 901 F.2d at 1363-64.

74. In re Revco D.S., Inc., 901 F.2d at 1366.

75. In re Revco D.S., Inc., 901 F.2d at 1366 (holding "that an implicit finding of good faith in a § 364(e) context is insufficient and that good faith under that section should not be presumed").

76. In re Adams Apple, Inc., 829 F.2d at 1489 (stating that "to permit a court to impose a stay after a creditor has lent money to a debtor would intrude on a reorganization process already underway and would interfere with the lender's ability to plan for its outlay of funds.").

77. In re Cooper Commons, LLC, 430 F.3d 1215, 1219 (9th Cir. 2005), cert. denied, 126 S. Ct. 1340, 164 L. Ed. 2d 55 (U.S. 2006).

78. In re Western Pacific Airlines, Inc., 181 F.3d 119, 11951, 34 Bankr. Ct. Dec. (CRR) 796, Bankr. L. Rep. (CCH) P 77956 (10th Cir. 1999) (citations omitted).

79. In re Western Pacific Airlines, Inc., 181 F.3d at 1196.

80. In re Adams Apple, Inc., 829 F.2d 1484.

81. In re Ellingsen MacLean Oil Co., Inc., 834 F.2d 599, 17 Collier Bankr. Cas. 2d (MB) 1402, Bankr. L. Rep. (CCH) P 72127 (6th Cir. 1987) (rejected by, Matter of Saybrook Mfg. Co., Inc., 963 F.2d 1490, 23 Bankr. Ct. Dec. (CRR) 355, 27 Collier Bankr. Cas. 2d (MB) 277, Bankr. L. Rep. (CCH) P 74692 (11th Cir. 1992)).

82. Matter of Saybrook Mfg. Co., Inc., 963 F.2d at 1493.

83. Matter of Saybrook Mfg. Co., Inc., 963 F.2d at 1494-95.

84. Matter of Saybrook Mfg. Co., Inc., 963 F.2d at 1496.

85. In re Revco D.S., Inc., 901 F.2d at 1364.

86. In re Swedeland Development Group, Inc., 16 F.3d 552, 561, 25 Bankr. Ct. Dec. (CRR) 486, 30 Collier Bankr. Cas. 2d (MB) 1034, Bankr. L. Rep. (CCH) P 75803 (3d Cir. 1994).

87. Pittsburgh Food & Beverage, Inc. v. Ranallo, 112 F.3d 645, 648, 30 Bankr. Ct. Dec. (CRR) 969, Bankr. L. Rep. (CCH) P 77407 (3d Cir. 1997)).

88. Pittsburgh Food & Beverage, Inc. v. Ranallo, 112 F.3d at 648 (quoting In re Swedeland Dev. Group, Inc., 16 F.3d 552, 559, 562 (3rd Cir. 1994)).

89. In re Swedeland Development Group, Inc., 16 F.3d at 559.

90. Shadduck v. Rodolakis, 221 B.R. 573, 579 n. 10, 98-2 U.S. Tax Cas. (CCH) P 50516, 81 A.F.T.R.2d 98-2455 (D. Mass. 1998); *see also* In re Burrell, 415 F.3d 994, 998 (9th Cir. 2005).

91. Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911); Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified by, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

92. Clow v. U.S. Dept. of Housing and Urban Development, 948 F.2d 614, 622 (9th Cir. 1991) (abrogated by, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210, 46 Env't. Rep. Cas. (BNA) 1097, 28 Envtl. L. Rep. 20434 (1998)).

93. Weinstein v. Bradford, 423 U.S. 147, 96 S. Ct. 347, 46 L. Ed. 2d 350, 21 Fed. R. Serv. 2d 1 (1975).

94. Belda v. Marshall, 416 F.3d 618, 620, 54 Collier Bankr. Cas. 2d (MB) 794, Bankr. L. Rep. (CCH) P 80323 (7th Cir. 2005); State of N.J., Dept. of Environmental Protection and Energy v. Heldor Industries, Inc., 989 F.2d 702, 708, Bankr. L. Rep. (CCH) P 75207 (3d Cir. 1993).

95. Weinstein v. Bradford, 423 U.S. at 149.

96. U. S. v. Arthur Andersen & Co., 623 F.2d 720, 725, 80-1 U.S. Tax Cas. (CCH) P 9360, 45 A.F.T.R.2d 80-1590 (1st Cir. 1980).

97. U. S. v. Arthur Andersen & Co., 623 F.2d at 725 ("Finally, while it is tempting to base a decision to review the merits of this case on the significance of the issue presented... neither precedent nor sound judicial policy favor such a course.... Moreover, we can conceive of no principled basis for adjudicating claims that particular issues or controversies fall within an 'importance exception' to the mootness doctrine.").

98. In re Smith 2006 WL 3627147, *1 (8th Cir. 2006) (citing Iowa Prot. & Advocacy Services v. Tanager, Inc., 427 F.3d 541, 544 (8th Cir. 2005)).

99. In re Kurtzman, 194 F.3d 54, 59, 35 Bankr. Ct. Dec. (CRR) 92 (2d Cir. 1999).

100. In re Kurtzman, 194 F.3d at 59.

101. In re HNRC Dissolution Co., 2005 WL 1972592, *6 (E.D. Ky. 2005).

102. In re HNRC Dissolution Co., 2005 WL 1972592, *6 (citing Reed v. United States, 758 F.2d 653 (6th Cir. 1985)).

103. In re HNRC Dissolution Co., 2005 WL 1972592, *6.

104. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 stat. 183 (1989), codified at 12 U.S.C.A. 1821.

105. Marc Development, Inc. v. F.D.I.C., 992 F.2d 1503 (10th Cir. 1993), opinion vacated as moot on other grounds, 12 F.3d 948 (10th Cir. 1993).

106. Marc Development, Inc. v. F.D.I.C., 992 F.2d at 1506, opinion vacated as moot on other grounds, 12 F.3d 948 (10th Cir. 1993).

107. U. S. v. Arthur Andersen & Co., 623 F.2d 720, 725, 80-1 U.S. Tax Cas. (CCH) P 9360, 45 A.F.T.R.2d 80-1590 (1st Cir. 1980).

108. In re Campbell, 36 Fed. Appx. 388, 390 (10th Cir. 2002). In re Di Giorgio, 134 F.3d 971, 975 (9th Cir. 1998) (refusing to apply the exception when the party had "not demonstrated a reasonable expectation that they will file for bankruptcy in the future while subject to a writ of possession for unlawful detainer of rental property.").

109. Kassner v. 2nd Avenue Delicatessen Inc., 2005 WL 1018187, *3 (S.D. N.Y. 2005) ("[T]he fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000))).

110. Clow v. U.S. Dept. of Housing and Urban Development, 948 F.2d at 622-23 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).

111. In re Burrell, 415 F.3d 994 , 999(9th Cir. 2005).

112. In re Burrell, 415 F.3d at 999.

113. See In re M Capital Corp., 290 B.R. 74, 7463, 41 Bankr. Ct. Dec. (CRR) 29 (B.A.P. 9th Cir. 2003).

114. In re M Capital Corp., 290 B.R. at 746.

115. In re Whiting, 325 B.R. 339, 2005 WL 1220494, *5 (B.A.P. 10th Cir. 2005), aff'd, 329 B.R. 358 (B.A.P. 10th Cir. 2005); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150-151, 14 Bankr. Ct. Dec. (CRR) 606, 14 Collier Bankr. Cas. 2d (MB) 811, Bankr. L. Rep. (CCH) P 71136 (3d Cir. 1986).

116. In re Integrated Telecom Express, Inc., 384 F.3d 108, 118, 43 Bankr. Ct. Dec. (CRR) 175, Bankr. L. Rep. (CCH) P 80168 (3d Cir. 2004), cert. denied, 545 U.S. 1110, 125 S. Ct. 2542, 162 L. Ed. 2d 286 (2005) (citing In re SGL Carbon Corp., 200 F.3d 154, 162 (3rd Cir. 1999).

117. In re Colony Hill Associates, 111 F.3d 269, 277, 30 Bankr. Ct. Dec. (CRR) 832, Bankr. L. Rep. (CCH) P 77383 (2d Cir. 1997).

118. In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d at 150-51.

119. In re Gucci, 126 F.3d 380, 389-90, 31 Bankr. Ct. Dec. (CRR) 893, Bankr. L. Rep. (CCH) P 77537 (2d Cir. 1997) (citing In re Onouli-Kona Land Co., 846 F.2d 1170, 1174, n.1 (9th Cir. 1988)).

120. In re Gucci, 126 F.3d at 390.

121. See George W. Kuney, Hijacking Chapter 11, 21 Emory Bankr. Dev. J. 1 (2005); George W. Kuney, Let's Make it Official: Adding an Explicit Pre-Plan Sale Process as an Alternative Exit from Chapter 11, 40 Houston L. Rev. 1265 (2004); Selling a Business in Bankruptcy Court Without a Plan of Reorganization, 18 CEB Cal. Bus. L. Pract. 57 (Summer 2003); Further Misinterpretation of Bankruptcy Code § 363(f): Elevating In Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Development, 76 Am. Bankr. L.J. 288 (2003); Misinterpreting Code § 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L.J. 235 (2002).

122. In re Thomas, 287 B.R. 782, 40 Bankr. Ct. Dec. (CRR) 176 (B.A.P. 9th Cir. 2002).

123. In re Thomas, 287 B.R. at 785.

124. In re Thomas, 287 B.R. at 785.

125. In re Thomas, 287 B.R. at 785.

126. In re Thomas, 287 B.R. at 785.

127. In re Thomas, 287 B.R. at 786; In re Whiting, 325 B.R. 339, 2005 WL 1220494, *5 (B.A.P. 10th Cir. 2005), aff'd, 329 B.R. 358 (B.A.P. 10th Cir. 2005) (noting that the 10th Circuit as well as the courts in both *Thomas* and *Abbotts* remanded the case for a finding as to good faith which the issue was first raised on appeal).

128. In re Second Grand Traverse School, 100 Fed. Appx. 430 (6th Cir. 2004).

129. In re Second Grand Traverse School, 100 Fed. Appx. at 433.

130. See 28 U.S.C.A. § 158(d); see also Judith A. McKenna and Elizabeth C. Wiggins, Alternative Structures for Bankruptcy Appeals, 76 Am. Bankr. L.J. 625 (2002).