1 Bankruptcy Law Manual § 2:51 (5th ed.)

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Chapter 2. Jurisdiction; Venue; Procedure; Jury Trials; Standing; Appeals

§ 2:51. Appeals—Procedure for taking an appeal to the district court or the Bankruptcy Appellate Panel

References

West's Key Number Digest

West's Key Number Digest, Bankruptcy 2041.1
West's Key Number Digest, Bankruptcy 3761

Treatises and Practice Aids

Steinberg, Bankruptcy Litigation §§ 9:73 to 9:93 (2d ed.)
Drake, Bankruptcy Practice for the General Practitioner § 4:18 (3d ed.)
Williams, Bankruptcy Practice Handbook § 19:8 (2d ed.)
Murphy, Creditors' Rights in Bankruptcy § 2:10 (2d ed.)

Bankruptcy Rule 8003(a)(1) provides that an appeal from a judgment, order, or decree of a bankruptcy judge to the district court or Bankruptcy Appellate Panel is taken by the filing of a notice of appeal with the clerk of the bankruptcy court within the time set forth in Bankruptcy Rule 8002.[1] Bankruptcy Rule 8003(a)(2) further provides that an appellant's failure to take any steps, other than timely filing the notice of appeal, does not affect the validity of the appeal, but may be grounds for other court action, including dismissal.[2] Bankruptcy Rule 8002 further provides that the notice of appeal must be filed within 14 days of the date of the entry of the judgment, order, or decree appealed from.[3] If parties have made post-trial motions, such as a motion for amended findings, for alteration of the judgment, or for a new trial, the time for filing the notice of appeal runs from the entry of the order disposing of the last such motion outstanding.[4] The bankruptcy court may extend the time for filing the notice of appeal in most cases,[5] but the request for such an extension must be made by written motion filed before the time for filing the notice of appeal has expired, except that, if the motion for extension is filed within 21 days after the expiration of the time for filing a notice of appeal and the party can show excusable neglect, the bankruptcy court can grant an extension of time to notice the appeal.[6] The extension can never be more than 21 days from the expiration of the time for filing a notice of appeal or 14 days from the date of entry of the order granting the motion, whichever is later.[7]

This shortened time frame for taking a bankruptcy appeal is the principal difference between filing an appeal from a bankruptcy court order and filing an appeal from a district court order.[8] The filing of the notice of appeal in timely fashion is considered jurisdictional.[9] Moreover, once the notice of appeal has been filed the bankruptcy court loses jurisdiction to expand upon or alter the judgment.[10] However, under Bankruptcy Rule 8008 (providing for indicative rulings), if a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of a pending appeal, the bankruptcy court may still consider the motion to the extent of deferring consideration of the motion, denying the motion, stating that the court would grant the motion on remand from the court presiding over the appeal, or stating that the motion raises a substantial issue.[11] If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the movant must promptly notify the clerk of the court presiding over the appeal of the bankruptcy court's ruling.[12]

The Bankruptcy Rules also set forth requirements for preparing the record on appeal,[13] obtaining a transcript,[14] preparing the briefs and appendix [superseded by Rule 8018],[15] and filing and service.[16] The rules also cover motions made during the pendency of the appeal,[17] and further provide that the district court or the judges of the Bankruptcy Appellate Panel (by unanimous decision) may proceed to decide the appeal without affording the parties an oral argument.[18] District courts and Bankruptcy Appellate Panels may promulgate more particular rules with respect to appeals in their respective courts so long as the rules are not inconsistent with or in derogation of federal law, the rules, official forms, and local rules of the circuit council or district court.[19] The rules may be suspended in appropriate cases.[20] Failure to abide by appellate rules, whether those found in the Bankruptcy Rules or in local rules, may be cause for dismissal of the appeal or for other appropriate sanctions.[21] Bankruptcy Rule 8020 provides that, if a district court or a Bankruptcy Appellate Panel determines that an appeal was frivolous, it may award damages and costs.[22]

On appeal, findings of fact are reviewed under a clearly erroneous standard.[23] Generally a finding of fact will be held to be clearly erroneous only if the appellate court is left with the firm conviction that a mistake of major significance has been made.[24] However, an appellate court reviews conclusions of law in a much different light. The appellate courts conduct de novo review of a lower court's conclusions of law and discretionary decisions under an abuse of discretion standard.[25] Mixed questions of law and fact are reviewed de novo.[26] At times, it is difficult to distinguish whether an appeal challenges a finding of fact, a conclusion of law, or a mixed question of law and fact.[27] From a practical standpoint, an appeal should normally concentrate on alleged errors in law because it is extremely difficult to overturn a lower court's factual findings.[28]

An appellant must consider the necessity of obtaining a stay pending appeal and whether a bond will be required.[29] A motion for stay pending appeal to the district court or the Bankruptcy Appellate Panel must ordinarily be presented to the bankruptcy judge in the first instance.[30] Only after the application for stay pending appeal is made to the bankruptcy court and denied may the appellant seek a stay pending appeal from the district court or the Bankruptcy Appellate Panel.[31] If a stay is issued, it may be conditioned upon the appellant obtaining a supersedeas bond, approved by the court.[32] When an appeal is taken by a trustee, a bond or other appropriate security may be required, but no bond or security can be required of the U.S. or any of its officers or agents if the appeal is taken by direction of any department of the government of the U.S.[33] A party seeking a stay pending appeal must show a likelihood of success on the merits of the appeal, that the appellant will suffer irreparable injury unless the stay is granted, that no substantive harm will come to the other interested parties, and that the stay will do no harm to the public interest.[34] The few courts that have addressed the issue hold that a bankruptcy court lacks the authority to grant a stay pending a further appeal from a district court or appellate panel to a court of appeals.[35]

If the appellant does not obtain a stay pending appeal, then the appeal may be constitutionally or equitably moot.[36] An appeal is considered constitutionally moot where there is no longer any live case or controversy to be decided.[37] In ordinary parlance, an appeal is considered equitably moot and will be dismissed if implementation of the judgment or order that is the subject of the appeal renders it impossible or inequitable for the appellate court to give effective relief to an appellant.[38] Under the doctrine of equitable mootness, an appeal in bankruptcy may be rendered moot by events which occur subsequent to the filing of the notice of appeal, even if effective relief may be granted.[39] Courts have held, for example, that an appeal from a bankruptcy court sale order or an appeal from an order granting stay relief to conduct a foreclosure is moot if the sale or the foreclosure occur during the pendency of the appeal and no stay has been obtained.[40] Courts have also held that an appeal from an order confirming a Chapter 11 plan is equitably moot if, during the pendency of the appeal, the plan has been substantially consummated because it would be difficult to unwind the transactions taken in conformance with the approved plan, and it would be inequitable to unwind them in any event.[41] Courts have developed various tests for determining whether an appeal from an order confirming a plan is equitably moot.[42] They are generally in agreement that the burden of proof as to mootness is on the party seeking dismissal on that ground.[43]

All lower courts (bankruptcy courts, district courts, Bankruptcy Appellate Panels, and circuit courts) are bound by Supreme Court precedent.[44] Circuit court decisions are binding on all lower courts within a circuit.[45] However, there is little agreement on the binding nature of district court or Bankruptcy Appellate Panel decisions.[46] Nonetheless, generally bankruptcy courts attempt to give deference to district court decisions within their district and Bankruptcy Appellate Panel decisions are generally given strong deference within their own circuits and elsewhere.[47]

Footnotes

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1 See, e.g., Matter of Dorsey, 870 F.3d 359, 64 Bankr. Ct. Dec. (CRR) 154 (5th Cir. 2017) (notice of appeal that Chapter 7 debtor filed in main bankruptcy case, from order reopening case in order to allow student loan creditors to file proofs of claim for student loan debt that was the subject of pending dischargeability adversary proceeding brought by debtor, did not qualify as notice of appeal from order later entered in "undue hardship" proceeding, refusing to grant debtor a discharge of student loan debt; main bankruptcy case and dischargeability adversary proceeding had to be treated as distinct for purposes of appeal, as having separate docket numbers, separate issues, and separate parties).

2 Fed. R. Bankr. P. 8003(a)(2). See also discussion in § 2:48. See In re High Voltage Engineering Corp., 544 F.3d 315, 50 Bankr. Ct. Dec. (CRR) 177 (1st Cir. 2008) (notice of appeal must be filed in the right case; appeal dismissed where trustee sought to appeal decisions made in a 2004 bankruptcy case, but filed the notice of appeal in a separate, though administratively consolidated, 2005 bankruptcy case); In re Mangum, 2006 WL 3626775 (N.D. Ill. 2006) (a trustee's filing the notice of appeal on the wrong docket did not render the filing of the notice of appeal untimely).

The notice of appeal must conform to Official Form 17A, contain the names of all parties and the names of their respective attorneys, and be accompanied by the requisite filing fee. See In re Martel, 328 Fed. Appx. 584 (10th Cir. 2009) (BAP did not abuse its discretion in dismissing for failure to pay the appellate filing fee;

the BAP gave the appellant fair warning of an impending dismissal); In re Davis, 246 B.R. 646, 46 Fed. R. Serv. 3d 102 (B.A.P. 10th Cir. 2000), aff'd in part, vacated in part on other grounds, 35 Fed. Appx. 826 (10th Cir. 2002) (the notice of appeal must specifically name each party who is taking the appeal; a party whose name does not appear on a notice of appeal is not an appellant). The bankruptcy court clerk serves the notice of appeal on the parties. Fed. R. Bankr. P. 8003(c)(1). The clerk's failure to do so does not affect the validity of the appeal. Fed. R. Bankr. P. 8003(c)(2). At the time the notice of appeal is filed, an appellant seeking to direct the appeal to the district court, rather than a Bankruptcy Appellate Panel, must file an election to proceed in district court. 28 U.S.C.A. § 158(c)(1); Fed. R. Bankr. P. 8005. See also § 2:48. A motion for leave to appeal as permitted by § 158(a)(3) requires the filing of both a notice of appeal and a motion for leave to appeal in accordance with Fed. R. Bankr. P. 8004(a). See discussion § 2:48.

Following passage of the 2005 Act, the Bankruptcy Rules were amended to address the new certification procedure. Amendments effective December 1, 2014 added new Bankruptcy Rule 8006 dealing exclusively with certifying a direct appeal to the court of appeals. Under Bankruptcy Rule 8006(a), a certification of a judgment, order, or a decree of the bankruptcy court for direct review in a court of appeals is effective when the certification has been filed, a timely appeal has been taken under Bankruptcy Rule 8003 or 8004, and the notice of appeal has become effective under Bankruptcy Rule 8002. Bankruptcy Rule 8004(e) provides that, if leave to appeal an interlocutory order or decree is required under 28 U.S.C.A. § 158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U.S.C.A. § 158(d)(2) satisfies the requirement. Official Form B 24 (certification to court of appeals by all parties) is to be used in all cases where the parties seek certification. See additional discussion of these issues in § 2:48.

3 Fed. R. Bankr. P. 8002(a)(1). See In re Murray Energy Holdings Co., 640 B.R. 558 (B.A.P. 6th Cir. 2022) (neither administrative expense order nor claims objection order was properly appealed as required by Bankruptcy Rules, and thus they were not subject of appeal from denial of motion to reconsider those orders; although counsel linked underlying orders as relevant documents when filing notice of appeal in bankruptcy court, creditor only identified reconsideration order as order on appeal and creditor only attached reconsideration order to notice of appeal and neither cited to nor attached administrative expense order or claims objection order). See also Fed. R. Bankr. P. 9006(a) and § 2:40 regarding how to compute the 14-day time limit. The 14-day time limit for filing a notice of appeal runs, not from the date the judge signs the order, but from the date that the decision is entered on the docket by the clerk. See In re Brown, 484 F.3d 1116 (9th Cir. 2007) (the minute entry memorialized an order, not a judgment; thus, it did not trigger the window for filing an appeal); In re Faragalla, 422 F.3d 1208, Bankr. L. Rep. (CCH) P 80360 (10th Cir. 2005) (notice of appeal that was filed more than 10 days [now 14 days] after court signed order which was subject of appeal was still timely if notice filed within 10 days [now 14 days] order was noted on docket). Such docket entries are routinely made by a clerk electronically and become public record when the entry is made on the electronic record. The period for filing a notice of appeal runs from the date a judgment is entered, even though it may be subsequently corrected in a minor way by the court. See In re American Safety Indem. Co., 502 F.3d 70 (2d Cir. 2007) (the court noted this was so even though the district court's law clerk had informed the appellant that the time would run from the latter date. The Supreme Court in Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96, 68 Fed. R. Serv. 3d 190 (2007), expressly abrogated the doctrine of unique circumstances pursuant to which a party was allowed to file an appeal despite the fact that a deadline had passed if the delay was the result of judicial action. *Bowles* dealt with an appeal to a circuit court which is covered by a statutorily defined time limit. See 28 U.S.C.A. § 2107; Fed. R. App. P. 4(a)(1)(A). Whether the case extends beyond statutorily set deadlines for filing an appeal and reaches all such deadlines and whether *Bowles* is, in fact, a retreat from Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867, 42 Bankr. Ct. Dec. (CRR) 100, 50 Collier Bankr. Cas. 2d (MB) 969, Bankr. L. Rep. (CCH) P 80031 (2004), has been discussed in the cases. See, e.g., In re Sobczak-Slomczewski, 826 F.3d 429, 62 Bankr. Ct. Dec. (CRR) 187, 75 Collier Bankr. Cas. 2d (MB) 1508, Bankr. L. Rep. (CCH) P 82966 (7th Cir. 2016) (Rule 8002(a)'s 14-day time limit to file a notice of appeal of a bankruptcy court's judgment or order is jurisdictional; debtor's one-day delay in filing notice of appeal from order of bankruptcy court determining that debt was nondischargeable could not be excused, on ground that debtor allegedly did not receive copy of order in mail until the day of filing deadline); In re Indu Craft, Inc., 749 F.3d 107, 59 Bankr. Ct. Dec. (CRR) 97, 88 Fed. R. Serv. 3d 624 (2d Cir. 2014) (clarifying the effect of an untimely—but not objected-

to—notice of appeal in a bankruptcy matter under Fed. R. App. P. 6(b) and holding that Rule 6(b)(1) is a nonjurisdictional, claim-processing rule); In re Berman-Smith, 737 F.3d 997, 58 Bankr. Ct. Dec. (CRR) 240, 70 Collier Bankr. Cas. 2d (MB) 1219, Bankr. L. Rep. (CCH) P 82559 (5th Cir. 2013) (an untimely notice of appeal under Rule 8002(a) is a jurisdictional bar to review); In re Caterbone, 640 F.3d 108, 54 Bankr. Ct. Dec. (CRR) 144, Bankr. L. Rep. (CCH) P 81973 (3d Cir. 2011) (even though Rule 8002(a) specifies the ten-day (now fourteen-day) time period within which a notice of appeal from a decision of the bankruptcy court must be filed, the statutory incorporation of that rule renders its requirement statutory and, hence, jurisdictional and non-waivable); In re Latture, 605 F.3d 830, 837, Bankr. L. Rep. (CCH) P 81765 (10th Cir. 2010) (the requirement of a timely notice of appeal is jurisdictional because "Congress did explicitly include a timeliness condition in 28 U.S.C. § 158(c)(2)—the requirement that a notice of appeal be filed within the time provided by Rule 8002(a)"); In re Coleman, 429 B.R. 387 (D.D.C. 2010) (assuming rule governing time for filing notice of appeal was jurisdictional, district court lacked subject matter jurisdiction over debtor's untimely appeal and assuming rule was claims-processing rule, dismissal of appeal was warranted; citing and harmonizing *Kontrick* and its progeny); In re Personal Elec. Transports, Inc., 2007 WL 1857340 (D. Haw. 2007), aff'd, 313 Fed. Appx. 51 (9th Cir. 2009) (dismissing a notice of appeal filed one day after the deadline in Fed. R. Bankr. P. 8002; "As recently reiterated by the United States Supreme Court, 'the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.' … There is no reason that this long-standing rule of law should not apply to an appeal of an order of the Bankruptcy Court." (quoting Bowles v. Russell, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96, 68 Fed. R. Serv. 3d 190 (2007)). For cases discussing the issue of what happens when a party appeals from an oral order, rather than the final judgment, see In re LTV Steel Co., Inc., 560 F.3d 449, 51 Bankr. Ct. Dec. (CRR) 112 (6th Cir. 2009) (the rule makes clear that this error is not reason to dismiss).

Notice of entry of such docketing is universally given electronically. See Fed. R. Bankr. P. 9036 (authorizes electronic service and provides that notice by electronic means is complete on transmission). See also In re Schimmels, 85 F.3d 416, 420, 36 Collier Bankr. Cas. 2d (MB) 143, 34 Fed. R. Serv. 3d 1596 (9th Cir. 1996) ("It is well established through case authority that Bankruptcy Rule 9006(f) [which gives three additional days to act when a prescribed time period commences upon service of a notice and the notice is sent by mail] does not apply to the 10-day [now 14-day] appeal period of Bankruptcy Rule 8002(a)."); Matter of Arbuckle, 988 F.2d 29, Bankr. L. Rep. (CCH) P 75221 (5th Cir. 1993) (three-day "mail rule" under Fed. R. Bankr. P. 9006 does not apply to 10-day [now 14-day] appeal period).

In In re President Casinos, Inc., 397 B.R. 468, 50 Bankr. Ct. Dec. (CRR) 255 (B.A.P. 8th Cir. 2008), the BAP held that if a party misses the deadline for filing an appeal, that party may not make a Rule 60(b) motion to cure the defect. It said that Rule 60(b) is reserved for extraordinary relief and exceptional circumstances and is not intended to substitute for an appeal. See also In re Reed, 943 F.3d 849, Bankr. L. Rep. (CCH) P 83468 (8th Cir. 2019) (district court erred in striking a notice of appeal without allowing the appellant an opportunity to cure the defect because doing so wrongly treated the curable defect as jurisdictional); In re Kupperstein, 943 F.3d 12 (1st Cir. 2019) (since the district court's inherent power to protect its own proceedings was not implicated, it erred in prematurely dismissing the debtor's appeal).

4 Fed. R. Bankr. P. 8002(b) (extending the time for filing a notice of appeal where a Rule 7052, 7059, or 9024 motion was timely made). See also In re Taylor, 343 Fed. Appx. 753 (3d Cir. 2009) (a second motion for reconsideration filed after the first was denied and making virtually no new arguments did not restart the clock); In re Ezekoye, 185 Fed. Appx. 179 (3d Cir. 2006) (appeal was untimely under Fed. R. Bankr. P. 8002(a) because the debtor had filed it untimely after the bankruptcy court entered its order denying reconsideration); In re Vazquez, 471 B.R. 752 (B.A.P. 1st Cir. 2012) (only creditor's initial post-judgment motion served to toll the 14-day period to file notice of appeal for underlying fee order; creditor's second post-judgment motion to alter or amend the fee order filed after denial of original motion, permitted review only of the bankruptcy court's denial of the motion to alter or amend). And see Fed. R. Bankr. P. 9023 (new trial, amendment of the judgment); 7052 (amended findings). But see Allen v. Chapter 7 Trustee, 223 Fed. Appx. 770 (10th Cir. 2007) (there is no such thing as a motion to reconsider; untimely motion to reconsider

did not toll time for filing a notice of appeal); In re Sabala, 334 B.R. 638 (B.A.P. 8th Cir. 2005) (a notice of appeal filed within 10 days [now 14 days] of the withdrawal of post-trial motions is timely). See also § 2:44.

5 Fed. R. Bankr. P. 8002(d). There can be no extension where the order appealed from grants relief from the automatic stay under §§ 362, 922, 1201, or 1301; authorizes the sale or lease of property or the use of cash collateral under § 363; authorizes the obtaining of credit under § 364; authorizes the assumption or assignment of an executory contract or unexpired lease; or confirms a Chapter 9, 11, 12, or 13 plan of reorganization. See also In re Allegheny Health Educ. & Research Foundation, 181 Fed. Appx. 289 (3d Cir. 2006) (court rejected appellant's argument that the notice of appeal, filed within the 30-day window, should have been treated as a request to extend the time for filing a notice of appeal; the rule requires a motion demonstrating excusable neglect).

6 Fed. R. Bankr. P. 8002(d)(1)(B). To determine whether a party filing an out-of-time motion for extension of time to file a notice of appeal has demonstrated the requisite excusable neglect, the court must engage in the two-step analysis set forth in Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74, 24 Bankr. Ct. Dec. (CRR) 63, 28 Collier Bankr. Cas. 2d (MB) 267, Bankr. L. Rep. (CCH) P 75157A, 25 Fed. R. Serv. 3d 401 (1993). It must first decide whether the failure to file the notice of appeal or to request an extension before the time expired was "neglect" and then must determine if the neglect is excusable. See, e.g., In re Johns-Manville Corp., 476 F.3d 118, 67 Fed. R. Serv. 3d 207 (2d Cir. 2007) (excusable neglect does not include the attorney's failure to count the time period for filing a cross-appeal correctly; attorney miscalculations do not rise to the level of excusable neglect); In re Schultz, 254 B.R. 149, 36 Bankr. Ct. Dec. (CRR) 261, Bankr. L. Rep. (CCH) P 78293, 48 Fed. R. Serv. 3d 294, 2000 FED App. 0010P (B.A.P. 6th Cir. 2000) (attorney's neglect in failing to file timely notice of appeal from order denying debtor's discharge was "excusable" under extraordinary circumstances of case); In re Brown, 313 B.R. 693, 51 Collier Bankr. Cas. 2d (MB) 813 (W.D. Mich. 2004) (debtor's neglect in not filing notice of appeal from order denying motion to convert case until after deadline was not "excusable" where failure to timely file was result of neglect and neglect was not "excusable" because court doubted good faith of debtor who had ongoing pattern of obstruction and delay). Courts tend to be unsympathetic to claims of excusable neglect. See, e.g., In re Amer Metrocomm Corp., 196 Fed. Appx. 86 (3d Cir. 2006) (no excusable neglect where attorney was called away on family matters and did not receive the bankruptcy court order within 20 days from the expiration of the time to file a notice of appeal); In re Enron Corp., 364 B.R. 482 (S.D. N.Y. 2007) (where lack of notice was the result of the claimant's own failure to comply with case management order explaining how to receive notice, there is no excusable neglect); In re LaClair, 360 B.R. 388 (Bankr. D. Mass. 2006) (attorney was ill and failed to file appeal in timely fashion; no excusable neglect; court had heard the illness excuse before, and, while attorney missed the appeal deadline, attorney was able to conduct other business in timely fashion); In re Steve A. Clapper & Associates of Florida, 346 B.R. 882 (Bankr. M.D. Fla. 2006) (counsel's misunderstanding as to the time to file a notice of appeal is not excusable neglect). See also discussion of *Pioneer*, § 2:40. But see Schaffner v. U.S. Trustee, 2012 WL 2683320 (E.D. Ky. 2012) (excusable neglect existed where it was apparent appellant did not act in bad faith and was seriously ill at the time).

7 Fed. R. Bankr. P. 8002(d)(3).

8 See Fed. R. App. P. 4(a)(1) (the time to appeal is generally 30 days after entry of the judgment or order appealed from). See also Williams v. Regency Financial Corp., 309 F.3d 1045, 48 U.C.C. Rep. Serv. 2d 1488 (8th Cir. 2002) (the appeal from a district court order in a bankruptcy appeal is to be filed within 30 days of the district court's entry of judgment). The purpose of the shortened time to file an appeal is designed to enable "prompt appellate review, often important to the administration of a case under the Code." Fed. R. Bankr. P. 8002, Advisory Committee Note.

9 In Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96, 68 Fed. R. Serv. 3d 190 (2007), in the context of an appeal from a district court judgment to a court of appeals, 28 U.S.C.A. § 2107 applied. It provides by statute the time period for taking an appeal to a court of appeals in a nonbankruptcy civil case and permits the district court to extend that time for filing the notice "for a period of 14 days from the date of

the order reopening the time to appeal." The district court granted a request for reopening and inexplicably extended the time to 17, rather than 14 days, and the appellant relied on that 17-day extension. The Supreme Court held that the 14-day timeframe was jurisdictional and therefore the court of appeals had no jurisdiction to hear the appeal. It reiterated a lengthy series of court decisions that hold that the timeframes for filing a notice of appeal are jurisdictional and reversed prior precedent that had created an equitable exception (the "unique circumstances" exception) to such time limits. The dissent urged that the *Bowles* decision was a step back from the Supreme Court's decision in Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867, 42 Bankr. Ct. Dec. (CRR) 100, 50 Collier Bankr. Cas. 2d (MB) 969, Bankr. L. Rep. (CCH) P 80031 (2004), which distinguished between claims processing rules (which are waivable and nonjurisdictional) and statutory time limits (which may be jurisdictional). See also In re Personal Elec. Transports, Inc., 2007 WL 1857340 (D. Haw. 2007), aff'd, 313 Fed. Appx. 51 (9th Cir. 2009) (*Bowles* applied to a notice of appeal filed one day after the deadline in Fed. R. Bankr. P. 8002); In re Bryan Road, LLC, 382 B.R. 855 (Bankr. S.D. Fla. 2008) (the unique circumstances test, as discussed in *Bowles*, cannot be extended so far as to allow the bankruptcy court to do that which a bankruptcy rule expressly prohibited by extending the time for a debtor to move for reconsideration of an order lifting the stay).

See also In re Sheedy, 875 F.3d 740, Bankr. L. Rep. (CCH) P 83179 (1st Cir. 2017) (bankruptcy court did not err in finding that debtor's counsel's failure to file a timely notice of appeal did not constitute excusable neglect); Netzer v. Office of Lawyer Regulation, 851 F.3d 647, 63 Bankr. Ct. Dec. (CRR) 235 (7th Cir. 2017) (regardless of whether 14-day time limit on notice of appeal from order of bankruptcy court was jurisdictional or could be equitably tolled, debtor-attorney waited too long to appeal—in not filing notice of appeal until 41 days after bankruptcy court's judgment); In re WorldCom, Inc., 708 F.3d 327, 57 Bankr. Ct. Dec. (CRR) 122, 84 Fed. R. Serv. 3d 903 (2d Cir. 2013) (time for taking appeal is mandatory and jurisdictional; district court's reopening of the time for appeal was an abuse of discretion, notwithstanding that the preconditions for such relief had been met under Fed. R. App. P. 4(a)(6), where the delay was wholly attributable to appellant's attorney); In re Caterbone, 640 F.3d 108, 54 Bankr. Ct. Dec. (CRR) 144, Bankr. L. Rep. (CCH) P 81973 (3d Cir. 2011) (appeal deadlines are mandatory and jurisdictional; when such appeal notice is untimely, district court and court of appeals lack jurisdictional power to hear those appeals); In re Latture, 605 F.3d 830, Bankr. L. Rep. (CCH) P 81765 (10th Cir. 2010) (failure to file a timely notice of appeal is a jurisdictional defect; harmonizing several Supreme Court decisions on the subject)); In re United Airlines, Inc., 355 Fed. Appx. 57 (7th Cir. 2009) (appellant did not establish excusable neglect for late-filed notice of appeal; appellant carelessly relied on appellant's attorney even though appellant knew that the attorney was ill and inattentive); In re Satterfield, 337 Fed. Appx. 739 (10th Cir. 2009) (affirming BAP's decision that appellant's failure to timely file a notice of appeal with the BAP was jurisdictional and deprived the BAP of jurisdiction to decide the appeal); In re Wiersma, 483 F.3d 933, 48 Bankr. Ct. Dec. (CRR) 15 (9th Cir. 2007), for additional opinion, see, 227 Fed. Appx. 603 (9th Cir. 2007) (bankruptcy rule's timely appeal requirement is jurisdictional (citing Fed. R. Bankr. P. 8002(a))); In re Johns-Manville Corp., 476 F.3d 118, 67 Fed. R. Serv. 3d 207 (2d Cir. 2007) (whether 30-day Federal Rules of Appellate Procedure time limit for filing a cross-appeal is also jurisdictional in light of recent Supreme Court decisions was not decided; court enforced time limit regardless); Clubside, Inc. v. Valentin, 468 F.3d 144 (2d Cir. 2006) (10-day [now 14-day] time to appeal is jurisdictional); In re Siemon, 421 F.3d 167 (2d Cir. 2005) (the 10-day [now 14-day] time limit is jurisdictional); In re Williams, 216 F.3d 1295, 36 Bankr. Ct. Dec. (CRR) 93 (11th Cir. 2000) (untimely notice of appeal had to be dismissed and could not be construed as a motion for extension of time due to excusable neglect); In re Colon, 941 F.2d 242, 245, 21 Bankr. Ct. Dec. (CRR) 1632, Bankr. L. Rep. (CCH) P 74210 (3d Cir. 1991) ("Under Bankruptcy Rule 8002 an appeal must be taken within 10 days [now 14 days] of the entry of the order appealed from, and a late filing is insufficient to vest the district court with jurisdiction of the appeal."); In re Kingsley Capital, Inc., 423 B.R. 344, 52 Bankr. Ct. Dec. (CRR) 179 (B.A.P. 10th Cir. 2010) (timely filing of a notice of appeal is jurisdictional and is not subject to waiver; discussing Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867, 42 Bankr. Ct. Dec. (CRR) 100, 50 Collier Bankr. Cas. 2d (MB) 969, Bankr. L. Rep. (CCH) P 80031 (2004), and finding that neither *Kontrick* nor subsequent decisions change this result); In re Long, 255 B.R. 241, 243, 45 Collier Bankr. Cas. 2d (MB) 355, 48 Fed. R. Serv. 3d 514 (B.A.P. 10th Cir. 2000) ("[t]he failure to timely file a notice of appeal is 'a jurisdictional defect barring appellate review'").

In *Wiersma*, the BAP dismissed appellant's timely appeal from a final order, holding that appellant had failed to prosecute the appeal by not responding to the BAP's request for extra briefing on the issue. Appellant accepted that holding and did not appeal to the court of appeals. Six months later, after appellant concluded that the original order had ripened to a stage of finality, the appellant took a second appeal from the same order. The Ninth Circuit held that the BAP had erred in allowing this late filing of an appeal from the original order. The BAP, initially believing the appeal was interlocutory, had erred as a matter of law, but legal issues should have been immediately appealed. The BAP had no power to correct this legal issue on its own at a later time. Further, the doctrine of unique circumstances in which courts had, before the *Bowles* decision, sometimes allowed an appellant to file late because the court itself has misled the appellant as to the correct procedure, did not apply because good faith reliance is not enough. The doctrine applies only where a court affirmatively assures a party that its appeal will be timely, not where the appellant reaches that decision on its own. See Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S. Ct. 987, 103 L. Ed. 2d 146, Fed. Sec. L. Rep. (CCH) P 94190, 13 Fed. R. Serv. 3d 1 (1989) (plaintiffs whose appeal was rendered ineffective not entitled to have appeal heard on basis of "unique circumstances"); In re Smith, 189 Fed. Appx. 88 (3d Cir. 2006) (debtor did not establish that court was estopped from enforcing the 10-day [now 14-day] time limit); In re Slimick, 928 F.2d 304, 20 Bankr. Ct. Dec. (CRR) 1754 (9th Cir. 1990) (no unique circumstances warranted review of untimely appeal; discussing Thompson v. Immigration and Naturalization Service, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed. 2d 404, 7 Fed. R. Serv. 2d 1211 (1964) (overruled on other grounds by, Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96, 68 Fed. R. Serv. 3d 190 (2007)), which articulates unique circumstances doctrine).

In In re Lang, 414 F.3d 1191 (10th Cir. 2005), the circuit court reiterated a basic point with respect to appellate jurisdiction. The BAP determined an appeal untimely and dismissed the appeal. On further appeal, the circuit court held that it was without jurisdiction to decide the appeal because the BAP was correct. Once the appellate court loses jurisdiction because an appeal was untimely, it cannot address the issue of whether the trial court had subject matter jurisdiction in the first place, in spite of the fact that the federal court can usually always raise the question of its own subject matter jurisdiction. Without jurisdiction, a court cannot proceed at all, not even to decide that the lower court had no jurisdiction to decide the case at all. It made no difference that the deficiency in appellate jurisdiction arose at the bankruptcy appellate level. See also Allen v. Chapter 7 Trustee, 223 Fed. Appx. 770 (10th Cir. 2007) (because the district court lacked jurisdiction to hear an appeal from an order issued on a removal motion because the appeal was untimely, the circuit court similarly lacked jurisdiction on the merits of removal).

10 See, e.g., In Re Cotton, 250 Fed. Appx. 968 (11th Cir. 2007) (a debtor's filing of a notice of appeal of the bankruptcy court's denial of debtor's motion to voluntarily dismiss debtor's Chapter 13 petition and conversion of debtor's case to Chapter 7 divested the bankruptcy court of jurisdiction while the appeal was pending); In re Sherman, 441 F.3d 794, 46 Bankr. Ct. Dec. (CRR) 57, Bankr. L. Rep. (CCH) P 80477, Fed. Sec. L. Rep. (CCH) P 93735 (9th Cir. 2006), opinion amended and superseded, 491 F.3d 948, Bankr. L. Rep. (CCH) P 80969 (9th Cir. 2007) (bankruptcy court cannot grant a discharge while an appeal from a motion to dismiss is pending); In re Transtexas Gas Corp., 303 F.3d 571, 53 Fed. R. Serv. 3d 680 (5th Cir. 2002) (bankruptcy court may not enter an order addressing a postjudgment motion once the appeal has been filed, even if resolution of the motion would expedite the appeal); In re Picht, 403 B.R. 707, 712, 61 Collier Bankr. Cas. 2d (MB) 1222 (B.A.P. 10th Cir. 2009) ("Courts have recognized a trial court's jurisdiction to act following the filing of a notice of appeal only in limited circumstances, such as when granted permission to do so by the appellate court, when authorized to act by a procedural rule, or when adjudicating a dispute between the parties regarding what documents properly constitute the record on appeal."); In re Whispering Pines Estates, Inc., 369 B.R. 752, 48 Bankr. Ct. Dec. (CRR) 104 (B.A.P. 1st Cir. 2007) (bankruptcy court lacks jurisdiction over stay relief motion while confirmation appeal is pending; the stay relief motion was sufficiently connected to the plan so that the filing of the notice of appeal divested jurisdiction).

But see In re Walker, 515 F.3d 1204, 49 Bankr. Ct. Dec. (CRR) 111, Bankr. L. Rep. (CCH) P 81108 (11th Cir. 2008) (a trial court that has read its findings and conclusions into the record may reduce them to writing and a written order following the notice of appeal); Waterson v. Hall, 515 F.3d 852 (8th Cir. 2008) (noting that a court does not usually lose jurisdiction to proceed with the case when a party appeals from a nonappealable

order and finding the two orders in question to be nonfinal); In re Smith, 212 Fed. Appx. 577 (8th Cir. 2006) (filing of a notice of appeal with respect to an interlocutory order does not deprive bankruptcy court of jurisdiction to proceed further with respect to other phases of the case); In re LaFata, 344 B.R. 715, 65 Fed. R. Serv. 3d 760 (B.A.P. 1st Cir. 2006), decision aff'd, 483 F.3d 13, 57 Collier Bankr. Cas. 2d (MB) 1430, Bankr. L. Rep. (CCH) P 80906 (1st Cir. 2007) (a bankruptcy court has jurisdiction to hear a Rule 60(b) motion while the appeal is pending); In re Marino, 234 B.R. 767, 34 Bankr. Ct. Dec. (CRR) 597 (B.A.P. 9th Cir. 1999) (while pending appeal divests lower courts of jurisdiction to expand upon or alter the judgment, lower court retains jurisdiction to implement or enforce the judgment; a distinction is drawn between actions to enforce and those to expand upon or alter); In re Big Rivers Elec. Corp., 266 B.R. 100 (W.D. Ky. 2000) (filing of appeal divests the bankruptcy court of jurisdiction over those aspects of the case involved in the appeal, but bankruptcy court retains jurisdiction over other issues not presented by the appeal); In re Legend Radio Group, Inc., 248 B.R. 281 (W.D. Va. 1999), order aff'd, 211 F.3d 1265 (4th Cir. 2000) (rule against concurrent jurisdiction does not prevent plan modifications if a confirmation order is appealed); In re Southold Development Corp., 129 B.R. 18 (E.D. N.Y. 1991) (rule against concurrent jurisdiction does not categorically prevent plan modifications if a confirmation order is on appeal); In re Washington Mut., Inc., 461 B.R. 200, 55 Bankr. Ct. Dec. (CRR) 113, Fed. Sec. L. Rep. (CCH) P 96600 (Bankr. D. Del. 2011), vacated in part on other grounds, 2012 WL 1563880 (Bankr. D. Del. 2012) (appeal regarding ownership of property does not prevent bankruptcy court from confirming a plan disposing of that property); In re National Century Financial Enterprises, Inc., 334 B.R. 907, 63 Fed. R. Serv. 3d 891 (Bankr. S.D. Ohio 2005) (bankruptcy court has jurisdiction to resolve dispute over contents of record on appeal); In re Carlson, 247 B.R. 754 (Bankr. N.D. Ill. 2000) (bankruptcy court retains jurisdiction to issue orders in furtherance of or in aid to the appeal).

11 Fed. R. Bankr. P. 8008(a).

12 Fed. R. Bankr. P. 8008(e).

13 Fed. R. Bankr. P. 8009, 8006, 8007. See In re Carlson, 519 B.R. 756 (B.A.P. 8th Cir. 2014), aff'd, 600 Fed. Appx. 501 (8th Cir. 2015), as corrected (Apr. 27, 2015) (because the debtors failed to provide an adequate record of the bankruptcy court's decisions, the BAP could not hold that the factual basis of the bankruptcy court's orders was clearly erroneous); In re Clinton, 449 B.R. 79 (B.A.P. 9th Cir. 2011) (affirming bankruptcy court's order granting relief from stay after debtor failed to provide any documentation regarding hearing; debtor failed to provide the BAP with the relevant orders, with any record of the findings of fact and conclusions of law delivered orally at the stay relief hearing, or with a transcript of that hearing); Slavinsky v. Educational Credit Management Corp., 362 B.R. 677 (D. Md. 2007) (debtor's failure to designate the record warranted dismissal of appeal even though debtor was appealing pro se; appellant had been given sufficient warning of impending dismissal).

14 Bankruptcy Rule 8009(b) sets forth procedures to be followed with respect to ordering a transcript of the proceedings. In summary, within the time period prescribed for designation of the record on appeal, the appellant must order in writing from the court reporter, a transcript of the parts of the proceedings not already on file that the appellant considers necessary for the appeal and file a copy of the transcript order with the bankruptcy clerk. Fed. R. Bankr. P. 8009(b)(1)(A). Alternatively, if the appellant is not ordering a transcript, the appellant must file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript. Fed. R. Bankr. P. 8009(b)(1)(B). If a cross-appeal has been filed, the cross-appellant, within 14 days after the appellant files a copy of the transcript order or a certificate of not ordering the transcript, must order in writing a transcript of such additional parts of the proceedings as the cross-appellant considers necessary for the appeal, or file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript. Fed. R. Bankr. P. 8009(b)(2). Bankruptcy judges often issue opinions from the bench without issuing a separate written opinion. A party appealing from such a bench ruling will need to order a transcript of the court's decision. For cases dealing with dismissals for failure to timely order a transcript, see, e.g., Hancock v. McDermott, 646 F.3d 356, 54 Bankr. Ct. Dec. (CRR) 199, 65 Collier Bankr. Cas. 2d (MB) 1202 (6th Cir. 2011) (denial of fees to appellant's attorney for failing to follow appellate procedure at district court level upheld by circuit court; delay in receiving transcripts from the bankruptcy court resulted

in the district court's termination of Rule 8009 deadline); In re Harris, 464 F.3d 263, Bankr. L. Rep. (CCH) P 80715 (2d Cir. 2006) (district court abused its discretion in dismissing an appeal for failure to timely supply a transcript; district court should have provided appellant an opportunity to be heard first as the appellant may have been confused on the need for such); In re Rose, 483 B.R. 540 (B.A.P. 8th Cir. 2012) (as a result of appellant's failure to provide BAP with an official transcript, the BAP was unable to determine whether the bankruptcy court's findings of fact had been clearly erroneous); In re Yun, 476 B.R. 243, 56 Bankr. Ct. Dec. (CRR) 245 (B.A.P. 9th Cir. 2012) (where commissioner failed to include a transcript of the bankruptcy court's hearing as a part of record on appeal, the record was insufficient for the BAP to review the bankruptcy court's determinations; the BAP presumed nothing happened at the hearing that would have aided the commissioner's case on appeal); In re Vazquez Laboy, 416 B.R. 325, 331 (B.A.P. 1st Cir. 2009), rev'd in part, vacated in part on other grounds, 647 F.3d 367, 65 Collier Bankr. Cas. 2d (MB) 1604 (1st Cir. 2011) ("An appellant's failure to provide a hearing transcript is fatal to an appeal where 'the Panel is unable to determine the legal foundation of the bankruptcy court's rulings, or whether the bankruptcy court made any initial oral findings and rulings.'" (quoting In re Gagne, 394 B.R. 219, 225 n.7, Bankr. L. Rep. (CCH) P 81336 (B.A.P. 1st Cir. 2008))); In re Wilson, 402 B.R. 66 (B.A.P. 1st Cir. 2009) (failure to supply the BAP with transcripts in English left BAP with no basis for reviewing the bankruptcy court's order); In re Raffeld, 356 B.R. 786, 56 Collier Bankr. Cas. 2d (MB) 1805 (B.A.P. 6th Cir. 2006) (failure to include a transcript in the record left the BAP unable to address an appellant's claim that rested on the evidentiary record); In re Cabrera, 2007 WL 4380275 (W.D. N.C. 2007) (mortgage firm's appeal dismissed for failure to file a transcript).

For a case discussing a litigant's rights to obtain (or not) a court recorder's notes or backup material in order to challenge the accuracy of the transcript, see In re Pratt, 511 F.3d 483 (5th Cir. 2007) (access is extremely limited by 28 U.S.C.A. § 753).

15 Fed. R. Bankr. P. 8014 (Briefs), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers). See In re Mondelli, 349 Fed. Appx. 731 (3d Cir. 2009) (district court did not abuse its discretion in dismissing an appeal for failure to timely designate the record; appellant had a history of dilatory conduct); In re Truong, 327 Fed. Appx. 260 (2d Cir. 2009) (denial of pro se (disbarred attorney) Chapter 7 motion to vacate a dismissal of an appeal for failure to file a timely brief sustained; the appellant had been given plenty of warning); In re E Toys Inc., 263 Fed. Appx. 235 (3d Cir. 2008) (a district court did not abuse its discretion in dismissing appeal for failure to prosecute; pro se appellant had failed to properly designate the record, been repeatedly dilatory in meeting briefing deadlines, and caused prejudice to appellee); In re Enron Corp., 475 F.3d 131, 47 Bankr. Ct. Dec. (CRR) 199, Bankr. L. Rep. (CCH) P 80840 (2d Cir. 2007) (the 15-day [now 14-day] deadline for appellant to file an opening brief under Rule 8009 runs from the date the entry of the appeal is docketed under Rule 2007; following decisions in In re Weiss, 111 F.3d 1159, 37 Fed. R. Serv. 3d 613 (4th Cir. 1997), and Jewelcor Inc. v. Asia Commercial Co., Ltd., 11 F.3d 394, 24 Bankr. Ct. Dec. (CRR) 1636, 30 Collier Bankr. Cas. 2d (MB) 328, Bankr. L. Rep. (CCH) P 75618, 27 Fed. R. Serv. 3d 1345 (3d Cir. 1993), the Second Circuit ruled that, unless the appeal was properly docketed by the district court and notice was given of such docketing, the time for filing an opening brief does not begin to run and case may not be dismissed for failure to file a brief); In re Goldblatt, 203 Fed. Appx. 545 (5th Cir. 2006) (dismissing appeal for failing to file a brief was not an abuse of discretion; appellant had a pattern of dilatory conduct); In re Fadayiro, 195 Fed. Appx. 523 (7th Cir. 2006) (dismissal of appeal for failure to prosecute was an abuse of discretion); In re Richardson Indus. Contractors, Inc., 189 Fed. Appx. 93 (3d Cir. 2006) (district court abused its discretion by dismissing an appeal for failure to timely file a brief); Riffin v. Baltimore County, Md., 2012 WL 2915251 (D. Md. 2012), aff'd, 521 Fed. Appx. 164 (4th Cir. 2013) (appeal dismissed where appellant failed to file required briefs within the time requirements, was aware of importance of filing deadlines, had filed multiple late appellate briefs, and appellees were prejudiced); Rivera-Siaca v. DCC Operating, Inc., 416 B.R. 9 (D.P.R. 2009) (district court dismissed appeal for late filing of a brief; the delay was not caused by excusable neglect; rather, counsel made a deliberate decision that working on another case was more important than filing untimely brief in this appeal); In In Re Terry Mfg. Co., Inc., 2007 WL 4287366 (M.D. Ala. 2007) (the time period within which to file a brief does not begin to run until the appeal is docketed and the appellee is given notice; following *Enron*); In re Ryan, 350 B.R.

632 (D.S.C. 2006) (appeal dismissed where appellant failed to file a timely brief even though appellant was given opportunity to explain the delay).

16 Fed. R. Bankr. P. 8018 (Serving and Filing Briefs; Appendices).

17 Fed. R. Bankr. P. 8018. Those may include, for example, a motion to dismiss or a motion to increase or decrease the bond on appeal. In most appellate courts, the clerk has delegated authority to decide more routine procedural motions, such as a routine motion to extend the deadline for filing the brief.

18 Fed. R. Bankr. P. 8018(b).

19 See Fed. R. Bankr. P. 8026(b)(2) (permitting district courts and Bankruptcy Appellate Panels to regulate practice with respect to bankruptcy appeals, but providing that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.").

20 Fed. R. Bankr. P. 8028 ("In the interest of expediting decision or for other cause in a particular case, the district court or the BAP, or where appropriate the court of appeals, may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8028. ").

21 Bankruptcy Rule 8003(a)(2) provides that the failure of the appellant to take any step in the appellate process "other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal." Fed. R. Bankr. P. 8003(a)(2). Courts thus take a flexible view in interpreting the rules. See, e.g., In re Harris, 464 F.3d 263, Bankr. L. Rep. (CCH) P 80715 (2d Cir. 2006) (failure to include transcript violates Federal Rules of Bankruptcy Procedure, but dismissal of appeal was not warranted); In re Miller, 397 F.3d 726, Bankr. L. Rep. (CCH) P 80231 (9th Cir. 2005) (Ninth Circuit reversed BAP decision to dismiss an appeal on purely technical violations of the court's appellate rules); English-Speaking Union v. Johnson, 353 F.3d 1013, 57 Fed. R. Serv. 3d 1059 (D.C. Cir. 2004) (court adopted "more flexible" view of enforcement of the rules); In re CPDC Inc., 221 F.3d 693, 44 Collier Bankr. Cas. 2d (MB) 949 (5th Cir. 2000) (district court has discretion as to what sanction is appropriate for violation of procedural rules). Courts generally hold, for example, that the district court or BAP should exercise discretion in dismissing a case for failure to file a timely brief. See, e.g., In re Shah, 204 Fed. Appx. 357 (5th Cir. 2006) (four-month delay in filing brief is cause to dismiss); In re Ross, 223 B.R. 702 (B.A.P. 8th Cir. 1998) (failure to file a brief on appeal is grounds in itself for dismissal); In re Salter, 251 B.R. 689, 85 A.F.T.R.2d 2000-1727 (S.D. Miss. 2000), aff'd, 234 F.3d 28 (5th Cir. 2000) (even a pro se appellant is held to requirement that a brief be filed; where filings made by a pro se litigant are not sufficient to serve as a brief, the appeal should be dismissed); In re Frank Santora Equipment Corp., 227 B.R. 206 (E.D. N.Y. 1998) (the 15-day [now 14-day] time limit for filing a brief is not jurisdictional; the court should exercise discretion to determine whether dismissal is appropriate).

22 Bankruptcy Rule 8020(a) provides that if the district court or BAP determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. Fed. R. Bankr. P. 8020(a). See, e.g., In re Lapke, 428 B.R. 839, 63 Collier Bankr. Cas. 2d (MB) 1305, Bankr. L. Rep. (CCH) P 81755 (B.A.P. 8th Cir. 2010) (although debtor's appeal was frivolous, BAP affirmed, but court declined to award damages); In re Schachtele, 343 B.R. 661 (B.A.P. 8th Cir. 2006) (after oral argument creditor dismissed the appeal; panel sua sponte, after notice and hearing, ordered appellant's attorney to pay debtor's attorney's fees on appeal; among other things, appellant lacked standing, the result of the appeal was obvious, and the appeal was frivolous); In re Great Road Service Center, Inc., 304 B.R. 547, 42 Bankr. Ct. Dec. (CRR) 127, 93 A.F.T.R.2d 2004-630 (B.A.P. 1st Cir. 2004) (imposing sanctions under this rule is a two-step process; first, the panel must determine whether the appeal is frivolous, and, second, the panel must decide whether the procedural requirements of Rule

8020 are met); In re Clay, 334 B.R. 623 (Bankr. C.D. Ill. 2005) (the rule does not permit the bankruptcy court to make such an award).

See also In re Westwood Plaza North, 889 F.3d 975 (9th Cir. 2018) (holding, as a matter of first impression, that a motion for sanctions under Fed. R. App. P. 38 regarding frivolous appeals should be filed within the time limits for filing a request for attorney's fees under Ninth Circuit Rule 39-1.6(a)).

23 See Fed. R. Bankr. P. 8013. See also In re Hodes, 402 F.3d 1005, Bankr. L. Rep. (CCH) P 80262 (10th Cir. 2005) (in reviewing a bankruptcy court decision, the district court and the court of appeals apply the same standards of review that govern appellate review in other cases); In re Casserino, 379 F.3d 1069, Bankr. L. Rep. (CCH) P 80147 (9th Cir. 2004) (bankruptcy court conclusions of law are reviewed de novo and its factual findings are reviewed for clear error); In re Wilson, 149 F.3d 249, 47 U.S.P.Q.2d 1212, 41 Fed. R. Serv. 3d 106 (4th Cir. 1998) (court of appeals, like the district court, reviews the decision of a bankruptcy court on legal questions de novo and reviews factual findings for clear error). But see In re TOUSA, Inc., 444 B.R. 613 (S.D. Fla. 2011), aff'd in part, rev'd in part on other grounds, 680 F.3d 1298, 56 Bankr. Ct. Dec. (CRR) 135, 67 Collier Bankr. Cas. 2d (MB) 1035, Bankr. L. Rep. (CCH) P 82276 (11th Cir. 2012) (if trial court adopts prevailing party's findings, the usual "clearly erroneous standard of review" is relaxed).

24 See, e.g., In re Cahill, 428 F.3d 536, Bankr. L. Rep. (CCH) P 80372 (5th Cir. 2005) (applying the “definite and firm conviction a mistake has been made” test); In re LWD, Inc., 340 B.R. 363 (W.D. Ky. 2006) (factual findings of bankruptcy court should not be disturbed unless there is the most cogent evidence of a mistake or miscarriage of justice); In re Advanced Systems, Inc., 257 B.R. 457, 44 U.C.C. Rep. Serv. 2d 882 (E.D. La. 2001) (under “clear error” standard, bankruptcy court findings of fact will be reversed only if, after considering all the evidence, an appellate court is left with the definite and firm conviction that a mistake has been made); Johnson v. Curtis Dworken Chevrolet, 242 B.R. 773 (D.D.C. 1999) (district court will not lightly conclude that the bankruptcy court's findings of fact are clearly erroneous). In particularly colorful language, courts have said that a finding of fact should be upset only if the decision strikes the reviewing court as wrong with the force of a five-week-old, unrefrigerated, dead fish. See In re Papio Keno Club, Inc., 262 F.3d 725, 728–29, 45 U.C.C. Rep. Serv. 2d 1146 (8th Cir. 2001) (“to be clearly erroneous, a decision must strike us as more than just maybe or probably wrong”).

25 See, e.g., In re Baker, 345 B.R. 261 (D. Colo. 2006) (district court reviews bankruptcy court's conclusions of law de novo); In re Slatkin, 310 B.R. 740, 43 Bankr. Ct. Dec. (CRR) 91 (C.D. Cal. 2004), aff'd, 222 Fed. Appx. 545 (9th Cir. 2007) (de novo review of legal conclusions); In re Norris, 239 B.R. 247, 137 Ed. Law Rep. 1011 (M.D. Ala. 1999) (district court reviews “de novo” a bankruptcy court's legal conclusions).

But see In re Shenango Group Inc., 501 F.3d 338, 48 Bankr. Ct. Dec. (CRR) 221, 58 Collier Bankr. Cas. 2d (MB) 978, 41 Employee Benefits Cas. (BNA) 2736 (3d Cir. 2007) (appellate court reviews bankruptcy court's interpretation of a previously confirmed plan for abuse of discretion); In re Northwest Airlines Corp., 349 B.R. 338, 153 Lab. Cas. (CCH) P 10728 (S.D. N.Y. 2006), aff'd, 483 F.3d 160, 48 Bankr. Ct. Dec. (CRR) 12, 57 Collier Bankr. Cas. 2d (MB) 1442, 181 L.R.R.M. (BNA) 2752, Bankr. L. Rep. (CCH) P 80896, 154 Lab. Cas. (CCH) P 10826 (2d Cir. 2007) (standard of review for a grant or denial of a preliminary injunction is abuse of discretion); In re Northwestern Corp., 346 B.R. 84, 87 (D. Del. 2006) (appellate court applies an abuse of discretion standard when reviewing bankruptcy court decision relating to retention of counsel; “An abuse of discretion occurs when the court bases its opinion on a clearly erroneous finding of fact, legal conclusion or improper application of law to fact.”).

26 See, e.g., In re BCE West, L.P., 319 F.3d 1166, 40 Bankr. Ct. Dec. (CRR) 239, 50 Collier Bankr. Cas. 2d (MB) 154, Bankr. L. Rep. (CCH) P 78800 (9th Cir. 2003) (bankruptcy court's conclusions on mixed questions of law and fact are reviewed de novo); In re GWI PCS 1 Inc., 230 F.3d 788, 36 Bankr. Ct. Dec. (CRR) 239 (5th Cir. 2000) (mixed questions of law and fact are reviewed de novo); In re Rosen Auto Leasing, Inc., 346 B.R. 798, 46 Bankr. Ct. Dec. (CRR) 235 (B.A.P. 8th Cir. 2006) (question of insider status is a mixed question of law and fact; determination of reasonably equivalent value and good faith are subject to clearly erroneous standard); In re Jumer's Castle Lodge, Inc., 338 B.R. 344, 349, Bankr. L. Rep. (CCH) P 80469 (C.D. Ill.

2006), aff'd, 472 F.3d 943, 47 Bankr. Ct. Dec. (CRR) 146, Bankr. L. Rep. (CCH) P 80830 (7th Cir. 2007) (finding with respect to reasonably equivalent value is a mixed question of law and fact; "the legal standards used by the bankruptcy court to define and interpret the phrase 'reasonably equivalent value,' are questions of law subject to de novo review; once the correct legal standards have been identified and applied, the question as to whether reasonably equivalent value was actually given is a question of fact subject only to review for clear error"); Leibowitz v. Parkway Bank and Trust Co., 210 B.R. 298 (N.D. Ill. 1997), aff'd, 139 F.3d 574, 32 Bankr. Ct. Dec. (CRR) 394 (7th Cir. 1998) (bankruptcy court conclusions on mixed questions of law and fact and/or questions pertaining to application of facts to the law are reviewed de novo).

27 See, e.g., In re Beaty, 306 F.3d 914, 40 Bankr. Ct. Dec. (CRR) 59, 49 Collier Bankr. Cas. 2d (MB) 339, Bankr. L. Rep. (CCH) P 78724 (9th Cir. 2002) (whether laches is an available defense is a question of law); In re Shahid, 254 B.R. 40, 44 Collier Bankr. Cas. 2d (MB) 1877 (B.A.P. 10th Cir. 2000) (whether attorney's fees should be awarded is a question of law subject to de novo review); In re Blair, 301 B.R. 181, 51 Collier Bankr. Cas. 2d (MB) 343, 182 Ed. Law Rep. 859 (D. Md. 2003) (undue hardship determination is a question of law reviewed under a de novo standard); In re Peachtree Lane Associates, Ltd., 206 B.R. 913 (N.D. Ill. 1997), aff'd, 150 F.3d 788, 32 Bankr. Ct. Dec. (CRR) 1235, Bankr. L. Rep. (CCH) P 77747 (7th Cir. 1998) (determination that venue was proper on ground that this was where debtor partnership had its principal place of business was a finding of fact). See also In re Treadwell, 637 F.3d 855, 54 Bankr. Ct. Dec. (CRR) 114, Bankr. L. Rep. (CCH) P 81956 (8th Cir. 2011) (BAP erred when it determined that the bankruptcy court decided the case on an erroneous legal theory and then made its own findings of fact on issues not addressed by the bankruptcy court; BAP should have instructed the bankruptcy court to decide, in the first instance, whether debtors were partners and, if so, whether the husband should have known of the fraud, and it declined to review the factual findings which the BAP should not have made in the first place).

28 See, e.g., In re Stewart, 948 F.3d 509, Bankr. L. Rep. (CCH) P 83485 (1st Cir. 2020) (BAP exceeded the bounds of appellate review by engaging in fact-finding when it reversed the bankruptcy court).

29 Fed. R. Bankr. P. 8007(a) provides the procedure for obtaining a stay pending appeal of a bankruptcy court decision to the district court or to the Bankruptcy Appellate Panel. Fed. R. Bankr. P. 8017 provides the procedure for obtaining a stay pending appeal of a district court or Bankruptcy Appellate Panel decision. See In re Lambert Oil Co., Inc., 375 B.R. 197 (W.D. Va. 2007) (Fed. R. Bankr. P. 8007(b) does not give the district court discretion to deny a stay if the appellant provides an adequate bond; district court has jurisdiction to grant the stay even after the notice of appeal to the court of appeals was filed).

The party seeking a stay pending appeal must move expeditiously. See In re Marshall, 595 B.R. 269 (B.A.P. 8th Cir. 2019) (debtor's appeal from an order granting stay relief was moot where the property was sold at a foreclosure sale and where the debtor sought no stay pending appeal); In re Kaplan, 373 B.R. 213, 215 (B.A.P. 1st Cir. 2007) ("The Appellant sat on his hands for two months. It appears that he now seeks an emergency stay only because he is confronted with the order to show cause. It is too late. As the Appellant has cited no just cause for his delay, the Panel will not entertain the motion at this late date.").

Fed. R. Bankr. P. 7062 provides for a 14-day stay of entry of judgment in adversary proceedings. See also Fed. R. Bankr. P. 3020(e) (order of confirmation is stayed for 14 days unless court orders otherwise); Fed. R. Bankr. P. 4001(a)(3) (14-day stay of orders granting relief from an automatic stay, unless court orders otherwise or the order was granted ex parte); Fed. R. Bankr. P. 6004(g) (14-day stay of orders authorizing use, sale, or lease of property other than cash collateral, unless court orders otherwise); and Fed. R. Bankr. P. 6006(d) (14-day stay of orders authorizing the assignment of an executory contract or unexpired lease, unless court orders otherwise). But see In re Duran, 483 F.3d 653, Bankr. L. Rep. (CCH) P 80898 (10th Cir. 2007) (§ 362(a) requiring a decision on a motion for relief from stay within 30 days of the making of the motion invalidates Rule 4001(a)(3)).

30 Bankruptcy Rule 8007(a)(1) provides that "[o]rdinarily, a party must move first in the bankruptcy court for … a stay of a judgment, order, or decree of the bankruptcy court pending appeal, … the approval of a supersedeas bond, …" or other relief pending appeal. Fed. R. Bankr. P. 8007(a)(1). See also In re Hutter, 221

B.R. 648 (Bankr. D. Conn. 1998) (motions for stay of bankruptcy court on a pending appeal must ordinarily be made first to the bankruptcy judge). Bankruptcy Rule 8007(e)(1) further provides that "[d]espite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may: (1) suspend or order the continuation of other proceedings in the case; or (2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest." Fed. R. Bankr. P. 8007(e)(1).

31 Fed. R. Bankr. P. 8007(b)(1) ("A motion [for a stay, approval of a supersedeas bond, or similar relief] may be made in the court where the appeal is pending."); Fed. R. Bankr. P. 8007(b)(2) ("The motion must: (A) show that moving first in the bankruptcy court would be impracticable; or (B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled in set out any reasons given for the ruling."); Fed. R. Bankr. P. 8007(b)(3) (The motion for stay in the district court must also include the reasons for granting the relief requested and facts relied upon; affidavits or other sworn statements supporting facts subject to dispute; and relevant parts of the record.).

32 Fed. R. Bankr. P. 8007(d). See In re Rose's Stores, Inc., 223 B.R. 487 (E.D. N.C. 1998) (appellant moving for stay pending appeal is party obligated to post bond).

33 Fed. R. Bankr. P. 8007(d). See In re President Casinos, Inc., 360 B.R. 262, 47 Bankr. Ct. Dec. (CRR) 180 (B.A.P. 8th Cir. 2007) (extensive discussion of standards to be used in setting bond and ruling that a bankruptcy court did not abuse its discretion in not increasing the amount of the bond when the appellate process took longer than expected).

34 See, e.g., In re Elias, 182 Fed. Appx. 3 (1st Cir. 2006) (debtor was not entitled to a stay pending appeal of an order granting relief from stay to a secured creditor to foreclose on the collateral; the evidence showed that the debtor was in default on mortgage loan and that the debtor had an inability to make timely adequate protection payments; there was no likelihood of success on the merits); In re Ross, 223 B.R. 702 (B.A.P. 8th Cir. 1998) (party seeking stay pending appeal must demonstrate a likelihood of success on the merits, that it will suffer irreparable harm unless the stay is granted, that no substantial harm will come to the other interested parties, and that the stay will do no harm to the public purpose); In re Forest Oaks, L.L.C., 2010 WL 1904340 (S.D. Ala. 2010) (Chapter 11 debtor's motion for stay pending appeal denied where debtor failed to demonstrate any likelihood that it might succeed in proving bankruptcy court abused its discretion in dismissing petition and issuing 180-day bar for filing of new Chapter 11 petition). For other cases articulating this four-prong test, see In re Akron Thermal, Ltd. Partnership, 414 B.R. 193 (N.D. Ohio 2009) (denial of stay was proper; appellant failed to show that it would be irreparably injured by not granting stay); In re Vincent Andrews Management Corp., 414 B.R. 1 (D. Conn. 2009) (request for stay pending appeal denied even where there was a likelihood of success on the merits); In re Wire Comm Wireless, Inc., 2008 WL 4279407 (E.D. Cal. 2008) (applying four-part test and holding that bankruptcy court should have granted a stay pending appeal of its decision not to enforce an arbitration clause); In re Target Graphics, Inc., 372 B.R. 866 (E.D. Tenn. 2007) (debtor not entitled to stay pending appeal; it did not matter that, if the stay were denied, the debtor would lose all assets and the appeal would become moot; debtor had failed to make any serious showing with respect to the merits of the appeal); In re Player Wire Wheels, Ltd., 428 B.R. 767 (Bankr. N.D. Ohio 2010) (denying motion for stay pending appeal of confirmation order by former wife of principal of Chapter 11 debtor where motion was belatedly made 41 days after entry of confirmation order and 32 days after wife filed notice of appeal, and where wife was not only seeking stay of further implementation of confirmation order, but also seeking to undo asset sale conducted pursuant to debtor's confirmed liquidating plan); In re Herrera, 63 Collier Bankr. Cas. 2d (MB) 65, 2010 WL 148182 (Bankr. W.D. Tex. 2010) (if the equities do not favor granting an appeal, it should not be granted, even though denying stay will moot the appeal; mootness, standing alone, does not provide grounds for granting a stay); In re Hussey, 378 B.R. 397 (Bankr. S.D. Fla. 2007) (purported creditor not entitled to stay of all Chapter 7 proceedings pending orders of a district court judge imposing sanctions; the creditor had cried wolf too often); In re Cujas, 376 B.R. 480 (Bankr. E.D. Pa. 2007) (a bankruptcy court's order remanding a removed action back to state court would not be stayed pending appeal; while there was a possibility of success on the merits, the only harm to the defendants if the stay was denied was that they would have to litigate in state court); In re Marrama, 345 B.R. 458 (Bankr. D. Mass. 2006) (a Chapter 13 debtor failed to show a likelihood

of success on appeal and was not entitled to a stay); In re Access Cardiosystems, Inc., 340 B.R. 656, 64 Fed. R. Serv. 3d 752 (Bankr. D. Mass. 2006) (standards that must be shown are same standards that must be shown to obtain a preliminary injunction); In re Gulf States Steel, Inc. of Alabama, 285 B.R. 739 (Bankr. N.D. Ala. 2002) (movant's failure to satisfy any one of the four-prong standards justifies denial of the motion).

35 See e.g., S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP, 927 F.3d 763, 67 Bankr. Ct. Dec. (CRR) 90 (3d Cir. 2019) (denial of a motion for stay pending appeal is a final, appealable order): In re Howell-Robinson, 2008 WL 5076975 (Bankr. D. D.C. 2008) (stay of district court order affirming bankruptcy court order pending appeal must be sought from district or circuit court, and thus granting trustee's motion to enforce bankruptcy court order but without prejudice to debtor's right to seek stay in district or circuit court). See also In re Capitol Hill Group, 330 B.R. 1, 45 Bankr. Ct. Dec. (CRR) 60, 54 Collier Bankr. Cas. 2d (MB) 1296 (Bankr. D. D.C. 2005) (failure of clerk of district court, following entry of orders by district court disposing of bankruptcy appeal, to transmit notice of entry of orders to bankruptcy clerk did not serve to stay district court's orders); In re Texas Equipment Co., Inc., 283 B.R. 222, 40 Bankr. Ct. Dec. (CRR) 64 (Bankr. N.D. Tex. 2002) (noting that recent opinions suggested that bankruptcy court's stay pending appeal does not apply throughout the appellate process and that bankruptcy court's stay does not stay judgment of higher courts).

36 See, e.g., In re VeroBlue Farms USA, Inc., 6 F.4th 880, 70 Bankr. Ct. Dec. (CRR) 141 (8th Cir. 2021) (pursuant to so-called "equitable mootness" doctrine, "equitable," "prudential," or "pragmatic" considerations may render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot, though district courts must apply rigorous test in determining whether to invoke doctrine); In re Financial Oversight And Management Board for Puerto Rico, 989 F.3d 123 (1st Cir. 2021) (allegations of constitutional violations did not preclude dismissal of appeal based on equitable mootness doctrine); In re Financial Oversight and Management Board for Puerto Rico, 987 F.3d 173 (1st Cir. 2021) (appeals dismissed as equitably moot where plan had been implemented long ago, relief sought by appellants was impractical, and appellants had sat on their rights); In re Railyard Company, LLC, 849 Fed. Appx. 227 (10th Cir. 2021) (appeal constitutionally moot where appellants failed to obtain a stay and, while appeal was pending, a settlement was consummated, proceeds were distributed, and chapter 7 case closed); In re City of Detroit, Michigan, 838 F.3d 792, 63 Bankr. Ct. Dec. (CRR) 45, 76 Collier Bankr. Cas. 2d (MB) 578, Bankr. L. Rep. (CCH) P 83014 (6th Cir. 2016) (pensioners' appeals from bankruptcy court order confirming the Chapter 9 plan of large city, which had effect of reducing pension benefits accorded to city employees and retirees, were equitably moot, where pensioners had failed to obtain stay pending appeal, where plan had been substantially consummated inasmuch as numerous significant, even colossal, actions had been undertaken or completed, many irreversible, in reliance on plan, and where the relief that pensioners requested on appeal would necessarily rescind bargain that was at heart of city's negotiated plan and adversely affect countless third parties, including the entire city population); In re Berkeley Delaware Court, LLC, 834 F.3d 1036, 63 Bankr. Ct. Dec. (CRR) 4, 76 Collier Bankr. Cas. 2d (MB) 183, Bankr. L. Rep. (CCH) P 83001 (9th Cir. 2016) (when bankruptcy court invokes § 363(m), governing sale of estate assets for a sale of claims pursuant to settlement agreement, all parties are bound by statutory requirement to seek a stay pending appeal in order to be able to challenge sale on appeal, regardless of whether an outside party makes a bid on the sale); In re Hilal, 226 Fed. Appx. 381 (5th Cir. 2007) (appeal from an order approving a compromise with a creditor is moot and was dismissed; there was no stay pending appeal and reversal would substantially affect the rights of others who were not parties to the appeal); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (failure to seek a stay pending appeal blocked appellate consideration of order confirming plan of reorganization); In re Wingerter, 394 B.R. 859, 60 Collier Bankr. Cas. 2d (MB) 783 (B.A.P. 6th Cir. 2008), rev'd on other grounds, 594 F.3d 931, Bankr. L. Rep. (CCH) P 81673 (6th Cir. 2010) (an appeal from a sanction order which merely reprimanded, but did not actually impose sanctions, was moot; there was nothing to appeal from). But see In re Gould, 401 B.R. 415, 61 Collier Bankr. Cas. 2d (MB) 1025, Bankr. L. Rep. (CCH) P 81445, 2009-1 U.S. Tax Cas. (CCH) P 50253, 103 A.F.T.R.2d 2009-1026 (B.A.P. 9th Cir. 2009), aff'd, 603 F.3d 1100, 2010-1 U.S. Tax Cas. (CCH) P 50378, 105 A.F.T.R.2d 2010-1975 (9th Cir. 2010) (by administrative mistake, IRS paid refunds to the debtor that it was disputing on appeal; this, along with the failure to obtain a stay, did not render the appeal moot; a remedy could still be fashioned;

rejecting Eighth Circuit's decision in In re Ealy, 396 B.R. 20, Bankr. L. Rep. (CCH) P 81357, 102 A.F.T.R.2d 2008-6881 (B.A.P. 8th Cir. 2008)).

Regarding the necessity of obtaining a stay pending appeal under § 364(e) with respect to a postpetition financing order, see In re Cooper Commons, LLC, 430 F.3d 1215 (9th Cir. 2005) (broadly reading § 364(e); appeal from the negotiated terms of a postpetition financing agreement is moot even though the appeal would not affect the validity of the debt or the priority of the lender's lien because the relief sought would modify the terms of the financing); In re Foreside Management Co., LLC, 402 B.R. 446, 51 Bankr. Ct. Dec. (CRR) 90 (B.A.P. 1st Cir. 2009) (citing Bank of New England v. BWL, Inc., 121 B.R. 413 (D. Me. 1990)) (the protections afforded postpetition lenders pursuant to § 364(e), prohibiting courts from modifying or vacating an order authorizing postpetition borrowing in the absence of a stay of that order rendered this appeal moot; such an appeal is moot and should be dismissed in the absence of a stay pending appeal); In re General Growth Properties, Inc., 423 B.R. 716 (S.D. N.Y. 2010) (appeal of unstayed debtor financing order was moot). For a discussion of postpetition financing, see § 11:21.

Another statutory mootness provision regarding sales of property in bankruptcy is found at § 363(m) and discussed in § 11:38. For decisions applying statutory mootness under § 363(m), see Matter of Sneed Shipbuilding, Incorporated, 916 F.3d 405 (5th Cir. 2019) (equitable mootness doctrine did not apply in Chapter 11 case in which no plan had even been proposed to limit appellate review of bankruptcy court order approving settlement and sale of Chapter 11 debtor's assets, but appeal from unstayed order of bankruptcy court that approved settlement between Chapter 11 trustee and party asserting interest in estate assets, and that authorized sale of these assets to third party, was statutorily moot); In re Keystone Mine Management, II, 739 Fed. Appx. 418 (9th Cir. 2018) (where the sale of the bankruptcy estate's assets was not stayed pending appeal, the bankruptcy court's finding that the creditor was a good-faith purchaser of Chapter 7 debtor's assets statutorily mooted the appellants' appeals under § 363(m)); In re Pursuit Capital Management, LLC, 874 F.3d 124, 64 Bankr. Ct. Dec. (CRR) 226, Bankr. L. Rep. (CCH) P 83174 (3d Cir. 2017) (remedy sought by disappointed bidders at auction sale of avoidance claims that the Chapter 7 estate lacked the funds to prosecute, a determination that avoidance claims were not estate assets and could not be sold to third party, would affect validity of court-approved sale of avoidance claims, and for that reason, disappointed bidders' failure to obtain stay of sales order, in order to prevent sale from proceeding to high bidder that purchased these claims in good faith, rendered their appeal from sales order statutorily moot under § 363(m)); In re Revel AC, Inc., 802 F.3d 558, 61 Bankr. Ct. Dec. (CRR) 166 (3d Cir. 2015) (holding, in a split decision, that under the "sliding-scale" approach for deciding whether to grant a stay pending appeal and for deciding how strong of a case that a movant must show, the necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors); In re Steffen, 552 Fed. Appx. 946 (11th Cir. 2014) (affirming the district court's ruling that a debtor's appeal of the bankruptcy court's sale order was moot where the debtor failed to obtain a stay of the sale as required under § 363(m)); In re C.W. Mining Co., 641 F.3d 1235, 54 Bankr. Ct. Dec. (CRR) 156, 65 Collier Bankr. Cas. 2d (MB) 685 (10th Cir. 2011) (§ 363(m) does not allow an appellate order to affect validity of a sale and also renders most appeals stemming from sale orders moot); In re Flynn, 417 Fed. Appx. 188 (3d Cir. 2011) (Chapter 7 debtor's appeal of court order authorizing sale of debtor's franchise business was statutorily moot under § 363(m); reversing authorization affects validity of sale and there was no showing of bad faith on bankruptcy trustee or purchaser's behalf); In re WestPoint Stevens, Inc., 600 F.3d 231, 52 Bankr. Ct. Dec. (CRR) 265, Bankr. L. Rep. (CCH) P 81718 (2d Cir. 2010) (review of sale order barred by statutory mootness); In re Polaroid Corp., 611 F.3d 438, 53 Bankr. Ct. Dec. (CRR) 103, Bankr. L. Rep. (CCH) P 81810 (8th Cir. 2010) (appeal from unstayed order approving sale of assets statutorily moot under § 363(m)). See also In re Belew, 608 B.R. 206 (B.A.P. 8th Cir. 2019) (debtor's appeal from the bankruptcy court order approving the sale was moot; although debtor timely appealed, debtor did not ask the bankruptcy court to stay either its order approving the proposed sale or the sale itself, trustee and bank completed the sale, and there was no suggestion that bank was not a good-faith purchaser).

A still further context that can create mootness is a failure to inform the court of a settlement. See In re Cellular 101, Inc., 539 F.3d 1150, 50 Bankr. Ct. Dec. (CRR) 116, 60 Collier Bankr. Cas. 2d (MB) 134, Bankr. L. Rep. (CCH) P 81306 (9th Cir. 2008) (a party to an appeal has a duty to timely inform the court that it

had reached a settlement that it believed potentially mooted the appeal and could be sanctioned for violating that duty; by failing, in connection with prior appeal of bankruptcy court's allowance of administrative expense claim, to raise question of whether appeal had become moot as result of postjudgment settlement between parties, and by attempting to raise the mootness argument only as "fallback" position, after it failed to persuade the court of appeals that claimant did not satisfy statutory prerequisites for allowance of administrative expense, Chapter 11 debtor effectively waived or forfeited claim that settlement foreclosed administrative expense claim).

37 See, e.g., In re Sundaram, 9 F.4th 16 (1st Cir. 2021) (where Chapter 13 debtor had moved for reconsideration of bankruptcy court order granting lender's motion for payment of escrowed insurance proceeds on which lender had a lien, and, while her reconsideration motion was pending, had moved successfully to dismiss case pre-confirmation, debtor's subsequent appeal of bankruptcy court orders releasing insurance-settlement funds and denying reconsideration was moot; insurance funds had been paid over to lender as part of anticipated reorganization of debtor's estate, there was no longer any pending bankruptcy proceeding or estate to which funds could have been restored for redistribution, debtor's appeal did not involve a mere ancillary matter, and funds were no longer in trustee's possession when underlying case was dismissed, such that the Bankruptcy Code's revesting requirement was not triggered and BAP could no longer afford any meaningful relief in connection with appeal); In re Castaic Partners II, LLC, 823 F.3d 966, 62 Bankr. Ct. Dec. (CRR) 167 (9th Cir. 2016) (debtors' appeal was constitutionally moot, where bankruptcy court granted creditor's motion for stay relief so that it could proceed with foreclosure sales of debtors' real property; bankruptcy court dismissed debtors' underlying cases while the appeal was pending, debtors failed to appeal the orders of dismissal, which became final 14 days later, and, absent an appeal from the dismissal orders, circuit court had no power to restore the bankruptcy case); In re Hunt, 550 F.3d 1002 (10th Cir. 2008) (appeal which raises issues of construction of Chapter 13 statutory provisions is moot when debtor converts to Chapter 7 while the appeal is pending; court rejects argument that the exception to mootness doctrine applied); In re Cook, 730 F.2d 1324 (9th Cir. 1984) (an appeal from matters which arose in a Chapter 11 case were rendered moot by conversion of case to Chapter 7, entry of discharge, and closing of Chapter 7 case); In re Armstrong, 294 B.R. 344 (B.A.P. 10th Cir. 2003), aff'd, 97 Fed. Appx. 285 (10th Cir. 2004) (if there is no live case or controversy, as mandated by the Constitution, the appeal will be dismissed as constitutionally moot).

38 See, e.g., In re Bullock, 986 F.3d 733 (7th Cir. 2021) (Chapter 13 debtor's appeal from bankruptcy court order denying him an exemption in proceeds of workers' compensation award that he received post-confirmation, and requiring him to file a modified plan that committed a portion of these proceeds to paying his unsecured creditors in full, was rendered moot when debtor filed and obtained confirmation of such a modified plan, though debtor argued that he had no choice but to do so on the threat of otherwise having his Chapter 13 case dismissed; debtor could have posted supersedeas bond to stay the enforcement of bankruptcy court's order, could have objected to confirmation of his modified plan and appealed if his objection were overruled, or could have allowed case to be dismissed and appealed that order, but instead filed and obtained confirmation of modified plan, with no objection on his part; later dismissal of Chapter 13 case also provided independent basis for dismissal of appeal); In re Gretter Autoland, Inc., 864 F.3d 888, 64 Bankr. Ct. Dec. (CRR) 114 (8th Cir. 2017) (appeal from district court's order dismissing, as equitably moot, a creditor's appeal from bankruptcy court's denial of Chapter 11 debtors' motion to assume and assign automobile dealership agreements and denial of creditor's motion to reconsider was moot in ordinary sense, where dealership agreements had been terminated or automatically rejected under § 365 as not having been timely assumed, where would-be purchaser to which debtors had proposed to assign agreements had withdrawn its purchase offer and obtained a refund of its purchase deposit with no objection by any party in interest, and where there were no potentially surviving provisions of dealership agreements to govern parties' behavior, and any potential breach of contract claims were too speculative for Article III purposes); In re Ahn, 705 Fed. Appx. 581 (9th Cir. 2017) (appeal regarding unstayed bankruptcy court order approving settlement of avoidance claims was equitably moot, citing *Castaic* and *Thorpe*); In re Thorpe Insulation Co., 677 F.3d 869, 67 Collier Bankr. Cas. 2d (MB) 437 (9th Cir. 2012) (to determine whether to apply equitable mootness the court should determine if a stay was requested, the reorganization plan was substantially consummated, what effect the remedy will have on third parties, and whether relief can be fashioned without completely

undermining the plan); In re SemCrude L.P., 456 Fed. Appx. 167, 179 O.G.R. 426 (3d Cir. 2012) (appeal by creditor was equitably moot; the plan had been substantially consummated, creditor did not obtain a stay pending appeal, appeal would affect the rights of parties not before the court, and relief requested would affect the success of the plan); In re Smith, 209 Fed. Appx. 607 (8th Cir. 2006) (BAP properly dismissed on equitable mootness grounds debtor's attorney's appeal from bankruptcy court order regarding attorney's fees; debtor had fulfilled debtor's obligations under the plan; the trustee had, pursuant to a bankruptcy court order, discharged the debtor and there had been no request for a stay); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (failure to obtain a stay is a key factor in determining whether the appeal is equitably moot); In re Burrell, 415 F.3d 994 (9th Cir. 2005) (appeal from bankruptcy court order denying debtor's discharge on one ground is rendered moot when bankruptcy court denied discharge on another ground); In re Chateaugay Corp., 988 F.2d 322, 326, Bankr. L. Rep. (CCH) P 75161 (2d Cir. 1993) ("The party who appeals without seeking to avail himself of [a stay afforded by Bankruptcy Rule 8005] does so at his own risk."); In re Roberts Farms, Inc., 652 F.2d 793, 798, 7 Bankr. Ct. Dec. (CRR) 1248, Bankr. L. Rep. (CCH) P 68325 (9th Cir. 1981) ("Appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the Bankruptcy Court and have permitted such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal."); In re Sasso, 409 B.R. 251, 254, 62 Collier Bankr. Cas. 2d (MB) 392 (B.A.P. 1st Cir. 2009) (appeal from bankruptcy court order converting the case from Chapter 13 to Chapter 7 which was followed by many acts of administration taken by the Chapter 7 trustee mooted debtors' appeal from the concurrent order denying debtors' motion to dismiss; "The general rule is that conversion of a bankruptcy petition from one chapter to another moots any appeal taken from an order in the original chapter."); In re Sterba, 383 B.R. 47 (B.A.P. 6th Cir. 2008) (appeal was moot because parties had agreed to liability and amount in preference action and were simply seeking to have the BAP render an advisory opinion on the issue of venue under 28 U.S.C.A. § 1409(b)); Allstate Ins. Co. v. Hughes, 174 B.R. 884 (S.D. N.Y. 1994) (insurance company's appeal from order entered in ancillary proceeding rendered moot by comprehensive change of circumstances). See also In re Walker, 587 Fed. Appx. 335 (7th Cir. 2014) (dismissing direct appeal on ground of mootness).

But see In re C.W. Mining Co., 641 F.3d 1235, 54 Bankr. Ct. Dec. (CRR) 156, 65 Collier Bankr. Cas. 2d (MB) 685 (10th Cir. 2011) (appeal of order authorizing assignment of a contract was not moot where some remedy was possible); Suter v. Goedert, 504 F.3d 982, 48 Bankr. Ct. Dec. (CRR) 256 (9th Cir. 2007) (appeal by Chapter 13 debtors of bankruptcy court order approving sale of their legal malpractice suit to the defendant law firm was not moot; while there was no stay pending appeal, state law permitted parties aggrieved to petition for an extraordinary writ to obtain reversal of state court order dismissing claim on the merits and debtors had the right to exercise that right); In re Resource Technology Corp., 430 F.3d 884, 45 Bankr. Ct. Dec. (CRR) 200, 55 Collier Bankr. Cas. 2d (MB) 393, Bankr. L. Rep. (CCH) P 80417, 35 Envtl. L. Rep. 20249 (7th Cir. 2005) (a lender's appeal from a bankruptcy court order approving a consummated settlement was not moot because the appellate court could order effective relief; even though it might be complicated to unwind the settlement, it was possible to do so); In re Hamilton, 399 B.R. 717 (B.A.P. 1st Cir. 2009) (the dismissal of a bankruptcy case did not warrant the dismissal of the debtor's appeal of an advisory proceeding because the BAP could fashion meaningful relief); In re PW, LLC, 391 B.R. 25, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008) (explaining that constitutional mootness requires impossibility of relief and equitable mootness looks beyond impossibility and concentrates on the equities and whether the transaction can or should be unwound; finding that the portion of a sale order that stripped liens was neither constitutionally nor equitably (statutorily, see § 363(m)) moot); In re VOIP, Inc., 461 B.R. 899 (S.D. Fla. 2011) (appeal from bankruptcy court order approving settlement of fraudulent transfer and other related claims against transferees for an allegedly inadequate amount was not equitably moot, though statute of limitations, at least as to fraudulent transfer claims, had run, and though lender group objecting to proposed settlement and seeking leave to pursue claims on behalf of estate had not obtained a stay pending appeal); In re PC Liquidation Corp., 383 B.R. 856 (E.D. N.Y. 2008) (appeal from order affirming Chapter 11 plan was not equitably moot).

39 See, e.g., In re VeroBlue Farms USA, Inc., 6 F.4th 880, 70 Bankr. Ct. Dec. (CRR) 141 (8th Cir. 2021) (pursuant to so-called "equitable mootness" doctrine, "equitable," "prudential," or "pragmatic"

considerations may render an appeal of a bankruptcy court decision moot even when the appeal is not constitutionally moot, though district courts must apply rigorous test in determining whether to invoke doctrine); In re Bodenheimer, Jones, Szwak, & Winchell L.L.P., 592 F.3d 664, 52 Bankr. Ct. Dec. (CRR) 157, Bankr. L. Rep. (CCH) P 81655 (5th Cir. 2009) (it is unclear whether the doctrine of equitable mootness applies in a Chapter 7 case, but even if it does, the facts of this case were that the court could still fashion equitable relief; reopening a Chapter 7 case and upsetting a settlement and distribution would not require the same disruption as setting aside a confirmed plan); In re San Patricio County Community Action Agency, 575 F.3d 553, 51 Bankr. Ct. Dec. (CRR) 233, 61 Collier Bankr. Cas. 2d (MB) 1897 (5th Cir. 2009) (suggesting that doctrine of equitable mootness does not apply in Chapter 7 cases, but deciding argument on its merits); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005) (doctrine of equitable mootness applies where, even though some matters could be unwound, remanding would unsettle a settlement of third-party claims unjustly or inequitably); In re Scruggs, 392 F.3d 124 (5th Cir. 2004) (the creditor received relief from stay but the district court was subsequently reversed; yet in the meantime, the creditor proceeded in state court to final judgment; thus debtor's appeal from the relief from stay order was moot); In re U.S. Airways Group, Inc., 369 F.3d 806, 43 Bankr. Ct. Dec. (CRR) 23, 52 Collier Bankr. Cas. 2d (MB) 282, 32 Employee Benefits Cas. (BNA) 2473, Bankr. L. Rep. (CCH) P 80107 (4th Cir. 2004) (within the context of a bankruptcy proceeding a court may dismiss an appeal as equitably moot when it becomes impractical or imprudent to upset the plan of reorganization); In re S.S. Retail Stores Corp., 216 F.3d 882, 36 Bankr. Ct. Dec. (CRR) 79 (9th Cir. 2000) (appeal from bankruptcy court's order is equitably moot when, in the absence of a stay, events occur that make it impossible for the appellate court to fashion effective relief); In re Continental Airlines, 91 F.3d 553, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996) (the mootness doctrine in bankruptcy is broader than the constitutional case or controversy mootness; an appeal should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable); Matter of Manges, 29 F.3d 1034, 25 Bankr. Ct. Dec. (CRR) 1684, 31 Collier Bankr. Cas. 2d (MB) 1247, Bankr. L. Rep. (CCH) P 76072 (5th Cir. 1994) (an appeal is equitably moot when a plan of reorganization has been so substantially consummated that a court cannot order effective relief, even though a live dispute remains among some of the parties to the bankruptcy case); In re United Producers, Inc., 353 B.R. 507, 47 Bankr. Ct. Dec. (CRR) 49, 2006 FED App. 0006P (B.A.P. 6th Cir. 2006), aff'd, 526 F.3d 942, 50 Bankr. Ct. Dec. (CRR) 2 (6th Cir. 2008) (the equitable mootness doctrine is a special mootness doctrine applicable in bankruptcy appeals, one that has been articulated only in the last 20 years, and one the Sixth Circuit adopted; stating that a matter is equitably (even if not constitutionally) moot if it meets the three-part test set forth in Fifth Circuit decisions); In re Long Shot Drilling, Inc., 224 B.R. 473 (B.A.P. 10th Cir. 1998) (appeal should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable).

See also In re Meruelo Maddux Properties, Inc., 667 F.3d 1072, 55 Bankr. Ct. Dec. (CRR) 279, 67 Collier Bankr. Cas. 2d (MB) 202, Bankr. L. Rep. (CCH) P 82159 (9th Cir. 2012) (appeal of district court's determination that creditor was entitled to relief from automatic stay by application of single asset real estate provisions to debtor was not rendered moot by confirmation of plan that lifted stay after appellate briefing was completed, since case was capable of repetition yet evading review, as similar appeals would not likely be resolved before plan confirmation, and parties had continued interest in resolving single asset real estate issue due to creditor's status as debtor's secured creditor entitled to stay relief upon application of single asset real estate provisions and due to possibility that issue would be relitigated if plan were overturned on appeal or debtor filed another Chapter 11 case); In re Sterba, 383 B.R. 47 (B.A.P. 6th Cir. 2008) (discussing exception to mootness doctrine for causes that are "capable of repetition, yet evading review").

40 See, e.g., Abengoa Bioenergy Biomass of Kansas, LLC, 958 F.3d 949, 68 Bankr. Ct. Dec. (CRR) 177 (10th Cir. 2020) (doctrine of equitable mootness may apply to a Chapter 11 cash-only liquidation); U.S. v. Asset Based Resource Group, LLC, 612 F.3d 1017 (8th Cir. 2010) (because creditor failed to move for stay of order approving foreclosure agreement and terms of foreclosure agreement had been carried out, appellate court lacked authority to grant effective relief; appeal was moot); In re Parker, 499 F.3d 616, Bankr. L. Rep. (CCH) P 81003 (6th Cir. 2007) (a debtor's failure to obtain a stay pending appeal of an order of a bankruptcy court approving a sale of debtor's malpractice action to the attorney's malpractice carrier foreclosed an appeal

from a later order that enjoined debtor prosecuting the malpractice action in state court; debtor's appeal and stay pending appeal had to be obtained in the proceeding in the first order or otherwise debtor's rights and claims became moot); Hower v. Molding Systems Engineering Corp., 445 F.3d 935, 46 Bankr. Ct. Dec. (CRR) 102, Bankr. L. Rep. (CCH) P 80512 (7th Cir. 2006) (creditor's appeal of order approving sale of assets is moot where the sale was consummated and the creditor had not sought a stay); In re Rare Earth Minerals, 445 F.3d 359, 46 Bankr. Ct. Dec. (CRR) 101, Bankr. L. Rep. (CCH) P 80501 (4th Cir. 2006) (sale and lease approved; no stay obtained; transaction consummated; appeal moot); In re Ginther Trusts, 238 F.3d 686, 37 Bankr. Ct. Dec. (CRR) 94 (5th Cir. 2001) (failure to obtain a stay pending appeal is fatal to a challenge to the bankruptcy court order authorizing a sale of the debtor's property); In re National Mass Media Telecommunication Systems, Inc., 152 F.3d 1178 (9th Cir. 1998) (failure to stay a foreclosure is fatal to the grant of any relief on appeal); In re Strong, 312 B.R. 378 (B.A.P. 8th Cir. 2004), aff'd, 138 Fed. Appx. 870 (8th Cir. 2005) (debtor appealed from order dismissing Chapter 13 case after debtor failed to make plan payments, but was denied a stay; as foreclosure of home went forward, the appeal was thereby rendered moot); In re Camp Arrowhead, Ltd., 429 B.R. 546, 51 A.L.R. Fed. 2d 749 (W.D. Tex. 2010) (dismissing appeal as moot where sale of estate property to a good faith purchaser had occurred without a stay pending appeal; sale order could not be reversed or modified); In re Propex, Inc., 432 B.R. 725 (E.D. Tenn. 2010) (creditors' appeal from unstayed order directing that debtor-in-possession's loan was to be repaid from proceeds of sale to court-approved purchaser was moot); In re Motors Liquidation Co., 428 B.R. 43 (S.D. N.Y. 2010) (failure of products liability claimants to seek stay of order approving sale of General Motors' assets free and clear of existing products liability claims precluded appellate review of sale order); Squires Motel, LLC v. Gance, 426 B.R. 29 (N.D. N.Y. 2010) (appeal from unstayed order dismissing Chapter 11 case was moot where, following dismissal, debtor's sole assets were sold at foreclosure sale); In re Lucre, Inc., 471 F. Supp. 2d 845 (W.D. Mich. 2007) (appeal of agreed order of a motion for relief from stay which allowed telecommunications company to seek to terminate preliminary injunctions that had been rendered against it in state court were rendered moot when the bankruptcy court subsequently granted its own injunction precluding provider from withholding service); Aerospace Holdings, LLC v. Bankruptcy Admin., 2006 WL 2645126 (M.D. N.C. 2006) (Chapter 11 debtor's appeal challenging conversion of its case to Chapter 13 constitutionally and equitably moot because debtor's only valuable asset was sold at a foreclosure sale and returning the case to Chapter 11 would be futile).

The appeal is moot even if it is later determined that the original order appealed from was erroneous. See In re Lomagno, 429 F.3d 16, 55 Collier Bankr. Cas. 2d (MB) 208, Bankr. L. Rep. (CCH) P 80396 (1st Cir. 2005) (foreclosure sale conducted after the dismissal of a Chapter 13 case, but prior to reversal of the dismissal, was a valid foreclosure sale; absent a stay pending appeal, the automatic stay is not in effect and it would be inappropriate to retroactively reimpose the stay). But see Trinity 83 Development, LLC v. ColFin Midwest Funding, LLC, 917 F.3d 599, 66 Bankr. Ct. Dec. (CRR) 239, Bankr. L. Rep. (CCH) P 83366 (7th Cir. 2019) (§ 363(m), providing that reversal or modification on appeal of an unstayed order authorizing sale or lease of property, does not affect validity of sale or lease, as long as purchaser or lessor acts in good faith, is not concerned with mootness and does not make any dispute moot).

41 See, e.g., In re City of Stockton, California, 909 F.3d 1256, 66 Bankr. Ct. Dec. (CRR) 147 (9th Cir. 2018) (holding, on direct appeal, that the appellant's appeal from the bankruptcy court's order overruling his objection to the debtor's Chapter 9 plan was equitably moot where he did not seek a stay of confirmation at any stage; the plan had been substantially consummated; the relief of undoing plan confirmation would bear unduly on innocent third parties; and the bankruptcy court could not fashion relief without undoing the confirmed plan); In re BGI, Inc., 772 F.3d 102, 60 Bankr. Ct. Dec. (CRR) 64, Bankr. L. Rep. (CCH) P 82727 (2d Cir. 2014) (doctrine of equitable mootness equally applies to appeals from Chapter 11 liquidation proceedings and appeals from Chapter 11 reorganization proceedings); In re Idearc, Inc., 662 F.3d 315 (5th Cir. 2011) (equitable mootness justified dismissing an appeal from confirmation of a Chapter 11 plan where the appellant had not obtained a stay pending appeal and debtor's common stock, newly created by the plan, had been publicly traded for over a year; the plan had been substantially consummated and the requested relief would harm both the success of the plan and the rights of third parties not before the court); In re Genesis Health Ventures, Inc., 204 Fed. Appx. 144 (3d Cir. 2006) (substantial consummation moots appeal from order denying motion for the appointment of a postconfirmation equity committee); In re GWI PCS 1

Inc., 230 F.3d 788, 803, 36 Bankr. Ct. Dec. (CRR) 239 (5th Cir. 2000) (FCC's appeal of a judgment avoiding debtors' obligations to pay bid price for air spectrum wireless telecommunications frequency licenses, and of order confirming Chapter 11 plan based on such avoidance, must be dismissed under equitable mootness doctrine; "In sum, it appears quite unlikely that we could place the Debtors' estates or the third parties back into the status quo as it existed before the avoidance judgment if we were to unravel this important and fundamental aspect of the reorganization plan at this time."); In re U.S. Brass Corp., 169 F.3d 957, 959, 34 Bankr. Ct. Dec. (CRR) 28, Bankr. L. Rep. (CCH) P 77921 (5th Cir. 1999) ("When evaluating whether an appeal of a reorganization plan in a bankruptcy case is moot, this court examines whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of the parties not before the court or the success of the plan."); Matter of Berryman Products, Inc., 159 F.3d 941, 944, Bankr. L. Rep. (CCH) P 77898 (5th Cir. 1998) ("The standard for mootness in the bankruptcy context differs from a constitutional mootness analysis. Article III of the United States Constitution requires an inquiry into whether a case or controversy exists; in contrast, reviewing courts considering bankruptcy appeals such as the one before us seek to determine whether implementation of the reorganization plan has progressed to a point at which fundamental changes in the plan would jeopardize its success."); In re Continental Airlines, 91 F.3d 553, 560, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996) (five-part test; factors include whether the reorganization plan has been substantially consummated); In re United Producers, Inc., 353 B.R. 507, 47 Bankr. Ct. Dec. (CRR) 49, 2006 FED App. 0006P (B.A.P. 6th Cir. 2006), aff'd, 526 F.3d 942, 50 Bankr. Ct. Dec. (CRR) 2 (6th Cir. 2008) (substantial consummation of the plan moots appeal from confirmation order); In re Winn-Dixie Stores, Inc., 377 B.R. 322 (M.D. Fla. 2007), decision aff'd, 286 Fed. Appx. 619 (11th Cir. 2008) (landlord's appeal from order confirming plan was equitably moot; many steps had been taken to implement the plan); In re Citation Corp., 371 B.R. 518 (N.D. Ala. 2007) (shareholder's appeal from order confirming prepackaged plan was equitably moot; no stay had been obtained and plan was substantially consummated); In re Grand Union Co., 200 B.R. 101 (D. Del. 1996) (debtor's appeal dismissed under doctrine of equitable mootness).

But see In re Semcrude, L.P., 728 F.3d 314, 58 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 82538, 179 O.G.R. 413 (3d Cir. 2013) (Chapter 11 debtors failed to show that allowing oil and natural gas suppliers to establish their rights and relative priority of their interests in crude oil and natural gas sold to debtors would undermine debtors' confirmed plan of reorganization; "Dismissing an appeal as equitably moot should be rare, occurring only where there is sufficient justification to override the statutory appellate rights of the party seeking review. Here, the evidentiary record does not support Debtors' contentions that a successful appeal would collapse their plan of reorganization or undermine the justifiable reliance of third parties to their significant harm."); In re Lett, 632 F.3d 1216, 1225-26, 54 Bankr. Ct. Dec. (CRR) 81, Bankr. L. Rep. (CCH) P 81934 (11th Cir. 2011) (citations omitted) (when considering circumstances as to whether appeal has been rendered equitably moot, appellate court "must 'strik[e] the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting'" that party; permitting a creditor to appeal confirmation of a plan based on noncompliance with the absolute priority rule even though the creditor made no such objection at the bankruptcy court level; despite the judgment creditor's failure to obtain a stay pending appeal and despite the fact that payments had been made under the plan, debtor had not substantially consummated the plan to the extent that it had become legally and practically impossible to unwind that which had already been done, and thus the appeal was not equitably moot); In re Blast Energy Services, Inc., 593 F.3d 418, 52 Bankr. Ct. Dec. (CRR) 156, Bankr. L. Rep. (CCH) P 81672 (5th Cir. 2010) (appeal from order confirming a plan was not equitably moot; the segregable issue of assumption or rejection of a contract would have little adverse effect on the reorganization or on any third party); In re Superior Offshore Intern., Inc., 591 F.3d 350, 52 Bankr. Ct. Dec. (CRR) 134, Bankr. L. Rep. (CCH) P 81651 (5th Cir. 2009) (appeal from confirmation of a Chapter 11 plan was not equitably moot; the relief sought was an appropriate determination of the relative rights of two equity security-related classes; the court can fashion effective relief without upsetting the rights of parties not before the court or the success of the plan); In re Paige, 584 F.3d 1327, 52 Bankr. Ct. Dec. (CRR) 91 (10th Cir. 2009) (Tenth Circuit formally adopts doctrine of equitable mootness but reads it narrowly; court permits an appeal from a Chapter 11 confirmation order in spite of the fact that the trustee had made all payments under the plan and the plan was substantially

consummated); In re Pacific Lumber Co., 584 F.3d 229, 52 Bankr. Ct. Dec. (CRR) 46, Bankr. L. Rep. (CCH) P 81642 (5th Cir. 2009) (doctrine of equitable mootness does not bar re-evaluation of whether administrative priority claims were correctly calculated or review of plan's release provisions, but equitable mootness does bar impairment, classification, and unfair discrimination contentions); In re Chateaugay Corp., 10 F.3d 944, 24 Bankr. Ct. Dec. (CRR) 1625, Bankr. L. Rep. (CCH) P 75617 (2d Cir. 1993) (substantial consummation of plan did not moot creditor's appeal from bankruptcy court order denying its priority expense claim); Matter of Specialty Equipment Companies, Inc., 3 F.3d 1043, 29 Collier Bankr. Cas. 2d (MB) 1215, Bankr. L. Rep. (CCH) P 75398 (7th Cir. 1993) (failure to obtain a stay from a confirmation order does not per se moot the appeal; here the facts showed, however, that appeal was moot); In re Investment Company of The Southwest, Inc., 341 B.R. 298, 46 Bankr. Ct. Dec. (CRR) 127 (B.A.P. 10th Cir. 2006) (no assets were sold, no stock was issued, and no capital was invested; the plan adjusted claims by issuance of new stock; court could grant effective relief to secured creditor on appeal); In re Anderson, 349 B.R. 448 (E.D. Va. 2006) (debtor's appeal from an order allowing claims was not moot even though the plan had been substantially consummated; plan contained provisions permitting review of allowed claims and review would not unravel the plan); In re Appletree Markets, Inc., 155 B.R. 431, 144 L.R.R.M. (BNA) 2203 (S.D. Tex. 1993) (union's appeal relating to rejection of union contract was not moot despite substantial confirmation of plan).

42 See In re Semcrude, L.P., 728 F.3d 314, 58 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 82538, 179 O.G.R. 413 (3d Cir. 2013) ("assess[ing] five prudential factors: '(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'" (quoting In re Continental Airlines, 91 F.3d 553, 560, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996); noting that the factors are "interconnected and overlapping"); In re Philadelphia Newspapers, LLC, 690 F.3d 161, 56 Bankr. Ct. Dec. (CRR) 222, 67 Collier Bankr. Cas. 2d (MB) 1770, Bankr. L. Rep. (CCH) P 82311 (3d Cir. 2012), as corrected, (Oct. 25, 2012) (applying the five factors identified in *Continental Airlines*); In re American HomePatient, Inc., 420 F.3d 559, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005) (adopting the three-part test for determining equitable mootness used in the Fifth Circuit); Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d 180, 38 Bankr. Ct. Dec. (CRR) 3, 46 Collier Bankr. Cas. 2d (MB) 802 (3d Cir. 2001) (referencing the five-factor test developed in In re Continental Airlines, 91 F.3d 553, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996), and holding that the district court did not err in dismissing an appeal from a confirmation order on equitable mootness grounds); In re Grimland, Inc., 243 F.3d 228, 37 Bankr. Ct. Dec. (CRR) 152, 49 Fed. R. Serv. 3d 214 (5th Cir. 2001) (using a three-part test that asks whether complaining party has failed to obtain stay, whether the plan has been substantially consummated, and whether relief requested would affect rights of parties not before the court or success of the plan); In re Healthco Intern., Inc., 136 F.3d 45, 32 Bankr. Ct. Dec. (CRR) 133, 39 Collier Bankr. Cas. 2d (MB) 939, Bankr. L. Rep. (CCH) P 77620 (1st Cir. 1998) (equitable mootness doctrine requires a two-part analysis: an equitable prong which looks at whether the appellant has repeatedly failed to request a stay and remediation has become impossible, and a second pragmatic prong that requires a showing that the order at issue has been implemented to such a degree that appellate review is no longer practical); In re Chateaugay Corp., 10 F.3d 944, 24 Bankr. Ct. Dec. (CRR) 1625, Bankr. L. Rep. (CCH) P 75617 (2d Cir. 1993) (adopting a five-part test that looks to whether it is possible for the court to order some effective relief; the relief will not affect the debtor's re-emergence as a revitalized corporate entity; the relief will not unravel intricate transactions creating an impossible situation for the bankruptcy court; the parties affected by the appeal have had an opportunity to participate in the proceeding; and the appellant diligently pursued obtaining a stay of the objectionable order); In re Williams, 256 B.R. 885, 37 Bankr. Ct. Dec. (CRR) 46 (B.A.P. 8th Cir. 2001) (adopting a five-part test which looks at whether the reorganization plan has been substantially consummated, a stay has been obtained, the relief requested would affect the rights of parties not before the court, the relief requested would affect the success of the plan and the public policy of affording finality to bankruptcy judgments); Freeman v. Journal Register Co., 452 B.R. 367 (S.D. N.Y. 2010) (stockholder's appeal of unstayed order confirming debtor's Chapter 11 plan was equitably moot where plan had been substantially consummated). But see In re One2One Communications, LLC, 805 F.3d 428, 61 Bankr. Ct. Dec. (CRR) 94 (3d Cir. 2015) (collecting cases; proper application of the

prudential factors did not permit dismissal of an appeal on equitable mootness grounds, even though the debtor's Chapter 11 plan had been substantially consummated).

43 See, e.g., Suter v. Goedert, 504 F.3d 982, 48 Bankr. Ct. Dec. (CRR) 256 (9th Cir. 2007) (lower courts erred in shifting burden of proof to the debtors-appellants to demonstrate nonmootness; the moving party should have been required to show that there was no effective remaining relief a court could provide).

44 See Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29, 25 Ed. Law Rep. 39 (1985) (only the Supreme Court can overrule one of its own precedents).

45 See Insurance Group Committee v. Denver & R. G. W. R. Co., 329 U.S. 607, 67 S. Ct. 583, 91 L. Ed. 547 (1947) (when an appellate court makes a ruling, lower courts are bound by such ruling unless the ruling is reversed by the appellate court or a superior court).

46 Many bankruptcy courts do not feel bound by a decision of the district court in a multi-judge district reasoning that, since the district court judges are not bound by a decision of another district court judge, then neither are the bankruptcy courts. For a general discussion of the issue, see In re Romano, 350 B.R. 276, 281 (Bankr. E.D. La. 2005) (discussing the two different views on the issue and deciding it was not bound by district court decision); In re NHB, LLC, 287 B.R. 475, 480, 8 A.L.R. Fed. 2d 785 (Bankr. E.D. Mo. 2002) (unless district court makes decision en banc, bankruptcy court not bound by single judge opinion in multi-judge district); In re Carrozzella & Richardson, 255 B.R. 267, 271–73, 45 Collier Bankr. Cas. 2d (MB) 12 (Bankr. D. Conn. 2000) (holding that bankruptcy courts are not bound by decisions of the district court or the BAP). Lacking an en banc decision, a circuit court decision is frequently considered the only binding precedent in multi-judge district courts.

For additional problems in this area with respect to BAP opinions, see Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472, 20 Bankr. Ct. Dec. (CRR) 919, 23 Collier Bankr. Cas. 2d (MB) 848, Bankr. L. Rep. (CCH) P 73411 (9th Cir. 1990) ("[A]s Article III courts, district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction."); In re Brooks-Hamilton, 400 B.R. 238, 51 Bankr. Ct. Dec. (CRR) 69 (B.A.P. 9th Cir. 2009) (acknowledging that the BAP is bound by its prior decisions; concurring opinion suggests that a later BAP should be permitted to depart from BAP precedent that is dead wrong); In re Proudfoot, 144 B.R. 876, 879, Bankr. L. Rep. (CCH) P 74962 (B.A.P. 9th Cir. 1992) ("It is the position of this panel that BAP decisions originating in any district in the Ninth Circuit are binding precedent on all bankruptcy courts within the Ninth Circuit in absence of contrary authority from the district court in which the bankruptcy court sits."); In re Tong Seng Vue, 364 B.R. 767 (Bankr. D. Or. 2007) (in light of Ninth Circuit BAP decision in *Proudfoot*, even though a district judge is not bound by the decisions of another district judge even in the same district, and in light of the fact that the applicable district court had not issued an opinion on the issue, Ninth Circuit BAP decisions were binding on all bankruptcy courts in the Ninth Circuit); In re Virden, 279 B.R. 401, 409 n.12 (Bankr. D. Mass. 2002) (BAP opinion may be persuasive authority, but it is not binding precedent); In re Williams, 257 B.R. 297, 301 n.5, 37 Bankr. Ct. Dec. (CRR) 64, 45 Collier Bankr. Cas. 2d (MB) 865 (Bankr. W.D. Mo. 2001) (the decisions of the BAP are not binding on the bankruptcy courts in the same circuit); In re Muskin, Inc., 151 B.R. 252, 254 (Bankr. N.D. Cal. 1993) (noting that caselaw as to the binding nature of appellate panel decisions is "wildly inconsistent," and holding that BAP decisions are binding on bankruptcy courts in the absence of conflicting district court authority in that district; however, "[i]t is entirely legitimate for a bankruptcy court to feel unbound by both a published district court opinion from the same district and an Appellate Panel decision where the two conflict. In such cases, the bankruptcy court has no way of knowing which court will hear the appeal and must therefore decide the issue on the merits rather than stare decisis."); In re Globe Illumination Co., 149 B.R. 614, 23 Bankr. Ct. Dec. (CRR) 1474, Bankr. L. Rep. (CCH) P 75118 (Bankr. C.D. Cal. 1993) (citing the spate of authority on the binding effect of BAP decisions and holding that bankruptcy courts throughout the Ninth Circuit must be bound by the decisions of the BAP, which is a unit of the circuit court).

47 See, e.g., In re Silverman, 616 F.3d 1001, 75 Cal. Comp. Cas. (MB) 880, 53 Bankr. Ct. Dec. (CRR) 146, Bankr. L. Rep. (CCH) P 81833 (9th Cir. 2010) (a bankruptcy court is not bound by a district court's decision from another district, although such decisions may still be persuasive).

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