Everything You Need to Know About Bankruptcy Appeals

Hon. Susan P. Graber
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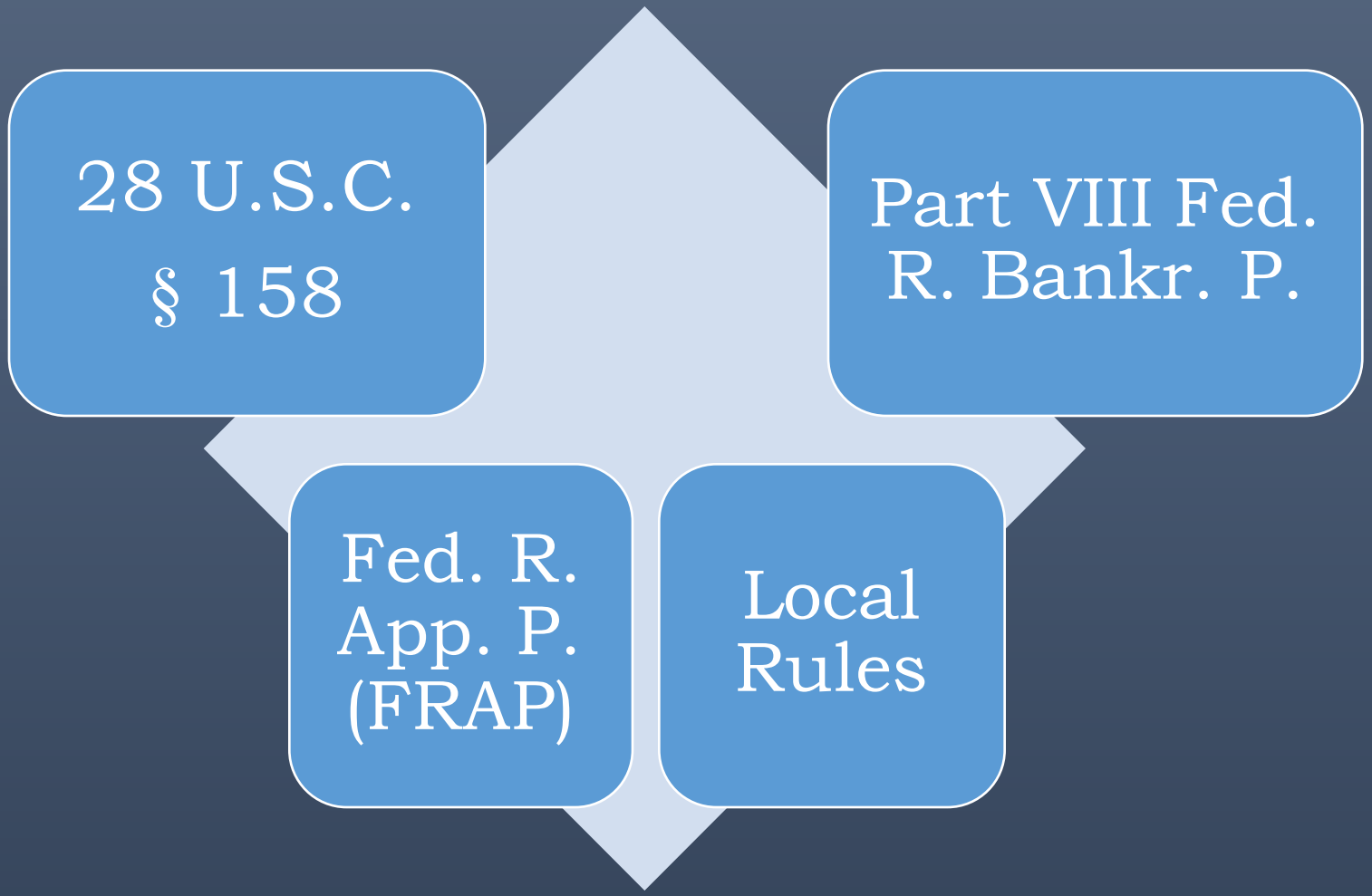
WHAT WE WILL TALK ABOUT

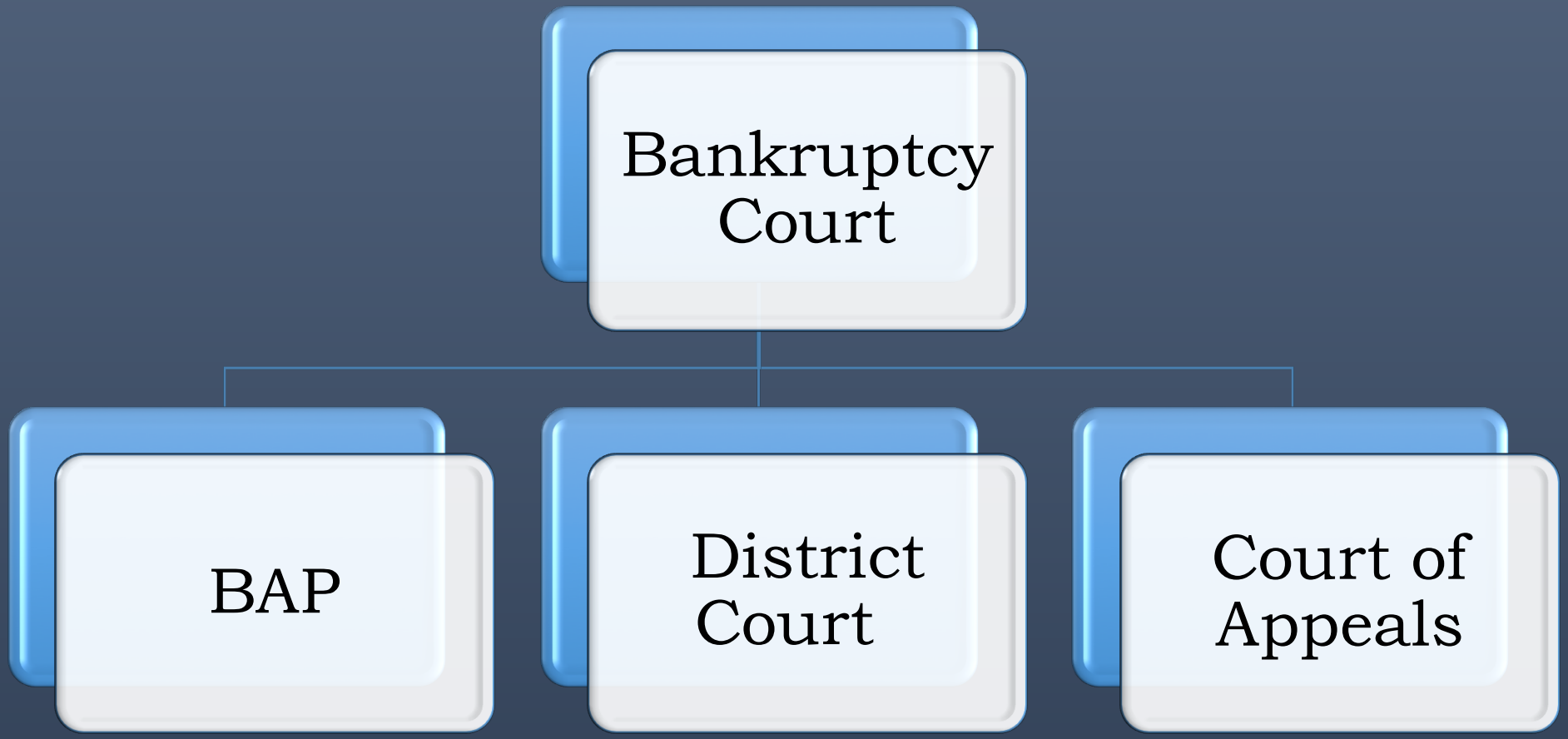
- Applicable Statutes and Rules
- Where to Take Your Appeal
- What Can Be Appealed: Final vs. Interlocutory
- Jurisdictional Considerations
- Proceeding With Your Appeal

Applicable Statutes and Rules



"Would You Tell Me, Please Which Way I Ought To Go From Here?"

Lewis Carroll, Alice's Adventures in Wonderland



BYPASSING THE INTERMEDIATE APPELLATE COURT

- Direct Appeal – 28 U.S.C. Section 158(d)(2)(A)
- Certification of question of law and authorization of direct appeal by COA

Direct Appeals, continued

- Effect of lack of authority to enter final order on appellate jurisdiction

- Wortley v. Bakst (11th Cir. 2017)
  - As bankruptcy court only had authority to make proposed findings and ruling, its dismissal order could not be the subject of certification of direct appeal.

  - Remand of direct appeal to district court was mandated with instructions for a review of rulings as a report of proposed findings of fact and rulings of law.

WHAT ORDERS CAN BE APPEALED?

- As of right: A final order.

- A final order ends the matter leaving nothing to do but execute the judgment

EXAMPLES OF FINAL ORDERS

- MAIN CASE
  - SALES, LIFT STAY, CONVERSION, DISMISSAL COMPROMISES, LIEN AVOIDANCE, TURNOVER, PROOFS OF CLAIM, FINAL FEES, CASE CLOSING
  - CLOSER CALLS: DENIAL OF LIFT STAY; APPOINTMENT OF TRUSTEE

EXAMPLES OF FINAL ORDERS

- ADVERSARY PROCEEDINGS
  - DISMISSAL, SUMMARY JUDGMENT AS TO ALL COUNTS

APPEALING INTERLOCUTORY ORDERS

Defining an interlocutory order –

- intermediate, provisional decision;
- small litigation unit;
- minor disagreement;
- discrete issue as opposed to discrete dispute
- intervening matter with further steps ahead

EXAMPLES OF INTERLOCUTORY ORDERS

- MAIN CASE: DENIAL OF PLAN CONFIRMATION; OVERRULING PLAN OBJECTION; SHOW CAUSE ORDER; GRANTING OR DENYING VENUE TRANSFER MOTION; RECUSAL ORDER; §§ 523 & 727 DEADLINE EXTENSION

- ADVERSARY PROCEEDINGS: SUMMARY JUDGMENT AS TO SOME COUNTS; DISCOVERY ORDERS & SANCTIONS; DENYING DISMISSAL

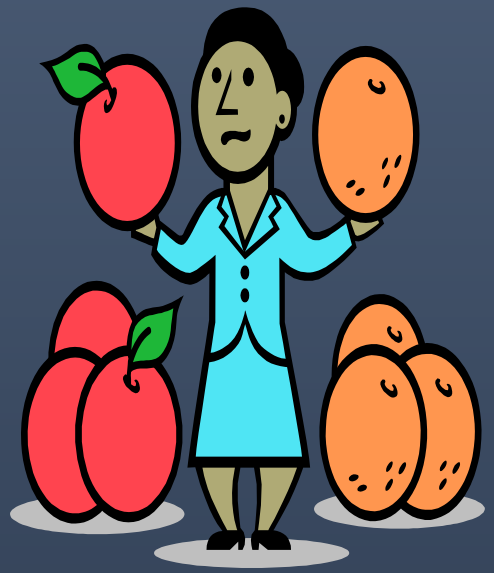
OBTAINING LEAVE TO APPEAL INTERLOCUTORY ORDERS

Movant must establish one of three precepts:

- 28 U.S.C. Section 158(a)(3)
- Collateral Order Doctrine
- Forgay-Conrad Doctrine

PROCEDURAL CONSIDERATIONS

- How to request leave to appeal
- Argue issue is too important to defer
- Differences between BAP and USDC



Bullard v. Blue Hills Bank

THE HOLDING

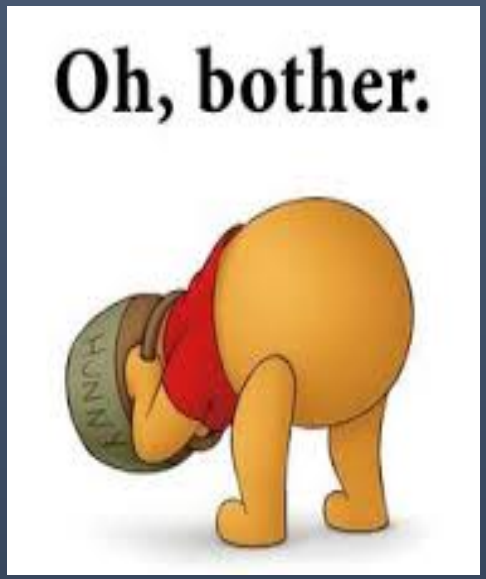
Order denying chapter 13 plan confirmation is interlocutory.

THE OUTCOME

At least one court has applied Bullard to a chapter 11 case.

SUGGESTED WORKAROUNDS

- 28 U.S.C. §§158(d)(2) and 1292
- Fed. R. Bankr. P. 3012
- Addressing claim via adversary proceeding
- Denial and dismissal (per Bullard)with stay?
- Other workarounds



Court of Appeals Appellate Bankruptcy Jurisdiction

- 11 U.S.C. § 158(d)(2)(A)
- How does the lack of authority of a bankruptcy judge affect finality?
  - Core v. non-core, related to proceeding
  - Where consent is absent to adjudication of non-core or *Stern*-type proceeding, bankruptcy judge lacks authority to enter final order.
  - Whether appellate jurisdiction is present to review orders that should have been proposed findings of fact and conclusions of law ? See *Ortiz* (7th Cir.) and *Wortley* (11th Cir.).

SIDE NOTE ON JURISDICTION . . . What happens when an appeal is settled?

General Rule

Bankruptcy court loses jurisdiction over subject matter after notice of appeal is filed.

Reaching a Settlement During Appeal

Fed. R. Bankr. P. 8008 Indicative Rulings

File Motion with bankruptcy court first and that court will issue an advisory ruling.

LIMITATIONS ON APPELLATE JURISDICTION

1. Untimely NOA
2. Appellant's lack of standing
3. Mootness

UNTIMELINESS

- Untimely appeal – Fed. R. Bankr. P. 8002(a)
- Failure to file timely motion to extend time to appeal – Fed. R. Bankr. P. 8002(d); seek extension within 14 days or upon showing of excusable neglect, within 21 days thereafter.
- Premature appeals – Fed. R. Bankr. P. 8002(b)
- Bankruptcy court may not extend deadline for certain orders, e.g. MRS, sales, plan confirmation.

STANDING IN A BANKRUPTCY CASE

- Party in interest and the right to be heard

- Examples: the debtor, U.S. Trustee, chapter 7 trustee, a creditor

- Note: A party has standing to appeal an order concluding standing was lacking

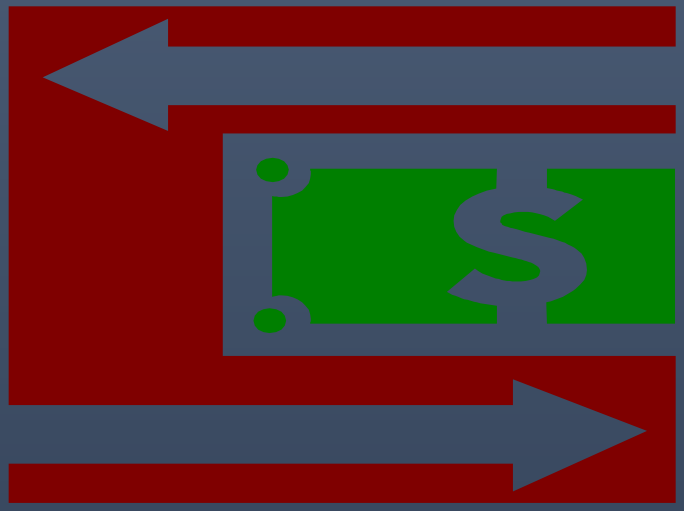
CONTRAST: STANDING TO APPEAL

- Person aggrieved
  - Rights and interests directly affected

- Examples:
  - Potential party defendant - no
  - Party contesting bankruptcy standing- yes
  - Party who failed to object below - no

EXAMPLE: CHAPTER 7 DEBTOR

- Insolvent estate; OR
- Debtor's discharge or exemptions unaffected by the order



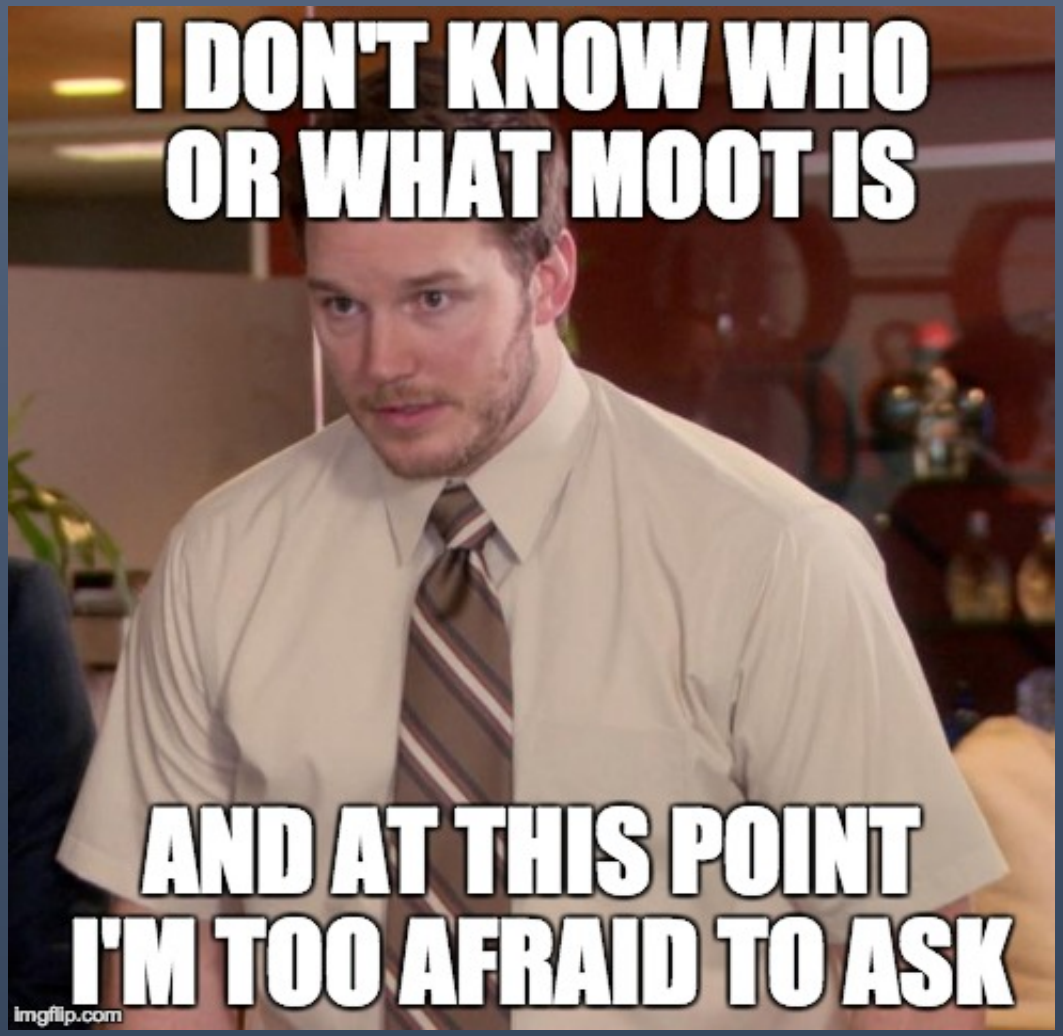
EXAMPLE: UNSUCCESSFUL BIDDER

- Unsuccessful bidder's standing to appeal sale order
  - General rule – losing bidder lacks standing
  - Exception – unfairness or defects in the sale

EXAMPLE: FAVORABLE ORDER

- General rule – Parties lack standing to appeal favorable order.
- Exception – when appellant can show prejudice or has preserved the issue.

MOOTNESS
A Threshold Issue



- Statutory
- Constitutional
- Equitable

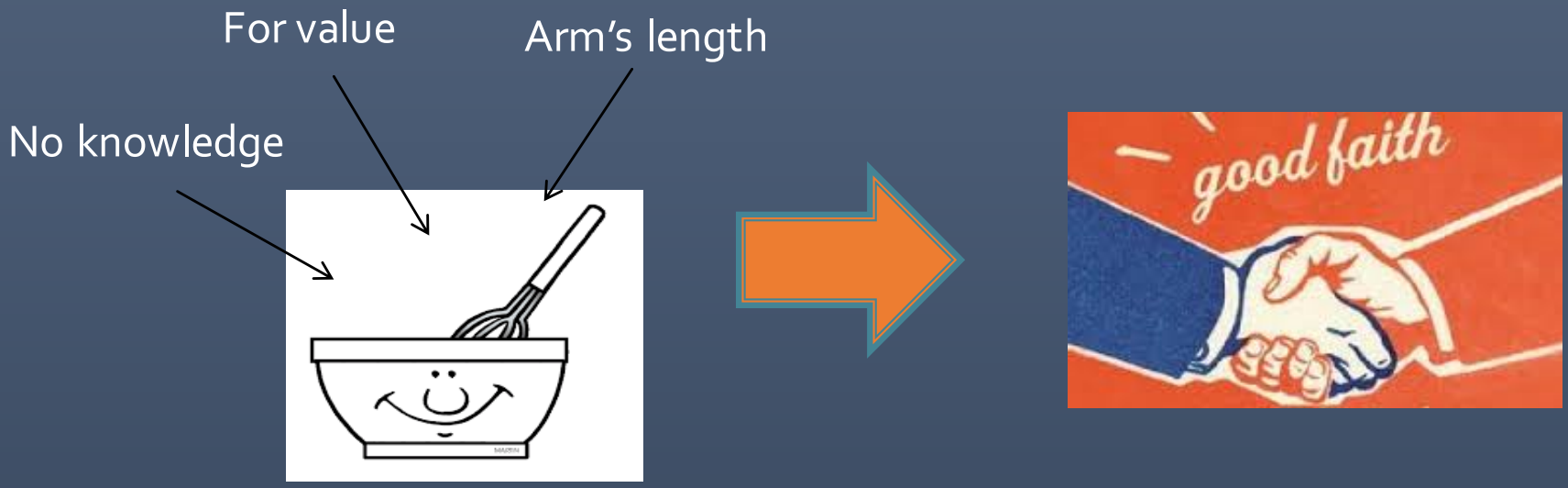
STATUTORY MOOTNESS

- Section 363(m) – unless stayed, sale to "good faith" purchaser cannot be reversed on appeal

- Section 364(e) – similar protection for good faith lender

STATUTORY MOOTNESS
11 U.S.C. § 363(m)

- Good faith is a mixed question of law and fact



- Good faith status is precluded by fraud, collusion, and attempting to take grossly unfair advantage of others

Scope of Appellate Review under 11 U.S.C. § 363(m)

- Appellate review of unstayed sale order is limited to question of whether purchaser was a good faith purchaser. *In re Old Cold, LLC (BAP 1st Cir. 2016)*

- Clearly erroneous standard applies to factual finding of good faith purchaser status

AUTOMATIC STAYS UNDER RULES

- Fed. R. Bankr. P. 6004(h) provides an automatic 14-day stay of orders approving the use, sale, or lease of property;
- Fed. R. Bankr. P. 4001(a)(3) provides 14-day stay of order granting relief from § 362 stay;

- Subject to modification or elimination by court

CONSTITUTIONAL MOOTNESS

- Federal courts are limited to hearing live cases or controversies
- There is no case or controversy if the court cannot grant any meaningful relief to the prevailing party

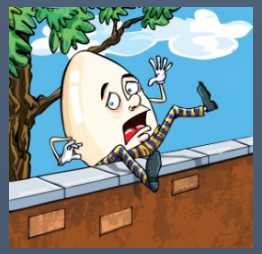
EQUITABLE MOOTNESS

- Court could grant relief, but doing so would be inequitable; unwinding impracticable

  - Did the appellant try to stay the judgment?
  - Will granting relief harm third parties who have relied on the judgment?
- Equitable mootness typically arises in appeals from confirmation orders, but could apply to any final order or judgment

EQUITABLE MOOTNESS

- Has a confirmed plan been substantially consummated?
- Has a stay been obtained?



- Would relief prejudice rights of parties not before the court?
- Would relief affect the success of the plan?
- Is a determination of the merits inconsistent with the policy of finality?

EQUITABLE MOOTNESS ARGUMENTS

"Sophisticated parties have learned that a 'pre-packaged' reorganization plan that is designed to be consummated over a weekend may be insulated from review by an Article III court even though the plan contains terms that would be unlawful if the plan were subjected to judicial review, and those parties are increasingly exploiting that opportunity."

Hon. Cheryl Krause

Hon. Thomas Ambro

"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."

EQUITABLE MOOTNESS ARGUMENTS

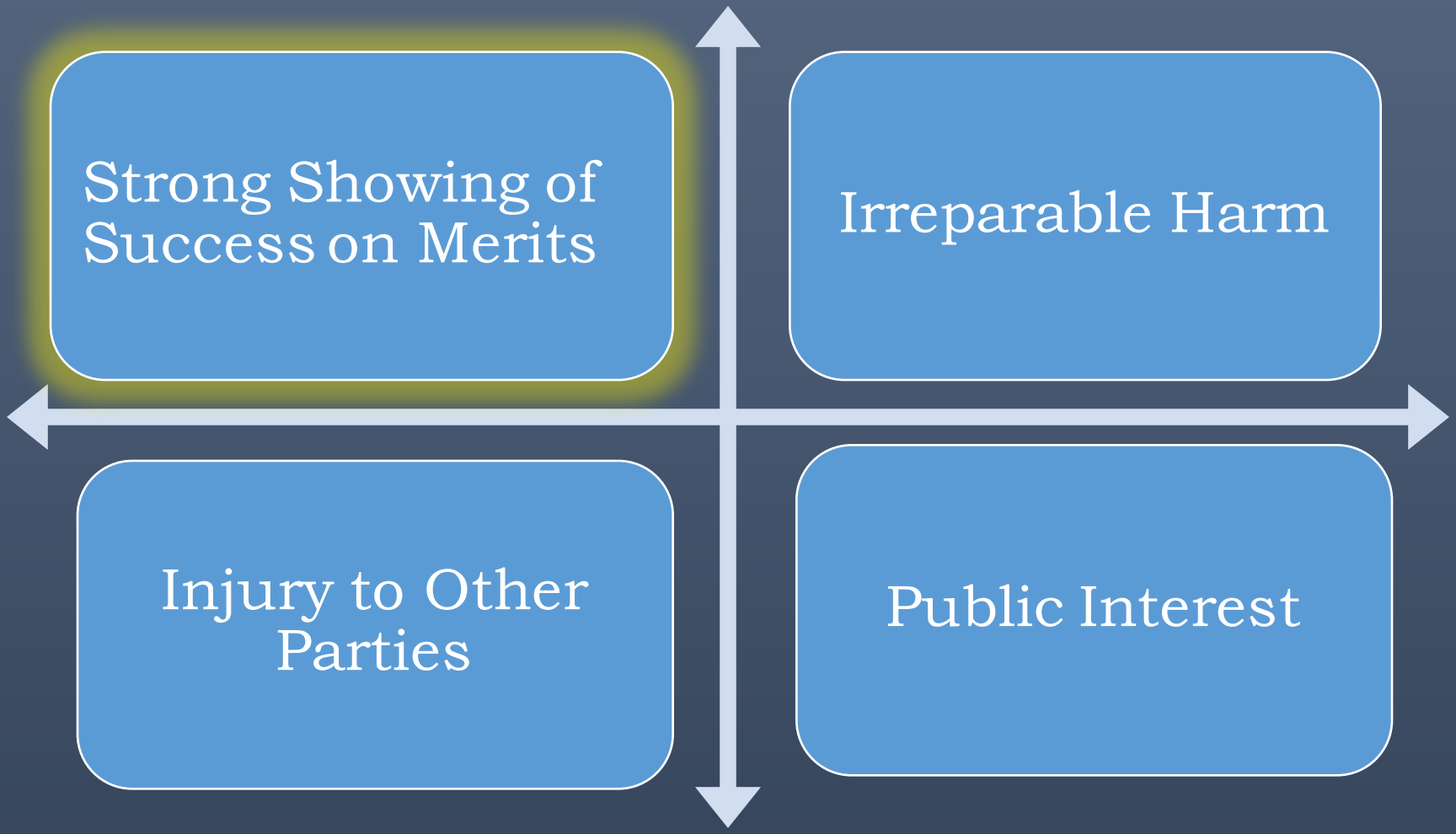
FOR EQUITABLE MOOTNESS	AGAINST EQUITABLE MOOTNESS
• Sections 363(m) and 364(e) evidence intent not to disturb consummated transactions	• No statutory basis
• Protects reliance of third parties, encourages investment	• Unfettered expansion into "modest" cases
• Pragmatic tool to protect finality of consummated plans	• Judicial abdication of responsibility
• Art. III court applies the Doctrine	• Constitutional concerns – insulation from Art. III review of non-Article III order
• Require bond to stay confirmation order	• Wasteful litigation over dismissal

PROCEEDING WITH THE APPEAL

MOTIONS

- Motion for Reconsideration
- Motion to Expedite an Appeal – Fed. R. Bankr. P. 8013(a)(2) (B)
- Sanctions: Can only be awarded upon motion – Fed. R. Bankr. P. 8020

Motion for Stay Pending Appeal



PROCEEDING WITH THE APPEAL

- COA process
- Filing Designation of Record/Statement of Issues; Agreed Statements. Fed.R. Bankr. P. 8009
- Watching Out for **Waiver -** **Consider whether issue was**:
  - Raised before trial court;
  - Addressed in Statement of Issues;
  - Analyzed In Brief

Proceeding With the Appeal

BEFORE STARTING TO WRITE: KNOW THE STANDARD OF REVIEW

1. Findings of Fact - Clearly Erroneous
2. Conclusions of Law - De Novo
3. Mixed Question of Law and Fact – Clear Error Unless Infected with Legal Error
4. Discretionary Ruling – Abuse of Discretion

PROCEEDING WITH THE APPEAL

- Brief Writing Tips
  - Know the rules; adhere to format and page limits
  - Review other good appellate briefs
  - Address appellate jurisdiction
  - Address both positive and negative facts and cases–being forthcoming and accurate earns the trust of the court
  - Write, revise, rewrite, and review
  - Be clear and concise; use style guides

PROCEEDING WITH THE APPEAL

Brief of an Amicus Curiae

- Consider necessity and collaborate early
- Know the rules: Fed. R. Bankr. P. 8017 and Fed. R. App. P. 29
- Avoid duplication-Explain importance
- Because they are extraneous, strive to produce rigorous analysis, polished, concise writing, and cogent arguments. Tone should be even and thoughtful.

ORAL ARGUMENT

- **WHAT TO PREPARE BEFOREHAND**:
  - Update the cases and the docket
  - Get to know your Panel
  - Master the record
  - Review your opponent's arguments and formulate responses
  - Identify and formulate responses to the weaknesses of your argument
  - Develop a theme, theory, and outline

ORAL ARGUMENT cont.

- Be prepared and focus on standard of review, legal theory and 2-3 points; state the precise disposition sought;
- Memorize and make a clear opening statement – never read;
- Anticipate judges' questions and respond to them
- Listen to the judges' questions; work the answers into your planned argument
- Never talk over or interrupt the judge; civility is the rule, no sarcasm or anger, but don't be obsequious

SUPREME COURT 101

- Petition for certiorari due **90 days after judgment** (not the mandate). 28 U.S.C. § 2101(c), S. Ct. R. 13.
  - Jurisdictional deadline – don't blow it
  - Can be extended up to 60 days on application to a Justice. S. Ct. R. 13.5.
  - If rehearing is sought, time runs from disposition of rehearing. S. Ct. R. 13.3.
- Common potential paths
  - Petition → waiver of response → cert. denied
  - Petition → response → cert. denied
  - Petition → waiver of response → response called for → response → reply → cert. denied
  - Petition → waiver of response → response called for → response → reply → cert. granted (after at least one conference)
- Merits briefing: merits brief → opposition brief → reply brief → oral argument → decision
- Consider amicus strategy early

SUPREME COURT 101, continued

- Arguments for granting cert.
  - S. Ct. Rule 10: Cert may be granted when a court of appeals has split from another court of appeals, or has decided an important question of law that should be settled by the Court, or in conflict with a decision of the Court.
  - "[C]ertiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

- Ideal cert. petition
  - Square, acknowledged split between courts of appeals
  - Cleanly presented question of law
  - Issue is of broad importance
  - No vehicle problems: no issues re jurisdiction, standing, an alternative basis for the decision below, messy facts, interlocutory posture

SUPREME COURT 101, continued

- Arguments for brief in opposition to certiorari
  - "Splitless" – there is no split in the circuits or the alleged circuit split is illusory; the cases can actually be reconciled with one another.
  - "Factbound" – The case turns on specific facts and is not suitable for announcing general principles of law.
  - "Seeks error-correction." The petition is really seeking only review of the court of appeals' application of established principles of law to the facts of the particular case.
  - "Needs percolation." Only a couple of courts have ruled on the question; the reasoning on one or both sides of the question is not well-developed; Supreme Court would benefit from having additional lower courts address the issue.
  - "Vehicle problem." Some aspect of the case might prevent the Court from reaching and resolving a clean legal question.

SUPREME COURT 101, continued

- Briefs on the merits
  - Except in rare cases, the briefs should focus on the legal question before the Court, not the facts in the record. If applying the correct legal principle to the facts is at all complicated, the Court will remand.
  - Do not raise arguments not within the scope of the question presented in the cert petition. If you are the respondent, do not raise arguments not raised in your brief in opposition.
  - Don't rely on what lower courts have said. Base your argument on first principles and Supreme Court decisions.
  - Bankruptcy cases before the Court are nearly always about statutory interpretation. Start with the text of the statute; then explain how your particular provision works within the structure of the Code. Link your discussion of purpose with the text and structure.

SUPREME COURT 101, continued

- Oral argument
  - This is a generalist court; walk the Justices through any technical points necessary to the argument and do not assume they understand bankruptcy jargon (this is also key for briefs).
  - The Court will pose hypotheticals. Be ready for them. Don't say "That's not this case."
  - You are there to have a conversation with the Justices and address their concerns, not to make a speech or summarize the arguments made in the briefs. You should welcome questions and treat them as an opportunity, not an interruption.
  - Have the two or three essential points you want to make firmly in mind (or on a cheat sheet) and make sure they get made.
  - Make good use of going second (if you are respondent) or rebuttal (if you are petitioner). This is your chance to respond to questions the Justices asked the other side.

QUESTION TIME

THANK YOU !

Everything You Need to Know About Bankruptcy Appeals

Hon. Susan P. Graber, Hon. Joan N. Feeney, and Danielle Spinelli[1]

I. Introduction

Bankruptcy appeals present unique issues for litigants. Unlike appeals in other civil actions, bankruptcy appeals are governed by their own sets of statutes and rules. In some jurisdictions, appellants may elect to proceed before a panel of bankruptcy judges or a single district judge. With court approval, appeals of bankruptcy court orders may, in certain cases, proceed directly to the circuit court of appeals. Bankruptcy appeals also tend to raise particular issues to which litigants must be alert – for instance, is the issue being appealed constitutionally, statutorily, or equitably moot? Moreover, the bankruptcy overlay affects standard appellate issues about jurisdiction and the distinction between final and interlocutory orders. This article explores these issues.

II. Applicable Statutes and Rules

Bankruptcy appeals are governed by 28 U.S.C. § 158. Subsections (a) and (c) provide that either the district court or bankruptcy appellate panel ("BAP") has jurisdiction to hear appeals from: (1) final judgments or orders; (2) interlocutory orders related to chapter 11 plan deadlines; and (3) with leave of court, interlocutory orders. Subsection (d) provides that courts of appeals have jurisdiction over final decisions from the district courts or BAPs, as well as final judgments and orders of the bankruptcy courts, provided certain procedural requirements are met.

Further governing such appeals are Part VIII of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Federal Rules of Appellate Procedure (the "Appellate Rules"), and applicable local rules of the circuit court, district court, BAP, and bankruptcy court.

III. Where to Take Your Appeal

A. Intermediate Appellate Courts – BAP vs. District Court

Pursuant to 28 U.S.C. § 158(c)(1), if a judicial council has established a BAP,[2] appeals from bankruptcy court judgments and orders are heard by the BAP, unless either party to the appeal elects to proceed in the district court. Until the Bankruptcy Rules were amended (effective December 1, 2014), an appellant would elect to proceed in the district court by filing a separate document when submitting its notice of appeal. Under the amended rules, however, the appellant elects to proceed in district court by making its election in the notice of appeal itself. Even if the appellant chooses to proceed in the BAP, the appellee can elect to proceed in the district court by filing an election at the BAP within 30 days of service of the appellant's notice of appeal.

[1] The primary authors would like to recognize the invaluable contributions to this article by Mary P. Sharon, James M. Wilton, Craig Goldblatt, and Jeremy R. Fischer.

[2] There are five BAPs in the United States, located in the First, Sixth, Eighth, Ninth, and Tenth Circuits.

B. Direct Appeal – Circuit Court

Under limited circumstances, the parties can seek to bypass the intermediate appellate court and proceed directly to the court of appeals. Bankruptcy Rule 8006 and 28 U.S.C. §158(d)(2) contain the prerequisites for certifying a direct appeal. The initial certification may occur by the parties jointly, or the bankruptcy court or intermediate appellate court at the request of either of the parties or *sua sponte*, followed by acceptance of the certification by the court of appeals. Only the court where the matter is pending may certify a direct appeal. Fed. R. Bankr. P. 8006(d). The matter is pending in the bankruptcy court for only 30 days after the effective date of the notice of appeal and, thereafter, jurisdiction passes to the intermediate appellate court. *Id.* 8006(b). Within 30 days after obtaining a certification, the parties must file a request with the court of appeals for permission to take a direct appeal. *Id.* 8006(g). The court of appeals will initially open a miscellaneous case and, if it accepts the direct appeal, 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).

A recent decision from the Eleventh Circuit, however, serves as a cautionary tale about seeking certification for direct appeal of bankruptcy court decisions in matters where it is disputed whether the bankruptcy court has authority to enter a final judgment. *Wortley v. Bakst*, 844 F.3d 1313 (11th Cir. 2017). In *Wortley*, a bankruptcy judge entered judgments ordering defendants in an adversary proceeding to pay the trustee over $2.5 million, plus attorneys' fees. The trustee was represented by a law firm that had hired the judge's fiancé during the pendency of the litigation, and the defendants subsequently sued the trustee and his counsel alleging "a scheme to improperly influence [the judge] and secured favorable rulings for the trustee" in the litigation. *Id.* at 1315. An independent bankruptcy judge ultimately entered an order dismissing the defendants' claims, but certifying the dismissal order for directly appeal under 28 U.S.C. §158(d)(2)(A) at the defendants' request. *Id.*

Before reaching the merits of the appeal, the Eleventh Circuit "address[ed] [its] own jurisdiction even though the parties have not questioned it." *Id.* at 1317. Because the dismissed claims arose under state law theories, the panel determined that the order involved non-core, related to issues. Moreover, because the parties did not consent to the bankruptcy court entering a final order, the bankruptcy court only had authority to propose findings and conclusions to the district court. *Id.* at 1318. However, because "[a]ppellate jurisdiction under § 158(d)(2)(A) . . . is limited to certified 'judgment[s], order[s], or decree[s] . . . [t]he question . . . is whether a report with proposed conclusions of law constitutes a judgment, order, or decree." *Id.* at 1321.

The Eleventh Circuit determined that because a "judgment, order, or decree" requires "a decision carrying some kind of command or adjudicative consequence," proposed findings and conclusions "do not. . . constitute a judicial decision with legal effect." *Id.* at 1322. Thus, the panel determined that "§ 158(d)(2)(A) does not give us jurisdiction to consider, on direct certified appeal, the merits of an unauthorized bankruptcy court order entered without consent in a related non-core proceeding unless it has first been reviewed by the district court as a report

with proposed findings of fact and/or conclusions of law under § 157(c)(1)." *Id.*. As a result, the panel was unable to proceed and the bankruptcy court's decision was transferred to the district court for further proceedings. *Id.*.

The moral of *Wortley* is that while certifying issues for direct appeal can be an efficient mechanism to avoid costly intermediate appellate review, the power of circuit courts to review bankruptcy court orders is subject to important limitations. Appellants must properly analyze their claims with an eye toward the bankruptcy court's authority. If the bankruptcy court lacks the necessary authority to enter a final order, district court *de novo* review of the findings and conclusions is essential before any appeal can proceed. If the defendants in *Wortley* had engaged in this analysis, they would have avoided an expensive trip to the Eleventh Circuit where the panel could not reach the merits of their appeal.

IV. What Orders and Judgments Can Be Appealed

In ordinary civil litigation, a party generally can only appeal a "final decision" as a matter of right. *See Bullard v. Blue Hills Bank*, 135 S.Ct. 1686, 1692 (2015). Because a bankruptcy case "involves 'an aggregation of individual controversies,'" however, the rules are different. *Id.* (citing 1 Alan Resnick & Henry Sommer, COLLIER ON BANKRUPTCY ¶ 5.08[1][b] (16th ed. 2014)). In bankruptcy, a party may appeal not only from a final judgment as a matter of right, but also from final orders, and from interlocutory orders issued under 1121(d) of the Bankruptcy Code. 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

Much to the frustration of litigants and judges alike, Congress has not codified a definition of what constitutes "final judgments, orders, and decrees." Instead, the definition has developed through case law. Outside 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 States*, 324 U.S. 229, 233 (1945). Because bankruptcy cases 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, 5 n.2 (1st Cir. 1993), applying the nonbankruptcy definition of finality could lead to "the absurd position that . . . only the order closing the bankruptcy case could be considered to be 'final.'" 1 COLLIER ON BANKRUPTCY ¶ 5.08[1][a]. For this reason, courts generally take a more flexible approach to finality in bankruptcy disputes. *See generally Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.)*, 676 F.3d 45 (2d Cir. 2012); *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013).

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

As in nonbankruptcy civil litigation, an order resolving an adversary proceeding in its entirety is final. The finality of orders resolving contested matters are more complicated. For instance, an order *granting* relief from stay is final, while an order *denying* stay relief typically is not final. *Pinpoint IT Servs., LLC v. Landrau Rivera (In re Atlas IT Exp. Corp.)*, 761 F.3d 177 (1st Cir. 2014). For a comprehensive collection of cases determining finality, *see* Hon. Joan N. Feeney, Hon. Michael G. Williamson & Michael J. Stephan, BANKRUPTCY LAW MANUAL § 2:49 pp. 469-79 (5th ed. 2015).

B. Interlocutory Orders

An order is 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). Interlocutory orders only resolve intervening matters—ones that require further steps before the court can adjudicate the ultimate merits of the matter. *In re Bank of New England Corp.*, 218 B.R. at 646. 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 802.

The Supreme Court's recent decision in *Bullard* demonstrates the impact that this flexible concept of finality can have on the outcome of a bankruptcy case. *See* 135 S. Ct. at 1694. In *Bullard*, a debtor proposed a chapter 13 plan that bifurcated mortgage debt into secured and unsecured claims. The plan proposed to pay the secured claim by the maturity date of the underlying promissory note and to discharge the unsecured claim upon plan completion. *Id*. at 1691. The mortgagee objected to the plan, creating a contested matter. The bankruptcy court sustained the objection, denied plan confirmation, and gave the debtor leave to amend the 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 hear only the appeal of a final order. *See id*. The Supreme Court ruled that an order denying confirmation with leave to file an amended plan was not final because the debtor was free to propose an alternative plan while the *status quo* remained unchanged. *See id*. at 1693.

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 & Tr. Co. v. Alsterda*, 815 F.3d 306, 313-14 (7th Cir. 2016). The secured creditor objected to the settlement between the trustee and a third party on the ground 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 312.

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 seeking a quick exit from the reviewing court will emphasize that the dispute is really part of a larger "discrete" dispute. The boundary between final and interlocutory orders in bankruptcy cases remains unclear, requiring a case-by-case analysis.

C. Leave to Appeal an Interlocutory Order

In order to proceed with an interlocutory appeal, a party must obtain leave of the intermediate appellate court. 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). 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 (1st Cir. B.A.P. 2004).

1. "Collateral Order Doctrine"

The "collateral order doctrine" applies only 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; *see also Mitchell v. Forsyth*, 472 U.S. 511 (1985) (describing collateral order doctrine more generally).

A four-part test is generally used 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.

In the bankruptcy context, issues of separability and conclusive determination—the first two factors—focus on whether review of the dispute would disrupt resolution of the bankruptcy case, and whether the decision completely resolves a party's rights and obligations with respect to the bankruptcy proceeding. *See id.* 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.").

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. To satisfy 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, 378-79 (1981).

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 in 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. 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.

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

An appellant may also obtain leave to appeal an interlocutory order if it establishes 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 the statute provides no express criteria, courts often turn to the standards that govern certification of interlocutory appeals under 28 U.S.C. § 1292(b). *See id.* For the purposes of section 1292(b), 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 (3d Cir. 1974) (en banc).

In addition, the legal issue being appealed must involve a "substantial ground for difference of opinion." Such difference of opinion exists where the proposed interlocutory appeal presents a difficult and pivotal question of law not settled by controlling authority. *See In re Watson*, 309 B.R. at 660; *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988). 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 N. Fork Bank v. Abelson*, 207 B.R. 382, 388 (E.D.N.Y. 1997).

3. *Forgay-Conrad* Doctrine

The *Forgay-Conrad* Doctrine is a narrow exception allowing interlocutory appeal where there is a grave risk of irreparable harm. In *Forgay v. Conrad*, the assignee of the debtor (today, the trustee) sued several third parties to recover land and slaves on the ground that they had been

transferred fraudulently. 47 U.S. 201, 201-02 (1848). The court entered an order declaring the transfers to be fraudulent and requiring the defendants to immediately deliver the land and slaves to the trustee. *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. *Id*. at 203.

The defendants appealed, 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. Thus, the doctrine provides for interlocutory appeal where the order commands the immediate transfer of property and 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 United States v. Kouri-Perez*, 187 F.3d 1, 11 (1st Cir. 1999) (stating that *Forgay* articulates a rule of "practical finality" when an order requires immediate payment and thus threatens special risk of harm to the appellant).

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 P.R. (In re Rodriguez)*, 516 B.R. 177, 182 (1st Cir. B.A.P. 2014); *Emann v. Latture (In re Latture)*, 605 F.3d 830, 834 (10th Cir. 2010). 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 or order. Fed. R. Bankr. P. 8002(d)(1). Additionally, if a party has timely filed certain motions in the bankruptcy court prior to the expiration of the initial 14-day period, the 14-day period will not begin to run until after the court has disposed of the motion. Fed. R. Bankr. P. 8002(b)(1).

B. Standing

In a bankruptcy case, as in any federal proceeding, a party must demonstrate "standing" to pursue an appeal. In the absence of standing, it is appropriate for the appellate court to dismiss the appeal. *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 (1) "injury," (2) "a causal connection that permits tracing the claimed injury to the defendant's actions," and (3) "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). 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 interests." *Spenlinhauer*, 261 F.3d at 117-18.

Standing cannot be waived and may be raised at any time by any party or the court. *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."). An appellate court is "duty bound" to inquire into an appellant's standing. *Pignato v. Dein Host, Inc. (In re Dein Host., Inc.)*, 835 F.2d 402, 404 (1st Cir. 1987).

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. *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 . . . ."). The two exceptions to this general rule are: (1) "if a successful appeal by the debtor would create an estate that has assets in excess of liabilities" (i.e., a "surplus case"), and (2) "an appeal taken from orders that affect the terms, conditions and extent of a debtor's discharge." *In re El San Juan Hotel*, 809 F.2d 151, 155 n.6 (1st Cir. 1987).

In general, an unsuccessful bidder in a sale of estate property lacks standing to appeal a sale order. *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"); *G-K Dev. Co. v. Broadmoor Place Invs., L.P. (In re Broadmoor Place Invs., L.P.)*, 994 F.2d 744, 746 n.2 (10th Cir. 1993) ("absent some other meritorious ground for appeal, [unsuccessful bidder] lacks standing to appeal"). However, "courts have found that even a mere unsuccessful bidder has standing to challenge the 'inherent fairness' or 'intrinsic structure of the sale.'" *Video Concepts, LLC v. Volpe Indus., Inc. (In re Volpe Indus., Inc.)*, No. 13-10300, 2013 WL 4517983, at *3 (D. Mass. Aug. 23, 2013) (unpublished) (quoting *Kabro Assocs. v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 274 (2d Cir. 1997)); *see also In re Global Indus. Techs.*, 645 F.3d 201 (3d Cir. 2011) (en banc) (addressing standing to appeal in bankruptcy more broadly).

C. Mootness

The doctrine of mootness presents another jurisdictional limitation for any bankruptcy appeal. An appeal may be rendered moot under a variety of situations.

1. 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 and controversies."). There is no case or controversy if the court cannot grant any meaningful relief to the prevailing party. *Id*. ("[A]ppeals 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."). Therefore, "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.*

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 an 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, at *4 (D. Del. Dec. 17, 2014) (unpublished) (appeal from order on lift-stay motion becomes constitutionally moot when the stay is subsequently lifted or terminated by operation of law).

2. Statutory Mootness

Sections 363(m) and 364(e) of the Bankruptcy Code affirmatively moot appeals from sale or financing orders if the purchaser/lender acted in "good faith" and no stay was obtained. 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.

i. Section 363(m)

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 to promote finality of bankruptcy sales. *See, e.g., In re C.W. Mining Co.*, 740 F.3d 548, 555 (10th Cir. 2014); *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 text of section 363(m) limits the scope of its protections to reversals and modifications that would "affect the validity of a sale." Thus, where reversal or modification on appeal would not actually or "effectively unwind the sale," statutory mootness arguably does not apply. 3 COLLIER ON BANKRUPTCY ¶ 363.11 (citing *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490 (3d Cir. 1998); *Fitzgerald v. Ninn Worx Sr. Inc. (In re Fitzgerald)*, 428 B.R. 872 (9th Cir. B.A.P. 2010)). However, because most aspects of a sale order are interdependent, and even modest changes could be deemed material by key parties, many circuits apply a "per se" test to appeals of sale orders. "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.'" *In re Stadium Mgmt. Corp.*, 895 F.2d at 847); *Parker v. Goodman (In re Parker)*, 499 F.3d 616, 620-21 (6th Cir. 2007) (explaining that majority of circuits have adopted per se rule). Thus, in many circuits, 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, and "§ 363(m) operates to limit appellate review of a sale order to the specific question of whether the purchaser was a good faith purchaser." *See, e.g., Mission Prod. Holdings, Inc. v. Old Cold, LLC (In re Old Cold, LLC)*, 558 B.R. 500, 513 (1st Cir. B.A.P. 2016) (quoting *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 839 (2d Cir. 1997) (holding "appellate jurisdiction of an unstayed sale order . . . is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser")). "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 Assocs., Ltd. (In re Mark Bell Furniture Warehouse, Inc.)*, 992 F.2d 7, 8 (1st Cir. 1993) (explaining such status is precluded by, "inter alia, fraud, collusion with the trustee, and taking 'grossly unfair advantage' of other bidders.").

ii. Section 364(e)

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 N. Atl. Millwork Corp.)*, 155 B.R. 271, 279 (Bankr. D. Mass. 1993).

Some courts have ruled that section 364(e) precludes reversal of any financing order unless there was a stay pending appeal or 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 (1st Cir. B.A.P. 2009). Other courts have held that section 364(e) should only protect lenders who detrimentally relied upon the prior order (e.g., by disbursing funds). *See Resolution Tr. Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc.)*, 16 F.3d 552, 561 (3d Cir. 1994) (en banc) ("[W]e 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) protects only "good faith" lenders. When determining whether a lender acted in "good faith," courts often "look to the integrity of an actor's conduct during the proceedings." *In re Foreside Mgmt. Co.*, 402 B.R. at 452 (quoting *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1489 (9th Cir. 1987)). 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.* (quoting *In re Adams Apple, Inc.*, 829 F.2d at 1489).

iii. Bankruptcy Rule 6004(h)

Bankruptcy Rule 6004(h) provides an automatic 14-day stay of orders approving the use, sale, or lease of property to provide 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); *In re Grubb & Ellis Co.*, No. 12-10685 (MG), 2012 WL 1036071, at *10 (Bankr. S.D.N.Y. Mar. 27, 2012). Bankruptcy Rule 6004(h), however, also enables a court to modify or eliminate the 14-day stay. Courts often grant requests to dispense with the 14-day period if no objections are filed or there is an important business justification requires the transaction to close on an expedited basis. *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").

3. Equitable Mootness

Equitable mootness is unique to bankruptcy cases. The judicially created doctrine renders certain disputes moot when no effective relief can be fashioned for the appellant even though the case is not technically constitutionally or statutorily moot. *Prudential Ins. Co. of Am. v. SW Boston Hotel Venture, LLC (In re SW Boston Hotel Venture, LLC)*, 748 F.3d 393, 402 (1st Cir. 2014). The scope of the equitable mootness doctrine remains a matter of disagreement among courts and has been applied inconsistently across the country, requiring attorneys to think carefully about its potential effect on their cases and, in particular, about the importance of seeking a stay.

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 id.*

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 and confirmed a plan that paid allowed general unsecured claims in full on the effective date. *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 before the hearing on their appeal. The district court dismissed the creditor's appeal as moot on the ground that the plan had been substantially consummated. *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. 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 the 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.

Id. at 797.

Thereafter, the Third Circuit articulated five factors that courts should consider when applying the doctrine of equitable mootness:

> (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.

In re Cont'l Airlines, 91 F.3d 553, 560 (3d Cir. 1996) (en banc). The most important of these considerations is whether the plan has been substantially consummated, which is a defined term in the Bankruptcy Code. *Id.* at 560-61 (citing 11 U.S.C. § 1101(2))*; see also R2 Invs., 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 claims was "inextricably intertwined with the implementation of the reorganization," which had been substantially consummated at the time of the appeal. *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. *Id*. at 563. The bankruptcy court's disallowance of the appellants' claims was crucial to the reorganization. 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.").

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, L.P. (In re Semcrude, L.P.), 728 F.3d 314, 321 (3d Cir. 2013). This opinion presaged a growing opposition to the doctrine. *See, e.g., In re 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." *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 courts 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 whether the doctrine should exist at all.

i. One2One Communications, LLC

One2One Communications, LLC, was a billing services company with one secured creditor and fewer than twenty unsecured creditors. *In re One2One Commc'ns, LLC*, 805 F.3d 428, 431-35 (3d Cir. 2015). Its largest unsecured creditor held a $9 million judgment against the company and its CEO. 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." *Id*. at 435-36. Crucially, however, it released the CEO and allowed equity holders to retain property without paying unsecured creditors in full. 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, ruling that the district court had abused its

discretion in applying the equitable mootness doctrine. *Id.* at 436. Although the judgment creditor had failed to obtain a stay and the plan was now substantially consummated, the district court had not considered whether the plan could be retracted without great difficulty or inequity. 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. Moreover, the absence of publicly traded debt meant that the reliance of third-parties on the confirmation order was "minimal." 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." *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. *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." *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.

Judge Krause explained that equitable mootness raises constitutional concerns by insulating the final order of a bankruptcy judge from Article III review. In *Wellness Int'l. 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. 135 S. Ct. 1932, 1944 (2015). Equitable mootness, Judge Krause opined, does not abide these factors. *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 leveling 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. *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. *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. *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. *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. *Id*. at 454.

ii. 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). *In re Tribune Media Co*., 799 F.3d 272, 275 (3d Cir. 2015). Aurelius Capital Management, L.P., a hedge fund specializing in distressed debt, bought $2 billion of Tribune's pre-LBO debt and became actively involved in the bankruptcy process. 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. Aurelius believed that this settlement undervalued the LBO actions, and had proposed a competing plan that would litigate rather than settle the claims. Ultimately, the bankruptcy court approved the plan supported by the debtor. *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's 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. 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. While these motions were pending, the confirmed plan was substantially consummated and Tribune moved to dismiss the appeal as equitably moot. *Id*. at 277.

In addition to Aurelius, a group of 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. *Id*. The district court denied both the Aurelius appeal and the bond trustees' appeal as equitably moot. *Id*. at 274.

On further appeal, the Third Circuit affirmed dismissal with respect to Aurelius and reversed with respect to the bond trustees. *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. *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. *Id*. at 282-84.

In *Tribune*, 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. *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." *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. *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 classes that the redistribution immediately affects." *Id*. at 280.

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. *Id.* 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. *Id.* 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.

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." *Id*. at 286. Bankruptcy courts are primarily courts of equity, and appellate courts should have discretion in issuing or withholding equitable remedies. On this point, Judge Ambro equated application of the equitable mootness doctrine to considering whether to award an injunction, 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 effect the intent of Congress to protect the finality of consummated plans. *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.

iii. 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. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props., 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. *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. 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. *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. *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. 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. *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. 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." *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. *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. *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."). 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. *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. *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. *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. *Id*. at 1175-76 ("[I]t is unlikely that [the new owner] will look favorably upon a plan that requires its wholly owned subsidiaries to pay an extra $30 million, the amount of [the new owner's] investment under the original plan, to the [secured creditor]."); *see also Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 240 (5th Cir. 2009) (noting that Fifth Circuit "has been especially solicitous of the rights of secured creditors following confirmation").

VI. Appellate Court Filings and Proceedings

A. Motions

1. Stay Pending Appeal

The filing of a notice of appeal does not stay the order on appeal. Thus, 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 bankruptcy court denies the motion, 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 retains jurisdiction to rule on a stay motion. *See id.* 8007(e)(2); *Dressler v. Seeley Co. (In re Silberkraus)*, 336 F.3d 864, 869 (9th Cir. 2003).

Since a stay is the functional equivalent of an injunction, the reviewing court will apply the established, four-part standard applicable to preliminary injunctions: (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) (per curiam) (unpublished)

2. 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 it lacks jurisdiction, a bankruptcy court may defer ruling on the motion, deny the motion, state that it would grant the motion, or state 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). Among 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 that 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). 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 Servs. 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) also 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. Tips on Writing Briefs

Part VIII of the Bankruptcy Rules provide comprehensive guidelines for the appellant's and appellee's briefs, as well as for cross-appeals and briefs of *amici curiae*, including page and word limits, the certificates to be appended, and the deadlines for filing.

One of the key parts of any appellate brief is a statement about the standard of review that applies to various issues being appealed. There are four standards of review:

1. 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 (1st Cir. B.A.P. 2014); *Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016).

2. Clear error - "[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." *Goat Island S. Condo. Ass'n v. IDC Clambakes, Inc. (In re IDC Clambakes, Inc.)*, 727 F.3d 58, 63–64 (1st Cir. 2013); *Nat'l Fitness Holdings, Inc. v. Grand View Corp. Centre, LLC*, 749 F.3d 1202, 1205-06 (10th Cir. 2014).

3. 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); *Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc.*, 168 F.3d 211 (5th Cir. 1999).

4. 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 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.

Courts will typically find that arguments advanced by a party in its brief, but that the party did not raise below, are waived. *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 St. P'ship)*, 355 F. App'x. 432, 437 (1st Cir. 2009) (per curiam) (unpublished) ("An appellant waives any issue which it does not adequately raise in its initial brief.").

D. Tips on Oral Argument

Bankruptcy Rule 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).

Before argument, check the cases on which you rely to ensure that they remain good law. If there has been a subsequent disposition, inform the court in writing before 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 that 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 to 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. Before 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 to 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. Further Appeals

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 circuit court of appeals is 30 days and may be extended as specified in Fed. R. App. P. 6(b).

VIII. Supreme Court Review

A party that is dissatisfied with a decision of the court of appeals may seek review in the Supreme Court of the United States by filing a petition for certiorari. Approximately 7,000 petitions for certiorari are filed in the Supreme Court in a typical year, with fewer than 100 – most recently, approximately 80 – being granted. In the bankruptcy context, the likelihood of

obtaining Supreme Court review is the greatest if the issue presents a "circuit split," meaning that the courts of appeals have adopted differing interpretations of the Bankruptcy Code. The Supreme Court is unlikely to grant certiorari simply on the basis of an alleged error (of either fact or law) in a lower court's decision in the absence of a disagreement among the courts of appeals that only the Supreme Court can resolve. Moreover, the Supreme Court is unlikely to grant certiorari, even in the presence of disagreement among the lower courts, unless that disagreement is "cleanly presented," meaning that the resolution of the question on which the lower courts have disagreed is likely to be outcome determinative of the particular dispute at issue. In recent years, the Supreme Court has granted certiorari in a few bankruptcy cases each year. The Court, however, has no special criteria that are unique to bankruptcy cases. It considers the cases on its docket as they arise, applying its usual criteria in deciding which cases to hear on the merits.

A petition for a writ of certiorari must be filed with 90 days of the decision of the court of appeals – although that deadline can be extended by up to 60 days by a Justice upon application. 28 U.S.C. § 2101(c); Supreme Court Rule 13. A party opposing certiorari may elect either to oppose the petition or to "waive" the right to respond. The Court's practice, however, is not to grant certiorari in the face of a waiver of response without calling for the respondent to file a response to the petition.

In cases in which certiorari is granted, the petitioner's merits brief is due within 45 days of the order granting certiorari, and the respondent's brief is due 30 days thereafter. The petitioner may also file a reply brief no more than 30 days after the respondent's brief is filed.

The Supreme Court holds oral argument – typically for one hour per case – several days each month from the beginning of its term in October through the following April. The Court will typically issue decisions in all of the cases in which it has heard argument before its term concludes in late June or early July.

IX. 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 assist in avoiding being trapped.