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The city of Detroit, Michigan filed for bankruptcy under chapter 9 of the Bankruptcy Code in July 2013. The filing marked the largest and most complex municipal bankruptcy case in the United States' history. Detroit's hotly contested, yet ultimately confirmed reorganization plan resulted in an immediate appeal, which required the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit to apply the doctrine of equitable mootness in the context of a chapter 9 case. The Sixth Circuit's decision that the doctrine, which is a judicial restraint to deciding the merits of an appeal, applied to Detroit's reorganization plan was only the fifth opinion nationwide to examine the role of appellate review in municipal bankruptcy cases. With very little precedent to follow, the Sixth Circuit's decision in the Detroit bankruptcy brings unique concerns to light about how the doctrine of equitable mootness should be applied in the context of municipal bankruptcies and what the recent Detroit bankruptcy decision means to the larger scholarship of bankruptcy appeals.

The Doctrine of Equitable Mootness

Garnering debate, and sometimes harsh criticism, the doctrine of equitable mootness has been a focal point for academic debates among legal scholars for decades.[1] "Unlike the constitutional doctrine of mootness, which bars consideration of appeals because no Article III case or controversy remains, the doctrine of *equitable* mootness is a pragmatic judicially-created principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable. Applied principally in bankruptcy proceedings because of the equitable nature of bankruptcy judgments, equitable mootness is often invoked when it becomes impractical and imprudent 'to upset the plan of reorganization at this late date.'"[2] Stated plainly, the reliance interests generated by a bankruptcy court's confirmation of a reorganization plan can be so strong that it becomes simply unfair to undue or alter it in any way.

The doctrine, however, is not without criticism. Famously, Hon. Frank Easterbrook for the Seventh Circuit banished the term equitable mootness.[3] Noting that the term equitable mootness is misleading, Easterbrook wrote "[t]here is a big difference between inability to alter the outcome (real mootness) and *unwillingness* to alter the outcome (equitable mootness)."[4] Likewise in 1994, Supreme Court Justice Samuel Alito, when he was then sitting on the United States Court of Appeals for the Third Circuit, questioned the doctrine, as it has no clear basis in law, and whether that was sufficient for the court to refuse "to entertain a live appeal over which [the court] indisputably possess[es] statutory jurisdiction and in which meaningful relief can be awarded."[5] Justice Alito again in 2001 criticized equitable mootness explaining that the "doctrine [of equitable mootness] can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans [which] places far too much power in the hands of bankruptcy judges."[6]

To fully understand the criticisms of the doctrine, it is important to understand the unique role of bankruptcy courts as non-Article III courts.

Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[7] "Congress has established 94 District Courts and 13 Courts of Appeals, composed of judges who enjoy the protections of Article III: life tenure ad pay that cannot be diminished."[8] The protections of Article III "help to ensure the integrity and independence of the Judiciary.[9]" However, bankruptcy judges do not enjoy the same protection of Article III judges. The Bankruptcy Amendments and Federal Judgeship Act of 1984 allocated district courts original jurisdiction over bankruptcy cases.[10] Bankruptcy judges are judicial officers of the United States district courts who are appointed to a term of fourteen years and subject to removal.[11] Commonly referred to as "non-Article III courts," bankruptcy courts only have the authority to enter final judgments and orders on "core proceedings," subject to appellate review by the district court. The bankruptcy code provides that "confirmations of plans" are core proceedings in which a bankruptcy court can enter a final order, but that is subject to appellate review by an Article III court.[12]

This right to review in Article III courts remains key to the Supreme Court's decision setting forth the limitations on a bankruptcy court's authority to decide cases.[13] By design, a party's right to appeal a bankruptcy decision is a fundamental part of constitutional separation of powers that is in place to ensure that parties to a bankruptcy case can still have their case reviewed by a neutral Article III

court. This arrangement strikes a balance between the concerns of a non-Article III courts ability to effectively make bankruptcy decisions in a court where the judges are experts on this complex area of law, and the need for an Article III judge, who, by nature of the lifetime appointment, can remain neutral.

On its surface, the doctrine of equitable mootness seems to fly in the face of this delicate balance and the reasons for it. Although the doctrine purports to protect parties' reliance interests on a confirmed reorganization plan, it also seems to restrain the Article III courts from performing their constitutionally created duty. The doctrine of equitable mootness creates an extremely thin line between judicial equity, and the separation of powers between the Article III judiciary and non-Article III bankruptcy courts. It is along this very line that Article III judges are forced to decide whether to evaluate the merits of complex bankruptcy matters, while simultaneously exercising judicial restraint. The tightrope walk becomes more difficult with each successive decision, which demonstrates how tenuous the doctrine is itself. This is especially true now that the Sixth Circuit penned the most comprehensive decision to extend the doctrine of equitable mootness to the Chapter 9 context, an area where prior to this Detroit bankruptcy case there was very little scholarship.[14]

The Detroit Bankruptcy Case

Chapter 9 provides for the adjustment of debts of a municipality. Section 109(c) of the United States Bankruptcy Code gives municipalities the right to file for bankruptcy under Chapter 9 of the code.[15] A municipality is defined as a "political subdivision or public agency or instrumentality of a State"[16] and can include anything from cities and townships to highway and water authorities. "Chapter 9 provides a debtor with an array of bankruptcy powers to enable it to achieve financial rehabilitation with very few, if any, corresponding limitations and duties of the type to which a Chapter 11 debtor is subject."[17] The statutory difference, however, "generally favor the Chapter 9 municipal debtor"[18] sometimes at the expense of creditors.

The City of Detroit filed for municipal bankruptcy protection under Chapter 9 on July 18, 2013.[19] The Detroit bankruptcy filing was the largest and most complex Chapter 9 municipal bankruptcy in U.S. history with over $18 billion in escalating debt and over 100,000 creditors.[20] The City of Detroit engaged in negotiations for over 16 months and on November 12, 2014, despite the appellants failed motion to stay, the bankruptcy court confirmed the proposed plan, which became effective on December 10, 2014.[21] Less than two weeks later, on December 23, 2014, the group of City of Detroit retirees filed an appeal in the district court.[22] The appellants in the Detroit bankruptcy appeal were participants in the City's General Retirement System ("GRS") who opposed the provisions of the bankruptcy plan that reduce their pension benefits by 4.5%.23 73% of the GRS pension claimants voted in favor of accepting the Plan, while a group of pensioners unsuccessfully moved for a stay of plan confirmation. The appellants challenged, among other things, the reduction in their pensions. The City of Detroit moved to dismiss the appeals as equitably moot. In determining whether an appeal from a confirmation of a bankruptcy plan should be dismissed as equitably moot, the prior Sixth Circuit precedent guided the district court to weigh three factors: (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 the parties not before the court or the success of the plan.[24]

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On September 29, 2015, the district court, applying the three-factor test, dismissed the appeal as equitably moot.[25] Six days later, on October 5, 2015, the pensioners appealed to the Sixth Circuit and almost a full year later, on October 3, 2016, the Sixth Circuit affirmed the district court's decision.[26] The Sixth Circuit held that although the appellants' failure to obtain a stay was not necessarily fatal, "[w]hen an appellant does not obtain a stay of the implementation of a confirmation plan, the debtor will normally implement the plan and reliance interests will be created."[27] Thus, finding that substantial consummation of the plan had occurred and third parties would be adversely affected by unraveling

the plan, the Sixth Circuit determined that the appeal was barred by equitable mootness.[28] The Sixth Circuit also determined the doctrine of equitable mootness applied with equal weight to Chapter 9 cases as it does to Chapter 11 cases. The court reasoned that "[t]he fact that the debtor is a municipality, with state sovereignty, rather than a business enterprise does not reduce the municipal debtor's rights in bankruptcy."[29]

Considering the recent review of the Detroit bankruptcy plan by the Sixth Circuit, there are now five cases that have evaluated the role of appellate review in Chapter 9 bankruptcies. Although the Sixth Circuit, in a split 2-1 decision, determined that the doctrine of equitable mootness applied to the Detroit bankruptcy plan, as the minority opinion points out, this elusive doctrine remains largely unsettled. Further, depending on a pending Eleventh Circuit decision, discussed below, a circuit split may emerge very soon. However, as it stands, at least in the Sixth Circuit, there is not a distinction between the application of the doctrine of equitable mootness in Chapter 9 and Chapter 11 cases. Therefore, if we are going to apply the doctrine of equitable mootness with equal force to Chapter 9 cases, cases that arguably affect people on a deeper level—Chapter 9 plans affect every resident of a municipality—the recent review of the Detroit bankruptcy plan naturally calls for a reexamination of the doctrine.

The first case to examine the role of appellate review in Chapter 9 cases was *Alexander v. Barnwell County Hospital* in 2013.[30] Similar to the appellants in the Detroit bankruptcy case, the appellant in *Barnwell* sought and was denied a stay in the bankruptcy court.[31] However, the appellant did not seek a stay in the district court pending appeal.[32] The South Carolina District Court held that the appeal was equitably moot because the appellant failed to seek a stay in the district court which caused the hospital to carry out the plan before the appeal was heard, thus, substantial consummation of the plan occurred.[33] Similarly, the Ninth Circuit in *In re City of Vallejo, California,* and the United States Bankruptcy Appellant Panel (BAP) of the Ninth Circuit in *In re City of Stockton, California,* both dismissed appeals because the plans were substantially consummated by the time the appeals were heard by the Ninth Circuit and BAP panel respectively.[34]

The most important decision was recently rendered by the District Court of the Northern District of Alabama. *Bennett v. Jefferson County, Ala.,* which is currently pending on appeal in the Eleventh Circuit, held that equitable mootness does not apply to Chapter 9 cases.[35] Similar to the appellants in the other cases, the *Jefferson County* appellants did not obtain a stay pending appeal to the district court and the municipality contended that the plan had been substantially consummated.[36] However, the *Jefferson County* court determined that the doctrine of equitable mootness does not apply to challenges to a confirmation order in Chapter 9 proceedings.[37] The court reasoned that the prudential concerns inherent in Chapter 11 cases (i.e. preserving going concern and maximizing value) are not present in Chapter 9 cases where the underlying policy "is not future profit, but rather continued provision of public services."[38] The court concluded that "[i]n light of the public and political interests at stake in any Chapter 9 proceeding" the court must deny the county's appeal to equity.[39]

The Sixth Circuit in its *City of Detroit* decision explicitly rejected extending the *Jefferson County* decision to all Chapter 9 equitable mootness determinations, reasoning instead that "the better conclusion drawn from *Bennett's* facts is that Jefferson County could not meet the third equitable mootness factor under a 'case-by-case assessment'" because the potential harm to third parties did not outweigh the harm to the appellants if the plan went unchallenged.[40]

The court, therefore, concluded "our determination that equitable mootness applies to these facts and to this Confirmation Order ends this appeal and forecloses any other claims or arguments."[42]

As both the district court and the Sixth Circuit discussed in *City of Detroit,* "[i]f the interest of finality and reliance are paramount to a Chapter 11 private business entity with investors, stakeholders, and employees, thus justifying equitable mootness, then these interests surely apply with greater force to the City [of Detroit]'s Chapter 9 Plan, which affects thousands of creditors and residents."[41] The court, therefore, concluded "our determination that equitable mootness applies to these facts and to this Confirmation Order

ends this appeal and forecloses any other claims or arguments."[42] The court does not determine the merits of the Chapter 9 plan confirmation because the appeal is dismissed under the doctrine of equitable mootness.[43]

The district and appellate courts in the *City of Detroit* did not erroneously apply the three-factor equitable mootness test, but it came to an undesirable result for the pensioners, who will never receive a chance for an Article III court to hear the merits of their appeal. It is unfortunate, as the dissent points out, that the doctrine of equitable mootness "has real-world consequences for the litigants before [the court]—retirees who spent their lives serving the people of Detroit through boom and bust, and who feel that the City's bankruptcy was resolved through a game of musical chairs in which they were left without a seat."[44]

Although the bankruptcy code provides that confirmation of plans are core-proceedings that are subject to appellate review by an Article III court, the recent Detroit bankruptcy decision does not give groups like the Detroit pensioners and the appellants in the other four municipal Chapter 9 cases, clear guidance of what needs to be done to ensure an Article III court hears the merits of their appeal. The appellants in these cases moved for and were denied a stay of plan confirmation by the bankruptcy courts and by the time the appeal was heard by an Article III court, the plan had been substantially consummated. Although failure to obtain a stay "is not necessarily fatal" to the equitable mootness test,[45] it seemed to be in these cases. These appellants seemingly had no form of recourse to challenge the decision of one non-Article III judge, which leaves an obvious tension between a doctrine rooted in finality and fairness, and the right to appeal a final bankruptcy judgement to an Article III court[46] However, it still naturally makes separation of powers purists uncomfortable since there was never a review of the largest municipal bankruptcy plan in our nation's history by an Article III court, seemingly because the appeal came too late.

Timing in the Context of Chapter 9 Cases

This naturally opens the door to a conversation about timing. If parties to a bankruptcy case have a right to judicial review of bankruptcy decisions, then when is the proper time for them to appeal the decision to an Article III court? It is troublesome that a group of retired, municipality employees, who are having their pensions cut by a Chapter 9 municipal bankruptcy plan, who appeal the plan just days after it is confirmed are essentially "too late" for a review. This is especially troublesome because the pensioners seemingly followed the procedure for appealing a plan. The pensioners applied for a stay during the bankruptcy case, although it was denied, and quickly appealed to an Article III court just days after plan confirmation. The plan did not become effective until December 10, 2014. However, by the time the appeal got reviewed by both the district court on September 29, 2015, and Sixth Circuit on October 3, 2016, the plan was understandably substantially consummated and granting the pensioners appeal would have affected the rights of other parties and the success of the plan. Therefore, the Article III courts in the Sixth Circuit found that the doctrine of equitable mootness barred the appeal.

Similarly, the appellants in the other four cases appealed the plan in the bankruptcy court, were denied a stay by the bankruptcy court, and then appealed to an Article III court. However, since most of the appellants did not again file for a stay in the Article III court pending appeal, the plans were substantially consummated by the time the appeal was heard by an Article III court. Therefore, it is important to emphasize how imperative it is for an appellant to apply for a stay at every level of the appeal process. Nevertheless, it is also important for an Article III court to move expediently through an appeals process so that even if the appellants fail the first prong of the equitable mootness test and do not move for or obtain a stay, it is not a death sentence to their appeal.

Therefore, it is important to emphasize how imperative it is for an appellant to apply for a stay at every level of the appeal process.

The answer may be faster appellate review in Article III courts. This could be a mandatory system where bankruptcy plan appeals are treated as emergencies in Article III courts. This serves two purposes: to not delay the consummation of a vital plan but also to ensure that the separation of powers is protected and the integrity of judicial review is maintained. There must be an importance placed on the speedy consummation of reorganization plans, especially in the context of a

Chapter 9 municipal bankruptcy where hundreds of thousands of residents are relying on a city to resume business as usual. However, that should not come at the expense of creditors', in the case of the *City of Detroit* retired public employees, right to have the plan reviewed by an unbiased Article III court.

This fifth municipal bankruptcy decision has substantially enhanced a small area of law that previously had very little scholarship. For the first time, there is a decision by a circuit court that presents a comprehensive analysis on the application of the doctrine of equitable mootness to Chapter 9 municipal bankruptcies. Even if the decision does not answer every question, the *City of Detroit* case creates a great launching point for further scholarship on the complex doctrine of equitable mootness in Chapter 9 bankruptcy appeals. ■

Endnotes

1 *See generally* Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals,* 19 Norton J. Bankr. L. & Pract. 33 (2010); Lenard Parkins et al., *Equitable Mootness: Will Surgery Kill the Patient?,* Am. Bankr. Inst. J., Sept. 2010, at 40, 40.; Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty on Predictable Precedent,* 159 U. Pa. L. Rev. 543, 546 (2010); Katelyn Knight, Comment, *Equitable Mootness in Bankruptcy Appeals,* 49 Santa Clara L. Rev. 253 (2009); Caroline L. Rosiek, Note, *Making Equitable Mootness Equal: The Need for a Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans,* 57 Syracuse L. Rev. 685 (2007).

2 *Mac Panel Co. v. Virginia Panel Corp.,* 283 F.3d 622, 625 (4th Cir. 2002) (emphasis original) citing *In re UNR Indus., Inc.,* 20 F.3d 766, 769 (7th Cir.1994).

3 *In re UNR Indus. Inc.,* 20 F.3d 766, 769 (7th Cir. 1994).

4 *Id.*

5 *In re Cont'l Airlines,* 91 F.3d 553, 570 (3rd Cir. 1996).

6 *Nordhoff Invs. v. Zenith Elecs Corp.,* 258 F.3d 180, 192 (3d Cir. 2001).

7 *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1938 (2015)

8 *Id.*

9 *Id.*

10 28 U.S.C. §§ 1334(a), (b).

11 28 U.S.C. §§ 152(a)(1), (e)

12 28 U.S.C. § 157(b)(2)(L).

13 *See, e.g., Wellness Int'l Network,* 135 S. Ct. at 1944 (2015) ("allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers *so long as Article III courts remain supervisory authority over the process"* (emphasis added).

14 *See generally 6th Circuit Splits Over Chapter 9 Equitable Mootness,* Bankruptcy Court Decisions Weekly News & Comments, 63 No. 4 Bankr. Ct. Dec. News 1 (Oct. 20, 2016); Laura E. Appleby and Todd J. Dressel, *Equitable Mootness is the Municipal Bankruptcy Context,* Law 36, New York (Oct. 21, 2016); Sixth Circuit Split Decision Upholds Equitable mootness in chapter 9, American Bankruptcy Institute, http://www.abi.org/newsroom/daily-wire/sixth-circuit-split-decision-upholds-equitable-mootness-in-chapter-9 (last visited December 28, 2016); Donna Higgins, *City Workers Can't Challenge Pension Cuts in Detroit's Bankruptcy Plan,* 13 Westlaw Journal Bankruptcy 2 (2016).

15 11 U.S.C. § 109(c)

16 11 U.S.C. § 101(40).

17 *In re City of Desert Hot Springs,* 339 F.3d 782, 789 (9th Cir. 2003).

18 *In re City of Detroit, Michigan,* 838 F.3d 792, 803 (6th Cir. 2016)

19 *In re City of Detroit, Michigan,* Debtor, No. 13-53846, 2015 WL 10936160, at *1 (E.D. Mich. Sept. 29, 2015).

20 *See In re City of Detroit,* 504 B.R. 191, 281 (Bankr. E.D. Mich. 2013).

21 *In re City of Detroit,* No. 13-53846, 2015 WL 603888, at *1 (Bankr. E.D. Mich. Feb. 12, 2015).

22 *Id,* at *19.

23 Although the Michigan constitution, like many state statutes, prohibits a municipality to reduce its pension obligations, Detroit was able to obtain a ruling that its pensions could be impaired. (see In re City of Detroit, 524 B.R. 147, 211 (Bankr. E.D. Mich. 2014)).

24 *In re United Producers, Inc.,* 526 F.3d 942, 948 (6th Cir. 2008)

25 *See In re City of Detroit, Michigan, Debtor,* No. 13-53846, 2015 WL 10936160 (E.D. Mich. Sept. 29, 2015).

26 *In re City of Detroit, Michigan,* 838 F.3d 792 (6th Cir. 2016).

27 *Id.,* at 798-99.

28 *Id.,* at 799.

29 *Id.,* at 803.

30 498 B.R. 550 (D.S.C. 2013).

31 *Id.,* at 559.

32 *Id.*

33 *Id.* at 559-60.

34 551 F. App'x 339 (9th Cir. 2013); 542 B.R. 261, 274-76 (B.A.P. 9th Cir. 2015).

35 *Bennett v. Jefferson County,* 518 B.R. 613 (N.D. Ala. 2014).

36 *Id.,* at 633.

37 *Id.* at 635.

38 *Id.* at 636 citing *In re Mount Carbon Metro. Dist.,* 242 B.R. 18, 34-35 (Bankr. D. Colo. 1999); *see also Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle P'ship,* 526 U.S. 434, 453 (1999).

39 *Bennett,* 518 B.R. at 638.

40 *In re City of Detroit,* 838 F.3d at 801 citing *In re United Producers,* 526 F.3d at 948.

41 *In re City of Detroit, Michigan,* 838 F.3d at 803 citing *In re City of Detroit, Michigan,* No. 14-CV-14872, 2015 WL 5697702, at *5.

42 *In re City of Detroit, Michigan,* 838 F.3d 792 at 798.

43 *Id.,* at 806.

44 *Id.*

45 *In re United Producers,* 526 F. 3d at 948.

46 See Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty on Predictable Precedent,* 159 U. Pa. L. Rev. 543, 546 (2010) ("[T]he problems direct appeals create highlight a tension inherent in bankruptcy law: the need to balance practical considerations such as speed, efficiency, and specialized review, with constitutional values, including fairness, due process, and the right to an appeal.").