# THE UNCONSTITUTIONAL CONFLUENCE OF STATUTORY MOOTNESS UNDER BANKRUPTCY CODE § 363(M) & BANKRUPTCY COURTS' DISCRETION UNDER BANKRUPTCY RULE 6004(H)

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## INTRODUCTION

Section 363(m) of Title 11 of the United States Code ("Bankruptcy Code")—taken together with the apparent discretion given under Rule 6004(h) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules")—permits bankruptcy courts to unilaterally foreclose the Article III appellate review that the United States Supreme Court has repeatedly held to be essential to the constitutional integrity of the power granted to bankruptcy courts.[1] This Article examines the constitutional and statutory

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1. *See* 11 U.S.C. § 363(m) (2021); Fed. R. Bankr. P. 6004(h). As stated by the Supreme Court:

> 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."

framework for bankruptcy courts' power, the Supreme Court jurisprudence flowing from pressure tests to that power, and whether Bankruptcy Code § 363(m) and Bankruptcy Rule 6004(h) can be squared with the law of the land.

## I. HISTORICAL FRAMEWORK & THE CURRENT STATUTE

Before 1978, district courts typically delegated bankruptcy proceedings to "referees."[2] Under the Bankruptcy Act of 1898 ("1898 Act"), bankruptcy referees had, among other things, "[s]ummary jurisdiction" over "claims involving property in the actual or constructive possession of the bankruptcy court."[3] In 1978, Congress enacted the Bankruptcy Reform Act ("1978 Act"), which repealed the 1898 Act and gave the newly created bankruptcy courts power "much broader than that exercised under the former referee system."[4] In 1982, the Supreme Court determined—by plurality opinion—that the 1978 Act's removal of "most, if not all, of the essential attributes of the judicial power from the Art. III district court, and [the vesting of] those attributes in a non-Art. III adjunct . . . ," was unconstitutional.[5]

Congress responded by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Act"), pursuant to which, *inter alia*:

> District courts have original jurisdiction over bankruptcy cases and related proceedings[6];

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> Congress has in turn established 94 District Courts and 13 Courts of Appeals, composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished. Because these protections help to ensure the integrity and independence of the Judiciary, "we have long recognized that, in general, Congress may not withdraw from" the Article III courts "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty."
>
> Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work.

Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938-39 (2015).

2. Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 31 (2014).
3. *See id.* (quotations omitted).
4. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 54 (1982).
5. *See id.* at 87.
6. 28 U.S.C. §§ 1334(a)–(b) (2021).

> Each district court may provide that any or all bankruptcy cases and related proceedings **"**shall be referred to the bankruptcy judges for the district"[7]; and
>
> Each district court is vested with appellate jurisdiction over the decisions of the bankruptcy courts in its district.[8]

With these Article III controls in place, bankruptcy judges were given the power to: "hear and determine [(A)] all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11," which have been so referred (collectively, "core proceedings"),[9] and (B) proceedings "related to a case under title 11" (collectively, "non-core proceedings");[10] and to enter appropriate orders and judgments, *subject to review under § 158*, (A) with respect to core proceedings[11] or (B) upon the district court's referral and with the consent of the parties with respect to non-core proceedings.[12]

## II. BANKRUPTCY COURTS' APPARENT AUTHORITY TO PRECLUDE LITIGANTS' RIGHT TO REVIEW BY AN ARTICLE III COURT IN THE CONTEXT OF AN ASSET SALE

Bankruptcy Code § 363(b) authorizes the use, sale, or lease of estate assets outside of the ordinary course of business.[13] Bankruptcy Code § 363(m) purports to limit appellate review of orders authorizing sales or leases under § 363(b) when the challenged sale/lease is to a good faith purchaser:

> 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.[14]

The use, sale and lease of estate assets outside of the ordinary course of business is also governed by Bankruptcy Rule 6004, which was promulgated by the Supreme Court under the Rules Enabling Act.[15]

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7. 28 U.S.C. § 157(a) (2021).
8. 28 U.S.C. § 158(a)–(b) (2021).
9. *See* § 157(b)(1).
10. *See* § 157(c)(1).
11. *See* § 157(b)(1).
12. *See* § 157(c)(2).
13. 11 U.S.C. § 363(b) (2021).
14. § 363(m).
15. *See* 28 U.S.C. § 2072 (2021).

Bankruptcy Rule 6004 stays the effectiveness of an order under Bankruptcy Code § 363(m) for fourteen days, unless the court orders otherwise.[16] The fourteen-day stay is *automatically effective by its terms*; no party need affirmatively invoke its protection.[17] It is incumbent upon a party seeking limitation or waiver of that automatic stay to affirmatively seek relief from the bankruptcy court.[18]

The automatic stay prescribed by Bankruptcy Rule 6004 is designed to permit litigants to seek and obtain a stay of an order approving a sale pending appeal to an Article III court.[19] Yet, appellate courts have interpreted Bankruptcy Rule 6004(h) to give bankruptcy courts the power to *completely eliminate* the fourteen-day stay, thereby preventing objectors from obtaining a stay pending appeal, resulting in the ostensible "statutory mootness" of any attempted appeal.[20] Indeed, the bar for complete elimination of the fourteen-day stay is not high: as justification for affirmance, appellate courts have cited economic realities typical of every Chapter 11 case, such as the necessity of borrowing additional cash for each day that the stay remains effective, making bankruptcy-court-determined insulation from appellate review the default.[21]

## III. ELIMINATION OF THE STAY PERIOD CANNOT BE SQUARED WITH

16. *See* Fed. R. Bankr. P. 6004(h).

17. *See* Fed. R. Bankr. P. 6004(h) ("An order authorizing the use, sale, or lease of property other than cash collateral *is stayed* until the expiration of 14 days after entry of the order, *unless the court orders otherwise*.") (emphasis added).

18. *Cf. In re* Filene's Basement, LLC, No. 11–13511 (KJC), 2014 WL 1713416, at *14 (Bankr. D. Del. Apr. 29, 2014) (considering waiver of fourteen-day stay set forth in Bankruptcy Rule 6004(h) only upon *debtor's motion* requesting the same).

19. *See* Fed. R. Bankr. P. 6004 advisory committee's notes to 1999 amendment ("Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363(b) of the Code before the order is implemented."). Note that prior to the 2008 amendment to the rule, the stay was embodied in subsection (g).

20. *See, e.g.*, Mission Prod. Holdings, Inc. v. Old Cold LLC, 879 F.3d 376, 388 (1st Cir. 2018) (holding that bankruptcy court did not abuse its discretion in eliminating entire Bankruptcy Rule 6004 stay period, notwithstanding objection to entry of order); Palladino v. South Coast Oil Corp., 566 Fed. Appx. 594, 595 (9th Cir. 2014) (holding that bankruptcy court did not abuse its discretion in waiving Bankruptcy Rule 6004 stay period where time was of the essence).

21. *See, e.g.*, *Mission*, 879 F.3d at 387–88 (affirming bankruptcy court's order, disregarding the constitutional argument and condoning a complete elimination of fourteen-day stay in light of the debtor's explanation that it would have to obtain further loans absent waiver of the stay).

SUPREME COURT JURISPRUDENCE

A bankruptcy court's ability to foreclose an Article III judge's review by altogether eliminating the period during which parties may seek to exercise their appellate rights would appear to exceed the power that Congress could have constitutionally conferred upon bankruptcy courts.[22] The Supreme Court has several times emphasized the absolute requirement that Article III courts have control over bankruptcy courts to ensure the bankruptcy system comports with the Constitution.[23] Judges from the United States Courts of Appeal have reiterated the importance of appellate review of bankruptcy court decisions by Article III courts.[24] Bankruptcy courts themselves avoid taking action that would purport to preclude litigants from benefiting from district court oversight on the basis that the bankruptcy courts lack the power to divest the district court of such supervisory authority.[25]

United States Courts of Appeal have reached similar conclusions as to the unconstitutionality of other Bankruptcy Code provisions that purported to preclude appellate review by an Article III judge. Bankruptcy Code § 305(a) allows a court after notice and a hearing to dismiss or suspend a bankruptcy case at any time if, among other bases, such action would better serve the interests of creditors or the debtor.[26]

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22. Bankruptcy Rule 6004(h)'s ostensible empowering of bankruptcy courts to foreclose Article III review may also render Bankruptcy Rule 6004(h) invalid under the Rules Enabling Act.

23. *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1946 (2015) ("So long as [bankruptcy] judges are subject to control by the Article III courts, their work poses no threat to the separation of powers."); *id.* at 1944 ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers *so long as Article III courts retain supervisory authority over the process*.") (emphasis added); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78–79 (1982) ("[T]his Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights—*so long as those adjuncts were subject to sufficient control by an Art. III district court*.") (emphasis added).

24. *See, e.g.*, One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J. concurring) ("Appellate review by an Article III judge is crucial" to ensuring against unconstitutional "intrusion" into the "institutional integrity of the Judicial Branch" under *Wellness*.) (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986)).

25. *See, e.g.*, *In re* Motors Liquidation Co., 536 B.R. 54, 60 (Bankr. S.D.N.Y. 2015) ("If I were to deny access to a district judge for Article III consideration of whether withdrawal of the reference is appropriate, such a ruling would impair Article III judges' ability to exercise the control over the bankruptcy system that was such an important premise in *Wellness*. *Depriving an Article III judge of the ability to exercise that control would raise substantial constitutional issues, as 'the power of the federal judiciary to take jurisdiction,' upon which the Wellness holding was so heavily based, would no longer 'remain[ ] in place.*'") (emphasis added) (quoting Sharif, 135 S. Ct. at 1945).

26. *See* 11 U.S.C. § 305(a) (2021).

Prior to a Congressional amendment in 1990, § 305(c)—implemented by the 1978 Act, which as set forth above, conferred sweeping jurisdiction upon bankruptcy courts—stated that orders under § 305(a) were "not reviewable by appeal or otherwise."[27] Somewhat surprisingly, that language survived the revisions implemented in the 1984 Act in response to the issues raised in *Marathon* (regarding Article III supervision of bankruptcy courts). The Eleventh Circuit found that section unconstitutional, in that it purported to deprive Article III courts of appellate jurisdiction over a bankruptcy court's decision to dismiss or suspend a bankruptcy case.[28]

But by enacting the Judicial Improvements Act of 1990 ("1990 Act"), Congress "limited non-reviewability to the court of appeals and the Supreme Court and, by implication, left intact the possibility of district court review of § 305(a) decisions when made by the bankruptcy court."[29] The Second Circuit concluded that "[s]uch Article III review of bankruptcy court decisions removes any constitutional concerns presented by the predecessor section."[30]

Prior to implementation of the 1990 Act, the First Circuit had noted the same constitutional tension in related provisions 28 U.S.C. § 1334(c)(2) and (d), which provided for "mandatory abstention" in certain circumstances and precluded appellate review of any decision so abstaining. The First Circuit circumvented the constitutionality issue by interpreting the section to mean that only an Article III *district court* could enter mandatory abstention orders; it found that to hold otherwise—thereby permitting bankruptcy courts to enter unreviewable mandatory abstention orders—would be unconstitutional.[31] The 1990 Act implemented a fix for § 1334 similar to that implemented in 11 U.S.C. § 305.[32]

Similarly, the Third Circuit considered the constitutionality of the doctrine of equitable mootness, a "narrow doctrine by which an appellate

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27. *See* § 305(c) (1978) (amended 1990).

28. *See In re* Parklane/Atlanta Joint Venture, 927 F.2d 532, 538 (11th Cir. 1991); *see also In re* Goerg, 930 F.2d 1563, 1565–66 (11th Cir. 1991) ("[P]ermitting a bankruptcy court to issue an unreviewable section 305 order . . . would violate Article III of the Constitution by impermissibly placing the jurisdiction of an Article III court within the unreviewable discretion of an Article I court.").

29. *In re* Axona Int'l Credit & Commerce Ltd., 924 F.2d 31, 34–35 (2d Cir. 1991).

30. *Id.*

31. *See In re* Corporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora, 805 F.2d 440, 443 (1st Cir. 1986).

32. *See* Neckless v. Creare Inc., 310 B.R. 478, 484 (Bankr. D. Mass. 2004) ("With judicial review of mandatory abstention orders by an Article III court in place, the constitutional problem . . . was resolved . . . .").

court deems it prudent for practical reasons to forbear deciding an appeal when to grant the relief requested will undermine the finality and reliability of consummated plans of reorganization."[33] In an earlier concurrence, another member of that Court had explained that equitable mootness "not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue."[34] Neither Congress nor the Supreme Court has considered whether equitable mootness poses a constitutional problem.

## IV. EVEN MATERIAL LIMITATION OF THE STAY PERIOD RUNS AFOUL OF SUPREME COURT JURISPRUDENCE

Assuming bankruptcy courts lack the constitutional power to completely eliminate the fourteen-day stay period prescribed by Bankruptcy Rule 6004(h), their apparent discretion to materially limit that stay under Rule 6004(h) likely also offends the constitutional integrity of Bankruptcy Code § 363(m). Several bankruptcy courts have recognized that they lack the power to reduce the stay period to such an extent as to render litigants' ability to seek and obtain a stay and exercise their appellate rights meaningless—even where proponents of waiving or reducing the stay period do demonstrate an urgent need to close.[35] District courts have agreed with the bankruptcy courts that have refused to eliminate the period for seeking a stay pending appeal, recognizing the

33. Tribune Media Co. v. Aurelius Capital Mgmt., 799 F.3d 272, 277 (3d Cir. 2015); *see also* PPUC Pa. PUC. v. Gangi, 874 F.3d 33, 37 (1st Cir. 2017) ("[E]quitable mootness is appropriate where, in the absence of a stay, a sale has progressed so far that relief would be impracticable.") (internal citations omitted).

34. *See* One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428, 445 (3d Cir. 2015).

35. *See, e.g.*, *In re* GMC, 407 B.R. 463, 520 n.143 (Bankr. S.D.N.Y. 2009) (explaining that "like the order entered by Judge Gonzalez in *Chrysler*, the order shortens the Fed. R. Bankr. P. 6004(h) and 6006(d) periods, *but still provides 4 days, so as to avoid effectively precluding any appellate review*.") (emphasis added); *In re* Filene's Basement, LLC, No. 11–13511 (KJC), 2014 WL 1713416, at *14 (Bankr. D. Del. Apr. 29, 2014) (finding that the "purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to request a stay pending appeal before the order can be implemented," and reducing stay to seven days instead of eliminating the period completely to allow objector a reasonable time to seek a stay pending appeal) (quoting 10 COLLIER ON BANKRUPTCY ¶ 6004.11, ¶ 6006.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014)); *In re* Borders Group, Inc., 453 B.R. 477, 486 (Bankr. S.D.N.Y. 2011) (quoting same Collier's language and preserving stay period for a reduced period of five days to allow objectors to seek stay).

need to preserve at least some meaningful period for litigants to seek a stay pending appeal.[36]

## CONCLUSION

Congress is constitutionally precluded from completely shielding bankruptcy courts from Article III appellate review—that much we know from the amendments to the initial versions of 11 U.S.C. § 305(c) and 28 U.S.C. § 1334(c)(2). In enacting Bankruptcy Code section 363(m), Congress limited appellate review to those instances when an objector has obtained a stay pending appeal (but importantly, did not *eliminate* such review altogether). The Supreme Court's enactment of Bankruptcy Rule 6004(h) automatically grants a fourteen-day stay during which would-be appellants may seek such a stay pending appeal, but vests the bankruptcy courts with the authority to eliminate that stay period. Bankruptcy Code section 363(m) and Bankruptcy Rule 6004(h), when working together, thus put the ability to foreclose appellate review of a sale order in the hands of the very bankruptcy courts that the Constitution requires be subject to Article III control. The Constitution would appear to preclude this proverbial fox from guarding the henhouse, even if the fox is wise and well-intentioned.

36. *See, e.g.*, Parker v. Motors Liquidation Co., 430 B.R. 65, 75–76 (S.D.N.Y. 2010) (with respect to a proposed sale that virtually all parties agreed would have an enormous impact on the entire United States economy, endorsing bankruptcy Judge Gerber's denial of debtor's request "to waive the [previously] ten-day stay period under Fed. R. Bankr. P. 6004(h) and 6006(d)," as well as his provision of "a four-day stay . . . so as to permit any objectors to seek and obtain appellate review or a stay.").