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Various Paths to Redress in Bankruptcy

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Reconsidering Reconsideration

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Reconsidering Reconsideration

In federal courts across the country "motions for reconsideration" are filed as challenges to all varieties of judgments and orders. Despite the frequency with which motions seeking this type of relief are filed, the procedural and substantive treatment of motions seeking "reconsideration" is consistently inconsistent. This article provides a brief discussion as to why confusion surrounds these types of motions, attempts to clarify how a reconsideration motion filed in a bankruptcy court is distinguishable from the same motion filed in a district court, and posits that the term "reconsideration" is often misused.

Why the Confusion?

First, let's blame attorneys. It has become common practice for attorneys dissatisfied with a particular ruling to challenge that ruling by way of a motion bearing the label "reconsideration." Unfortunately, the term "reconsideration" is used liberally and often without citation to an actual rule or authority—leaving courts with the onerous task of determining on what legal basis the reconsideration is sought. Moreover, the lack of understanding surrounding this type of motion and the authority under which it can be filed frequently causes attorneys to cite inapplicable rules and statutes in support of their request. But attorneys are not entirely to blame—courts are equally (if not more) responsible for the misunderstanding and mystery surrounding reconsideration motions. When a motion seeking "reconsideration" is filed, courts are presented with a golden opportunity to identify the proper basis for the motion, discuss its procedural appropriateness, and apply the relevant standard of review. Regrettably, courts often miss the mark, which compounds the confusion.

The Proper Authority for a "Motion for Reconsideration"

When filing a motion branded as a request for "reconsideration," litigants invoke local rules, inherent powers, and federal procedural rules.[1] Likewise, when the legal basis for a "motion for reconsideration" is unclear, courts occasionally resort to a time-consuming and inefficient method of addressing the motion in which they analyze the request under each potential basis. These practices lack thoughtful evaluation and amount to a trial and error test of the possible grounds for relief. As a result, the proper authority for "reconsideration" often remains uncertain. However, a closer look at local rules, a court's inherent powers, and federal procedural rules provides clarity.

Indeed, if a court's local rules explicitly provide for "reconsideration," then the authority under which such a motion may be filed is simple and straight forward. Alternatively, all courts possess an inherent

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[1] *See, e.g.,*Garza v. Citigroup Inc., 724 F. App'x 95, 101 (3d Cir.), *cert. denied sub nom.* Lopez Garza v. Citigroup Inc., 138 S. Ct. 2625, 201 L. Ed. 2d 1028 (2018) (Rule 59(e)); Green v. Schmelzle, 309 F. Supp. 3d 18, 20 (W.D.N.Y. 2018) (inherent power); Elias v. Boswell, No. 3:13-CV-22, 2014 WL 5590830, at *1 (M.D. Ala. Nov. 3, 2014) (Rule 60(b)); Putz v. Golden, No. C10-0741, 2012 WL 13019225 (W.D. Wash. July 30, 2012) (local rule).

power to alter an order at any time before final disposition of the case.[2] Thus, even absent a codified authority, litigants may appeal to a court's inherent powers as a basis for reconsideration of an order.

As for the Federal Rules of Civil Procedure, it is well established that they contain no express authority for a "motion for reconsideration."[3] Nevertheless, courts and attorneys frequently cite to Rule 59(e) or Rule 60(b) as a basis for "reconsideration"—even though neither of these Rules employs that specific term. It may be argued that "motion for reconsideration" is merely a term of art, and that the relief requested is properly rooted in the Federal Rules of Civil Procedure under Rule 59(e) as a "motion to alter or amend a judgment," or under Rule 60(b) as a motion for "relief from a judgment or order." In the district court, this can only be so if the ruling to be "reconsidered" is a *final* judgment or order because Rules 59(e) and 60(b) are applicable only to *final* judgments or orders—not to interlocutory orders.[4] As a result, when a district court is asked to revisit a non-final or interlocutory order, the authority for "reconsideration" cannot be found in Federal Rules of Civil Procedure 59 or 60, and instead must stem from a local rule or a court's inherent powers. However, the bankruptcy counterparts to Rules 59 and 60 (Federal Rules of Bankruptcy 9023 and 9024) change the game for motions filed in bankruptcy court.

Saved by the Bankruptcy Rules

Federal Rules of Bankruptcy Procedure 9023 and 9024 incorporate Federal Rules of Civil Procedure 59 and 60, respectively, to bankruptcy cases. As discussed, Rule 59 and 60 do not apply to interlocutory orders and, as a corollary, one would think that Bankruptcy Rules 9023 and 9024 similarly do not apply

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[2] *See* FED. R. CIV. P. 54(b) adv. Committee notes (stating that a court may revise its own interlocutory decisions "at any time before the entry of judgment adjudicating all the claims and the parties' rights and liabilities"); FED. R. CIV. P. 60(b) adv. Committee notes (stating that "interlocutory judgments . . . are left subject to the complete power of the court rendering them to afford such relief from them as justice requires"); *see also, e.g.*, Pepper v. United States, 562 U.S. 476, 506, 131 S. Ct. 1229, 1250, 179 L. Ed. 2d 196 (2011) (noting that the "law of the case" doctrine—which disfavors revisiting issues already decided—does not limit a court's power to reconsider a prior decision); State Nat'l Ins. Co. v. Cty. of Camden, 824 F.3d 399, 417 (3d Cir. 2016); Potts v. Howard Univ. Hosp., 623 F. Supp. 2d 68, 71 (D.D.C. 2009).

[3] *See, e.g.*, Wiest v. Lynch, 710 F.3d 121, 127 (3d Cir. 2013) (citing Auto Servs. Co. v. KPMG, LLP, 537 F.3d 853, 856 (8th Cir. 2008)) (noting that "[a] 'motion for reconsideration' is not described in the Federal Rules of Civil Procedure").

[4] *See* FED. R. CIV. P. 60(b) advisory committee notes ("The addition of the qualifying word 'final' emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence *interlocutory judgments are not brought within the restrictions of the rule*[.]") (emphasis added). With respect to Rule 59(e), an examination of the purpose of Rule 59 and the context of the word "judgment" as it is used elsewhere in the Federal Rules inevitably leads to the conclusion that finality is required for Rule 59(e) to apply. *See* FED. R. CIV. P. 59(e) advisory committee notes (explaining that subdivision (e) was added to affirm a court's inherent power to alter a final judgment); *see also* FED. R. CIV. P. 54(b) (defining "judgment" as "a decree and any order from which an appeal lies" and, in doing so, implicitly excluding interlocutory orders—orders or other rulings which do not end the action—from the definition of "judgment").

to non-final orders. While this assumption holds true for Bankruptcy Rule 9023[5], Congress distinguished Bankruptcy Rule 9024 from its federal counterpart and made it applicable to *all* orders of the bankruptcy court.[6] Therefore, litigants may seek relief from *any* order in bankruptcy court on the grounds enumerated in Federal Rule of Civil Procedure 60(b). As a result, when a "motion for reconsideration" is filed in a bankruptcy court, the predicate for the relief sought can be rooted in local rules, inherent powers, or Bankruptcy Rule 9024.

Reconsideration by any other name

The term "reconsideration" is ubiquitously used to describe any type of motion which asks a court to alter its prior ruling. What proves problematic, however, is that this usage can lead to defects in the construction and treatment of the motion—and can be a misnomer altogether.

As an initial matter, if a "motion for reconsideration" is filed in a district which has a local rule that expressly provides for "reconsideration," then the motion should adhere to the procedural and substantive requirements delineated in that local rule. For example, the Local Rules for the United States District Court for the District of New Jersey dictate specific page limits for a brief submitted in connection with a "motion for reconsideration" which differ from the page limits for an ordinary motion.[7] Additionally, the standard of review for a "motion for reconsideration" in the District of New Jersey is decidedly different from the standard of review for a motion filed pursuant to Rule 59(e) or Rule 60(b).[8] As this example shows, the procedural and substantive treatment of a "motion for reconsideration" filed under a local rule can be significantly different from a motion "to alter or amend a judgment" or a motion for "relief from a judgment or order" filed pursuant to the Federal Rules of Civil Procedure.[9] Thus, a movant who files a motion labeled "reconsideration" in a court that has local rules which provide for "reconsideration" may unintentionally subject the motion to procedural and substantive requirements which render the motion defective or unpersuasive.

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[5] Bankruptcy Rule 9023 merely incorporates Federal Rule 59 and, thus, serves only as a mechanism to seek a new trial or amendment of a *final* judgment in bankruptcy cases.

[6] *See* FED. R. BANKR. P. 9024 advisory committee notes ("For the purpose of this rule all orders of the bankruptcy court are subject to Rule 60.").

[7] *See* D.N.J. L.CIV.R. 7.2(b) (allowing 40-pages for a brief submitted in support of, or in opposition to, an ordinary motion versus a 15-page limit for a brief submitted in conjunction with a "motion for reconsideration").

[8] *Compare* D.N.J. L.CIV.R. 7.1(i) (directing that relief sought in a "motion for reconsideration" is warranted only if a movant can show that there were controlling decisions which the court "overlooked") *with* FED. R. CIV. P. 59(e) and 60(b).

[9] *See, e.g.*, Local Rule 9013-8 for the United States Bankruptcy Court for the Southern District of California (including a requirement for a "motion for reconsideration" that "[s]ubstantiation of the relevant ground for relief must be by admissible evidence and, if applicable, citation to the newly adopted statutory or case authority"); Local Rule 9023-1 for the United States Bankruptcy Court for the Northern District of Georgia (requiring that a motion for reconsideration must be filed within 14 days after entry of the underlying judgment or order); Local Bankruptcy Rule 9024-1 of the Bankruptcy Court for the District of Hawaii (requiring service of a motion for reconsideration "on all parties who filed a pleading in the underlying matter"); Local Rule 60.1 of the District Court for the District of Hawaii (outlining only three possible grounds for a motion for reconsideration).

Reconsideration motions may also have unintended consequences on the ability to file an appeal. Pursuant to Bankruptcy Rule 8002, an appeal must be filed within 14 days after entry of the ruling being appealed. While a motion filed under Rule 9023 or 9024 will toll the 14-day period in which to appeal, a "motion for reconsideration" which relies on a court's inherent powers or a local rule may not have this tolling effect. Thus, by the time these "motions for reconsideration" are heard, the time limit under Rule 8002 has expired and the litigants will have lost the ability to appeal.

Further, a motion filed pursuant to Bankruptcy Rule 9024—even if labeled "motion for reconsideration" as a term of art—must acknowledge that it is actually seeking "relief from a judgment or order" to be successful. A movant cannot merely present the same arguments and factual circumstances and expect a different result. Rather, the movant must argue that relief from a prior ruling is warranted based on one of the specific grounds enumerated in Rule 60(b) such as mistake, newly discovered evidence, or fraud.

In light of these procedural and substantive distinctions, pervasive use of the term "reconsideration" suggests that it is often improperly used. Many motions bearing the label "reconsideration" are not intended to invoke a local rule, and/or are more appropriately a motion for relief under the Federal Rules as opposed to a request for true "reconsideration." Certainly, litigants may rely on a court's inherent power to reconsider its orders at any time and, in this sense, a motion labeled as one for "reconsideration" is aptly named. However, convincing a court to revisit and change a prior decision is a difficult hurdle to overcome and is appropriate only in unique situations.[10]

Reconsider filing for "Reconsideration"

Motions for "reconsideration" filed under any of the authorities discussed are not a means to ask a court to "take another look" when a litigant is displeased with the court's ruling. Instead, these motions are intended for use in limited, defined circumstances and must present a compelling reason to reconsider or a proper basis for relief from the prior ruling. While there is certainly a time, place, and purpose for such a request, an amorphous motion seeking general "reconsideration" will not be successful and can be a waste of court resources, attorneys' time, and clients' money.

In short, it is not "reconsideration" to present the same arguments to the same court and expect a different outcome—it is the definition of "insanity."[11] Likewise, it is not "reconsideration" when a litigant thinks a court reached the wrong conclusion and would like a second opinion—there's another word for that and it's called an "appeal." [12] Perhaps litigants themselves should first reconsider the relief they seek and the legal basis on which they rely before asking a court for "reconsideration."

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[10] *See, e.g.*, Pepper v. United States, 562 U.S. 476 (holding that a court may reconsider a prior decision if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice).

[11] Albert Einstein is widely credited as having said, "Insanity is doing the same thing over and over again and expecting different results."

[12] *See, e.g.*, In re Vehicle Carrier Servs. Antitrust Litig., No. CV133306, 2016 WL 1628879, at *2 (D.N.J. Apr. 25, 2016), *aff'd*, 846 F.3d 71 (3d Cir. 2017), as amended (Jan. 25, 2017), *cert. denied sub nom.* Alban v. Nippon Yusen Kabushiki Kaisha, 138 S. Ct. 114, 199 L. Ed. 2d 31 (2017) ("Mere disagreement with a decision of the district court

should normally be raised through the appellate process and is inappropriate on a motion for reconsideration.”) (internal citations and quotations omitted).

THE ART OF LITIGATING BANKRUPTCY APPEALS:
OUTLINE OF PRACTICE POINTS

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This outline consists of three parts. The first contrasts some of the major differences between litigating cases in the bankruptcy courts and prosecuting bankruptcy appeals. The second part offers some commentary on how to structure an effective appellate argument and draft an effective appellate brief. The third part outlines the functions, challenges, and pitfalls of appellate oral advocacy.

I. Context is King: Understanding the Roles and Functions of the Appellate Courts

A. Understand your audience. The bankruptcy courts are specialized courts. In contrast, the district and circuit courts, as well as the U.S. Supreme Court, are all courts of general jurisdiction, and this difference has significant ramifications for the prosecution of bankruptcy appeals.

First, appellate judges are not often immersed in the substance and practice of bankruptcy law, and often express frustration in resolving bankruptcy issues. As one circuit judge has remarked: "These bankruptcy cases give us a great deal of difficulty. They are prosecuted by expert lawyers before expert judges, and then appealed to us novices." Appellate judges often perceive bankruptcy issues as fundamentally arcane. In preparing for any bankruptcy appeal, counsel should bear this in mind, and think carefully about how best to present and explain the relevant issues so as not to add to the frustration.

Of particular importance is the need to pay careful attention to the idiom of bankruptcy law and its relative inaccessibility to most appellate judges and their law clerks. Before writing the briefs and preparing for argument, it is critical to spend some time thinking about how best to explain concepts like "adequate protection" and "indubitable equivalent" if these are relevant to the appeal. It is also helpful to think about how much of the bankruptcy process should be explained by way of background. It is easy for bankruptcy lawyers to take for granted that the audience understands what "property of the estate" is, or how the "automatic stay" functions. This can be a mistake. Try the following approach:

> Werner Heisenberg was comfortable explaining complex principles of theoretical physics, like his uncertainty principle, using short-hand mathematical and scientific concepts. His mentor, Niels Bohr, however, insisted that he be able to explain things in terms that a non physicist could understand. The same concept applies in preparing a bankruptcy appeal.

Second, the appellate courts have "daily diets" that are quite different from those of the bankruptcy courts. A bankruptcy judge's typical "diet" consists of a steady stream of financial woe in which success is often measured in terms of jobs saved, debtors reorganized, discharges

granted, and value preserved. On the other hand, the "daily diet" of the average appellate judge (which may include a heavy docket of criminal matters) is quite different, and the judge's general perspective on how to address cases and controversies is shaped accordingly.

For example, bankruptcy judges are often concerned with advancing the policies of the Bankruptcy Code as they perceive them. In contrast, many appellate judges never acquire much of a sense of comfort that they actually understand the policies of the Bankruptcy Code, let alone how they relate to the particular case before them.

Similarly, bankruptcy judges often perceive their role as essentially equitable in nature. In contrast, equity is not particularly in vogue in the federal courts generally, and most appellate judges are far more cautious about invoking equity as an overt basis of decision-making—at least the kind of equity that typically animates proceedings in the bankruptcy courts.

Not surprisingly, appellate judges are more likely to emphasize different doctrinal tools in interpreting the Bankruptcy Code. This helps explain an increase in "plain meaning" interpretations as cases move up the appellate ladder. The upshot is that the particular equitable, policy, or practice-based argument that may find such currency in the bankruptcy court may be a much harder sell on appeal.

Third, the institutional focus of the appellate courts, particularly the courts of appeals, is quite different from that of the bankruptcy courts. The bankruptcy judge has to decide cases, and often must do so quickly—on occasion more quickly then he or she would like. In addition, the bankruptcy judge also understands that if he or she makes a mistake, there is a higher court that can fix things. The judges of the courts of appeals, on the other hand, are often the end of the line. Not only do few cases go any farther, but the decisions of the circuit courts have precedential effect over all the lower courts within their respective jurisdictions. Accordingly, the circuit judges often place a greater emphasis on understanding how a particular result will add or detract from the larger jurisprudence, and appellate presentations should be tailored accordingly.

B. Understand the relevant standards of appellate review. In general, appellate courts review factual determinations under the clearly erroneous standard. In contrast, questions of law are subject to de novo review. In addition, decisions to grant discretionary relief based on the particular facts is subject to review for abuse of discretion. With regard to issues of law, the question becomes: did the court below apply the correct legal standard, which is freely reviewable. With regard to factual findings, the question often becomes: are they supported in the record. If so, they are not likely to be disturbed on appeal unless the bankruptcy judge clearly missed the boat. Assuming that the bankruptcy court applied the correct legal standard to the relevant facts, and the relevant legal standard permits some leeway in applying the law to those facts (e.g., in considering whether to grant a request to extend plan exclusivity), the question becomes: did the court abuse its discretion in making its decision. This standard is highly deferential, and is not likely to be overturned on appeal unless the appellate court is convinced that the bankruptcy court made an obviously incorrect choice.

A common pitfall for trial lawyers who both prosecute a matter in the bankruptcy court and then prosecute the same matter on appeal is the tendency to focus on the details of the lower court proceedings at the expense of the legal issues that are more likely to attract the attention of the appellate judges. In most instances, the bankruptcy court's factual findings are a non-issue, and the real focus should be on analysis of the legal principles at stake in the case.

II. Structuring the Arguments and Writing the Briefs

A. Pay attention to the story. In writing the briefs and preparing for argument, remember that the task is essentially that of crafting a story that is being told at two critical levels. First, there is the story of the particular case before the court—the human drama that is the foundation of the controversy. Second, there is the story of the law—the story behind the legal principle that the court is being asked to resolve. To be effective, both must be presented in an interesting and compelling way.

B. Think Hemingway, not Faulkner. Simply your points, and strip down your prose. Distill the most important facets of the story, and avoid layering the presentation with too many issues, too many arguments, and too many adjectives. Every practitioner has seen briefs that take the "kitchen sink" approach by presenting every argument that the lawyer could think of. This approach only demonstrates a lack of focus and direction, and inevitably undermines the lawyer's credibility.

C. Organize the materials from the court's perspective. A good organization anticipates the questions that the reader will have, and anticipates what the reader really wants to know. It has a good logical and narrative flow.

D. Structure the decision-making process. Judges like to pull away the different strands of the argument to see what your position is really based upon. Make it easy and logical for the judge to do this in a way that allows your main points to shine through.

E. Define the issues narrowly. Avoid asking the court to overturn an entire area of law. Judges have a natural reluctance to take large leaps. Identify issues that the court need not, decide if the court rules in your favor on preliminary matters.

F. Prioritize. Focus on the three or four most critical points and build your main arguments around them.

G. Pay careful attention to analogies. Lawyers tend to argue by analogy. Pure logic and statistics tend to leave a colder impression than a powerful analogy or anecdote. Certainly logical reasoning is a critical part of sound lawyering, but it is the story and the analogy that really make the point. Good analogies can be enormously powerful. Bad ones, however, leave the argument open to attack.

H. Explain why the court should rule in favor of your client. Do not simply recite what the cases or statutes say, and leave it to the court to "do justice" in a vacuum. Many briefs lack analysis, and this can be fatal.

I. Test your arguments from different perspectives. Have others review your arguments for weaknesses and potential improvements. Consider running things by a nonlawyer, which can help sharpen the "justice" aspect of your presentation.

> Harold Koh: "The case, in the end, must have a common-sense point, a justice-based appeal. My mother, who is a sociologist, once said to me: 'These judges have never met you. Why don't you tell me what you're going to argue, because if I'm not persuaded, then why should they be?' (Unfortunately, after I laid out my position, she still wasn't persuaded!)."

J. Avoid excessive citations and quotations. Some briefs contain "wall-to-wall" quotations, followed by long string cites. This style is not very effective. Be judicious in selecting quotes and citing authority.

K. Avoid vicious hyperbole. Just because one side says the other side's argument is "outrageous" does not make it so. More important, by saying so, the lawyer insults the reader's intelligence. If the other side's argument is really outrageous, the reader will be able to figure that out.

L. Avoid sarcasm and ad hominem remarks. Attack the issues, not the other lawyers, or the judge below.

M. Avoid pandering. Phrases such as "learned counsel" or "the esteemed, honorable court below" sound phony and detract from the presentation.

N. Avoid legalese. Phrases such as "beyond peradventure" and "sine qua non" are tiring and obscure. Similarly, terms such as "obligor" and "obligee" detract from the story by depersonalizing the parties. Refer instead to the actual people or institutions involved. In addition, avoid phrases like "clearly wrong" or "clearly right." A lawyer once remarked at argument in the Supreme Court that the resolution of the case was perfectly clear, prompting the Chief Justice to interrupt with the comment that, if the resolution were so obvious, then why were they all there.

O. Front-load the argument. The judges should be able to understand what the issues are from the outset of the presentation. It is important to get to the point early, preferably within the first few pages. This is the best opportunity to hook the court on your position. Burying the essential points somewhere in the brief is far less effective.

P. Do not misquote authority, or miscite the record. This only damages your credibility.

Q. Take care in assembling the appendix of the record. Include in the appendix critical excerpts from the record that the court should have handy in resolving your case. If possible, avoid the multiple “phone book” approach, which insists on including every document from the record.

III. Oral Argument.

A. Oral argument is important. Indeed, it can be a critical part of the process. In general, it is a chance to answer questions and either cement the court’s views, or cast doubt on any tentative conclusions.

> Justice O’Connor: “The lawyer can strengthen a point beyond that which was evident from the brief and give us a lot more confidence in our tentative opinion . . . [or] a lawyer can shake [the justice’s] confidence. It doesn’t happen in a majority of cases, but often enough that it would encourage a lawyer to think, ‘Yes, oral argument is important.’”

> Justice Scalia: “I use [oral argument] to give counsel his or her best shot at meeting my major difficulty with that side of the case. ‘Here’s what’s preventing me from going along with you. If you can show why that’s wrong, you have me.’”

B. Preparation is critical to a successful argument. Know the case thoroughly: the facts, the record, the parties, the proceedings, the briefs, the important cases, the statutes, and the arguments on all sides. If a judge asks a question about the record, be prepared to answer and avoid responding: “I was not the lawyer who tried this case.”

C. Make wise use of your time. Avoid attempting to uncover and memorize every detail about even the most trivial precedent cited in your brief. Target the most important cases arid principles, and locus on understanding and organizing them to make the most persuasive presentation.

D. Develop a theme for the argument. Tighten your focus and be able to explain your key points in three or four short sentences. It is often not possible to make more than a few good legal points in the limited time available for oral argument. Develop your theme and, if possible, make use of it in answering questions.

E. Practice with several moot court sessions. The conventional wisdom is that, in preparing for argument, counsel should do what feels comfortable. But forget the conventional advice if following it means you would avoid doing moot court sessions. You must practice with moot courts. If possible, videotape the sessions (if you can bear watching yourself argue). In practicing your argument, pay particular attention to the following:

1. Try to eliminate distracting ways of arguing or answering questions, such as distracting hand motions;

2. Focus on which questions are the most frequent, and which responses are working or not working;

3. Consider whether is it taking you too long to get to your point.

In addition, consider different panels of moot judges:

1. Those who know your case. They can help you get the details right.

2. Those who know nothing about your case, but who are good lawyers. They can help you get the big picture right.

3. Other bankruptcy lawyers. They can help you hone your bankruptcy arguments.

4. Generalists. They can help ensure that you explain the concepts adequately.

5. Your mother. At the very least, she will be flattered that you asked.

F. Anticipate the questions. Understand the strengths and weaknesses of your arguments and prepare to address the weaknesses, not simply hammer away at strengths. At the very least, you should be able to answer the following questions with short, common-sense responses:

1. What is the case about?

2. How would the legal rule that you advocate work in practice?

3. How would the particular result that you seek affect future cases?

4. Does the court have the authority to grant the requested relief?

5. Why should the court grant the requested relief?

G. Focus on your opening. This may be only chance that you have to get in one or two uninterrupted lines. Use the opportunity to highlight the most important points. Hook the judges from the beginning and explain why you should win.

H. Avoid obscure reasoning. Avoid presenting elaborate, multi-step proofs to support your position. For example, other bankruptcy lawyers may well appreciate an elaborate argument drawn from the interplay between a section of the Bankruptcy Code and various provisions of the procedural rules. Oral argument, however, is not often the place for obscure complexity.

I. Prepare to concede points that are indefensible. If pressed, make concessions that should be made. Sticking to an indefensible position only undermines your credibility. If you

must make a concession, however, explain why the concession does not mean you lose. Do not concede a point unless you agree that it should be conceded.

J. Be respectful yet conversational. As one commentator has explained: "Use the tone that you would use when you're initiating conversation with an elderly relative from whom you seek a large bequest." Be informal and conversational without being familiar. Treat the argument like a seminar, not a lecture.

> Justice Rhenquist: "[The 'All American oral advocate'] will recognize that there is an element of drama in oral argument . . . . But she also realizes that her spoken lines must have substantive legal meaning . . . She has a theme and a plan for her oral argument but is quite willing to pause and listen carefully to questions . . . . She avoids table pounding and other frustrating mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and an impression of *fin de siecle* ennui."

K. Answer the questions. Listen carefully and do not be evasive. The judges' questions present an opportunity to understand what it is that the judges care about and what it is that is bothering them. Make sure you understand the question before giving an answer, and try to answer the question by first stating "Yes," or "No," or "I do not know," or "It depends." If a judge asks a question, avoid saying things like "I'll get to that later," or "that's irrelevant." Do not try to bluff your way through an answer. Lawyers often do not like to admit that they do not know an answer. But it is better to respond that you do not know the answer than to fake a response.

> Justice White: "All of us on the bench [are] working on the case, trying to decide it . . . [The lawyers] think we are there just to learn about the case. Well, we are learning, but we are trying to decide it, too. [I]t is then that all of us . . . are working on the case together, having read the briefs and anticipating that [we] will have to vote very soon and attempting to clarify [our] own thinking and perhaps that of [our] colleagues. Consequently, we treat lawyers as a resource rather than as orators who should be heard out according to their own desires."

L. Answer hypothetical questions carefully. Listen carefully, and respond succinctly and directly. If the hypothetical question is not your case, answer it anyway, and then explain why the hypothetical is distinguishable. Avoid answering with responses like "but that's not our case" or "that's not the facts here."

M. Return to your theme. Use your key points in responding to questions and redirect the argument wherever possible. For example, if the case involves the applicability of a particular section of the Bankruptcy Code, you might develop the theme that "there are three circumstances that must be present, *A*, *B*, and *C*, for the statute to apply." In responding to a hypothetical question, you might explain that "although the answer to your question is yes, the hypothetical omits one of the key circumstances, *C*, so in that case the statute would not apply."

N. Listen to the judges' comments and concerns and be flexible. Prepare your argument in interchangeable parts. If the court wishes to proceed down a particular path, be prepared to go down that path, even though you would prefer to address that topic later. If a judge begins by making it clear that one of your arguments is dead wrong, and you have another good argument that gets you to the same point, consider focusing on the alternative argument rather than battling with the judge and wasting your time

O. Be familiar with the court environment. Unless you appear regularly in the particular court, view some arguments there in advance and get a sense of the lay of the land.

P. Know something about the judges. Before argument, try to get a sense of what the particular judges are like during argument. Review relevant opinions and speak to others who have experience with the judges assigned to your case. You may also consult various on-line resources, such as the almanac of the federal judiciary.

Q. Pay attention to organizational mechanics. Try the Winston Churchill approach. During the war, Churchill required reports to be distilled to a single page. Similarly, outline your argument on a single sheet of paper (making sure that you can read the type). Underneath this single sheet you may have your entire argument written out on several pages for reference in case you get lost at some point. BUT DO NOT READ YOUR ARGUMENT. Tab your copy of the appendix and briefs, so that you can go directly to particular references if necessary.

> Harold Koh: "The night before I argued my first case at the Supreme Court, the phone rang at my hotel. The voice said 'Harold, this is Larry Tribe. I just wanted to tell you that the podium at the Supreme Court is exactly thirteen inches by twenty inches. This means that you can't put a notebook there, because if you turn the page, it will hit the microphone. The best way to deal with it is to prepare your outline on two sheets of paper, cut to the exact size, and lay them flat. Now, first of all, this showed me that Larry Tribe is quite a perfectionist. But second, it showed me that at oral argument, it's imperative that you not leave anything to chance. You must think in advance about all of these mechanical things; so-that you don't get into mistakes or fumble around in those precious moments that you're actually standing up at the podium."

R. Let yourself relax. While standing at the podium, allow yourself to relax and be drawn into the conversation with the judges. For the time that you are there, assume that the court is truly interested in what you have to say (which is most often the case).

S. Be enthusiastic about your case. If you have no passion for your case, it is unlikely that the court will either. Avoid presenting your position in a monotone. Be sincerely enthusiastic, but do not go overboard.

T. Get plenty of sleep. The night before the argument is not the time to stay up and cram until the wee hours of the morning. Arrive at the court refreshed and focused.

U. Avoid humor. Some folks have a rare gift for humor and can inject it naturally and effectively into their presentations. Most, however, are not comedians, and attempts at humor for those without the natural gift often fall flat. Avoid needless embarrassment and do not try to inject contrived humor into the proceedings.

V. Avoid speaking too quickly. Some lawyers tend to speak quickly, particularly when they fear that they will not have enough time to make all their points. This is often counterproductive. It is better to speak slowly and have your points understood than speak too quickly and leave the judges behind.

W. Maintain eye contact. Look directly at the judge to whom you are speaking. Staring up at the ceiling, out the window, or at the clock over the bench is distracting and undermines the effectiveness of the presentation.

X. Avoid filling up time just to fill up time. If you have made your points and the court has no further questions, do not keep talking simply to talk. Apart from annoying the judges, you run the risk of stumbling into an issue that suddenly careens out of control and undermines your case. It is best to avoid snatching defeat from the jaws of victory.

Y. Have the court read along with you. If your argument centers on a particular statutory text, have the judges read it along with you if that helps your argument. This can provide a useful way to focus the court's attention. The same applies to other critical references in the record.

Z. Be aware of how much time is left. Be sensitive to when you are nearing the end of your allotted time. If you have not yet made your "must make" points, make them now.

AA. Reiterate your key points in closing. Use your closing to reiterate your key points. You should be able to state them succinctly in a few short sentences.

BB. Listen carefully to the previous argument. If you are counsel for the appellee, listen to the points that opposing counsel is making and whether he or she is making any headway. Also pay attention to the judges' reactions and what seems persuasive. Note the points that require a response and be prepared to address those points. The same applies to the appellant's rebuttal argument.

CC. Be flexible in responding to the previous argument. If you are counsel for the appellee, you should prepare your points in advance based on how you believe the argument will proceed. But you should also be prepared to ditch your prepared remarks and proceed right to the heart of the controversy and address what interests the judges. If the judges seem focused on a particular issue that you may turn to your advantage, you should consider leading with that issue. Take your cue from the judges. If your opponent has been evasive in answering a particular question, you may wish to answer the question directly if doing so assists your position.

DD. Expect to be limited to the time that you are allotted. Some courts (e.g., the Supreme Court), are very strict about enforcing time limits. Other courts, however, will permit counsel to exceed the limit if the argument is going somewhere. Courts impose time limits to force counsel to think about what is really important in the case, and get to the point quickly. Do not assume that the court will allow extra time.

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

Robert J. Keach and Lindsay Zahradka Milne †

TABLE OF CONTENTS

INTRODUCTION 493
I. HISTORICAL FRAMEWORK & THE CURRENT STATUTE 494
II. BANKRUPTCY COURTS' APPARENT AUTHORITY TO PRECLUDE LITIGANTS' RIGHT TO REVIEW BY AN ARTICLE III COURT IN THE CONTEXT OF AN ASSET SALE 495
III. ELIMINATION OF THE STAY PERIOD CANNOT BE SQUARED WITH SUPREME COURT JURISPRUDENCE 496
IV. EVEN MATERIAL LIMITATION OF THE STAY PERIOD RUNS AFOUL OF SUPREME COURT JURISPRUDENCE 499
CONCLUSION 500

INTRODUCTION

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

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

> Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

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

I. HISTORICAL FRAMEWORK & THE CURRENT STATUTE

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

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

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

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

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

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

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

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

II. Bankruptcy Courts' Apparent Authority to Preclude Litigants' Right to Review by an Article III Court in the Context of an Asset Sale

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

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.[14]

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

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

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

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

III. Elimination of the Stay Period Cannot be Squared with

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

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

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

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

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

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

SUPREME COURT JURISPRUDENCE

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

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

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

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

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

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

26. *See* 11 U.S.C. § 305(a) (2021).

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

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

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

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

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

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

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

30. *Id.*

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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