No. 25-1048

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re: CHRISTOPHER M. COOK,
Debtor.

CHRISTOPHER M. COOK,
Debtor – Appellant,

– v. –

THOMAS P. GORMAN, Chapter 13 Trustee,
Trustee – Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
(1:24-cv-00288-MSN-WBP)

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Association of Consumer Bankruptcy Attorneys is a nonprofit association. It has no parent corporation, and no publicly held company owns a 10% or more interest in NACBA.

The National Consumer Bankruptcy Rights Center is a nonprofit association. It has no parent corporation, and no publicly held company owns a 10% or more interest in NCBRC.

This case arises out of a bankruptcy proceeding, Appellee serves as the duly appointed Trustee of the bankruptcy estate of Christopher M. Cook.

There is no creditors' committee.

RULE 29(a)(2) STATEMENT

Both Appellant and Appellee have consented to the filing of this brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a nonprofit organization of approximately 1,500 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process.

[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for any party authored this brief in whole or in part, and no person or entity other than NACBA and NCBRC, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

NACBA and NCBRC regularly file[2] *amicus curiae* briefs in systemically important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors. NACBA, NCBRC, and Chapter 13 debtors throughout the Fourth Circuit have a vital interest in the outcome of this case.

Only individuals can file for Chapter 13 bankruptcy protection. 11 U.S.C. § 109(e). The Chapter 13 debtor, in this case, sought an appeal of a confirmation order (which confirmed an amended plan he objected to)[3] on the basis that the first plan proposed by the debtor complied with 11 U.S.C. § 1325(a) and should have been confirmed. On appeal the district court brushed aside the debtor's argument and summarily held that equitable mootness barred the relief sought by the debtor. This is despite no Fourth Circuit case ever having applied the judge-made doctrine of equitable mootness to a Chapter 13 case.

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[2] When referencing *amicus curiae* briefs that contribute citations to U.S. Supreme Court opinions in bankruptcy cases, it has been noted that, "The contribution of the NACBA briefs is not surprising. Aside from the Solicitor General, the NACBA is the most common single amicus to appear in these cases…" See, Ronald J. Mann, Bankruptcy and the U.S. Supreme Court, p. 213, n. 6 (2017).

[3] This framework of a Chapter 13 debtor filing a plan they disagree with, and then objecting to it is the proper method for a debtor appealing a Chapter 13 confirmation order. See e.g., Trantham v. Tate, 112 F.4th 223, 230 (4th Cir. 2024).

Respectfully, NACBA and NCBRC submit that all Chapter 13 bankruptcy debtors have an interest in the issue at the heart of this first impression case—whether an appeal of an order confirming a Chapter 13 plan can be equitably moot simply because plan payments have begun.[4] This issue directly implicates consumers' rights.

STANDARD OF REVIEW

This Court has yet to address the proper standard of review for reviewing a lower court determination of equitable mootness. See, Bate Land Co. LP v. Bate Land & Timber LLC (Bate Land & Timber LLC), 877 F.3d 188, 195 n. 5 (4th Cir. 2017) ("This court has declined to decide whether we review an equitable mootness determination *de novo* or for abuse of discretion."). Other circuits are split on this issue. See, FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.), 6 F.4th 880, 889 n.5 (8th Cir. 2021); see also, In re One2One Commc'ns, LLC, 805 F.3d 428, 453 (3d Cir. 2015) (collecting cases) (Krause, J., concurring).

[4] *Amici* are advocating on behalf of Mr. Cook in this appeal solely with respect to the issue of equitable mootness. If this Court agrees that equitable mootness was improperly applied here, this case would likely need to be sent back to the district court so that it can be the first court to hear the merits of the debtor's appeal.

Amici advocate that this Court should apply a *de novo* standard when reviewing equitable mootness as: (1) the bankruptcy court never address the issue of equitable mootness; (2) reviewing the relevant factors of whether to apply equitable mootness appears to be a pure question of law; and, (3) a *de novo* standard helps to reinforce the general rule that federal courts should hear cases on their merits. See, Samson Energy Res. Co., v. Semcrude, L.P. (In re Semcrude, L.P.), 728 F.3d 314, 326 (3d Cir. 2013) ("The presumptive position remains federal courts should hear and decide on the merits cases properly before them...When equitable mootness is used as a sword rather than a shield, this presumption is upended.").

SUMMARY OF ARGUMENT

a. Federal courts have a "virtually unflagging obligation…to exercise the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Despite this directive, district courts and circuit courts of appeals have created an exception to this obligation in certain cases by dismissing bankruptcy appeals under the doctrine of equitable mootness. As this Court has recognized, equitable mootness is not related to Article III mootness. Kiviti v. Bhatt,

80 F.4th 520, 531 (4th Cir. 2023) ("So-called equitable mootness is not real mootness but a pragmatic doctrine particular to bankruptcy under which appellate courts dismiss an appeal when changes to the status quo following the order being appealed make it impractical or inequitable to unscramble the eggs.") (citation omitted).

Over the years, equitable mootness has been subject to increasing criticism. As noted by multiple circuit courts and scholars, the doctrine of equitable mootness "permit[s] federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." Taleb v. Miller, Canfield, Paddock & Stone, P.L.C. (In re Kramer), 71 F.4th 428, 445 (6th Cir. 2023) (quoting In re Cont'l Airlines, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting)).

This Court has generally limited the application of equitable mootness, as it has not upheld an equitable mootness finding in a

published decision since 2004,[5] and has only applied the doctrine in Chapter 11 reorganizations.

b. Equitable mootness has no application in this case. The confirmed plan was simple. Only four general unsecured claims were allowed in the Chapter 13 (there were no secured claims or priority claims). The debtor is an individual (entities other than individuals cannot seek Chapter 13 relief) and the debtor is not in business. The plan that was confirmed did not transfer any property; rather, the debtor was to make monthly payments to the trustee that would be distributed pro-rata to the four unsecured creditors. Any party that would be impacted by a reversal of the confirmed plan is a party to the bankruptcy case that voluntarily filed a proof of claim, not a third party. There would be no need for the bankruptcy court to order these creditors to return any overpayments in the event of a reversal, but even if there was, the bankruptcy court has that express power to order such returns under 11 U.S.C. § 502(j). The district court was not left without a remedy to

[5] Retired Pilots Ass'n of US Airways, Inc. v. US Airways Group, Inc. (In re US Airways Group, Inc.), 369 F.3d 806 (4th Cir. 2004).

"unscramble" what occurred at confirmation and it erred in finding the appeal equitably moot.

ARGUMENT

I. The district court improperly avoided the merits of this appeal by invoking the doctrine of equitable mootness

A. Equitable mootness generally

Equitable mootness is a judge-made doctrine that was spawned from an appeal in the Chapter 11 case of Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793 (9th Cir. 1981). In Roberts Farms, the confirmed Chapter 11 plan (along with other orders on appeal) dealt with the sale of certain property of the debtor. Id. 652 F.2d at 797. The Ninth Circuit, taking a page from this Circuit, found that the appealing parties failed to obtain a stay of the sales of property and that failure mooted the appeals. Id. at 796 (citing In the Matter of Abingdon Realty Corp., 530 F.2d 588 (4th Cir. 1976)). The rationale for why such a stay was necessary was an amendment to former Bankruptcy Rule 805[6] ("Stay

[6] The language added to then Bankruptcy Rule 805 stated, "Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal." While stays pending appeal are now governed by Fed. R. Bankr. Pro. 8007; this language added to Rule 805 in 1976 is now codified at 11 U.S.C. § 363(m).

Pending Appeal") in 1976. After Roberts Farms, many circuit courts understood equitable mootness in Chapter 11 cases to flow from Bankruptcy Rule 805 when confirmation orders called for the sale of the debtor's property. See, Taleb v. Miller, Canfield, Paddock & Stone, P.L.C. (In re Kramer), 71 F.4th at 446 ("Former Rule 805 embodied a broader policy that could be applied to bar appeals from an order confirming a bankruptcy plan of reorganization where certain property transactions do not stand independently and apart from the plan of arrangement.") (citation and quotations omitted).

At its inception, equitable mootness was utilized to prevent the undoing of very complex Chapter 11 plans. Tiffany Chang, Equitable Mootness in the Second Circuit, 31 S. Cal. Interdisc. L.J. 353, 358 (2022) ("The doctrine was designed to be expressly limited to complex reorganizations with intricate transactions."), see also, One2One Commc'ns., LLC v. Quad/Graphics, Inc. (In re One2One Commc'ns), 805 F.3d 428, 438 (3rd Cir. 2015) (Krause, J., concurring) ("The doctrine was designed to be limited in scope and cautiously applied, specifically in highly complex cases where limited relief was not feasible and upsetting

a reorganization would cause substantial harm to numerous third parties.") (citation and quotation omitted).

Equitable mootness was also intended to be used sparingly. See, Samson Energy Res. Co. v. SemCrude, L.P. (In re SemCrude, L.P.), 728 F.3d 314, 326-327 (3rd Cir. 2013) ("Dismissing an appeal as equitably moot should be rare, occurring only where there is sufficient justification to override the statutory appellate rights of the party seeking review."); see also, 7 Collier on Bankruptcy ¶ 1129.09 (16th ed. 2025) ("This power, however, is sparingly used.").

Even when used, it has been limited to Chapter 11 cases. Id. ("Traditionally, the equitable mootness doctrine has been applied only to appeals from orders confirming plans of reorganization in chapter 11."); see also, In re Kramer, 71 F.4th at 448 ("In the two decades that followed, we continued to apply equitable mootness to bar appeals only of confirmation orders of reorganization plans in Chapter 11 reorganizations.").

This Court has embraced equitable mootness in appropriate bankruptcy appeals when "effective relief on appeal becomes impractical, imprudent, and therefore inequitable." Bate Land Co. LP v. Bate Land &

Timber LLC (Bate Land & Timber LLC), 877 F.3d at 195. Application of equitable mootness, "is based on practicality and prudence, does not employ rigid rules, and requires that a court determine whether judicial relief on appeal can, as a pragmatic matter, be granted." Id. (citation and quotations omitted).

Relevant factors this Court uses in evaluating equitable mootness are:

> (1) whether the appellant sought and obtained a stay;
>
> (2) whether the reorganization plan or other equitable relief ordered 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 interests of third parties.

Id.

B. The growing criticism of equitable mootness

In the years since the adoption of equitable mootness, many courts and scholars have noted its over-usage by district and circuit courts to

dismiss bankruptcy appeals without touching the merits thereof. See e.g., In re Kramer, 71 F.4th at 445 ("The name—equitable mootness—is misleading because there is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome (equitable mootness).") (citing In re VeroBlue Farms USA, Inc., 6 F.4th at 888) (quotation omitted); see also, Bruce A. Markell, The Needs of the Many: Equitable Mootness' Pernicious Effects, 93 Am. Bankr. L. J. 377, 397-98 (2019); Robert Miller, Equitable Mootness: Ignorance is Bliss and Unconstitutional, 107 KY. L. J. 269, 291-92 (2018).

The first major critique of equitable mootness came from then Judge Alito of the Third Circuit. See, In re Cont'l Airlines, 91 F.3d at 567 (en banc) (Alito, J., dissenting). That chorus has continued:

> The doctrine was intended to promote finality, but it has proven far more likely to promote uncertainty and delay. Ironically . . . a motion to dismiss an appeal as equitably moot has become "part of the Plan." Proponents of reorganization plans now rush to implement them so they may avail themselves of an equitable mootness defense, much like Appellees did here. Rather than litigate the merits of an appeal, parties then litigate equitable mootness. And even if an appeal is dismissed as equitably moot by a district court, that dismissal is appealed to our Court, often resulting, in turn, in a remand and further proceedings.
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> * * * *
>
> Without the equitable mootness doctrine…the District Court would have ruled on the merits long ago.

In re One2One Commc'ns, 805 F.3d at 446-447 (Krause, J., concurring). As mentioned above, this Court has not accepted an invitation to dismiss an appeal on equitable mootness grounds since 2004, despite numerous invitations to do so.

Recently, the Supreme Court has frowned upon the use of equitable mootness concepts to cut off a bankruptcy litigant's right to appeal. MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 295 (2023) ("Our cases disfavor these kinds of mootness arguments."); see also, Kramer, 71 F.4th at 446, n.1 ("We also note that the Supreme Court may have recently indicated its position on equitable mootness when it explained that, irrespective of statutory mootness, an appeal in a bankruptcy case remains live so long as it remains possible for a court to grant any effectual relief whatever to the prevailing party.") (citation omitted). The Supreme Court has frowned on equitable mootness because if a bankruptcy litigant has "a concrete interest, however small, in the outcome of the litigation," the appeal is not moot. MOAC Mall Holdings, 598 U.S. at 295.

No circuit court has extended equitable mootness to a Chapter 13 case; this Court should not do that now.

II. Equitable mootness does not apply in this consumer debtor's Chapter 13 case

The relevant factors for equitable mootness are not present here.

a. Whether the debtor sought a stay of the confirmation order. The short answer is no. However, what the court below did not look at is why this debtor would not seek (or be able to seek) a stay pending appeal.

Mr. Cook is a disabled veteran on a fixed income. [J.A. 79-80]. It seems highly unlikely that he could afford a bond pending appeal, or the attorney's fees to seek a stay at the district court and this Court (he did, after all, file for bankruptcy protection). Meanwhile, he is the Chapter 13 debtor and must still make a payment each month to the trustee, even on appeal. See, 11 U.S.C. § 1326(a).

b. Whether the plan has been substantially consummated. Substantial consummation only exists in Chapter 11—it is a defined term of art. 11 U.S.C. § 1101(2).[7] The significance of substantial consummation in Chapter 11 is that once this event has occurred, the plan can no longer

[7] Substantial consummation is defined 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) commencement of distribution under the plan.

be modified. 11 U.S.C. § 1127(b). There is no such impediment to modifying a plan in a Chapter 13 case as the plan can be modified "at any time after confirmation…upon request of the debtor, the trustee, or the holder of an allowed unsecured claim." 11 U.S.C. § 1329(a). Only after all payments have been completed (after 3-5 years), can a Chapter 13 plan no longer be modified. Id.

Substantial consummation in Chapter 11 is not congruent with a Chapter 13 case. For starters, the property that is transferred in a Chapter 13 case normally consists of the debtor's wages, a portion of which is paid each month to the Chapter 13 trustee. 11 U.S.C. § 1322(a)(1) ("The plan—(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.").

Whereas a Chapter 11 plan typically can (and a Chapter 13 plan cannot), among other things:

1. merge or consolidate the debtor with one or more persons, 11 U.S.C. § 1123(a)(5)(C);

2. cancel or modify any indenture or similar instrument, 11 U.S.C. § 1123(a)(5)(F);

3. extend a maturity date or change an interest rate or other term of outstanding securities, 11 U.S.C. § 1123(a)(5)(H);

4. amend the debtor's charter, 11 U.S.C. § 1123(a)(5)(I);

5. issue securities of the debtor or any entity the debtor creates or is merged into via the plan in exchange for cash, property, existing securities, or in exchange for claims or interests, 11 U.S.C. § 1123(a)(5)(J).

A Chapter 13 debtor is an individual. A consumer debtor does not choose a successor, issue notes or other securities, amend a charter or merge into another entity. Also, in contrast to a corporate Chapter 11 debtor, the individual in Chapter 13 claims property as exempt under Section 522(b)[8] to help facilitate their "fresh start." Clark v. Rameker, 573 U.S. 122, 124 (2014).

A debtor in Chapter 13 does not commence distributions under a plan, it is the trustee who makes these distributions. 11 U.S.C. § 1326(c).

[8] Only individuals can claim exemptions. See, 11 U.S.C. § 522(b)(1).

c. The extent to which the relief requested on appeal would affect the success of the reorganization plan. If this appeal were successful, the first plan of the debtor would become the confirmed plan. The parties would not be left to try and reconstitute a plan or try and move towards confirmation, confirmation of a new plan would be automatic.

d. The extent to which the relief requested on appeal would affect the interests of third parties. The challenged plan on appeal called for payments of four $200 per month installments, followed by one $400 per month installment, then one $600 per month installment and finally thirty $625 per month installments over a 36-month period for a total of $20,550. [J.A. 264-265]. The first plan, which the debtor believes should have been confirmed, proposed a total payout of $7,200 over 36 months, [J.A. 263]; a difference of $13,350.

Only four creditors have allowed claims in this Chapter 13 case.[9] Each of these creditors voluntarily filed a proof of claim in the Chapter

[9] These unsecured claims are held by: (1) Navy Federal Credit Union, $19,736.11 [Claims Register No. 1]; (2) LVNV Funding, LLC, $16,098.08 [C.R. 2]; (3) American Express National Bank, $8,159.10 [C.R.3]; (4) Social Security Administration, $72,837.80 [C.R. 4]. Their claims collectively total $116,831.09. Payments from the trustee would pay these four creditors pro-rata. The claims register for In re

13 case. If the debtor is successful on the merits of his appeal, these creditors will receive less money than under the current plan. However, it should be noted that none of the creditors filed any objection to the first plan of the debtor. And if the debtor prevails on the merits of its appeal, the bankruptcy court would likely not need to order the return of any overpayment to the creditors.[10] Even if such a need existed, this is an express power the bankruptcy court absolutely holds. See, 11 U.S.C. § 502(j), see also, In re Roberts, 632 B.R. 719, 722 (Bankr. D. S.C. 2021) ("As an initial note, the Trustee has the implicit authority under the Bankruptcy Code to recover overpayments made to a creditor.").

e. Complexity of plan and other considerations.

As mentioned above, equitable mootness is to be invoked to prevent the untangling of very complex business transactions and sales that were relied upon by innocent third parties. None of that is present in this Chapter 13 case. Confirmation here merely set the amount of money the debtor pays each month to the Chapter 13 trustee. The amount of money in controversy is trivial compared to a normal Chapter 11 case and the

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Christopher M. Cook, E.D. Va. Bankr. case no. 23-10889-KHK can be found here: https://ecf.vaeb.uscourts.gov/cgi-bin/SearchClaims.pl. (last visited March 6, 2025).

[10] The debtor's brief explicitly disclaims any desire to force disgorgement from creditors if the appeal is successful.

amounts involved in the circuit opinions holding that equitable mootness does not apply. See e.g., In re Semcrude, L.P., 728 F.3d at 324 (Possible difference of $207,300.62 to redistribute if appeal was successful was not enough to find equitable mootness), and, In re VeroBlue Farms USA, Inc., 6 F.4th at 889 (redistributing $12 million in plan payments already made if appeal was successful did not support equitable mootness).

This is not to say that there could never be a finding of equitable mootness in an appeal of a confirmed Chapter 13 plan. Appeals of plans where real property has been surrendered to a secured creditor, foreclosed, and sold to an unrelated third party may be equitably moot. See e.g., Pitassi v. Deutsche Bank Nat'l Trust Co. (In re Pitassi), __ B.R. __, 2025 Bankr. LEXIS 295 (1st Cir. B.A.P., February 6, 2025). Also, in the rare case where a confirmed plan sells real property to a third party and no stay is obtained, appeal of the confirmation order may be equitably moot. See e.g., Sei Insieme LLC v. 307 Assets LLC (In re 307 Assets LLC), 665 B.R. 214 (S.D. N.Y. 2024). In such cases, the court would need to consider whether the relief sought in the appeal can still be afforded notwithstanding the sale. See, MOAC Mall, *supra*. For

example, the plan may call for additional payments by the debtor that can still be altered by a successful appeal.

Lastly, it should also be noted that finding there is no equitable mootness in a routine Chapter 13 case (one where no property is sold to a third party under the plan) cuts both ways. Finding no equitable mootness here also prevents a Chapter 13 debtor from short-circuiting the merits of an appeal by a trustee or creditor who has objected to confirmation of a plan.

CONCLUSION

For these reasons, *Amici Curiae* respectfully request that the Order and Judgment of the district court be VACATED, and this case be remanded to the district court to consider the merits of this appeal.

Respectfully submitted, this the 12th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. Rule 29(a)(5) because this brief contains 3,941 words, excluding the portions thereof exempted by Fed. R. App. P. 32(f); and,

I certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

CERTIFICATE OF SERVICE

I certify that on March 12, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system:

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