Appealing Propositions: Everything You Need to Know About Bankruptcy Appeals

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I. Introduction

A number of issues must be resolved well before an intermediate appellate court or the court of appeals reaches the merits of a bankruptcy appeal. For example, an appellant must demonstrate that the court has jurisdiction and ensure that the appeal has not become statutorily, constitutionally, and/or equitably moot. An appellee should be vigilant about these issues as the appellant's failure to comply with jurisdictional thresholds or applicable procedures can result in an early dismissal of the appeal.

In Part II, we describe the applicable statutes and rules and, in Part III, we address where to take your appeal. Part IV explains final versus interlocutory appeals, and Part V explores in detail issues of jurisdiction, including a lengthy discussion of the latest cases addressing equitable mootness. In Part VI, we discuss how to proceed with your appeal, including how to tackle the various motions that may be filed and what waiver issues to keep in mind. After we wrap up in Parts VII and VIII, we provide a chart that takes the guesswork out of where to file a motion.

II. A Brief Overview – Applicable Statutes and Rules

Section 158 of Title 28 governs bankruptcy appeals. Subsections (a) and (c) provide that either the district court or bankruptcy appellate panel ("BAP") shall have jurisdiction to hear appeals from final judgments, orders, and decrees, from interlocutory orders related to chapter 11 plan deadlines, and, with leave of court, from interlocutory orders. Subsection (d) provides that courts of appeals have jurisdiction over final decisions, judgments, orders, and decrees from the district court or BAP and also over final judgments, orders, or decrees of the bankruptcy court, provided certain procedural requirements are met.

Further governing such appeals are Part VIII of the Federal Rules of Bankruptcy Procedure (as amended on December 1, 2014), the Federal Rules of Appellate Procedure, and applicable local rules of the circuit court, district court, BAP, and bankruptcy court.

III. Where to Take Your Appeal

A. Intermediate Appellate Courts

Pursuant to 28 U.S.C. § 158(c)(1), if a judicial council has established a BAP,[1] the BAP will hear the appeal unless any party elects to have the district court hear it. Prior to December 1, 2014, an appellant would elect to proceed at the district court by filing a separate document when submitting the notice of appeal. Under the amended rules, the appellant may elect to

[1] Five judicial councils have established BAPs: the First, Sixth, Eighth, Ninth, and Tenth. The present iteration of the U.S. Bankruptcy Appellate Panel for the First Circuit was established in July 1996.

proceed in district court by so indicating ***in*** the notice of appeal. The appellee can elect to proceed in the district court by filing an election, substantially in conformance with Official Form 17B, at the BAP within 30 days after service of the notice of appeal.

B. A Direct Appeal to the Circuit

The parties can seek to bypass the intermediate appellate court and proceed directly to the court of appeals. Subsection 158(d)(2) of 28 U.S.C. and Fed. R. Bankr. P. 8006 contain comprehensive guidelines for certifying a direct appeal to the court of appeals. These procedures contemplate an initial certification by the bankruptcy court or intermediate appellate court, followed by acceptance of the certification by the court of appeals. Only the court where the matter is pending may certify a direct review on request of parties or on its own motion. Fed. R. Bankr. P. 8006(d). The matter is pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. Thereafter, jurisdiction passes to the intermediate appellate court to consider certification. *Id.* 8006(b). Within 30 days after obtaining a certification, the parties must file a request for permission to take a direct appeal at the court of appeals. *Id.* 8006(g). The court of appeals will initially open a miscellaneous case and if it grants the direct appeal certification, it will assign a new case number and the matter will proceed in the ordinary course. Generally speaking, the substantive requirements for certification of a direct appeal are similar to those for interlocutory appeals under 28 U.S.C. § 158(a)(3) and for interlocutory appeals in general civil cases under 28 U.S.C. § 1292(b).

IV. What You Can Appeal

As Chief Justice Roberts recently explained, "[i]n ordinary civil litigation, a case in federal district court culminates in a 'final decision.'" *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686, 1692 (2015). "A party can typically appeal as of right only from that final decision." *Id.* Justice Roberts then acknowledged that because a bankruptcy case "involves 'an aggregation of individual controversies,'" *id*. (citing 1 Collier on Bankruptcy ¶ 5.08[1][b], p. 5-42 (16th ed. 2014)), the rules are different.

In bankruptcy, a party may appeal *as of right* not only from a final judgment, but also from final orders and decrees in cases and proceedings and from interlocutory orders issued under 11 U.S.C. § 1121(d) (addressing orders increasing or reducing the time periods set forth therein). A party may also appeal other interlocutory decisions but only if it receives "leave of court." *See* 28 U.S.C. § 158(a).

A. Final Orders

The U.S. Code does not define "final judgments, orders, and decrees." Outside of bankruptcy, a final decision "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United S*tates, 324 U.S. 229, 233 (1945); *see also In re Saco Local Dev. Corp.*, 711 F.2d 441, 443 (1st Cir. 1983) (then-Judge Breyer explaining that a traditional civil action in a federal court is viewed as a "single judicial unit," from which only one appeal would lie). Bankruptcies, however, typically involve "numerous controversies bearing only a slight relationship to each other." *Estancias La Ponderosa Dev.*

Corp. v. Harrington (In re Harrington), 992 F.2d 3, 6 n.2 (1st Cir. 1993). Applying the traditional theory of finality could lead to "the absurd position that . . . only the order closing the bankruptcy case could be considered to be 'final.'" Collier on Bankruptcy ¶ 5.08[1][a] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.). Accordingly, courts take a flexible approach to bankruptcy disputes, *Harrington*, 992 F.2d at 5, and the "judicial unit" must be thought of as a discrete dispute or proceeding within a case. *In re Saco Local Dev.*,711 F.2d at 444-45 ("Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case . . .").

A bankruptcy order is final, therefore, if it resolves a discrete dispute within the case, including issues as to the proper relief. *See id.* at 445 (holding that an order overruling trustee's claim objection was a final order); *see also Allen v. Old Nat'l Bank of Wash. (In re Allen)*, 896 F.2d 416, 418 (9th Cir. 1990) (a bankruptcy order may be considered final if it "determines and seriously affects substantial rights [and] can cause irreparable harm if the losing party must wait until bankruptcy proceedings terminate before appealing."); *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643 (B.A.P. 1st Cir. 1998) (providing an extensive discussion on final versus interlocutory orders).

It is apodictic that an order resolving an adversary proceeding in its entirety is final. Orders resolving contested matters, which by their nature can vary from minor disputes to plan objections, may be final or interlocutory depending on the decision. *See, e.g.*, *Bullard*, 135 S. Ct. at 1693 (explaining order denying chapter 13 plan confirmation is not a final order); *Pinpoint IT Serv., LLC v. Landrau Rivera (In re Atlas IT Export Corp.)*, 761 F.3d 177 (1st Cir. 2014) (explaining that order granting relief from stay is final and concluding that order denying stay relief may lack finality). For a comprehensive collection of cases determining finality, *see* Hon. Joan N. Feeney, Hon. Michael G. Williamson, Michael J. Stephan, Esq. Bankruptcy Law Manual § 2:49 pp. 469-79 (5th ed. 2015).

B. Interlocutory Orders

An order will be deemed interlocutory "where events which follow the order can move interested parties from a position of opposition to a position of support." *In re Am. Colonial Broad. Corp.*, 758 F.2d 794, 802 (1st Cir. 1985). Such an order decides only a non-final intervening matter—one that requires further steps before the court can adjudicate the merits of the matter. *In re Bank of New England Corp.*, 218 B.R. at 646. In such circumstances, in the ordinary course of events "allowing an appeal before the full significance of the order is manifested would be a colossal waste of judicial resources." *In re Am. Colonial Broad. Corp.*, 758 F.2d at 801.

The Supreme Court's recent decision in *Bullard*, demonstrates the profound impact that this flexible concept of finality can have on the trajectory of a bankruptcy case. *See* 135 S. Ct. at 1694. In that case, the chapter 13 debtor proposed a plan that bifurcated his mortgage debt into a secured and unsecured claim; he sought to pay the former by the maturity date in the note and discharge the latter at plan completion. *See id*. at 1691. The mortgagee objected to the plan, creating a contested matter. The bankruptcy court sustained the objection, declined to confirm

the plan, and gave the debtor leave to propose an amended plan. Although the order sustaining the objection arguably resolved the contested matter, the First Circuit BAP treated the denial of plan confirmation as interlocutory and affirmed the bankruptcy court. *See id*. The First Circuit subsequently dismissed the debtor's appeal of the BAP decision for lack of jurisdiction, noting that, absent certification under 28 U.S.C. § 158(d)(2), it could only hear the appeal of a final order. *See id*. Proclaiming "[i]t ain't over till it's over," the Supreme Court ruled that an order denying confirmation with leave to file an amended plan could not be final because the debtor was free to propose an alternative plan while the status quo (i.e., the automatic stay, the parties' rights and obligations, and the remittance of plan payments to the trustee) remained unchanged. *See id*. at 1693 (determining the relevant "proceeding" for the purposes of finality to be "the entire process culminating in confirmation or dismissal").

But not all discrete disputes are alike. The Seventh Circuit recently applied *Bullard* to hold that a secured creditor's objection to the settlement of a fraudulent transfer claim was not the kind of discrete dispute that would "stand alone" outside of bankruptcy and, therefore, the bankruptcy court's order overruling the objection and approving the settlement was not a final order. *See Schaumburg Bank & Trust Co. v. Alsterda*, 815 F.3d 306, 313-14 (7th Cir. 2016). The secured creditor bank objected to the settlement between the trustee and a third party on the grounds that the bank held a superior claim to the property at issue (and, by extension, the proceeds that the estate would realize from the settlement). *See id*. at 308-09. Under the terms of the settlement, the trustee recovered 100% of the value of the alleged fraudulent transfer. *See id.* But what the bank was really arguing about, the Seventh Circuit surmised, was the resolution of its claim. The court had yet to decide how much of the settlement proceeds would flow to the bank. Finding the bank's priority argument to be a "discrete dispute" within a "discrete dispute," the Seventh Circuit concluded that it was "too small a litigation unit to justify treatment as a final judgment." *See id*. at 313.

These decisions show how "finality" in bankruptcy is flexible depending on the context of the specific proceeding. While the appellant will emphasize the freestanding nature of the dispute on appeal in an effort to secure higher court review, an appellee desiring a quick exit from the reviewing court will try to show how that dispute is really part of a larger "discrete" dispute. The boundary between final and interlocutory orders remains unclear, requiring a case-by-case analysis of the seemingly endless permutations of discrete disputes that can arise in a bankruptcy case.

C. Obtaining Leave to Appeal an Interlocutory Order

Leave of the court is required for appeals of interlocutory orders other than those listed in 28 U.S.C. § 158(a)(2). *See* 28 U.S.C. § 158(a)(3). The intermediate appellate court may treat the notice of appeal of an interlocutory order as both a notice and a motion for leave to proceed with an interlocutory appeal or it can otherwise order an appellant to file a motion. *See* Fed. R. Bankr. P. 8004(d). The better practice is to file a motion with the notice of appeal. The bankruptcy court will transmit the motion to the intermediate appellate court. The intermediate appellate court will, in most cases, dispose of the motion on the pleadings. *See id.* 8003(c).

Absent leave, an intermediate appellate court lacks jurisdiction to consider an interlocutory appeal.

An appellant can proceed with an interlocutory appeal if the appellant can meet one of three precepts. *See, e.g.*, *Watson v. Boyajian (In re Watson)*, 309 B.R. 652, 660 (B.A.P. 1st Cir. 2004). They are:

i. The Collateral Order Doctrine

The First Circuit BAP applies the "collateral order" doctrine to "a small class of decisions, termed 'collateral orders,' which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *In re Bank of New England Corp.*, 218 B.R. at 649 (internal quotations omitted).

The First Circuit applies a four-part test to identify collateral orders. The order must involve: (1) an issue essentially unrelated to the merits of the main dispute, capable of review without disrupting the main trial; (2) a complete resolution of the issue, not one that is "unfinished" or "inconclusive"; (3) a right incapable of vindication on appeal from final judgment; and (4) an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion. *See In re Am. Colonial Broad. Corp.*, 758 F.2d at 803. Essentially, this test considers the "separability, finality, urgency, and importance" of the decision being appealed. *See id.* The First Circuit cautions that the test is stringent and must remain so. *Lee-Barnes v. Puerto Ven Quarry Corp.*, 513 F.3d 20, 25 (1st Cir. 2008).

In the bankruptcy context, issues of separability and conclusive determination—which are covered by the first two factors—focus on whether review of the dispute would disrupt or otherwise affect the resolution of the case, and whether the decision completely resolves a party's rights and obligations with respect to the bankruptcy proceeding. *See In re Am. Colonial Broad. Corp.*, 758 F.2d at 803 (appeal of bankruptcy court's order authorizing special master to negotiate sale with highest bidder was inseparable from the reorganization as a whole because to consider the losing bidder's appeal on the merits "would essentially put the court of appeals into the shoes of the bankruptcy court as to the reorganization as a whole."); *see also Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546–47 (1949) (holding that order refusing to apply state law requiring plaintiff to post bond to maintain action was "not an ingredient of the cause of action" and thus sufficiently separate to allow for interlocutory appeal).

The third factor, that the decision be effectively unreviewable on later appeal, has been equated with the threat of "irreparable harm" that the appellant may suffer if review is delayed. *See In re Bank of New England Corp.*, 218 B.R. at 651. In a sense, this factor is an offshoot of the *Forgay-Conrad* Doctrine, discussed below. To meet this factor, the appellant must show some urgent need beyond the routine hardships of trial, *see In re Cont'l Inv. Corp*., 637 F.2d 1, 6 (1st Cir. 1980), and that "its opportunity for meaningful review will perish unless immediate appeal is permitted," *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981) (finding no irreparable harm where an order could be vacated following final judgment and a new trial ordered).

For example, in *White Motor Corp*. the district court granted interlocutory review of an order establishing a program under which a special master would determine the merits of numerous products liability claims against the debtor. *See Rockwell Int'l Corp. v. White Motor Corp. (In re White Motor Corp.)*, 25 B.R. 293, 297 (N.D. Ohio 1982). First, the bankruptcy judge's authority to establish the program was separable from the merits of the products liability claims themselves. *Id.* at 295. Second, the order creating the program would be unreviewable following the completion of the debtor's reorganization plan because, by that time, assets would have been depleted and potential liable parties dismissed or discharged. *Id*. at 296.

The fourth factor, that the issue on appeal be an important and unsettled question of controlling law, looks at whether the issue on appeal "will settle the matter not simply for the case at hand but for many others." *See Grinnell Corp. v. Hackett*, 519 F.2d 595, 597 (1st Cir. 1975); *see also In re Bank of New England Corp.*, 218 B.R. at 650 (denying appeal of interlocutory order where issue was of consequence to the parties, but held "minimal precedential promise"). Importance in this context refers to the scope of precedential value of a decision on the issue. *In re Cont'l Inv. Corp.*, 637 F.2d at 6-8. An appeal that involves nothing more than a discretionary decision of the bankruptcy court, does not rise to the level of importance needed for recognition under the collateral order doctrine. *See Lee-Barnes*, 513 F.3d at 25-26 (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878 (1994)). For example, neither a bankruptcy court's decision as to the scope of an indemnification obligation, *In re Bank of New England Corp.*, 218 B.R. at 650, nor a district court's decision as to whether a surety bond was void, *Lee-Barnes*, 513 F.3d at 25-26, constituted an important and unsettled issue of law. *See also In re Am. Colonial Broad. Corp.*, 758 F.2d at 803 (finding appeal of which bid should have been accepted by the bankruptcy court involved a discretionary decision of the bankruptcy court "not controlled by much in the way of any law, let alone 'important and unsettled' law"). However, a bankruptcy court's decision regarding whether a removed foreclosure action was a core or noncore proceeding, *In re Jackson Brook Inst., Inc.*, 227 B.R. 569, 578 (D. Me. 1998), and a district court's decision regarding whether the identity of a tipster should remain protected, *Gill v. Gulfstream Park Racing Ass'n., Inc.*, 399 F.3d 391, 398 (1st Cir. 2005), present "just the sort of 'important' legal question that immediate appeal under the collateral order doctrine is supposed to resolve." *Id.* at 399.

ii. Discretionary Authority under 28 U.S.C. § 158(a)

In order for an appellant to obtain leave to proceed with an appeal of an interlocutory order under this precept, it must show that the case involves a controlling question of law over which there is a substantial difference of opinion and that an immediate appeal would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 158(a); *In re Watson*, 309 B.R. at 659. Because section 158(a) provides no express criteria, courts often turn to the standards that govern certification of interlocutory appeals under 28 U.S.C. § 1292(b). *See In re Watson*, *309 B.R. at 659*; *Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 494 B.R. 92, 95 n.5 (B.A.P. 1st Cir. 2013), *appeal dismissed*, 752 F.3d 483 (1st Cir. 2014), *aff'd*, 135 S. Ct. 1686 (2015). For the purposes of section 1292(b), and by extension section 158(a)(3), a question of law is "controlling" when its resolution is "serious to the conduct of the litigation, either

practically or legally." *Katz v. Carte Blanche Corp*., 496 F.2d 747, 755 (3rd Cir. 1974); *Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (finding that a question that would significantly alter the scope of a case is "controlling"). The precedential prospects of the question "are beside the point." *See In re Bank of New England Corp.*, 218 B.R. at 652.

In addition, the order on appeal must involve a legal issue on which there is "substantial ground for difference of opinion." Such difference of opinion exists where the proposed interlocutory appeal presents one or more difficult and pivotal questions of law not settled by controlling authority. *See In re Watson*, 309 B.R. at 660; *see also Booten v. United States*, 233 F. Supp. 2d 227, 228 (D. Mass. 2002) (finding "substantial ground for difference of opinion" when there is no "binding precedent on point"); *In re San Juan Dupont Plaza Hotel Fire Litig*., 859 F.2d 1007, 1010 n.1 (1st Cir. 1988) (interlocutory review is proper "where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority") (internal quotation omitted). This hurdle is likely insurmountable if the order being appealed turned on the relatively routine application of law to fact. *See In re Bank of New England Corp.*, 218 B.R. at 653 (finding that the case-specific issues concerning contract interpretation did not "rise to the level of difficulty and significance required under § 1292(b)").

Finally, immediate appeal must materially advance the ultimate termination of the litigation. On this factor, courts look to the circumstances of the litigation, including whether reversal on appeal would materially "affect the scope of the trial and the individuals subject to suit . . . ." *Canty v. Old Rochester Reg'l Sch. Dist*., 54 F. Supp. 2d 66, 77 (D. Mass. 1999); *see also In re Watson*, 309 B.R. at 660 ("An interlocutory appeal materially advances the ultimate termination of the litigation where resolution of the issue on appeal greatly assists in resolving the underlying matter, and does not unnecessarily delay resolution of the underlying matter."); *In re Murray*, 116 B.R. 6, 9 (D. Mass. 1990) (denying leave to appeal order declining to extend the exclusivity period as appeal would delay the proceeding by preventing other interested parties from filing a plan).

iii. The Forgay-Conrad Doctrine

The *Forgay-Conrad* Doctrine is a narrow exception allowing interlocutory appeal where there is a grave risk of irreparable harm. As the Seventh Circuit recently noted, the facts of *Forgay v. Conrad* itself, decided in 1848, "starkly remind the reader that times have changed." *See HSBC Bank USA, N.A. v. Townsend*, 793 F.3d 771, 779 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 897 (2016). In that case, the assignee of the debtor (today, the trustee) sued several third parties to recover land and slaves on the grounds that they had been transferred fraudulently. *See Forgay v. Conrad*, 47 U.S. 201, 201-02 (1848). The bankruptcy court entered an order declaring the transfers to be fraudulent and requiring the defendants to immediately deliver the land and slaves to the trustee. *See id*. The order further directed a master to take an account of the profits of the lands and slaves, which the defendants had received, and the court retained jurisdiction for further decree. *See id*. at 203.

The defendants appealed the order of the bankruptcy court, and the trustee moved to dismiss the appeal on the ground that it was not a final order. *See id*. The Supreme Court agreed

that the order was not final "in the strict, technical sense of that term," but opted to take "a more liberal, and, as we think, a more reasonable construction" of finality, holding that the order should be considered "final" to the extent that it compelled immediate turnover of the land and slaves. *See id.* at 203-04. Accordingly, *Forgay* stands for the proposition that a litigant may take a direct and immediate appeal from an interlocutory order or decree that commands the immediate transfer of property, where the losing party will be subjected to undue hardship and irreparable injury if appellate review must wait until the final outcome of the litigation. *See id*. at 204.

The Seventh Circuit interprets the *Forgay-Conrad* Doctrine narrowly to apply only to the delivery of property where the losing party would suffer irreparable harm. *See Townsend*, 793 F.3d at 779. This reading avoids applying *Forgay* to any order requiring immediate payment. Taking a slightly different approach, the First Circuit refers to *Forgay* as articulating a "practical finality" doctrine, which permits interlocutory appeals from "immediate payment" orders which threaten a special risk of harm to the appellant. *See United States v. Kouri-Perez*, 187 F.3d 1, 11 (1st Cir. 1999).

V. Appellate Jurisdiction

A. Timeliness.

Following the entry of a judgment, order, or decree of the bankruptcy court, an appellant has 14 days to file a notice of appeal with the clerk of the bankruptcy court. *See* Fed. R. Bankr. P. 8002(a) and 8003(a). The timely filing of a notice of appeal is mandatory and jurisdictional. *See Rodriguez v. Banco Popular de Puerto Rico (In re Rodriguez)*, 516 B.R. 177, 182 (B.A.P. 1st Cir. 2014). An appellate court does not have jurisdiction over an appeal that is not timely filed. *Id*.

A party may seek an extension of the deadline within the 14 days after the entry of the judgment, order, or decree or within 21 days thereafter if the party shows excusable neglect. *See* Fed. R. Bankr. P. 8002(d)(1). Subject to several exceptions, an appellant may extend the time to file the notice by the longer of 21 additional days from the end of the initial 14-day period, or 14 days after the order granting the motion to extend time is entered. *See* Fed. R. Bankr. P. 8002(d)(3). If a party has timely filed any of the following motions, the initial 14-day period will not begin to run until after the court has disposed of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;
(B) to alter or amend the judgment under Rule 9023;
(C) for a new trial under Rule 9023; or
(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

Fed. R. Bankr. P. 8002(b)(1).

B. Standing

In a bankruptcy case, as in any federal proceeding, a party needs to demonstrate "standing" to pursue an appeal. In the absence of standing, it is appropriate for the appellate court to dismiss the appeal. *See Spenlinhauer v. O'Donnell*, 261 F.3d 113, 117-18 (1st Cir. 2001). A typical federal appellant must satisfy Article III's "case or controversy" requirement by showing: (i) "injury," (ii) "a causal connection that permits tracing the claimed injury to the defendant's actions," and (iii) "a likelihood that prevailing in the action will afford some redress for the injury." *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 467 (1st Cir. 2009) (citations omitted). In bankruptcy, an appellant must qualify as a "person aggrieved" and must demonstrate that "the challenged order directly and adversely affects an appellant's pecuniary interest." *Spenlinhauer*, 261 F.3d at 117-18 (citation omitted); *see also In re El San Juan Hotel*, 809 F.2d 151, 154-55 (1st Cir. 1987) (explaining that a "person aggrieved" is one whose property is diminished, burdens are increased, or rights are impaired); *Aja v. Emigrant Funding Corp. (In re Aja*), 442 B.R. 857, 861 (B.A.P. 1st Cir. 2011) (same). Phrased differently, only parties-in-interest in a bankruptcy case that have a direct financial stake in a bankruptcy ruling may appeal. The principle underpinning this "heightened standing requirement is that bankruptcy proceedings—often administratively and procedurally unwieldy—not be prolonged by unnecessary appeals." *Spenlinhauer*, 261 F.3d at 118 n.4 (internal quotations omitted).

Standing cannot be waived and may be raised at any time by any party or the court. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."); *Eldorado Canyon Prop., LLC v. JPMorgan Chase Bank, N.A. (In re Eldorado Canyon Prop., LLC)*, 505 B.R. 598, 599-600 (B.A.P. 1st Cir. 2014); *Great Road Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc*.), 304 B.R. 547, 550 (B.A.P. 1st Cir. 2004). An appellate court is "duty bound" to inquire into an appellant's standing. *See, e.g., Pignato v. Dein Host, Inc. (In re Dein Host., Inc.)*, 835 F.2d 402, 404 (1st Cir. 1987). What follows are examples of how standing can sound the death knell for an appeal.

i. Chapter 7 Debtors

A chapter 7 debtor generally lacks standing to appeal a bankruptcy court's order if the estate is insolvent and there is no surplus that would potentially revert to the debtor after distribution to creditors. *See Spenlinhauer*, 261 F.3d at 118 ("Since title to property of the estate no longer resides in the chapter 7 debtor, the debtor typically lacks any pecuniary interest in the chapter 7 trustee's disposition of that property. Thus, normally it is the trustee alone . . . who possesses standing to appeal from bankruptcy court orders") (internal citations omitted). The two exceptions to this general rule are: (i) "if a successful appeal by the debtor would create an estate that has assets in excess of liabilities" (i.e., a "surplus case"), and (ii) "an appeal taken from orders that affect the terms, conditions and extent of a debtor's discharge." *El San Juan Hotel*, 809 F.2d at 155 n.6 (citations omitted).

ii. Unsuccessful Bidders

In general, an unsuccessful bidder in a sale of estate property lacks standing to appeal a sale order. *See Video Concepts, LLC v. Volpe Indus. Inc. (In re Volpe Indus., Inc.)*, Civ. No. 13-010300-DPW, 2013 WL 4517983, at *3 (D. Mass. Aug. 23, 2013); *see also Stark v. Moran (In re Moran)*, 566 F.3d 676, 681 (6th Cir. 2009) ("[f]rustrated bidders do not have standing to object to the sale of property") (citation omitted); *G-K Dev. Co. v. Broadmoor Place Inv. (In re Broadmoor Place Inv.)*, 994 F.2d 744, 746 n.2 (10th Cir. 1993) ("absent some other meritorious ground for appeal, [unsuccessful bidder] lacks standing to appeal . . . .").

That said, "courts have found that even a mere unsuccessful bidder has standing to challenge the 'inherent fairness' or 'intrinsic structure of the sale.'" *In re Volpe Indus., Inc*., 2013 WL 4517983 at *3 (citing *Kabro Assoc. v. Colony Hill Assoc. (In re Colony Hill Assoc.)*, 111 F.3d 269, 274 (2nd Cir. 1997)). For this reason, an unsuccessful bidder was acknowledged to have standing when it contested a sale based upon the debtor's failure to give it notice pursuant to an applicable local rule, *Cedar Island Builders, Inc. v. South Cnty. Sand & Gravel, Inc*., 151 B.R. 298, 301 (D.R.I. 1993) and a highest timely bidder was permitted to appeal acceptance of a late upset bid, *see In re Muscongus Bay Co*., 597 F.2d 11, 12 (1st Cir. 1979); *In re Gil-Bern Indus., Inc*., 526 F.2d 627 (1st Cir. 1975).

iii. Standing to Appeal a Confirmed Plan

Not surprisingly, under the "person aggrieved" doctrine, parties generally lack standing to appeal decisions rendered in their favor. *See Elkin v. Metro. Prop. & Cas. Ins. Co. (In re Shkolnikov)*, 470 F.3d 22, 24 (1st Cir. 2006) ("It is an abecedarian rule that a party cannot prosecute an appeal from a judgment in its favor"). An exception exists, however, "when there has been some error prejudicial to [the debtor], or he has not received all he is entitled to." *O & S Trucking, Inc. v. Mercedes Benz Fin. Servs. USA (In re O&S Trucking, Inc.)*, 811 F.3d 1020, 1024 (8th Cir. 2016).

The Eighth Circuit decision in *In re O&S Trucking, Inc*. is a cautionary tale for debtors seeking to appeal plan confirmation orders. The case is instructive regarding: (i) the "aggrieved person" standard in the context of debtors appealing plan confirmation orders, and (ii) how to develop a record for such appeals. O&S owned and operated a commercial truck fleet. After seeking bankruptcy protection, O&S sought a determination of a creditor's secured claim. After O&S disagreed with the bankruptcy court's valuation and unsuccessfully sought reconsideration, it filed an appeal. Simultaneously, O&S filed a plan of reorganization, incorporating the allegedly erroneous order and noting that the claim was subject to adjustment, pending appeal. After O&S's plan was confirmed, O&S also appealed the plan confirmation order.

On appeal, the Eighth Circuit noted that a debtor can establish standing when appealing a favorable ruling only if the debtor can demonstrate prejudicial error or that the debtor failed to receive something to which the debtor was entitled. *Id*. (explaining that "[w]hen a debtor invokes this exception . . . in order to appeal from a favorable plan-confirmation judgment, the exception runs into tension with the strong policy favoring finality." *Id*. (citation omitted). The

Eighth Circuit cited to the procedure enabling debtors to appeal confirmed plans outlined in *Zahn v. Fink (In re Zahn)*, 526 F.3d 1140 (8th Cir. 2008). As the court explained:

> In *Zahn*, we examined a case in which a Chapter 13 bankruptcy debtor sought review of an adverse interlocutory ruling. The debtor appealed the interlocutory order; however, the BAP dismissed the appeal for lack of jurisdiction because the panel concluded that the interlocutory ruling did not constitute a final, appealable order. To obtain a final, appealable order, the debtor proposed a plan incorporating the bankruptcy court's allegedly erroneous interlocutory ruling. The debtor then objected to her own plan, highlighting her opposition to this disputed provision. Over this objection, the bankruptcy court confirmed the debtor's proposed plan. The debtor then appealed to the BAP. We held that this procedure properly preserved the issue for appeal and demonstrated person-aggrieved status. In sum, we concluded: "A debtor who objects to her own plan may be an aggrieved party and have standing to appeal confirmation of such plan."

In re O&S Trucking, Inc., 811 F.3d at 1024.

Ultimately, the Eighth Circuit ruled that O&S's failure to object to its plan was fatal and that the language in the plan noting that the amount of the claim was subject to adjustment based on the appeal did not satisfy the requirement that a debtor object to the plan to preserve the issue for appeal.

C. Mootness

The doctrine of mootness presents another jurisdictional limitation for a bankruptcy appeal. A discussion follows of the various types of mootness which can serve as grounds for dismissal of the appeal.

i. Statutory Mootness

Sections 363(m) and 364(e) of the Bankruptcy Code affirmatively moot appeals from sale or financing orders, respectively, if: (i) the purchaser/lender acted in "good faith," and (ii) no stay was in effect. Thus, an appellate court will grant a motion to dismiss an appeal, or sua sponte dismiss an appeal, from a sale or financing order as statutorily moot if the purchaser or lender has been determined to have acted in good faith and no stay pending appeal was obtained.

Section 363(m) of the Bankruptcy Code provides as follows:

> 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.

Section 363(m) seeks, inter alia, to promote optimum bids and finality of bankruptcy sales. *See, e.g., Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.)*, 136 F.3d 45, 49 (1st

Cir. 1998); *Anheuser-Busch Inc. v. Miller (In re Stadium Mgmt.Corp.)*, 895 F.2d 845, 847-48 (1st Cir. 1990).

The First Circuit applies a "per se" test to appeals of sale orders. *See In re Stadium Mgmt. Corp.*, 895 F.2d at 847 ("The effect of § 363(m) is that 'when an order confirming a sale to a good faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal.'") (citation omitted); *see also In re Parker*, 499 F.3d 616, 620-21 (6th Cir. 2007) (explaining that majority of circuits have adopted per se rule). Thus, in the First Circuit, section 363(m) insulates a purchaser from the effects of reversal of a sale order on appeal if the purchaser acted in good faith, and the appellant failed to obtain a stay.

The First Circuit defines "[a] 'good faith' purchaser [a]s one who buys property in good faith and for value, without knowledge of adverse claims." *Mark Bell Furniture Warehouse Inc. v. D.M. Reid Assoc. (In re Mark Bell Furniture Warehouse)*, 992 F.2d 7, 8 (1st Cir. 1993) (citation omitted) (explaining such status is precluded by, "inter alia, fraud, collusion with the trustee, and taking 'grossly unfair advantage' of other bidders.") The issue of good faith is "a mixed question of law and fact." *Id.; cf. Green v. Gray*, No. 12-10604, 2013 WL 1124731, at *5 (D. Mass. Mar. 18, 2013) (good faith findings are reviewed for clear error).

Section 364(e) of the Bankruptcy Code provides as follows:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

Section 364(e) seeks "to allow good-faith lenders to rely upon conditions at the time they extend credit and to encourage lenders to lend to bankrupt entities." *Fleet Nat'l Bank v. Doorcrafters (In re North Atl. Millwork Corp.)*, 155 B.R. 271, 279 (Bankr. D. Mass. 1993) (citation omitted).

Some courts have ruled that section 364(e) precludes reversal of any financing order unless: (i) there was a stay pending appeal, or (ii) the lender did not act in good faith. *See, e.g., Keltic Fin. Partners, LP v. Foreside Mgmt Co, (In re Foreside Mgmt. Co.)*, 402 B.R. 446 (B.A.P. 1st Cir. 2009). Another noted that section 364(e) should only protect lenders who detrimentally relied upon the prior order (e.g., by disbursing funds). *See Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 561 (3d Cir. 1994) ("we see no reason why section 364(e) should be understood to protect a lender with respect to money it has not disbursed."). And one court has concluded that section 364(e) prevents a reversal or modification of any term in the approved financing agreement. *Weinstein, Eisen & Weiss LLP v. Gill (In re Cooper Commons, LLC)*, 430 F.3d 1215, 1219 (9th Cir. 2005) ("[Section] 364(e) broadly protects any requirement or obligation that was part of a post-petition creditor's agreement to finance.").

Courts agree that section 364(e) only protects "good faith" lenders. Courts disagree, however, regarding whether the bankruptcy court must make an express finding of good faith. *Compare Burchinal v. Central Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9th Cir. 1987) (courts should presume the post-bankruptcy creditor's good faith and then inquire to see whether the presumption can be overcome) *with N.Y. Life Ins. v. Revco D.S., Inc. (In re Revco D.S. Inc.)*, 901 F.2d 1359, 1366 (6th Cir. 1990) (order authorizing DIP financing must include an explicit finding that the loan is being extended in good faith). The First Circuit BAP has ruled that a bankruptcy court need not include an express finding that the extension of a loan is in good faith, absent any "evidence of any bad faith or improper motive on the part of the lender." *In re Foreside Mgmt. Co.*, 402 B.R. at 453.

When determining whether a lender acted in "good faith," courts often "look to the integrity of an actor's conduct during the proceedings." *Id*. at 452 (quoting *In re Adams Apple*, 829 F.2d at 1489). As explained in *Foreside*, "[m]isconduct defeating good faith includes fraud, collusion, or an attempt to take grossly unfair advantage of others" and "[a] creditor fails to act in good faith if it acts for an improper purpose" or with "[k]nowledge of the illegality of a transaction". *Id.* In *Foreside*, the BAP applied an abuse of discretion standard. *Id*. at 450. *See generally TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 521 n. 24 (5th Cir. 2014) (explaining inconsistent application of standard of review with respect to issue of good faith).

Federal Rule of Bankruptcy Procedure 6004(h) provides an automatic 14-day stay of orders approving the use, sale, or lease of property. It provides sufficient time for an appellant to seek a stay pending appeal and avoid a sale closing that will moot an appeal. *See, e.g., In re Filene's Basement, LLC*, No. 11-13511 (KJC), 2014 WL 1713416 at * 14 (Bankr. D. Del. April 29, 2014) (citation omitted); *In re Grubb & Ellis Co.*, No. 12-10685 (MG), 2012 WL 1036071 at *10 (Bankr. S.D.N.Y. Mar. 27, 2012).

Federal Rule of Bankruptcy Procedure 6004(h) enables a court to modify or eliminate the 14-day stay. Courts often grant requests to dispense with the 14-day period if: (i) no objections are filed, or (ii) all objections are overruled and an important business justification requires the transaction to close on an expedited basis and the objecting party's interest is adequately protected (considering the likelihood of success on appeal). *See In re Grubb & Ellis Co*., 2012 WL 1036071 at *10; *see also In re Ormet Corp*., No. 13-10334 (MFW), 2014 WL 3542133 at *4 (Bankr. D. Del. July 17, 2014) (stay can be waived if "immediate closing is required to remedy the Debtors' precarious financial and business position"); *In re L.A. Dodgers LLC*, 468 B.R. 652, 662 (Bankr. D. Del. 2011) (waiving the stay when the debtors were "operating within a small time frame").

ii. Constitutional Mootness

Constitutional mootness emanates from the "case or controversy" requirement of Article III of the United States Constitution, under which a federal court lacks jurisdiction to adjudicate a dispute unless it presents a live case or controversy. *See Bank of Boston v. Wallace*, 218 B.R. 654, 656 (D. Mass. 1998) ("The constitutional doctrine of mootness ensures that federal courts

refrain from rendering judgments, or advisory opinions in expired disputes. The mootness doctrine is based on the fundamental jurisdictional tenet that federal courts are limited to hearing live cases or controversies.") (citing U.S. Const. Art. III, § 2). There is no case or controversy if the court cannot grant any meaningful relief to the prevailing party. *Id*. ("appeals should be dismissed as moot where an appellate court lacks the power to provide an effective remedy for an appellant should it find in its favor on the merits."). As such, "an appeal must be dismissed as moot where the judicial determination sought would have no practical effect on an existing controversy between the parties." *Id*. (citations omitted).

Typically, constitutional mootness is characterized by the occurrence of an event during the pendency of an appeal that precludes the court from granting an appellant relief, even if it prevailed on appeal. *See Oakville Dev. Corp. v. FDIC*, 986 F.2d 611, 613 (1st Cir. 1993) (constitutional mootness applies "where, as here, a plaintiff appeals from the dissolution of any injunction or the denial of injunctive relief, but neglects to obtain a stay. When, as will often happen, the act sought to be enjoined actually transpires, the court may thereafter be unable to fashion a meaningful anodyne."); *Orange Cnty. Water Dist. v. Fairchild Corp. (In re Fairchild Corp.)*, No. 10-56 (GMS), 2014 WL 7215211 *4 (D. Del. Dec. 17, 2014) (appeal from order on lift-stay motion becomes constitutionally moot when the stay is subsequently lifted or terminated by operation of law); *Melo v. GMAC Mtg., LLC (In re Melo)*, 496 B.R. 253 (B.A.P. 1st Cir. 2013) (discussing effect on appeal of main case dismissal).

iii. Equitable Mootness

In addition to constitutional mootness, bankruptcy appellate practitioners must deal with the judicially created equitable mootness doctrine, under which appellate courts may hold that a dispute has become moot because no relief can be fashioned for the appellant even though the case is not technically constitutionally moot. The scope of the equitable mootness doctrine remains a matter of disagreement among courts and has been applied somewhat inconsistently, requiring attorneys to think carefully about its potential impact on their cases and, in particular, about the importance of seeking a stay.

Notwithstanding the flexible approach to finality in bankruptcy proceedings described above, it is beyond dispute that an order confirming a plan of reorganization is a final order. *See Whispering Pines Estates, Inc. v. Flash Island, Inc. (In re Whispering Pines Estates, Inc.)*, 370 B.R. 452, 459 (B.A.P. 1st Cir. 2007) (chapter 11); *Factors Funding Co. v. Fili (In re Fili)*, 257 B.R. 370 (B.A.P. 1st Cir. 2001) (chapter 13). With some limited statutory exceptions, a party with standing should have an absolute right to appeal an order confirming a plan to the district court, the BAP, or directly to the court of appeals. An appeal does not stay the bankruptcy case, however, unless the appellate court expressly orders suspension of the case during the pendency of the appeal. *See* 28 U.S.C. § 158(d)(2)(D). *See, e.g., United Surety & Indemnity Co. v. López-Muñoz*, BAP No. PR 16-011 (B.A.P. 1st Cir. April 15, 2016) (granting motion for stay and suspending confirmation proceedings).

Despite a party's right to appeal a final order, an appellate court may dismiss the appeal of certain orders, such as a confirmation order, before reaching the merits because the appeal is

equitably moot. Unlike constitutional mootness, where it is impossible for the court to grant any relief whatsoever, "equitable mootness" applies if the failure to seek a stay resulted in impossible remediation or if relief is no longer practicable despite appellant's efforts to seek a stay. *See Prudential Ins. Co. v. SW Boston Hotel Venture, LLC (In re SW Boston Hotel Venture, LLC)*, 748 F.3d 393, 402 (1st Cir. 2014) (addressing equitable mootness and standard of review); *see also Kasparian v. Conley (In re Conley)*, 369 B.R. 67, 71 (B.A.P. 1st Cir. 2007) (explaining the doctrine and exceptions thereto).

The equitable mootness doctrine flows from the Ninth Circuit's decision in *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981). There, a bankruptcy court's order disallowed the claims of a group of creditors (filed in excess of $1.5 billion) and confirmed a plan that paid allowed general unsecured claims in full on the effective date. *See id*. at 794. The creditors with the disallowed claims appealed without seeking a stay of the confirmation order and, consequently, the plan was substantially consummated prior to the hearing on their appeal. The district court dismissed the creditor's appeal as moot on the grounds that the plan had been substantially consummated. *See id*. at 795. In affirming the dismissal, the Ninth Circuit found it significant that the creditors had failed to seek a stay pending appeal, which could have prevented the plan from being consummated. *See id*. at 796. Facts being as they were, however, the Ninth Circuit found it impossible to fashion an effective remedy, a circumstance which it termed a "lack of equity":

> Here the many intricate and involved transactions . . . were contemplated by the plan of arrangement (even to and including liquidation and reorganization of the debtor corporation) and stand solely upon the order confirming the plan of arrangement for court approval and confirmation of these transactions. Were we to deny the motion to dismiss for mootness and on consideration of the merits reverse the order of the District Court, what would be the result? Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.

See id. at 797.

Thereafter, the Third Circuit discussed the "widely recognized and accepted doctrine" of equitable mootness in *In re Cont'l Airlines*, 91 F.3d 553, 558-59 (3rd Cir. 1996) (en banc). In that case, a group of creditors appealed the bankruptcy court's orders denying their claims for post-petition adequate protection payments (an administrative claim) and confirming the debtor's plan of reorganization. *See id*. at 557. The Third Circuit articulated five factors a court should consider when applying the doctrine:

(1) Whether the reorganization plan has been substantially consummated;
(2) Whether a stay has been obtained;

(3) Whether the relief requested would affect the rights of parties not before the court;
(4) Whether the relief requested would affect the success of the plan; and
(5) The public policy of affording finality to bankruptcy judgments.

See id. at 560.

The foremost consideration in equitable mootness is whether the plan has been substantially consummated, which is a defined term in the Bankruptcy Code. *See id.* at 560-61 (citing 11 U.S.C. § 1101(2))*; R2 Investments, LDC v. Charter Commc.'ns., Inc. (In re Charter Commc.'ns, Inc.)*, 691 F.3d 476, 481 (2d Cir. 2012).

The Third Circuit explained that the bankruptcy court's rejection of the appellant's administrative claims was "inextricably intertwined with the implementation of the reorganization," which had been substantially consummated at the time of the appeal. *See Cont'l Airlines*, 91 F.3d at 561. Specifically, investors had relied upon the confirmation order in making the decision to proceed to close a transaction that injected $450 million into the reorganized entity. One of the investors' chief concerns was the amount of administrative claims that would have to be paid. To limit their exposure, the investment agreement conditioned the investors' performance on administrative claims being no higher than a specified cap. *See id*. at 563. The bankruptcy court's disallowance of the appellants' claims (which would have otherwise exceeded the cap, excusing the investors from performance) was crucial to the reorganization. *See id*. The confirmation order included findings and rulings disallowing the appellant's claims and found, on that basis, that there was substantial, credible, and uncontested evidence that the administrative claims – excluding the claims of the appellants – would be within the cap. *See id*. The investors had relied on the unstayed confirmation order in consummating the investment transaction. Considering these events, the Third Circuit concluded that to afford relief to the appellants at this point would undermine the grounds upon which the investors relied in making their investment. *See id*. at 564-65 ("Our inquiry should not be about the "reasonableness" of the Investors' reliance . . . [r]ather, we should ask whether we want to encourage or discourage reliance by investors and others on the finality of bankruptcy confirmation orders."). It was in consideration of the impact on the investors, the Third Circuit implied, that a reversal of the order disallowing the appellants' claims would be unfair.

As the equitable mootness doctrine continued to develop, courts placed increased emphasis on whether the plan has been substantially consummated. The Third Circuit revisited the doctrine in 2013 clarifying the analysis as follows:

> In practice, it is useful to think of equitable mootness as proceeding in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.

Samson Energy Res. Co. v. Semcrude (In re Semcrude), 728 F.3d 314, 321 (3rd Cir. 2013).

This opinion presaged a growing opposition to the doctrine. *See, e.g., Cont'l Airlines*, 91 F.3d at 569 (Alito, J. dissenting). Then-Judge Alito observed that the doctrine "has nothing to do with mootness" and is better understood as a "federal common law rule designed to . . . facilitat[e][] reorganizations and the protection of those who reasonably rely on reorganization plans." *See id.* at 571 (Alito, J. dissenting). But such policy considerations, Judge Alito argued, cannot justify the refusal of an Article III court to entertain an appeal over which it indisputably has statutory jurisdiction and in which meaningful relief can be awarded.

In 2015, a series of significant courts of appeals decisions addressed the equitable mootness doctrine. The opinions are notable not only for how the court applied the doctrine (i.e., large vs. small cases and appellants with big vs. small claims), but also for the concurrences through which the judges debated the whether the doctrine should exist at all.

1. One2One Communications, LLC

One2One Communications, LLC was a billing services company with one secured creditor and fewer than 20 unsecured creditors. *See In re One2One Commc'ns, LLC*, 805 F.3d 428, 431 (3rd Cir. 2015). Its largest unsecured creditor held a $9 million judgment against the company and its chief executive officer ("CEO"). *See id*. The plan was relatively simple and "did not provide for new financing, mergers or dissolutions of entities, issuance of stock or bonds, name change, change of business location, change in management or any other significant transactions." *See id*. at 435-36. Crucially, however, it released the CEO and allowed equity holders to retain property without paying unsecured creditors in full. *See* Quad/Graphics Inc's Memorandum of Law in Opposition to Confirmation of the Debtor's Fourth Amended Plan of Reorganization, Case No. 12-27311 (NLW) [Docket No. 235] (Bankr. D.N.J. Feb. 14, 2013). The bankruptcy court confirmed the plan over the judgment creditor's objection, and the creditor appealed. The district court dismissed the appeal as equitably moot. The Third Circuit reversed, however, finding that the district court had abused its discretion in applying the equitable mootness doctrine. *See One2One Commc'ns, LLC*, 805 F.3d at 436. Although the judgment creditor had failed to obtain a stay and that the plan was now substantially consummated, the district court had not considered whether the plan could be retracted without great difficulty or inequity. *See id*. at 436. The Third Circuit described the transactions that followed confirmation (investment by the plan sponsor, distributions to creditors, and hiring of new employees) to be routine and ordinary course. *See id*. Moreover, the absence of publically traded debt meant that the reliance of third-parties on the confirmation order was "minimal." *See id*. at 437. The Third Circuit reversed the dismissal and remanded to the district court for consideration of the judgment creditor's appeal on the merits.

Concurring in the opinion, Judge Krause questioned whether the Third Circuit should continue to consider equitable mootness, suggesting en banc review to eliminate the doctrine. Judge Krause's provided an extensive critique of the doctrine, questioning its constitutional and statutory basis. First, Judge Krause noted the unfettered expansion of the doctrine to dismiss appeals in "modest, non-complex bankruptcies [] where appellants have sought limited relief." *See id*. at 438-39. In addition, she opined, district and bankruptcy courts extended equitable

mootness beyond confirmation orders to orders approving settlements and structured dismissals among other orders.

Additionally, she asserted, equitable mootness is not among the "handful of narrow and deeply rooted" judge-made abstention doctrines recognized by the Supreme Court. *See id*. at 440. In fact, where there is no other forum and no later exercise of jurisdiction, dismissing an appeal as equitably moot is not abstention, Judge Krause argued, but "abdication." *See id.*

Judge Krause explained that there is no statutory basis for the equitable mootness doctrine. She wrote that the limited basis for abstention in 28 U.S.C. § 1334, which concerns original jurisdiction, cannot be read to apply to an Article III court's appellate jurisdiction. Moreover, the narrow exceptions to appellate review set forth in section 363(m) and section 364(e) of the Bankruptcy Code must lead to the conclusion that Congress did not intend for other orders to be immune from appeal. *See One2One Commc'ns, LLC*, 805 F.3d at 442-44.

Judge Krause explained that equitable mootness raises constitutional concerns by insulating the final order of a bankruptcy judge from Article III review. *See id*. at 446. In *Wellness Intl. Network, Ltd. v. Sharif*, the Supreme Court approved the adjudication of proceedings over which the bankruptcy judge lacked constitutional authority provided that there existed (1) litigant consent to adjudication by the bankruptcy judge; and (2) Article III judicial review. *See* 135 S. Ct. 1932, 1944 (2015). Equitable mootness, Judge Krause opined, does not abide these factors. *See One2One Commc'ns, LLC*, 805 F.3d at 445 ("Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation . . . all before the challengers reach an Article III court.").

In addition to these criticisms, Judge Krause suggested that the parties end up litigating equitable mootness instead of the merits of the appeal, which undermines any theoretical efficiencies realized by application of the doctrine. *See id*. at 446. Alternatively, Judge Krause suggested that plan proponents make use of the following remedies to ward off appellants desiring to block or unwind a plan: (1) deploying the equitable defense of laches; (2) arguing bad faith delay, which has prejudiced other parties; and (3) expedited briefing schedules. *See id*. at 449. Also, Judge Krause asserted that unscrambling a plan might be difficult, but not impossible in most cases, and that the appellate courts should hear the appeal if they could grant even limited relief to the appellant. *See id*. at 450. If the doctrine is to persist, Judge Krause advocated for de novo review of equitable mootness dismissals, instead of the abuse of discretion standard that the majority applied arguing that the court of appeals is in just as good a position to decide equitable mootness as the lower appellate court. *See id*. at 453. Finally, Judge Krause suggested that the reviewing court adopt a "quick look" at the merits of the appellant's challenge, which would guide the court's assessment of the effects of granting different forms of relief. *See id*. at 454.

2. Tribune Media Company

In contrast to One2One Communication's "garden variety" chapter 11, Tribune Media Company's reorganization was a "mega-case." Tribune filed for bankruptcy in December 2008, after a leveraged buyout left it saddled with $8 billion in LBO debt (on top of $5 billion in pre-

LBO debt). *See In re Tribune Media Co*., 799 F.3d 272, 275 (3d Cir. 2015). Aurelius Capital Management, L.P. ("Aurelius"), a hedge fund specializing in distressed debt, bought $2 billion of Tribune's pre-LBO debt and became actively involved in the bankruptcy process. *See id*. A central component of the plan backed by the debtor, the creditors' committee, and the senior lenders was the settlement of several LBO-related causes of action for $369 million. *See id*. Aurelius believed that this settlement undervalued the LBO actions, and had proposed a competing plan that would litigate rather than settle the claims. *See id*. Ultimately, the bankruptcy court approved the plan supported by the debtor. *See id*. at 276.

Aurelius appealed the confirmation order and sought to stay its implementation in the bankruptcy court. The bankruptcy court conditioned granting a stay on Aurelius posting a $1.5 billion bond, the amount of which it estimated based upon the contingent liability to the debtor associated with the stay of the implementation of the plan while an appeal was pending. *See id*. Aurelius moved to vacate the bond requirement and expedite its appeal, but the bankruptcy court denied the requests and did not stay plan implementation. Thereafter, Aurelius again moved for an expedited briefing schedule and hearing of its appeal. *See id.* While these motions were pending, the confirmed plan was substantially consummated and Tribune moved to dismiss the appeal as equitably moot. *See id*. at 277.

In addition to Aurelius, a group of bond trustees (the "Bond Trustees") appealed the order confirming the plan, based upon their treatment under the plan, arguing that their prepetition subordination agreements with another creditor class entitled them to certain distributions, which the plan allocated to the other creditor class. *See id*. The district court denied both the Aurelius appeal and the Bond Trustees appeal as equitably moot. *See id*. at 274.

On further appeal, the Third Circuit affirmed dismissal with respect to Aurelius and reversed with respect to the Bond Trustees. *See id*. at 281-83. In an opinion by Judge Ambro, the Third Circuit moved away from the five factors articulated in *Cont'l Airlines* and reaffirmed the two-step method articulated in *Semcrude*, which asks first whether the plan has been substantially consummated and then looks to whether relief can be granted without "unscrambling" the plan and harming third parties. *See id*. at 279. The difference between Aurelius and the Bond Trustees, in the Third Circuit's view, was that granting relief to the former (which would require undoing the LBO settlement) would unravel the entire Tribune plan, whereas granting relief to the latter would simply require shifting distributions from one creditor class to another. *See id*. at 282-84.

In *In re Tribune Media Co*., the Third Circuit clarified who the equitable mootness doctrine has in mind when it refers to "third parties" who have justifiably relied on plan confirmation. Here, it was the "outside investors" who had made equity investments in the reorganized Tribune. *See id*. at 279. Their interests were more worthy of protection than others, the Third Circuit explained, because "we want to encourage behavior (like investment in a reorganized entity) that contributes to a successful reorganization." *See id*. Abstention under the equitable mootness doctrine, therefore, "further[s] the free flow of commerce" because it avoids disturbing the complex transactions undertaken after the plan was consummated. *See id*. By contrast, any potential relief that a reviewing court would grant to the Bond Trustees would only

affect another class of Tribune's creditors. The impact on third parties was thus limited because "the remedy of taking from one class of stakeholders the amount given to them in excess of what the law allows is not apt to be inequitable, as there is little likelihood it will have damaging ripple effects beyond the class that the redistribution immediately affects." *See id*. at 280.

The Third Circuit found another reason not to hear Aurelius' appeal: its unwillingness to post the $1.5 billion bond. *See id*. at 281. Although an appellant's failure to obtain a stay is not part of the *Semcrude* analysis, the Third Circuit's reliance on this fact as further justification for dismissing the appeal is reminiscent of *Robert Farms*, where the appellant failed to diligently seek a stay pending appeal, *see* 652 F.2d at 796, and *Cont'l Airlines*, where the Third Circuit considered it relevant that the appealing creditors refused to post a bond. *See* 91 F.3d at 562. In *In re Tribune Media Co*, the Third Circuit stated the Aurelius's failure to post the bond, or to offer to post a smaller bond "leads us to conclude that it effectively chose to risk a finding of equitable mootness and implicitly decided that an appeal with a stay conditioned on any reasonable bond amount was not worth it." *See* 799 F.3d at 282.

In addition to writing for the majority, Judge Ambro appended a concurrence to answer Judge Krause's criticisms of the equitable mootness doctrine addressing each point in turn. Regarding the constitutional arguments, Judge Ambro disagreed that equitable mootness insulates bankruptcy court judgments from Article III review. *See In re Tribune Media Co.*, 799 F.3d at 285. The personal rights and structural concerns at the heart of the Supreme Court's decisions in *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) and *Wellness Int'l Network*, 135 S. Ct. at 1944, are not implicated by the equitable mootness doctrine, he reasoned, because an Article III court applies the doctrine. *See In re Tribune Media Co.*, 799 F.3d at 285. The cases where the Supreme Court is concerned with the structural integrity of the Constitution involve congressional aggrandizement, not whether an Article III judge can abstain from hearing a case. Equitable mootness does not, Judge Ambro concluded, violate a litigant's right to an Article III adjudicator or raise concerns about congressional aggrandizement. *See id.*

Addressing the apparent lack of a statutory basis for equitable mootness, Judge Ambro observed that sections 363(m) and 364(e) of the Bankruptcy Code "bespeak a congressional intent that courts should keep their hands off consummated transactions." *See id*. at 286 (internal quotation omitted). Bankruptcy courts are primarily courts of equity, and appellate courts should have discretion in issuing or withholding equitable remedies. *See id*. On this point, Judge Ambro equated application of the equitable mootness doctrine to considering whether to award an injunction, *see id*. at 287, something which is within the sound discretion of the court. The equitable mootness doctrine should remain in the judge's "*equitable* toolbox" to be used when necessary to affect the intent of Congress to protect the finality of consummated plans. *See id*. at 287-88.

Finally, Judge Ambro lauded the practical benefits of the equitable mootness doctrine. It should be used, he wrote, in those rare instances where it is necessary to "shut[] an appellant out of the courthouse" rather than "locking a debtor inside." *Id.* at 289.

On this last point, Judge Ambro stressed the need for the equitable mootness doctrine in those "rare" cases that reorganize thousands of relationships among countless parties:

> When a plan is substantially consummated, it is sometimes not only as difficult to restore an estate to the *status quo ante* consummation as it is to gather all the feathers from the proverbial pillow, it is also a crushing expense to the reorganized entity and its shareholders. If we jettisoned the entire equitable mootness doctrine, it is hard to imagine that any complex plan would be consummated until all appeals are terminated. For why would an equity investor wish to put money into a reorganized entity if the plan could be ordered unraveled? And would not the cost of credit increase prohibitively with such a specter? Without equitable mootness, any dissenting creditor with a plausible (or even not-so-plausible) sounding argument against plan confirmation could effectively hold up emergence from bankruptcy for years (or until such time as other constituents decide to pay the dissenter sufficient settlement consideration to drop the appeal), a most costly proposition.

Id. at 288-89. Judge Ambro concluded his concurrence noting the practical benefit of allowing a stay of the confirmation order in instances where the appellant posts a bond to protect against the loss in value to the estate as its reorganization is delayed by an appeal. *See id*. at 289.

3. Transwest Resort Properties, Inc.

In *In re Transwest Resort Properties, Inc.*, the Ninth Circuit reversed the district court's dismissal of a secured creditor's appeal, reviewing the lower court's legal conclusions under the equitable mootness doctrine de novo. *See JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Prop. Inc. (In re Transwest Resort Prop., Inc.)*, 801 F.3d 1161, 1168 (9th Cir. 2015). The secured creditor in *Transwest* held a secured claim of almost $300 million against collateral hotel properties valued at under $100 million. *See id*. at 1164-65. It elected under section 1111(b) of the Bankruptcy Code to have its entire claim treated as secured in the hopes that the hotels would increase in value post-bankruptcy. *See id.* at 1165. The debtors' proposed restructured loan terms had a special provision whereby the debtors could sell the hotels within a certain time window (between years 5 to 15 on the new loan) subject to the secured creditor's mortgage, meaning that the creditor would be unable to collect its loan if the hotels were sold in this window and any upside value would inure to the reorganized debtors. *See id.* The secured creditor objected to the debtors' plan as "gutting" its section 1111(b) election. *See id*. at 1166-67. The bankruptcy court overruled the objection and confirmed the plan.

The secured creditor diligently pursued an appeal and stay of the confirmation order. Ironically, in declining to impose a stay, the bankruptcy and district courts considered that the possibility of the appeal becoming equitably moot if the plan were consummated was remote. Nevertheless, the district court dismissed the appeal for that very reason once stay relief was denied and the plan became effective. *See id*. at 1167. On appeal, the Ninth Circuit ruled that the secured creditor's right to have its matter heard outweighed other considerations under the equitable mootness doctrine. *See id*. at 1173. In reaching this conclusion, the Ninth Circuit made a number of interesting observations about the "third parties" who would be affected by a

reversal or modification of the confirmation order. *See id*. at 1169. It noted that the relief requested (namely that the exception to the due-on-sale clause in the restructured lending agreement) would only impact the reorganized debtors. *See id*. Noting how the reorganized debtors' new owner had participated at every stage of the reorganization, the Ninth Circuit declined to find it the "type of innocent third party that the equitable mootness doctrine is meant to protect." *See id.* Specifically, the new owner had negotiated directly with the secured creditor over the very portions of the confirmation order that gave rise to its objections, and had additionally filed a notice of appearance as "appellee" in the earlier stage of the appeal. *See id*. at 1170.

In declining to apply the equitable mootness doctrine to uphold dismissal of the appeal in *Transwest*, the Ninth Circuit appeared to focus less on the third party's reliance on a confirmation order, and more on its involvement in the bankruptcy and, in particular, whether its actions made the appeal foreseeable. *See id*. at 1171 ("[W]hen a sophisticated investor such as [the new owner] helps craft a reorganization plan that presses the limits of the bankruptcy laws, appellate consequences are a foreseeable result." (internal quotation omitted)). The dissent strongly disagreed with this formulation of the equitable mootness doctrine, stating that a third party's involvement in the reorganization should not weigh against protecting its interests on appeal. *See id*. at 1174. The dissent pointed out that the third party was not involved with the debtors pre-bankruptcy and that it invested $30 million in the debtors under the court-approved plan. After the funder had agreed to finance the reorganization it was only natural that it would become involved in the bankruptcy proceedings. *See id*. Moreover, whether the new owner's action made an appeal foreseeable wrongly focuses the inquiry on the reasonableness of the third party's reliance as opposed to the reasons why investors like the new owner should be encouraged to rely on the finality of confirmation orders. *See id*. at 1174-75 ("The rule the majority endorses ignores the realities of the marketplace, and creates strong incentives for investors to delay funding improvements until after the appeal is completed, which may take years."). Finally, the dissent argued, the availability of fashioning a limited form of relief was not so simple here. Incorporating the majority's proposed remedies into the reorganization plan, could cause the new owner to stop funding improvements and divest, which would, in fact, end up unraveling the plan. *See id*. at 1175-76 ("[I]t is unlikely that [new owner] will look favorably upon a plan that requires its wholly owned subsidiaries to pay an extra $30 million, the amount of [new owner's] investment under the original plan, to the [secured creditor].").

VI. Proceeding With The Appeal

After overcoming any jurisdictional issues, parties then turn their attention to the next set of issues that arise in an appeal. In this section, we address matters that frequently crop up during the course of a bankruptcy appeal.

A. Motions

i. Motion for Reconsideration and Jurisdiction

If a party filed a motion for reconsideration in the bankruptcy court within 14 days of the docketing of the judgment, order, or decree, the time for taking an appeal of the underlying order

is tolled. If the ruling on reconsideration is adverse, an appeal encompassing both the reconsideration order and the underlying order must be filed within 14 days of the disposition of the reconsideration motion. An appellant should take care to include both the underlying order and reconsideration order in the notice of appeal. If an appellant only lists the reconsideration order in the notice of appeal, the appeal can still include both orders if the parties treat the appeal as including both (via their briefs and at oral argument). *See, e.g., Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 8 (1st Cir. 2005); *Zukowski v. St. Lukes Home Care Program*, 326 F.3d 278, 283 n.4 (1st Cir. 2003); *Aybar v. Crispin–Reyes*, 118 F.3d 10, 15 n.5 (1st Cir. 1997). To narrow the issue on appeal to the reconsideration order, an appellee should raise the procedural issue in both the brief and at oral argument.

If the appellant filed the motion for reconsideration after 14 days have lapsed from the docketing of the underlying order,[2] the appeal will be restricted to the reconsideration order notwithstanding if the parties raise both issues in their briefs and at oral argument. *See Haddock Rivera v. ASUME (In re Haddock Rivera)*, 486 B.R. 574, 577 n.4 (B.A.P. 1st Cir. 2013).

ii. Motion for Stay Pending Appeal

As the filing of a notice of appeal does not stay the order on appeal, an appellant should consider filing a motion for stay pending appeal with the bankruptcy court to avoid a mootness issue. *See* Fed. R. Bankr. P. 8007. If the appellant is unsuccessful, the appellant may file another request for stay with the appellate court. *See id.* 8007(b). Although the bankruptcy court is generally divested of jurisdiction with regard to the matter on appeal, it may nevertheless entertain and rule on a motion for stay pending appeal. *See id.* 8007(e)(2); *Dressler v. The Seeley Co. (In re Silberkraus)*, 336 F.3d 864, 869 (9th Cir. 2003).

Prior to December 1, 2014, the Part VIII rules provided that a motion for stay pending appeal had to be filed promptly. That rule was thereafter stricken. The First Circuit BAP reinserted that requirement via a local rule. *See* 1st Cir. BAP L.R. 8007-1.

In determining whether to grant a stay pending appeal, a court will apply the same four-part standard for a preliminary injunction: (1) whether the applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably harmed absent injunctive relief; (3) whether issuance of the stay will injure other parties; and (4) where the public interest lies. *See Elias v. Sumski (In re Elias)*, 182 F. App'x 3, 4 (1st Cir. 2006) (explaining that the sine qua non of stay relief is the ability to establish the first prong); *see also Otero Rivera v. Lake Berkley Resort Master Assoc., Inc. (In re Otero Rivera)*, 532 B.R. 425, 427 (Bankr. D.P.R. 2015) (reviewing standards to obtain the "extraordinary remedy" of a stay).

iii. Indicative Rulings

Generally, after a notice of appeal is filed, the bankruptcy court no longer has jurisdiction to consider any motion related to the order on appeal. Rather than ruling on a motion over which

[2] *See Eastern Sav. Bank v. LaFata (In re LaFata)*, 344 B.R. 715 (B.A.P. 1st Cir. 2006) (explaining impact of motions filed under Fed. R. Civ. P. 60(b) on jurisdiction while an appeal is pending). *See also In re Daniels*, 462 B.R. 356 (Bankr. D. Mass. 2012) (same from lower court perspective).

it lacks jurisdiction, a bankruptcy court may defer ruling on the motion, deny the motion, state that it would grant the motion, or that it raises a substantive issue. Fed. R. Bankr. P. 8008(a). If the bankruptcy court has indicated that it would grant the motion or that it raises a substantive issue, the movant must promptly inform the clerk of the appellate court of the ruling. The appellate court may then remand or dismiss the matter. *See, e.g.,* 1st Cir. BAP L.R. 8008-1 (providing mechanism for rule). One of the most common types of proceedings under this rule are motions to approve settlements.

B. Record on Appeal, Statement of Issues, and the Transcript

The appellant must file a designation of record and statement of issues on appeal within 14 days after the notice of appeal becomes effective or an order granting leave to appeal is entered. *See* Fed. R. Bankr. P. 8009(a). If the record includes documents which were sealed at the bankruptcy court, the party wishing to include the document must file a motion with the intermediate appellate court to accept the document. *See id.* 8009(f). In the First Circuit, if the appellant fails to include issues in the statement of issues, the appellant cannot later raise them in the brief or at oral argument. *See City Sanitation, LLC v. Allied Waste Serv. of Mass., LLC (In re Am. Cartage, Inc.)*, 656 F.3d 82, 90-91 (1st Cir. 2011). Challenges to whether the record accurately discloses what occurred in the lower court or motions to strike are resolved by the bankruptcy court. All other questions should be presented to the intermediate appellate court. Fed. R. Bankr. P. 8009(e).

Under Fed. R. Bankr. P. 8009(d), the parties can provide an agreed-upon statement as the record on appeal and the parties, bankruptcy court, or the court where the appeal is pending can correct the record.

Fed. R. Bankr. P. 8009(b) now provides extensive instructions for the ordering and filing of a transcript. It also discusses procedures for the rare instances when a transcript is unavailable.

C. A Few Reminders on Brief Writing

The amended Part VIII rules now provide comprehensive guidelines for the appellant and appellee briefs, as well as for cross-appeals and briefs of amici curiae. Pay attention to page and word limits, the certificates to be appended, and the deadlines for filing.

Always address the standard of review and explain if different standards apply to different arguments. Those standards are:

i. **de novo** - "Under the de novo standard of review, 'we consider a matter anew, as if no decision had been rendered previously.'" *PREPA v. Wiscovitch Rentas (In re PMC Mktg. Corp.)*, 517 B.R. 386, 394 (B.A.P. 1st Cir. 2014) (Hoffman, J., concurring) (citing *Calderon v. Lang (In re Calderon)*, 507 B.R. 724, 728 (B.A.P. 9th Cir. 2014).

ii. **clearly erroneous** - "' [A] factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Ross v. Garcia (In re Garcia)*, 532

B.R. 173, 181 (B.A.P. 1st Cir. 2015) (quoting *Goat Island S. Condo. Ass'n v. IDC Clambakes, Inc. (In re IDC Clambakes, Inc.)*, 727 F.3d 58, 63–64 (1st Cir. 2013)).

iii. **abuse of discretion -** "An abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Latin Am. Music Co. v. Archdiocese of San Juan of the Roman Catholic & Apostolic Church*, 499 F.3d 32, 43–44 (1st Cir. 2007) (quoting Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 6 (1st Cir. 2005)).

iv. **mixed question -** For a mixed question of facts and law, the standard of review is "clear error unless the bankruptcy court's analysis was based on a mistaken view of the legal principles involved." *Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.)*, 534 F.3d 76, 82 n.2 (1st Cir. 2008).

At the same time you file your brief, file your paginated appendix (the subset of the record) and make sure it has all you need from the designated record.

Always be candid in your brief and address all of the facts and law that pertain to your appeal, not just those that assist your case. Write, rewrite, and proofread your brief and then read it out loud. While these suggestions may seem simplistic, they bear repeating as many briefs are filed in haste and with typos. An error-filled brief may unintentionally cause the court concern about whether the same pertains to your argument.

Bear in mind that it is often advisable to select a limited number of issues to press on appeal. A good rule of thumb is to identify no more than three or four of your strongest arguments. Litigants who attempt to reargue every point they lost below are often unpersuasive on appeal because they are unable to crystalize the error for the appellate court.

A party should not address arguments in its brief that the party did not raise below. *Noonan v. Rauh (In re Rauh)*, 119 F.3d 46, 51 (1st Cir. 1997). As to the matters a party will address in the brief, the writer should ensure that the matter is fully discussed and not just perfunctorily mentioned or referenced only in a footnote. The latter may result in waiver as well. *See, e.g., Eakin v. Goffe, Inc. (In re 110 Beaver Street P'ship)*, 355 F. App'x. 432, 437 (1st Cir. 2009) ("An appellant waives any issue which it does not adequately raise in its initial brief.").

D. A Few Reminders on Oral Argument

Fed. R. Bankr. P. 8019(b) provides a presumption of oral argument which can be overcome if the court determines that the appeal is frivolous, the dispositive issues have been authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and record. The parties should provide a statement in their briefs as to whether oral argument "should, or need not, be permitted." *See* Fed. R. Bankr. P. 8019(a).

Prior to argument, check the cases upon which you rely to ensure that they remain good law. If there has been a subsequent disposition, inform the court in writing prior to argument or

bring a copy to hand up during the hearing. Bring a copy of your brief and the appendix, if not the entire record. Know it and tab it. Remember that although you cannot raise issues during oral argument that you did not raise below and in your briefs, failing to argue every matter you briefed will not result in waiver.

Arrive early to observe other arguments. When it's your turn, don't read from your brief. Instead, prepare an outline and try and get through it during the hearing. Many advocates prefer to memorize a short opening statement that they can deliver to the judges from memory while making eye contact. Prior to argument, try to anticipate the questions a judge may ask; during argument, listen carefully to the questions so you are answering the ones posed rather than the one you would have liked to receive. Try and return to your argument but if that seems elusive, attempt to make your main points before the red light goes on. Do not interrupt even if you see judges interrupting each other. If you finish early, finish early by stating your request for relief—either that the judgment be affirmed or reversed. Resist the urge to stay at the podium unnecessarily.

VII. Next Steps

Once the district court or BAP has issued its decision, the judgment is stayed for 14 days, unless the court orders otherwise. *See* Fed. R. Bankr. P. 8025(a). The deadline for taking an appeal of the intermediate appellate court's ruling to the First Circuit is 30 days and may be extended as specified in Fed. R. App. Proc. 6(b).

VIII. Conclusion

Before reaching the merits of a bankruptcy appeal, issues of jurisdiction and procedure can present traps for the unwary. Understanding the foregoing material should greatly assist in avoiding being trapped.

IX. Appendix

At a Glance Chart: Which Court Decides What Matter.

AT A GLANCE CHART: WHICH COURT DECIDES WHAT MATTER?

Issue/Motion	Bankr. Ct. Decides	Intermediate App. Ct. Decides
Timeliness of Notice of Appeal		✔
Motion for Leave to Appeal		✔
First Motion for Stay Pending Appeal	✔	
Second Motion for Stay Pending Appeal		✔
Motion to Extend Time to file Notice of Appeal	✔	
Motion to Extend Time to Pay Appeal Filing Fee	✔	
Motion to Extend Time to File DOR/SOI	✔	
Motion To Extend Deadline to Pay Appeal Filing Fee and/or file DOR/SOI		✔
Parties' Statement Regarding Transcript Unavailability	✔	
Motion to Strike Item(s) from Designation of Record	✔	
Parties' Agreed Statement Regarding Record on Appeal	✔	
Appellee Election to Proceed to USDC and other election issues		✔
Motion to Consolidate Appeals		✔
Motion for Indicative Ruling (i.e. Motion to Approve Settlement)	✔	BAP/USDC re-mands/dismisses to allow USBC to rule
Motion to Voluntarily Dismiss Appeal		✔
Motion to Extend Time to File Brief		✔
Certifying a Direct Appeal to First Circuit[1]	✔	✔

[1] Certification is filed with the clerk of the court where the matter is pending. A matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought. A matter is pending at the BAP or district court thereafter.