

CIRCUIT SPLITS:

A Preview of Possible Supreme Court Bankruptcy Cases

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Harrington v. Purdue Pharma, LP, 23-124 (cert. granted Aug. 10, 2023).

QP.: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimant's consent?

State of Case Law:

Yes. *In re Purdue Pharma, L.P.*, 69 F.4th 45 (2d Cir. 2023); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re A.H. Robbins Co.*, 880 F.2d 694 (4th Cir. 1989).

No. *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); *In re Western Real Estate Fund, Inc.*, (10th Cir. 1991).

U.S. Bank Nat'l Assoc. v. Windstream Holdings, Inc., 22-926 (petition filed March 15, 2023) (set for conference on Sept. 26, 2023).

Q.P.: 1. Does the lack of statutory and constitutional basis for the equitable mootness doctrine, combined with its demonstrated potential for abuse, require it to be abolished?

No split identified. All Circuits faced with the questions about equitable mootness have upheld the doctrine. See, *In re Tribune Media Co.*, 799 F.3d 272, 286 (3d Cir. 2015) (Ambro, J. concurring). But some judges would not. See *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997); *In re One2One Comm'cns, LLC*, 805 F.3d 428, 446-47 (3d Cir. 2015) (Krause, J., concurring); *Cobb v. City of Stockton (In re City of Stockton, Cal.)*, 909 F.3d 1256, 1270 (9th Cir. 2018) (Friedland, J., dissenting); *In re City of Detroit, Michigan*, 838 F.3d 792, 805 (6th Cir. 2016) (Moore, J., dissenting), *cert. denied*, 581 U. S. 918 (2017).

2. Does the Second Circuit's rule that an appeal from a substantially consummated plan is automatically equitably moot if the appellant did not pursue a stay, regardless of a stay's availability or any other equitable factors, undermine any prudential purpose for the doctrine?

Pursuit of Stay Required. *U.S. Bank Nat'l Assoc. v. Windstream Holdings, Inc.*, 2022 U.S. App. LEXIS 29630 (2d Cir. Oct. 25, 2022); *In re Chateauguay Corp.*, 10 F.3d 944, 952-53 (2^d Cir. 1993); *Cobb v. City of Stockton (In re City of Stockton, Cal.)*, 909 F.3d 1256, 1263 (9th Cir. 2018)

Pursuit of Stay One Factor. *Cooperativa de Ahorro y Credito v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.)*, 989 F.3d 123, 129 (1st Cir. 2021); *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015), *cert. denied*, 577 U.S. 1230 (2015); *Bate Land Co. LP v. Bate Land & Timber LLC (In re Bate Land & Timber LLC)*, 877 F.3d 188, 195 (4th Cir. 2017); *Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 429-30 (5th Cir. 2022), *cert. pending*, 598 U.S. ____ (2023); *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798 (6th Cir. 2016); *In re VeroBlue Farms*, 6 F.4th at 889; *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282-83 (10th Cir. 2013); *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992); *In re Aov Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986).

3. Does the Second Circuit's rule that the appellant bears the burden of proof in showing lack of equitable mootness cause reviewing courts to speculate that effective relief is unavailable without any evidence?

Burden on Appellant. *U.S. Bank Nat'l Assoc. v. Windstream Holdings, Inc.*, 2022 U.S. App. LEXIS 29630 (2d Cir. Oct. 25, 2022).

Burden on Appellee. *In re SemCrude, L.P.*, 728 F.3d 314, 321 (3d Cir. 2013); *In re Paige*, 584 F.3d 1327, 1339-40 (10th Cir. 2009); *In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004), *cert. denied*, 506 U. S. 811 (1992).

May a corporation recover damages pursuant to 11 U.S.C. §362(h) for a violation of the automatic stay, or is recovery limited to human being debtors?

No, corporations may not recover damages pursuant to §362(h). *Spookyworld Inc. v. Town of Berlin (In re Spookyworld Inc.)*, 346 F.3d 1 (1st Cir. 2003); *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corp. Sys., Inc.)*, 108 F.3d 881 (8th Cir. 1997); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539 (11th Cir. 1996); *Havelock v. Taxel (In re Pace)*, 67 F.3d 187 (9th Cir. 1995); *Johnston v. Env't'l Corp. v. Knight (In re Goodman)*, 991 F.2d 613 (9th Cir. 1993); *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183 (2^d Cir. 1990).

Yes, corporations may recover damages pursuant to § 362(h). *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Dev. Corp.)*, 901 F.2d 325 (3^d Cir. 1990); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289 (4th Cir. 1986).

Is post-petition appreciation in the value of property during a chapter 13 case property of the estate upon conversion to chapter 7?

Yes. *Castleman v. Burman (In re Castleman)*, 2023 U.S. LEXIS 19470 (9th Cir. July 28, 2023).

No. *Rodriguez v. Barrera (Barrera III)*, 22 F.4th 1217 (10th Cir. 2022).

May the bankruptcy court lengthen the 180-day time period set forth in 11 U.S.C. §109(g) barring the refiling of a bankruptcy case?

Yes. *Dietrich v. Nob-Hill Stadium Properties*, 2007 WL 579547 (6th Cir. 2007); *In re Dempsey*, 247 Fed. App'x. 21 (7th Cir. 2007); *Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327 (2d Cir. 1999).

No. *Frieouf v. United States (In re Frieouf)*, 938 F.2d 1099 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992).

Is the deadline to appeal a bankruptcy court decision set forth in Bankruptcy Rule 8002(a)(1) jurisdictional?

No. *Tennial v. REI Nation, LLC (In re Tennial)*, 978 F.3d 1022 (6th Cir. 2020).

Yes. *In re Sobczak-Slomczewski*, 826 F.3d 429 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1119 (2017); *Berman-Smith v. Gartley (In re Berman-Smith)*, 737 F.3d 997 (5th Cir. 2013); *In re Caterbone*, 640 F.3d 108 (3^d Cir. 2011); *Emann v. Latture (In re Latture)*, 605 F.3d 830 (10th Cir. 2010).

Does a party that fails to appear at a hearing and object to the relief that is being sought lack standing to appeal the order that is entered?

Yes. *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686 (7th Cir. 1992).

No, so long as the party's pecuniary interests are directly and adversely impacted by the order. *In re Matter of Point Center Financial, Inc.*, 890 F.3d 1188 (9th Cir. 2018); *White v. Univision of Va. Inc. (In re Urban Broad Corp.)*, 401 F.3d 236 (4th Cir. 2005).

When does the Trustee lose the protection of the *Barton* doctrine?

When the receivership/bankruptcy case is closed. See *Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. 2021) and *Tufts v. Hay*, 977 F.3d 1204 (11th Cir. 2020).

The doctrine continues to apply after a receivership/bankruptcy case is closed. *Satterfield v. Malloy*, 700 F.3d 1231 (10th Cir. 2012); *In re Crown Vantage, Inc.*, 421 F.3d 963 (9th Cir. 2005); *Muratore v. Darr*, 375 F.3d 140 (1st Cir. 2004); *In re Linton*, 136 F.3d 544 (7th Cir. 1998).

Does state or federal law govern an action to recharacterize debt as equity?

Federal Law Governs. *Bayer Corp. v. MasoTech Inc. (In re AutoStyle Plastics Inc.)* 269 F.3d 726 (6th Cir. 2001) relying upon *Roth Steel Tube Co. v. Comm'r of Internal Revenue*, 800 F.2d 625 (6th Cir. 1986); *Redmond v. Jenkins (In re Alternate Fuels, Inc.)* 789 F.3d 1139 (10th Cir. 2015); *Cohen v. KB Mezzanine Fund II (In re SubMicron Sys. Corp.)*, 432 F.3d 448 (3d Cir. 2006); *Fairchild Dornier GMBH v. Official Comm. Of Unsecured Creditors (In re Dornier Aviation (N. Am.), Inc.)*, 453 F.3d 225 (4th Cir. 2006); *Sender v. The Bronze Grp., Ltd., (In re Hedged-Invs. Assocs., Inc.)*, 380 F.3d 1292 (10th Cir. 2004).

State Law Governs. *Grossman v. Lothian Oil Inc. (In re Lothian Oil Inc.)*, 650 F.3d 539 (5th Cir. 2011); *Official Comm. Of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141 (9th Cir. 2013).

Does the Social Security Act bar bankruptcy courts from exercising jurisdiction over Medicare provider agreements?

Yes. *Florida Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297 (11th Cir. 2016), cert. denied, 137 S. Ct. 2214 (2017); *Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340 (3d Cir. 2012); *BP Care, Inc. v. Thompson*, 398 F.3d 503 (6th Cir. 2005); *St. Vincent's Med. Ctr. v. United States*, 32 F.3d 548 (Fed. Cir. 1994); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990).

No. *Benjamin v. United States (In re Benjamin)*, 924 F.3d 180 (5th Cir. 2019); *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010).