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GLM v. Windstream: Second Circuit Endorses Expansive Equitable Mootness Doctrine, Declines to Consider Merits of Critical Vendor Objection

In February 2021, the Second Circuit Court of Appeals issued an opinion in the *Windstream Holdings* bankruptcy cases that dismissed a creditor's appeal of an order approving critical vendor payments on the basis that the appeal was equitably moot.[1] The Second Circuit refused to consider the merits of the appeal, finding instead that because the Windstream debtors had, during the pendency of the appeal, confirmed and substantially consummated their plan of reorganization, the appeal of the critical vendor order was equitably moot. The opinion is notable as it emphasizes the Second Circuit's preference to invoke the doctrine, even on appeals of matters other than plan confirmation, and underscores the importance of appellants taking all measures available to increase the odds that an appeal is not deemed equitably moot.

The saga began with the Windstream debtors' chapter 11 filings on February 25, 2019, on which date the debtors also filed a motion seeking approval to pay the prepetition general unsecured claims of certain critical vendors. Rather than identify by name those vendors deemed critical, the debtors instead informed the Southern District of New York bankruptcy court that they had "identified approximately 263 vendors as Critical Vendors" and "believe[d] they owed the Critical Vendors approximately $80 million."[2] The debtors explained to the court the procedures by which they identified those vendors deemed critical, including by specifically answering ten questions (*i.e.*, whether an alternative vendor is available, the degree to which replacement costs would exceed the vendor's claim).[3] Finally, the debtors, in their proposed order, contemplated a procedure by which they would share the list of critical vendors and any critic al vendor payments only with the U.S. Trustee, any statutory committee of creditors, and the court (for *in camera* review).[4]

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[1] *GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)*, 2021 U.S. App. LEXIS 4630 (2d Cir. Feb. 18, 2021).

[2] *GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)*, 614 B.R. 441, 445 (S.D.N.Y. 2020).

[3] *Id.*

[4] *Id.* at 446.

The bankruptcy court granted the motion on an interim basis, and GLM DFW, Inc. ("GLM"), a prepetition creditor which was not among the list of proposed critical vendors, objected to entry of the motion on a final basis on several grounds, including that (i) the court, not the debtors, should determine which vendors were critical and (ii) the debtors should be compelled to publicly disclose the identity of the critical vendors and any payments to such creditors.[5] At the final hearing, the debtors offered testimony regarding the procedures it had implemented to identify critical vendors, and argued that maintaining confidentiality regarding the list of potentially critical vendors was needed in order to preserve the debtors' leverage in negotiating with those vendors.[6] On April 22, 2019, the bankruptcy court entered the final order approving the critical vendor protocol, and GLM appealed the order to the United States District Court for the Southern District of New York.

On April 3, 2020, the district court affirmed the bankruptcy court's order, agreeing with the debtors on the merits. Among other things, the district court found that "[c]ourt supervision of each individual critical-vendor designation is not only impractical in large bankruptcies . . . but it was unnecessary here, given the oversight of the U.S. Trustee and the creditors' committee . . . ."[7] The court also cited a long list of Southern District cases for the proposition that "bankruptcy courts routinely rely on debtors' representations and business judgment to identify critical vendors."[8] The district court also disagreed with GLM's argument that the list of critical vendors should have been filed, instead finding that the debtors were under no obligation to file the list, and even were there such an obligation, the list would likely constitute "confidential information" that could be sealed.[9]

GLM appealed the district court's affirmance to the Second Circuit. While the appeal was pending, the Windstream debtors confirmed, effectuated, and substantially consummated their plan of reorganization. Accordingly, the Second Circuit, in a short opinion, declined to address the merits of the appeal, finding instead that the appeal was equitably moot.

The Second Circuit explained that "[e]quitable mootness is a prudential doctrine under which a court may dismiss a bankruptcy appeal 'when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.'"[10] And the Circuit Court further offered that the "primary purpose of equitable mootness is to give courts a tool 'to avoid disturbing a reorganization plan once implemented.'"[11] With that background, the Second Circuit held that "where . . . such a plan has already been substantially consummated, we presume

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[5] *Id.*

[6] *Id.* at 447.

[7] *Id.* at 452.

[8] *Id.*

[9] *Id.* at 455-56.

[10] *GLM DFW, Inc.*, 2021 U.S. App. LEXIS 4630, at *2 (citing *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005)).

[11] *Id.* (internal citation omitted).

that an appeal is equitably moot" and "[a] party seeking to overcome that presumption may do so only by demonstrating that five factors — dubbed the *Chateaugay* factors — are met."[12] Those factors are:

> (1) "the court can still order some effective relief;"
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> (2) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity;"
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> (3) "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 [b]ankruptcy [c]ourt;"
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> (4) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings;" and
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> (5) "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."[13]

Notably, the primary issue argued by GLM was not whether it had satisfied the *Chateaugay* factors—it clearly had not—but rather whether the mootness doctrine was applicable at all. GLM argued that it was not, "because the appeal does not directly concern the bankruptcy court's order confirming Windstream's plan of reorganization."[14] The Second Circuit emphatically disagreed, holding that "equitable mootness can be applied 'in a range of contexts'" and "the equitable mootness doctrine is applicable in this case even though GLM has not expressly asked us to reject the bankruptcy court's approval of Windstream's plan of reorganization."[15]

Having established that the equitable mootness doctrine could apply, the Second Circuit then considered whether the appeal at hand was equitably moot, and concluded that it was, as overturning the critical vendor order—entered on the fourth day of a bankruptcy case that had since seen a plan confirmed and consummated—"could cause tens of millions of dollars in previously satisfied claims to spring back to life, thereby potentially requiring the bankruptcy court to reopen the plan of reorganization," and would be "highly disruptive" to creditors who had received the critical payments years ago.[16]

In sum, for bankruptcy practitioners, the entire Windstream/GLM trilogy

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[12] *Id.* at *3.

[13] *Id.* at *3 (citing *Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993)).

[14] *Id.* at *3-*4.

[15] *Id.* at *4-*5.

[16] *Id.*at *6.

highlights two important considerations. First, viewed solely in the critical vendor context, the decisions are instructive regarding the difficulty in contesting or overturning a bankruptcy court's critical vendor decisions, particularly where such decisions are supported by a debtor's representations and testimony. And second, viewed more broadly, the saga highlights the Second Circuit's endorsement of the equitable mootness doctrine in a variety of contexts and its willingness to apply the doctrine even outside of plan confirmation appeals, and the necessity for objecting parties in the Second Circuit to take all available measures to increase the chances that an appeal will not be deemed equitably moot.

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