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Bankruptcy Rule 9024: Paper Tiger or Powerful Procedural Tool When Stacked Against the Bankruptcy Code

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Introduction

The U.S. Supreme Court, in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, [1] first recognized [2] that bankruptcy courts possessed equitable authority to set aside their own orders and judgments. [3] " [W]e think the [bankruptcy] court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action." [4] This equitable power was ultimately promulgated into Rule 9024 of the Federal Rules of Bankruptcy Procedure (Rule 9024), which, absent certain exceptions, makes Rule 60 of the Federal Rule of Civil Procedure (Rule 60) applicable in bankruptcy cases. [5]

Unlike the application of Rule 60 in a case pending in the U.S. district courts, [6] Rule 9024 seemingly cannot provide a party with a substantive remedy that has been previously foreclosed by a provision of the Bankruptcy Code. [7] This distinction is based on section 2075 of Title 28 (the Bankruptcy Rules Enabling Act), [8] which was modified to ensure that the Bankruptcy Rules do not supercede the statutory provisions of the Bankruptcy Code. [9] Instead, Bankruptcy Rules merely provide a mechanism by which the Bankruptcy Code's provisions are implemented and effectuated. [10] Thus if a substantive provision of the Bankruptcy Code expressly foreclosed the relief that a party was seeking, Rule 60 could not trump that foreclosure. [11]

Bankruptcy decisional law has consistently cited adherence to the Bankruptcy Rules Enabling Act. [12] Nevertheless, bankruptcy courts over time have, in certain instances, crafted remedies born from Rule 60 that on their face have elevated Rule 9024 over express provisions of the Bankruptcy Code. [13] These decisions commonly do maintain adherence to the precept that Rule 60(b) cannot usurp a provision of the Bankruptcy Code [14] but nevertheless find ways to do exactly that. The various rationales enabling the elevation of Rule 60 over a Bankruptcy Code provision are intensely fact-specific and evidence the prominent role that equity or a court's inherent discretion or both [15] play in this decision making process.

In the end, Rule 9024 should be nothing more than a paper tiger when viewed in the light of the Bankruptcy Rules Enabling Act and when stacked against the finality-driven policies underlying certain provisions of the Bankruptcy Code. Part I of this article provides a brief primer on and discusses the policy considerations of the Bankruptcy Rules Enabling Act. Part II discusses the importance of finality in orders and judgments entered under the Bankruptcy Code. Part III of the article provides a survey of cases that either elevate Rule 9024 above a finality-driven order or maintain allegiance to the Bankruptcy Rules Enabling Act. Finally, this article rejects the utilization of Rule 60 where the Bankruptcy Code has previously foreclosed relief and proposes a two-part test to ensure strict adherence to the Bankruptcy Rules Enabling Act.

The Bankruptcy Rules Enabling Act

Rule 9024's predecessor was promulgated under the Bankruptcy Rules Enabling Act that Congress enacted in 1964. [16] The Bankruptcy Rules Enabling Act vested with the U.S. Supreme Court authority to promulgate rules related to bankruptcy proceedings. [17] The Bankruptcy Rules Enabling Act "finds its origins in another federal statute, Section 2075 of Title 28 (the 'Rules Enabling Act')." [18]
The Rules Enabling Act allows the Supreme Court to prescribe general rules of practice and procedure in the United States District Courts. The Bankruptcy Rules Enabling Act gives the Supreme Court the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. [19]

As initially enacted, both the Rules Enabling Act and the Bankruptcy Rules Enabling Act had a similar purpose: to allocate authority between the courts and Congress. The court was "allocated only those decisions concerned with procedure, and Congress has retained control over primary, substantive policy decisions." [20]

The Bankruptcy Reform Act of 1978, however, deleted the second sentence of paragraph (b) in the Bankruptcy Rules Enabling Act. [21] The deletion of the second sentence meant that the Bankruptcy Rules could not supersede the statutory provisions of the Bankruptcy Code. [22] According to one commentator, the deletion was intentional "because Congress felt that recent enactments of statutory provisions should not be subject to revisions through the rulemaking process." [23]
By deleting the final sentence of [the Bankruptcy Rules Enabling Act], thus not permitting the Bankruptcy Rules to supersede statutory provisions, a different kind of care was required in drafting the Rules. Not only was it necessary to maintain the procedural nature of the Rules, as was the case in the earlier development, but it was also now mandatory that a full familiarity with the new Code be developed to ensure against writing a Rule that would be inconsistent with a Code provision and, therefore, invalid. [24]

Thus the Bankruptcy Rules Enabling Act, as modified, established that any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Bankruptcy Code. [25] It follows, then, that a conflict may arise when the provisions of Rule 60(b) are not harmonious with one or more of the provisions of the Bankruptcy Code that further the policy of finality of orders and judgments in a bankruptcy proceeding.

The Importance of Finality of Orders and Judgments in Bankruptcy

A primary theme within our current bankruptcy system is the significant importance of finality [26] in orders and judgments. Thus if Rule 9024 were simply authority to permit an unadulterated second bite at the same apple, the stringent finality-enforcing provisions of the Bankruptcy Code might be eviscerated. [27] Finality is important to ensure the secure, prompt, and effectual "administration and settlement of the estate...within a limited period of time." [28] Indeed, "the policies of finality and necessity of fashioning effective remedies in bankruptcy law pervade the Code." [29]

Nowhere is finality more evident than the various provisions within the Bankruptcy Code that impose deadlines which, absent consent or court-authorized extensions, contrast deals with liquidation. [30] For example, executory contracts are automatically rejected if not assumed by a Chapter 7 trustee within 60 days after the order of relief is entered. [31] Thirty days after a party moves for relief from stay of any act against property of the estate, such stay is terminated. [32] An unexpired lease of nonresidential real property under which the debtor is the lessee is deemed rejected if the trustee does not assume or reject it within the earlier of 120 days after the order of relief is entered or the date of the confirmation

order. [33] The debtor loses its exclusive right to file a plan of reorganization if it does not do so within 120 days after the order for relief is entered. [34]

The time restraints contained in the Bankruptcy Code and the Bankruptcy Rules are "intended to expedite the completion" [35] of the bankruptcy proceeding.
The Chapter 11 process alters contractual and property rights of creditors and other parties; therefore, to prevent a party from being irreparably harmed, the bankruptcy court is authorized to conduct some hearings on an accelerated basis. The accumulation of administrative expenses in the form of professional fees over the course of a corporate reorganization adds further impetus to the requirement that cases be completed as quickly as possible. Hence, unlike a typical civil suit that may linger for years, the critical legal issues in a corporate reorganization must be resolved immediately. [36]

The doctrine of equitable mootness further underscores the significance finality plays in bankruptcy orders and judgments. The equitable mootness doctrine primarily applies when a final bankruptcy order or judgment is appealed. [37]
Under the doctrine, a bankruptcy appeal becomes "equitably moot" when, during the appeal, actions or events take place that preclude the appellate court from providing either the appellant or the appellee relief. [38] Once the appeal becomes equitably moot, the appellate court will dismiss. [39]

Failure to stay a bankruptcy sale order pursuant to section 363(m) of the Bankruptcy Code [40] is often cited as a basis for dismissing an appeal of the sale order on equitable mootness grounds. [41] Similarly, allowing performance under a confirmed plan of reorganization to a point beyond any possible appellate invalidation is another common basis for dismissal of an appeal on equitable mootness grounds. [42]
Indeed, an order confirming a chapter 11 plan is the most significant order that may be entered in a chapter 11 case. In furtherance of the desire for closure in respect of reorganization cases, appellate courts have acknowledged the necessity for preservation of the integrity and finality of confirmation orders that have been 'implemented'. Thus, the doctrine of mootness has emerged with its concomitant limitation on appellate review of confirmation orders as to plans of reorganization that have been consummated. [43]

"[F]inality in bankruptcy" is the dominant rationale underscoring these decisions. [44] "The trend is towards an absolute rule that requires appellants to obtain a stay before appealing [an order, including] a sale of assets." [45]

Affording finality to bankruptcy court orders and judgments is thus a bedrock principle underscoring the expeditious and orderly reorganization of a debtor and the settlement of a debtor's estate. [46]

Rule 9024 and Rule 60(b) in Bankruptcy Proceedings

After the enactment of the Bankruptcy Rules Enabling Act, the general rules governing the power to reconsider final orders and judgments in bankruptcy cases are contained in Rule 9024. [47] Relief under Rule 9024 can be by way of motion or by the bankruptcy court, sua sponte. [48] Utilizing a time continuum, generally relief under Rule 9024 can be entered between a reasonable time after the date that the final order or judgment was entered and within one year after it was entered. [49] The one-year limitation does not apply to motions seeking to reopen a case under section 350 of the Bankruptcy Code or challenging uncontested claims allowance or disallowance orders. [50] In those instances, a Rule 9024 Motion can be filed at any time. [51] If the relief being sought relates to a discharge order under section 727 of the

Bankruptcy Code or plan confirmation orders entered under Chapters 11, 12, or 13, the motion's timeliness is seemingly circumscribed by provisions contained within sections 1144, 1230, and 1330 of the Bankruptcy Code. [52]

Under the Bankruptcy Rules Enabling Act, finality-driven provisions of the Bankruptcy Code should render Rule 9024 a nullity. There have been a few instances where such provisions have been circumvented under cover of Rule 60(b) based on standards employed by circuit courts in nonbankruptcy cases. One such example of this circumvention can be found in *In re 401 East 89th Street Owners, Inc.*, [53] where the bankruptcy court utilized Rule 60(b) to provide an equity holder relief from a confirmation order, notwithstanding that the Chapter 11 confirmation order had been substantially consummated. [54]

In *401 East 89th Street*, the confirmed plan required that each shareholder pay an assessment fee in accordance with the number of shares held. The assessment fee served as the funding mechanism for the plan. The shareholders would retain their property rights in the debtor if they satisfied the assessment. Failure to pay the assessment would result in automatic termination of the shareholder's interest in the debtor. [55] One of the debtor's shareholders failed to pay its assessment, its shares were cancelled, and new shares in like amount were issued to the debtor's mortgagee in accordance with the plan. [56] Implicit in the court's decision was that the plan had been substantially consummated. The shareholder argued that it never received notice of the plan and sought relief under Rule 60(b) on the grounds of excusable neglect and extraordinary circumstances. [57]

As an initial matter, the court in *401 East 89th Street* relied on the Second Circuit's decision in *Paddington Parners v. Pouchard* [58] to substantiate relief utilizing Rule 60(b). *Paddington Partners* involved claims of breach of contract and violations of federal securities law and the Racketeer Influenced and Corrupt Organizations Act [59] and was wholly unrelated to a case filed under the Bankruptcy Code. Taking its cue from the Rules Enabling Act and not the Bankruptcy Rules Enabling Act, the Second Circuit noted that because "60(b) allows extraordinary judicial relief, it is invoked only if the moving party meets its burden of demonstrating 'exceptional circumstances.'" [60]

In granting the shareholder's motion, the *401 East 89th Street* court concluded that the shareholder had, in fact, demonstrated "exceptional circumstances" [61] justifying relief under Rule 60(b). [62] In addition to noting that the shareholder's motion was timely and established entitlement under one of the enumerated grounds in Rule 60(b), the court also concluded that the harm to the shareholder outweighed the necessity of finality in confirmation order. [63] Relying on *401 East 89th Street*, other bankruptcy courts have confirmed that Rule 60(b) may be utilized to modify a plan of reorganization if the movant established exceptional circumstances and if the harm to the movant outweighed the necessity of finality in the order confirming the plan. [64]

In *Midkiff vs. Dunivent (In re Midkiff)*, [65] the Bankruptcy Appellate Panel for the 10th Circuit affirmed an order revoking a Chapter 13 discharge under Rule 60(b)'s "inadvertence" or "mistake" provisions because "the court had not been apprised of all the facts." [66] Before discussing *Midkiff*, a brief analysis of section 1328--the discharge provision of Chapter 13--is in order. Section 1328(a) requires that a discharge be granted after the completion by the debtor of all payments under the plan. [67] Before one year after a discharge, "the court may revoke such discharge only if (a) such discharge was obtained by the debtor through fraud; and (b) the requesting party did not know about the fraud until after the discharge was granted." [68] Consequently, the plain language of the Bankruptcy Code mandates that a debtor's discharge can only be revoked upon a showing of fraud. [69]

In *Midkiff*, the bankruptcy court entered an order of discharge after the debtor completed his payment obligations under the plan. After the discharge order was entered, the Chapter 13 trustee moved under Rule 9024 and Rule 60(b) to vacate

the discharge order in order to collect and disburse an income tax refund. [70] The bankruptcy court granted the trustee's motion, citing Rule 60(b)(1). [71] As its rationale, the court noted that because it was unaware of the debtor's income tax refund at the time that the discharge order was entered, it was a "mistake" for the order to have been entered in the first instance. [72]

A similar decision was affirmed by the Ninth Circuit in *Cisneros v. United States of America (In re Cisneros)*. [73] In support of its decision that Rule 9024 and Rule 60(b) could usurp the discharge revocation provisions of section 1328(e), the court stated

Section 1328(e) therefore does not conflict with Rule 9024...A chapter 13 debtor's right to have his discharge revoked only for fraud (and not on general equitable grounds or for some reason that would justify revocation under chapter 7) is in no way infringed when a court vacates an order of discharge entered by mistake. [74]

A rational inference drawn from analyzing these cases is that bankruptcy courts, not unlike district courts, believe retention of discretion to set aside final judgments and orders is permitted so long as the factors employed by Rule 60(b) are satisfied. The distinction between the bankruptcy courts and the district courts is notable in this regard, however, given that the Bankruptcy Rules Enabling Act prevents the utilization of the Bankruptcy Rules to resurrect a right that had been previously foreclosed by a Bankruptcy Code provision.

A more appropriate analysis and conclusion that is juxtapose to *Midkiff*, *Cisneros*, and *401 East 89th Street* can be found in the Third Circuit's decision in *Branchburg Plaza Assoc. vs. Fesq (In re Fesq)*. [75] In *Fesq*, a lien creditor sought to set aside a Chapter 13 debtor's confirmation order entered based on "mistake, inadvertence, or execusable neglect" under Rule 60(b). [76] In accord with the Bankruptcy Rules Enabling Act, the court initially confirmed that "Rule 9024 [could] not validly provide [the lien creditor] with a substantive remedy that would be foreclosed by Section 1330(a)." [77] Consequently, Rule 9024 could only be invoked if it was harmonious with section 1330(a). The lien creditor argued that the confirmation order could be set aside within the time period and for the reasons prescribed by Rule 60(b) but that if the basis was fraud, the motion must have been filed within 180 days after the confirmation order was entered. [78] The Third Circuit rejected the lien creditor's argument and affirmed the bankruptcy's court's order:"We adhere to all relevant considerations, plain meaning, logic, case law and policies underlying the Code to hold that fraud is the only ground for relief available for revocation of a chapter 13 confirmation order." [79] Indeed, the plain language of the Bankruptcy Rules Enabling Act mandates as much.

Adherence to the Bankruptcy Rules Enabling Act

Bankruptcy courts are encouraged to employ the following two-part test to ensure compliance with the Bankruptcy Rules Enabling Act: First, determine whether the subject matter of the Rule 60(b) motion relates to a Bankruptcy Code provision that regulates the type of challenge to an order or the time in which such challenge can be made. If so, the movant is foreclosed from seeking relief under Rule 60(b) and must rely on the specific Bankruptcy Code provision for relief. If not, then determine whether the movant filed the Rule 60(b) motion within the time parameters contained in Rule 60(c) and established one of the enumerated factors contained in Rule 60(b). To the extent that circuit courts have adopted standards for the various bases for relief contained in Rule 60(b), then the movant would be required to establish those standards as well. If the movant meets its burden under Rule 60(b) and (c), the motion may be granted. Otherwise, the motion must be denied.

Conclusion

Bankruptcy courts cannot employ Rule 60(b) where the Bankruptcy Code has previously foreclosed relief. Thus when a Bankruptcy Code provision enumerates an exclusive basis for setting aside a final judgment or order and proscribes the time limit for doing so, Rule 60(b) cannot be utilized to usurp that provision. This result is mandated by both the stringent finality-enforcing provisions of the Bankruptcy Code [80] and the Bankruptcy Rules Enabling Act. In the end, then, reconciliation of Rule 60(b) with certain finality-driven provisions of the Bankruptcy Code can be accomplished only by way of adherence to the Bankruptcy Rules Enabling Act.

Footnotes

1 Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557 (1937).

2 Matter of CADA Investments, Inc., 664 F.2d 1158, 1161, 5 Collier Bankr. Cas. 2d (MB) 1166 (9th Cir. 1981) (noting that *Owens-Illinois* first expressed that the bankruptcy court possessed equitable powers to set aside its own orders). See also Schhovanec, Philip A., The Sale of Property Under Section 363: The Validity of the Sales Conducted Without Prior Notice, 46 Okla. L. Rev. 489, 511 (1993) ("[a] bankruptcy court, sitting as a court of equity, has long been recognized as having the power to set aside its own orders").

3 Owens-Illinois, 300 U.S. at 137;In re F.A. Potts & Co., Inc., 86 B.R. 853, 856, 17 Bankr. Ct. Dec. (CRR) 888, 12 Fed. R. Serv. 3d 205 (Bankr. E.D. Pa. 1988), order aff'd, 93 B.R. 62 (E.D. Pa. 1988), judgment aff'd, 891 F.2d 280 (3d Cir. 1989) and judgment aff'd, 891 F.2d 282 (3d Cir. 1989) ("[c]ourts have long recognized that a bankruptcy court may, in the exercise of its equitable powers, enter an order setting aside a previous order"); see also Schhovanec, 46 Okla. L. Rev. at 511 ("[a] bankruptcy court, sitting as a court of equity, has long been recognized as having the power to set aside its own orders").

4 Owens-Illinois, 300 U.S. at 137.

5 Fed. R. Bankr. P. 9024.

6 28 U.S.C.A. § 2072 ("All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect"); see also discussion regarding Bankruptcy Rules Enabling Act, infra.

7 In re Fesq, 153 F.3d 113, 116, 40 Collier Bankr. Cas. 2d (MB) 768, Bankr. L. Rep. (CCH) P 77778 (3d Cir. 1998).

8 See 11 U.S.C.A. § 2075 ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right").

9 See, e.g., Fesq, 153 F.3d at 116 ("Rule 9024 cannot validly provide...a substantive remedy that would be foreclosed by" the Bankruptcy Code); In re Rickel & Associates, Inc., 260 B.R. 673, 679, 37 Bankr. Ct. Dec. (CRR) 190, 45 Collier Bankr. Cas. 2d (MB) 1614 (Bankr. S.D. N.Y. 2001) ("the Rules cannot provide a remedy that the Bankrutpcy Code has substantively foreclosed"); Matter of Newport Harbor Associates, 589 F.2d 20, 23, 19 C.B.C. 239, Bankr. L. Rep. (CCH) P 67014 (1st Cir. 1978) ("Chapter XI Rule 11-63(8) makes it clear that, notwithstanding Rule 60's general applicability, the statute of limitations provided for by Rule 11-41 is to remain absolute and inviolable in the Chapter XI context in respect of revocation of confirmation" (internal quotations and citations omitted)).

10 Fesq, 153 F.3d at 116.

11 Fesq, 153 F.3d at 116.

12 See, e.g., Fesq, 153 F.3d at 116 ("Rule 9024 cannot validly provide...a substantive remedy that would be foreclosed by" the Bankruptcy Code); Rickel, 260 B.R. at 679 ("the Rules cannot provide a remedy that the Bankrutpcy Code has substantively foreclosed"); Newport Harbor, 589 F.2d at 23 ("Chapter XI Rule 11-63(8) makes it clear that, notwithstanding Rule 60's general applicability, the statute of limitations provided for by Rule 11-41 is to remain absolute and inviolable in the Chapter XI context in respect of revocation of confirmation" (internal quotations and citations omitted)).

13 See, e.g., In re Cisneros, 1466, 994 F.2d 1462, Bankr. L. Rep. (CCH) P 75303, 72 A.F.T.R.2d 93-5175, 138 A.L.R. Fed. 729 (9th Cir. 1993) ("Section 1328(e)...is no way infringed when a court vacates a order of discharge entered by mistake"); In re 401 East 89th Street Owners, Inc., 223 B.R. 75, 32 Bankr. Ct. Dec. (CRR) 1143 (Bankr. S.D. N.Y. 1998) (determining that exceptional circumstances existed that warranted granting equity holder relief from order confirming Chapter 11 plan).

14 Cisneros, 994 F.2d at 1465 ("[i]f the Bankruptcy Rule and the Code itself are indeed in conflict... the statute must take precedence"); In re Poteet Const. Co., Inc., 122 B.R. 616, 619, 66 A.F.T.R.2d 90-5742 (Bankr. S.D. Ga. 1990) ("While 11 U.S.C. § 1141(a) does not bar the application of Rule 60(b) to orders of confirmation, the inclusion of this provision in the Bankruptcy Code as well as the narrow grounds established under 11 U.S.C. § 1144 for the revocation of an order of confirmation supports a strong presumption in favor of finality"); In re Midkiff, 271 B.R. 383, 386, Bankr. L. Rep. (CCH) P 78564, 89 A.F.T.R.2d 2002-559 (B.A.P. 10th Cir. 2002) ("A chapter 13 debtor's rights to have his discharge revoked only for fraud is in no way infringed when a court vacates an order of discharge entered by mistake" under Rule 9024).

15 See In re Boroff, 189 B.R. 53, 56 (D. Vt. 1995) ("A motion for relief from judgment under Rule 60(b) is addressed to the discretion of the court"); Pierce v. Cook & Co., Inc., 518 F.2d 720, 722, 20 Fed. R. Serv. 2d 541 (10th Cir. 1975) ("Rule 60(b) gives the court a 'grand reservoir of equitable power to do justice in a particular case'").

16 King, Lawrence P., The History and Development of the Bankruptcy Rules, 70 Am. Bankr. L.J. 217, 218 (1996).

17 King, 70 Am. Bankr. L.J. at 218.

18 King, 70 Am. Bankr. L.J. at 218.

19 Fong, Christopher, Creditors and Rule 9019(A): Casting Doubt on the Trustee's Sole Authority to Settle Claims of the Estate, 82 Am. Bankr. L.J. 591, 627 (2008).

20 Fong, 82 Am. Bankr. L.J. at 627.

21 King, 70 Am. Bankr. L.J. at 236.

22 King, 70 Am. Bankr. L.J. at 218.

23 King, 70 Am. Bankr. L.J. at 236 (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 449 (1977), reprinted in 2 Collier on Bankruptcy, Appendix, at 449 (Lawrence P. King et al. eds., 15th ed. 1995)).

24 King, 70 Am. Bankr. L.J. at 239.

25 See In re Pacific Atlantic Trading Co., 33 F.3d 1064, 1066, 25 Bankr. Ct. Dec. (CRR) 1595, Bankr. L. Rep. (CCH) P 76041, 74 A.F.T.R.2d 94-5862 (9th Cir. 1994) ("any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code."); In re Barnes, 308 B.R. 77, 81, 52 Collier Bankr. Cas. 2d (MB) 153 (Bankr. D. Colo. 2004) ("the Bankruptcy Rules cannot override substantive provisions provided in the Bankruptcy Code"); In re Grabill Corp., 113 B.R. 966, 974, 20 Bankr. Ct. Dec. (CRR) 768 (Bankr. N.D. Ill. 1990), decision aff'd, 135 B.R. 835 (N.D. Ill. 1991), aff'd, 983 F.2d 773, 23 Bankr. Ct. Dec. (CRR) 1393, 28 Collier Bankr. Cas. 2d (MB) 346, Bankr. L. Rep. (CCH) P 75108 (7th Cir. 1993) ("[i]n the event of a conflict between the Bankruptcy Rules and the Code, the Code controls").

26 "[A] final order [or judgment] is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Stripp, Stephen, Balancing of Interests in Orders Authorizing the Use of Cash Collateral in Chapter 11, 21 Seton Hall L. Rev. 562, 587 (1991).

27 Simon v. Navon, 116 F.3d 1, 5, 30 Bankr. Ct. Dec. (CRR) 1196, 38 Collier Bankr. Cas. 2d (MB) 38, Bankr. L. Rep. (CCH) P 77395, 37 Fed. R. Serv. 3d 1248 (1st Cir. 1997).

28 H.R. Doc. No. 93-137, at n.26 (1973) ("this [Supreme] Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effentual [sic] administration and settlement of the estate of all bankrupts within a limited period'" (citing Ex parte Christy, 44 U.S. 292, 312, 3 How. 292, 11 L. Ed. 603, 1845 WL 5996 (1845))).

29 In re Stadium Management Corp., 895 F.2d 845, 848, 20 Bankr. Ct. Dec. (CRR) 341, Bankr. L. Rep. (CCH) P 73229 (1st Cir. 1990).

30 See Cywicki, Circuit City Unplugged: Did Chapter 11 Fail to Save 34,000 Jobs? [Testimony Before the United States House of Representatives Committee on the Judiciary--Subcommittee on Commercial and Administrative Law], available online at: http:// www.mercatus.org /uploadedFiles/Mercatus/Zywicki% #20Testimony % 20*on*%#20Circuit%#20City%#20-%#20March%#2011,%#202009.pdf, p. 11-12 (last visited on April 14, 2009) ("BAPCPA amended section 365(d) of the Code to limit the time during which a debtor-lessee must decide whether to assume or reject an unexpired lease of nonresidential real property... There may be costs to a bankruptcy regime that brings about a swifter resolution of bankruptcy cases, including the possibility that this may lead to the liquidation of some firms that might otherwise have reorganized successfully").

31 11 U.S.C.A. § 365(d).

32 11 U.S.C.A. § 362(d)(3).

33 11 U.S.C.A. § 365(d)(4).

34 11 U.S.C.A. § 1121(b).

35 Cuevas, Carlos J., Judicial Code Section 158: The Final Order Doctrine, 18 SW. U. L. Rev. 1, 4-7 (1988).

36 Cuevas, 18 SW. U. L. Rev. at 4-7.

37 In re Trico Marine Services, Inc., 337 B.R. 811, 814 (Bankr. S.D. N.Y. 2006), adhered to on reargument, 343 B.R. 68, 46 Bankr. Ct. Dec. (CRR) 136, 56 Collier Bankr. Cas. 2d (MB) 294 (Bankr. S.D. N.Y. 2006) ("[t]he doctrine of 'equitable mootness' is closely related to the ability to grant relief under § 1144. Under this doctrine, a proceeding challenging a confirmation order should be dismissed as moot when, although relief could conceivably be fashioned, the implementation of the relief would be inequitable"); In re Anderson, 349 B.R. 448, 454 (E.D. Va. 2006) ("[e]ssentially, equitable mootness is a pragmatic 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").

38 Kanowitz, Richard S. and Klein, Michael A., The Divergent Interpretations of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders, 17 Norton J. Bankr. L. & Prac. 557 (August 2008).

39 Kanowitz & Klein, 17 Norton J. Bankr. L. & Prac. 557.

40 Pursuant to 11 U.S.C.A. § 365(m):
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.

41 See, e.g., In re Filtercorp, Inc., 163 F.3d 570, 576, 33 Bankr. Ct. Dec. (CRR) 767, Bankr. L. Rep. (CCH) P 77854, 37 U.C.C. Rep. Serv. 2d 799 (9th Cir. 1998).

42 In re Public Service Co. of New Hampshire, 963 F.2d 469, 473, Bankr. L. Rep. (CCH) P 74609 (1st Cir. 1992).

43 Miller & Marcus, The Crumbling of Debtor Leverage in Chapter 11 Cases--An Implementation or Perversion of the Bankruptcy Reform Act of 1978, C371 ALI-ABA 105, 148 (1989).

44 In re Onouli-Kona Land Co., 846 F.2d 1170, 1172, 17 Bankr. Ct. Dec. (CRR) 1371, 18 Collier Bankr. Cas. 2d (MB) 1436, Bankr. L. Rep. (CCH) P 72247 (9th Cir. 1988).

45 In re USA Commercial Mortg. Co., 2007 WL 2571947 *7 (D. Nev. 2007).

46 Public Service Co. of NH, 963 F.2d at 471-72; see also In re Information Dialogues, Inc., 662 F.2d 475, 477, 8 Bankr. Ct. Dec. (CRR) 334, Bankr. L. Rep. (CCH) P 68388 (8th Cir. 1981) ("mootness doctrine promotes an important policy of bankruptcy law-that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained");

Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1424, 13 Collier Bankr. Cas. 2d (MB) 50, Bankr. L. Rep. (CCH) P 70525 (9th Cir. 1985) (mootness doctrine recognizes "particular need for finality in orders regarding stays in bankruptcy"); In re AOV Industries, Inc., 792 F.2d 1140, 1149, 14 Bankr. Ct. Dec. (CRR) 816, Bankr. L. Rep. (CCH) P 71190 (D.C. Cir. 1986) (refusing to overturn plan, in part because of "virtues of finality").

47 Fed. R. Bankr. P. 9024 provides that:

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

The relevant provisions of Fed. R. Civ. P. 60 can be found in subsections (b) and (c), which provide:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

48 In re Aztec Supply Corp., 399 B.R. 480, 488-90, 51 Bankr. Ct. Dec. (CRR) 29 (Bankr. N.D. Ill. 2009). The court in *Aztec* noted that Rule 60 had been interpreted to allow relief only by way of motion; however, in view of the provisions of section 105(b) of the Bankruptcy Code that allow the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisons" of the Bankruptcy Code, a bankruptcy court has authority to raise Rule 60, sua sponte. Aztec, 399 B.R. at 488-90.

49 Fed. R. Bankr. P. 9024; but see Whelton v. Educational Credit Management Corp., 432 F.3d 150, 155, n. 2, 204 Ed. Law Rep. 492, Bankr. L. Rep. (CCH) P 80486 (2d Cir. 2005) (noting that plaintiff/creditor was "bound only by 'the reasonable time' limitation of Rule 60(b)(4)" because it was attempting to declare a provision of a confirmed plan void ab initio).

50 Fed. R. Bankr. P. 9024.

51 Fed. R. Bankr. P. 9024.

52 A motion to revoke a section 727 discharge must be made within one year after the entry of the discharge order if the party seeking the revocation alleges that the discharge was obtained through the fraud of the debtor and if the movant did not know of the fraud at the time that the discharge was entered. See 11 U.S.C.A. § 727(e)(1). If the debtor knowingly and fraudulent failed to report the acquisition of property that is property of the estate or, among other things, failed to obey any lawful order of the bankruptcy court, the revocation could be filed within the later of one year after the discharge order or the date that the case was closed. 11 U.S.C.A. § 727(e)(2). A motion revoking a Chapter 11, Chapter 12, and Chapter 13 confirmation order must be filed within 180 days of the date that the order was entered. See 11 U.S.C.A. §§ 1144, 1230(a), 1330(a).

53 401 East 89th Street, 223 B.R. 75.

54 Pursuant to sections 1144 and 1127(b), courts have limited jurisdiction to modify a plan of reorganization after substantial consummation. See 11 U.S.C.A. §§ 1144 and 1127(b); see also In re Spiegel, Inc., 354 B.R. 51, 54, 47 Bankr. Ct. Dec. (CRR) 79 (Bankr. S.D. N.Y. 2006), aff'd, 2007 WL 656902 (S.D. N.Y. 2007), aff'd, 269 Fed. Appx. 56 (2d Cir. 2008), cert. denied, 129 S. Ct. 146, 172 L. Ed. 2d 40 (2008).

55 401 East 89th Street, 254 B.R. at 77.

56 401 East 89th Street, 254 B.R. at 78.

57 401 East 89th Street, 254 B.R. at 78.

58 Paddington Partners v. Bouchard, 34 F.3d 1132, 29 Fed. R. Serv. 3d 1306 (2d Cir. 1994).

59 Paddington Partners, 34 F.3d at 1135.

60 Paddington Partners, 34 F.3d at 1142.

61 The court cited to the Second Circuit's declaration that "since Rule 60(b) allows extraordinary judicial relief, it is invoked only if the moving party meets its burden by demonstrating exceptional circumstances." 401 East 89th Street, 254 B.R. at 78 (citing Paddington Partners, 34 F.3d at 1142).

62 401 East 89th Street, 223 B.R. at 79.

63 401 East 89th Street, 254 B.R. at 79.

64 See, e.g., Spiegel, 354 B.R. at 54 (denying movant's Rule 60(b) motion inasmuch as movant failed to meet its burden); Rickel, 260 B.R. at 678 (noting that a court could modify a confirmation order under Rule 60(b)).

65 In re Midkiff, 271 B.R. 383, Bankr. L. Rep. (CCH) P 78564, 89 A.F.T.R.2d 2002-559 (B.A.P. 10th Cir. 2002).

66 Midkiff, 271 B.R. at 386.

67 See 11 U.S.C.A. § 1328.

68 See 11 U.S.C.A. § 1328(e)

69 See, e.g., Fesq, 153 F.3d at 115 ("Confirmation orders can be revoked only upon a showing of fraud" and only within 180 days after the order was entered).

70 Midkiff, 271 B.R. at 385-86.

71 Midkiff, 271 B.R. at 385-86.

72 Midkiff, 271 B.R. at 385-86.

73 In re Cisneros, 994 F.2d 1462, Bankr. L. Rep. (CCH) P 75303, 72 A.F.T.R.2d 93-5175, 138 A.L.R. Fed. 729 (9th Cir. 1993). In *Cisneros*, however, the debtor was not entitled to a section 1328(a) discharge because he had not made all payments under the confirmed plan.

74 Cisneros, 994 F.2d at 1466.

75 In re Fesq, 153 F.3d 113, 40 Collier Bankr. Cas. 2d (MB) 768, Bankr. L. Rep. (CCH) P 77778 (3d Cir. 1998).

76 Fesq, 153 F.3d at 116.

77 Fesq, 153 F.3d at 116.

78 Fesq, 153 F.3d at 116.

79 Fesq, 153 F.3d at 121.

80 Navon, 116 F.3d at 5.

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