



# ROCHELLE'S DAILY WIRE

## **Splits and Confounding Issues Destined for the Supreme Court**

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### **40<sup>th</sup> Annual Jay L. Westbrook Bankruptcy Conference**

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Bill Rochelle • Editor-at-Large  
American Bankruptcy Institute  
bill@abi.org • 703. 894.5909

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66 Canal Center Plaza, Suite 600 • Alexandria, VA 22014 • [www.abi.org](http://www.abi.org)



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## Supreme Court



# ROCHELLE'S DAILY WIRE

*This Term*



*An arbitration case to be argued in November may inform bankruptcy courts whether they must enforce arbitration agreements.*

## **Supreme Court Update: Equitable Mootness Not Ready for Prime Time**

With two petitions for *certiorari* denied this month and a third withdrawn last month, there are no “pure” bankruptcy cases already on the Supreme Court’s calendar for the term that began on October 4.

One *certiorari* petition still pending is an odds-on favorite for a “grant”: The justices are being asked to resolve a circuit split on the constitutionality of the 2018 increase in fees for the U.S. Trustee system.

There is an arbitration case to be argued in November in the Supreme Court. Depending on what the decision says, the outcome might affect how lower courts treat arbitration agreements arising in bankruptcy cases.

### No High Court Ruling Yet on Equitable Mootness

In the justices’ first two conferences this term, they denied *certiorari* petitions from the Second and Third Circuits asking the Court to decide the validity of the judge-made doctrine of equitable mootness. See *GLM DWF Inc. v. Windstream Holdings Inc.*, 21-78 (Sup. Ct. *cert. den.* Oct. 4, 2021); and *Hargreaves v. Nuverra Environmental Solutions Inc.*, 21-17 (Sup. Ct. *cert. den.* Oct. 12, 2021). To read ABI’s latest report on the *certiorari* petitions, [click here](#).

As is customary, the Court gave no reason for declining to rule on the validity of a doctrine that allows federal appellate courts to refuse to review the merits of orders confirming chapter 11 plans. On occasion, the doctrine has been invoked to dismiss appeals from other bankruptcy court orders.

Equitable mootness is arguably impermissible in view of appellate courts’ mandatory jurisdiction. The doctrine is also questionable when appeals are dismissed even though there is constitutional jurisdiction under Article III, given the continued existence of a case or controversy.

The attempted appeals coming from the Second and Third Circuits were both attractive candidates for high court review.

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