What Every Coverage Lawyer Should Know About Preserving Error at Trial and on Appeal

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1 The authors’ views are their own and not those of their firms or their clients. Further, each individual author does not necessarily agree with everything in this paper, which is a joint project and which necessarily contains portions that were authored by other panelists.
I. INTRODUCTION

In recent years, the Supreme Court of the United States has periodically reminded litigants, “we are a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That adage is consistent with the well-established principle that appellate courts generally will not consider arguments unless they are properly preserved in the trial court and subsequently presented for review. While the concept of waiver is familiar to most attorneys, the actions necessary to preserve error for eventual review at each stage of the proceedings may not always be intuitive or obvious. This paper identifies, and offers solutions to avoid, situations where an attorney could waive an appealable issue both in the district court and on appeal.

II. AVOIDING WAIVER AND PRESERVING ERROR IN THE DISTRICT COURT

Throughout proceedings in a federal district court, an insurance coverage attorney can proactively create a record and preserve objections to error in anticipation of an eventual appeal. Before discussing several common circumstances in the district court that implicate appealable issues, however, this paper addresses waiver risks that arise in conjunction with an uncommon procedural mechanism of salience to coverage attorneys.

A. Waiver of Certified Questions of State Law

One waiver issue that may not immediately come to mind, but should not be overlooked by insurance coverage attorneys, is certification of questions of state law. Insurance issues are questions of state law, but many are decided in federal court on the basis of diversity jurisdiction under the Declaratory Judgment Act. Thus, a preliminary issue to consider before taking a position on a particular legal issue in a federal court is whether the case presents a question that should be certified and decided by a state court.

A question of state law that is worthy of certification to a state’s highest court is typically one that is unanswered by the state’s highest court and determinative of the entire proceeding. See, e.g., CAL. R. OF CT. 8.548(a) (permitting the California Supreme Court to “decide a question of California law” on the request of certain other state and federal courts if “[t]he decision could determine the outcome of a matter pending in the requesting court” and “[t]here is no controlling precedent”); OHIO SUP. CT. R. OF PRAC. 9.01(A) (“The Supreme Court [of Ohio] may answer a question of law certified to it by a court of the United States. This rule is invoked if . . . there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.”); TEX. R. APP. P. 58.1 (“The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent.”).

As stated above, insurance cases present fertile grounds for requests for certification to a state supreme court, although the requests are not always granted by either the federal courts to which the requests are made or the state courts receiving the requests. See, e.g., *Ins. Co. of Pa. v. Nat’l Fire & Marine Ins. Co.*, 592 F. App’x 630, 631 (9th Cir. 2015) (declining to certify question involving trigger of coverage under Nevada law on the basis that the issue did not present a dispositive question); *K F Dairies, Inc. v. Fireman’s Fund Ins. Co.*, 224 F.3d 922, 924

A coverage attorney who believes that the relevant state’s highest court should answer a question of state law central to the case should raise the issue at the appropriate time to avoid potentially waiving the opportunity for later certification. Although the federal courts of appeals possess the authority to certify a question of state law, they are generally reluctant to do so when a party requests certification for the first time on appeal. *E.g.*, *Castagnaro v. Bank of N.Y. Mellon*, 772 F.3d 734, 736 (1st Cir. 2014). The concern with gamesmanship seems clear: parties should be discouraged from seeking a decision from the district court only as a “gamble” before seeking a second bite at the apple through another court system via certification of the question on appeal. *See, e.g.*, *Commonwealth Util. Corp. v. Goltens Trading & Eng’g PTE, Ltd.*, 313 F.3d 541, 549 (9th Cir. 2002) (“We believe that particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below.”); *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 210 (8th Cir. 1987) (“The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision.”); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (“[T]he request before us is appellants’ first such request. Appellants filed and tried the case in federal court without seeking certification. To certify the questions at this late date would only prolong the life of this litigation at all the parties’ expense.”).

Consequently, the failure to seek certification in the district court is not an absolute bar to subsequent certification by the court of appeals, but a party who declines to seek certification in the district court will likely encounter the same skepticism with which the court of appeals greets any other claim or argument raised for the first time on appeal.

We highlight one notable exception to the courts of appeals’ preference that parties seek certification in the district court in the first instance: states that do not permit certification by a federal district court. Under the relevant rules in both California and New York, for example, federal district courts are conspicuously absent from the list of courts permitted to certify a question of state law. *See Cal. R. of Ct. 8.548(a)* (“On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law . . . .”); *N.Y. Ct. R. § 500.27(a)* (“Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of
the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.”).

As one court lamented, “[c]onsidering the importance of this issue to California disability law, the question of statutory construction would have been appropriate for certification to the California Supreme Court. Unfortunately, no such avenue is available to the district courts.” See Bryan v. United Parcel Serv., Inc., 307 F. Supp. 2d 1108, 1115 (N.D. Cal. 2004). Because the procedure is unavailable, absent a request in the district court, the Ninth Circuit often certifies questions of state law to the California Supreme Court despite an earlier substantive ruling on the relevant question by the district court in the same litigation. See, e.g., Yahoo! v. Nat’l Union Fire Ins. Co. of Pitt., Pa., ___ F.3d ___, 2019 WL 209713 (9th Cir. 2019) (certifying a question to the California Supreme Court in a case brought by a policyholder in the federal district court); Frlekin v. Apple, Inc., 870 F.3d 867, 870 (9th Cir. 2017).

That being said, any delay in raising a certification question even in the appellate court could easily be viewed with disfavor. In Hinojos v. Kohl’s Corp., 718 F.3d 1098 (9th Cir. 2013), for example, the Ninth Circuit lambasted a party that sought certification after the panel’s comments at oral argument suggested that it might rule in the other party’s favor. Id. at 1108. The Ninth Circuit paused in its opinion denying certification to remind the appellee that it had first removed the case from state court, denying the state court an opportunity to decide the issue that the appellee claimed for the first time after oral argument was not clear and should be certified. See id. (stating that the certification request came only after the panel “expressed profound skepticism at oral argument regarding the merits of [the appellee’s] position”).

Collectively, these cases serve as a reminder that a failure to timely request certification in the district court or the appellate court will typically be viewed with disfavor. Courts, however, will not penalize a litigant barred by state rules from seeking certification at an earlier stage in the proceedings. That being said, a party, either in the district court or on appeal, would be wise to raise a state law question at the earliest possible opportunity.

B. Mistakes in the District Court That Can Result in Waiver on Appeal

Aside from the unique waiver pitfalls that can arise if a case implicates certification to a state’s highest court, coverage attorneys can take steps at each stage of litigation in the district court to preserve an adequate record and avoid waiving potentially appealable issues.

1. Waiver at the Pleading Stage

Whether filing a complaint or responding to one, a coverage attorney’s decisions at the pleading stage can resonate all the way into an appeal. To obtain relief on allegations raised in a complaint, a plaintiff must of course pursue the relevant claim in the district court. For example, the Seventh Circuit declined to consider a life insurer’s argument for the first time on appeal that an insured made a misrepresentation in the policy application where, although raised vaguely in

2 To avoid California’s more limited certification rules, one district court in the Northern District of California came up with a creative workaround by certifying a question of law to the Ninth Circuit under 28 U.S.C. § 1292(b) for the express purpose of certifying the question to the California Supreme Court. Bryan, 307 F. Supp. 2d at 1115.
the complaint, the insurer never pursued that misrepresentation theory in the district court. *Nat’l Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 360 (7th Cir. 1987).

In turn, when answering a complaint, Federal Rule of Civil Procedure 8(c) provides that a party *must* recite affirmative defenses in a responsive pleading. The failure to raise an available affirmative defense in an answer therefore risks waiver of that defense. *See, e.g., Brent v. Wayne Cty. Dep’t of Human Servs.*, 901 F.3d 656, 680 (6th Cir. 2018) (“Federal Rule of Civil Procedure 8(c) requires defendants to raise affirmative defenses in their first responsive pleadings; the failure to do so may result in waiver of the defense.”). Coverage counsel should also be aware of the coverage nuances of specific states relating to waiver. Relying on New York law, the Second Circuit held in *Burt Rigid Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83 (2d Cir. 2002), that an insurer waived late notice defenses under an insurance policy where the answer asserted affirmative defenses based on specific exclusions in the policy but failed to raise late notice until its responses to interrogatories. *Id.* at 96. While the *Burt Rigid* case was grounded, in part, on New York’s stringent insurance law rules governing disclaimers of coverage, it serves as another reminder that a litigant should carefully review its pleadings to ensure they are complete to avoid the application of waiver principles.

Failure to raise an affirmative defense in the responsive pleading is not an absolute waiver in all cases, however. Under limited circumstances, some circuits permit a defendant to raise an affirmative defense for the first time even after trial where, although the affirmative defense does not appear in the answer, the record establishes that the plaintiff had notice of the defense and would not be prejudiced by the defendant’s failure to raise it sooner. *See, e.g., Feingold v. State Farm Mut. Auto. Ins. Co.*, 629 F. App’x 374, 375 (3d Cir. 2015) (concluding that insurer did not waive non-cooperation defense raised at summary judgment but not in answer where the record conclusively established insured’s repeated failure to submit to medical examination sought by insurer); *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co.*, 706 F.3d 622, 633 (5th Cir. 2013) (reasoning that insured was not prejudiced where district court granted summary judgment based in part on policy provision not raised in answer because the insured was aware of the provision, “the only section describing the extent of liability” under the policy).

2. **Dispositive Motion Practice**

Anyone familiar with federal litigation—and insurance coverage litigation in particular—knows that courts most often resolve cases not at trial but through pretrial motion practice, particularly motions for summary judgment. Insurance cases offer generous opportunities for courts to consider ruling on dispositive motions based on questions of contractual interpretation. Filing or responding to a motion for summary judgment presents coverage attorneys with numerous opportunities to make costly mistakes that can result in waiver of an appealable issue.

To begin, the courts of appeals will usually decline to consider arguments that a party failed to advance in the first instance in the district court in support of or opposition to a motion for summary judgment. *See, e.g., Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1144 (10th Cir. 2009) (declining to consider argument raised for first time on appeal); *see also Anderson v. Am. Gen. Ins.*, 688 F. App’x 667, 670 (11th Cir. 2017) (“It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the
district court cannot be broached for the first time on appeal.” (quoting Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009))). Although a court of appeals can conceivably affirm a district court’s judgment on any grounds supported by the record, it may decline to do so. Moreover, a court of appeals cannot do so if the district court did not make the findings of fact necessary for the appellate court to affirm on that basis as a matter of law. See, e.g., Metro. Prop. & Cas. Ins. Co. v. Calvin, 802 F.3d 933, 939 (8th Cir. 2015) (remanding for factual findings rather than affirming judgment on arguments raised in district court but for which district court made no factual findings).

At summary judgment, a party must also raise any objections to improper evidence submitted by the opposing side. Thus, the Sixth Circuit held in one case that a party need not file motions in limine for all objectionable evidence presented in support of a motion for summary judgment, so long as the party objects to the evidence when opposing the motion. Sigler v. Am. Honda Motor Co., 532 F.3d 469, 480–81 (6th Cir. 2008) (first citing Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003); then citing Taylor v. Principi, 141 F. App’x 705, 708 (10th Cir. 2005)).

3. Motions in Limine

Although a coverage attorney need not always file a motion in limine to preserve in the record an objection to evidence presented by an opposing party, a motion in limine can help refine and preserve certain evidentiary arguments. Motions in limine create a written record of arguments raised about particular pieces of evidence. In fact, the Sixth Circuit has held that if the district court rules on motions in limine, then the rulings obviate the need for counsel to renew the objection to preserve the grounds for appeal if disputed evidence is later offered at trial. See Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 312 (6th Cir. 2016) (citing United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999)). If, however, the district court does not rule on the motions, then counsel must renew the objection at trial to preserve the argument for appeal. Id. at 313 (citing United States v. Finnell, 276 F. App’x 450, 453 (6th Cir. 2008)); Green Constr. Co. v. Kan. Power & Light Co., 1 F.3d 1005, 1013 (10th Cir. 1993) (holding that party waived objection to evidence of insurance following denial of motion in limine by failing to renew objection during trial).

Motions in limine can also provide a vehicle for preserving evidence in the record that may be necessary for an appeal. In Riordan v. State Farm Mutual Auto Insurance Co., 589 F.3d 999 (9th Cir. 2009), the Ninth Circuit considered a motion to strike from the record on appeal portions of deposition excerpts submitted by the appellee to supplement the record on appeal. Id. at 1003. The Ninth Circuit noted that, under the Federal Rules of Appellate Procedure, the record on appeal consisted of those documents “filed” with the clerk of court in the district court. Id. (first citing FED. R. APP. P. 10(a); then citing FED. R. APP. P. 5(d)(2)). Because the appellee appended the disputed deposition excerpts to a motion in limine in the district court, the Ninth Circuit held that the excerpts met the definition of “filed” under the federal rules and were therefore properly before the court as part of the appellate record. Id. Thus, the appellee’s inclusion of the excerpts with the motion in limine in the district court allowed him to look back to the excerpts when they became necessary for his argument on appeal. Id.
4. Preserving Objections on the Record in Open Court

As the discussion above already implies, perhaps the fundamental means for preserving an issue for appeal is to state an oral objection on the record in open court at the relevant hearing or during trial. See Rock-Tenn, 813 F.3d at 313 (“[W]hen a motion in limine is not ruled upon, counsel must object at trial to preserve error.”); Olin Corp. v. Certain Underwriters at Lloyd’s London, 468 F.3d 120, 132 (2d Cir. 2006) (noting that, “[g]enerally, specifically stating an objection to the court’s ruling is sufficient to preserve that issue for appeal,” and concluding that party adequately preserved issue for appeal by “explicitly stat[ing] that [it] intended to preserve the objection”); Horsey v. Mack Trucks, Inc., 882 F.2d 844, 847 (3d Cir. 1989) (holding that party failed to preserve in the record transcript objections to district court’s failure to read voir dire questions regarding insurance).

These objections are particularly critical not only to a district court’s decision to admit evidence but also any decision to exclude evidence. If the court chooses to exclude disputed evidence, it is crucial for counsel propounding admission to make an adequate offer of proof to provide the court with sufficient information to reconsider the dispute on appeal. Am. Auto. Ins. Co. v. Omega Flex, Inc., 783 F.3d 720, 723–24 (8th Cir. 2015) (“To preserve a claim that the district court erred in excluding evidence, ‘a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.’” (quoting F ED. R. EVID. 103(a)(2))); see Hatcher v. MDOW Ins. Co., 903 F.3d 724, 732–33 (8th Cir. 2018) (“[E]ven if the jury had been admonished to disregard [a property owner’s] testimony, [the property owner] made no offer of proof as to what additional or alternative information he wanted to tell the jury but was prevented from saying.”).

As an illustration, a policyholder’s counsel in a coverage action may want to introduce (potentially objectionable) evidence of the insurer’s handling of comparable claims. Assuming the insurer’s counsel objects to the evidence as irrelevant and the district court sustains the objection, the insured’s counsel would need to make a sufficient offer of proof. If the evidence consists of an exhibit or other physical evidence, counsel making the offer of proof should ensure that the evidence is marked and identified in the record, as the local rules in the court of appeals may require that the appellate court have the opportunity to examine the exhibit itself on appeal. See, e.g., 10th Cir. R. 10.4(D)(1) (“If an appeal is based on a challenge to the admission or exclusion of evidence, the giving or failing to give a jury instruction, or any other ruling or order, a copy of the pages of the reporter’s transcript must be included in the record or appendix to show where the evidence, offer of proof, instruction, ruling or order, and any necessary objection are recorded.”); 10th Cir. R. 10.4(D)(4) (“Other items, such as trial exhibits and transcript excerpts, must be included when they are relevant to an issue raised on appeal and are referred to in the brief.”). If the evidence consists of witness testimony, coverage counsel making an offer of proof should request the opportunity to question the witness on the record outside the presence of the jury to ensure that the disputed testimony appears in the transcript of the proceedings on appeal.

An attorney making an objection must also make sure that the district court rules on it. In the presence of the jury, the district court may decide to admit or exclude evidence subject to the objection but may also delay ruling on the objection until a break in the proceedings. When the appropriate opportunity arises, it is crucial that the attorney renew the objection and obtain a
decision from the court, as the court of appeals generally will not consider a point of error not presented to the district court for decision in the first instance.

5. Constructing a Record Around Jury Instructions

As a component of the district court proceedings implicating substantive legal issues and reviewed de novo by the court of appeals, jury instructions can provide a fruitful source of appealable issues. See State Farm Fire & Cas. Co. v. Silver Star Health & Rehab, 739 F.3d 579, 585 (11th Cir. 2013) (“[W]e review jury instructions de novo to determine whether they misstate the law or mislead the jury to the prejudice of the party who objects to them.” (alteration in original) (quoting Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1283 (11th Cir. 2008))). But like any other issue for which a coverage attorney might seek appellate review, it is necessary to take appropriate action in the district court to preserve the issue for appeal.

With regard to jury instructions, Federal Rule of Civil Procedure 51(c)(1) expressly provides that “[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.” Unsurprisingly, the courts of appeals hold that failure to object to a proposed jury instruction in the manner prescribed by Rule 51(c)(1) precludes a party from raising the alleged error on appeal. See, e.g., Schmitz v. Canadian Pac. Ry. Co., 454 F.3d 678, 683 (7th Cir. 2006). Rule 51(d)(2) does, however, provide a limited exception: a court may consider a “plain error” in an instruction given or in the failure to give an instruction if the asserted error “affects substantial rights.” Absent a plain error affecting a client’s substantial rights, however, an attorney’s failure to object adequately to an alleged error will be fatal to the ability to raise the error on appeal.

The Eighth Circuit’s decision in Barton v. Columbia Mutual Casualty Insurance Co., 930 F.2d 1337 (8th Cir. 1991), provides a stark warning of the consequences of failing to make a record during the formulation and giving of jury instructions. In the district court in that case, a jury returned a verdict in favor of the insurer on the insureds’ claim seeking insurance coverage for damages arising out of the collapse of their chicken house caused by a severe storm. Id. at 1338. On appeal, the insureds argued that the district court erred by declining to give the jury their requested instruction defining the word “hail” as used in the disputed policy. Id. at 1340. Outside the presence of the jury, the district judge explained his reasons for declining to give the instruction and “then invited [the insureds’] counsel ‘to make any record you wish in relation to the instructions.’” Id. The insured’s counsel replied, “I have nothing.” Id. After giving the instructions to the jury, “the district court invited counsel ‘to make any record they wish to in regards to the instructions, and again counsel for the [insureds] replied, ‘I don’t have any, Your Honor. I’ve already made my motion on that.’” Id. Based on that record, the Eighth Circuit determined that the insureds had not properly preserved their objection to the instruction. Id. The court of appeals noted in particular that Rule 51 required the insureds’ counsel to give specific reasons for the objection because the district court gave a specific explanation for declining to give the requested instruction. Id. at 1341. Without a record establishing the grounds for the objection, the court of appeals had no basis for reviewing the district court’s decision.
6. Inviting Error

Finally, “[u]nder the invited error doctrine, ‘[a]n erroneous ruling generally does not constitute reversible error when it is invited by the same party who seeks on appeal to have the ruling overturned.’” Matthew v. Unum Life Ins. Co. of Am., 639 F.3d 857, 868 (8th Cir. 2011) (alteration in original) (quoting Roth v. Homestake Mining Co., 74 F.3d 843, 845 (8th Cir. 1996)); see also Ray v. Unum Life Ins. Co. of Am., 314 F.3d 482, 486 (10th Cir. 2002) (“The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error.” (quoting Zink Co. v. Zink, 241 F.3d 1256, 1259 (10th Cir. 2001))). The courts of appeals will not permit a party to pursue one position in the district court and then pursue a contrary one on appeal. See Counts v. Am. Gen. Life. & Accident Ins. Co., 111 F.3d 105, 108 (11th Cir. 1997). Likewise, a party may not obtain reversal on appeal based on its own legal theories adopted by the district court. For instance, in Farley v. Nationwide Mutual Insurance Co., 197 F.3d 1322 (11th Cir. 1999), an insurer argued that one of the questions on a verdict interrogatory contained a material mistake of law. Id. at 1331. But the Eleventh Circuit rejected the argument as meritless because the insurer’s own proposed jury verdict form contained the exact same language that the insurer characterized as erroneous. Id. The court of appeals reiterated that it “will not find that a particular instruction constitutes plain error if the objecting party invited the alleged error by requesting the substance of the instruction given.” Id. (quoting Wood v. President & Tr. of Spring Hill Coll. in Mobile, 978 F.2d 1214, 1223 (11th Cir. 1992)).

Notably, the invited error doctrine does not preclude a party from making arguments and taking positions to mitigate the negative effects of an earlier unfavorable ruling, as the Fifth Circuit’s decision in Munoz v. State Farm Lloyds of Texas, 522 F.3d 568 (5th Cir. 2008), shows. There, State Farm timely objected to the admission of evidence that a grand jury declined to indict the insured for arson related to the fire that gave rise to the insurance coverage dispute. Id. at 571. After the district court erroneously permitted reference to the impermissible non-indictment evidence during closing arguments, it allowed State Farm to suggest jury instruction language to limit the prejudicial effect of the evidence. Id. at 573–74. When State Farm renewed its objection before the Fifth Circuit, the insured argued that State Farm’s participation in the formulation of the mitigating jury instruction meant that State Farm had invited the asserted error. Id. at 573. The Fifth Circuit flatly rejected that argument. Emphasizing that “State Farm timely objected and was overruled,” the court of appeals explained that by subsequently acting to limit the negative effects of the non-indictment evidence, “State Farm did not abandon, waive, or otherwise sanction the district court’s initial error.” Id. at 574. Because State Farm made the crucial timely objection in the district court, the Fifth Circuit reversed the district court’s decision and granted State Farm a new trial. Id.

III. PRESERVING ARGUMENTS ON APPEAL

Attorneys must be vigilant in preserving arguments in the district court. But the issuance of an appealable order in the district court does not relieve attorneys of this continued obligation. The appellate process is fraught with moments where an argument can be waived or forfeited if it is not properly raised or developed. As explained below: (A) the notice of appeal must be properly comprehensive to preserve arguments; and (B) the opening brief on appeal must contain all of the appellant’s contentions with citations to authorities and the record.
A. The Notice of Appeal Must Be Properly Comprehensive in Order to Preserve Arguments

Federal Rule of Appellate Procedure 3(c) provides the requirements for the contents of a notice of appeal (which is filed in the district court), including the requirement that the notice of appeal “designate the judgment, order, or part thereof being appealed”:

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

Courts analyzing the requirements of Rule 3(c) often reference the twin guideposts of liberality and stringency. “Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal.” Smith v. Barry, 502 U.S. 244, 248 (1992) (citations and internal quotation marks omitted); see also United States v. Gooch, 842 F.3d 1274, 1277 (D.C. Cir. 2016); Frieder v. Morehead State Univ., 770 F.3d 428, 430 (6th Cir. 2014); Diaz Aviation Corp. v. Airport Aviation Servs., Inc., 716 F.3d 256, 262 (1st Cir. 2013); Gov’t of V.I. v. Mills, 634 F.3d 746, 752 (3d Cir. 2011); United States v. Taylor, 628 F.3d 420, 423 (7th Cir. 2010); Kinsley v. Lakeview Reg’l Med. Ctr. LLC, 570 F.3d 586, 589 (5th Cir. 2009); Le v. Astrue, 558 F.3d 1019, 1022 (9th Cir. 2009); Chambers v. City of Fordyce, 508 F.3d 878, 881 (8th Cir. 2007); United States v. Little, 392 F.3d 671, 681 (4th Cir. 2004); United States v. Smith, 182 F.3d 733, 735 (10th Cir. 1999); 16A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 3949.4 (4th ed.), Westlaw (updated Sept. 2018).

As detailed below: (1) a notice of appeal that specifies only part of a final judgment or only some interlocutory orders in the case will not suffice to appeal the unspecified parts of the judgment or interlocutory orders; (2) a notice of appeal filed before the district court denies a post-judgment motion will not suffice to appeal the order denying the post-judgment motion; and (3) a notice of appeal that specifies only the order denying a post-judgment motion will not suffice to appeal the underlying judgment, although exceptions apply.

1. A Notice of Appeal That Specifies Only Part of a Final Judgment or Only Some Interlocutory Orders in the Case Will Not Suffice to Appeal the Unspecified Parts of the Judgment or Interlocutory Orders

A notice of appeal that names the final judgment suffices to support review of all earlier orders that merge in the final judgment under the general rule that an appeal from a final judgment supports review of all earlier interlocutory orders, at least if the earlier orders are part of the progression that led up to the judgment. However, if a notice of appeal specifies only part of a final judgment or only some interlocutory orders, then it will not suffice to appeal the
unspecified parts of the judgment or unspecified interlocutory orders. This is sometimes known as the *expressio unius* principle. *See* WRIGHT & MILLER, supra, § 3949.4.

As an example in the insurance context, in *White v. State Farm Fire & Casualty Co.*, 664 F.3d 860 (11th Cir. 2011), an insured under a homeowner’s policy brought suit against an insurer, alleging breach of contract, bad faith, and fraud. *Id.* at 862. The district court denied summary judgment to the insurer on the contract claim, entered summary judgment for the insurer on the bad faith and fraud claims, and granted the insurer’s motion for reconsideration as to the contract claim. *Id.* at 863. The insured’s notice of appeal provided only that he sought to appeal the district court’s “Order dated August 16, 2010 wherein [it] granted Defendant’s Motion for Reconsideration.” *Id.* at 864. In that August order, the district court reconsidered its analysis of the insured’s breach of contract claim and granted summary judgment in favor of the insured on that claim. *Id.* The court of appeals held that “[b]ecause [the insured] listed only the 16 August 2010 order in his notice of appeal and nothing on the face of the notice otherwise evidenced that he intended to appeal the court’s 15 June 2010 order, we lack jurisdiction to consider the district court’s decision on his bad faith and fraud claims.” *Id.*

Other courts of appeals have reached similar conclusions based on similar reasoning. *See* *Denault v. Ahern*, 857 F.3d 76, 82 (1st Cir. 2017) (“And the law, as we noted, is clear that where a notice of appeal designates only specific interlocutory orders or parts thereof, it does not provide us with jurisdiction to review others.”); *Johnson v. Perry*, 859 F.3d 156, 168 (2d Cir. 2017) (“As this notice neither stated that Perry wished to challenge all parts of the district court’s order . . . , but instead expressly referred to the denial of Perry’s motion for summary judgment, we cannot infer that the notice encompassed any ruling by the district court other than that denying his summary judgment motion.”); *Burley v. Gagacki*, 834 F.3d 606, 620 (6th Cir. 2016) (“Here, although plaintiffs’ notice of appeal lists six specific orders, it does not appeal the district court’s assessment of juror expenses or its resolution of the Burleys’ *Batson* challenge. These omissions strip this court of jurisdiction, and we dismiss these claims.”); *Rosillo v. Holten*, 817 F.3d 595, 597 (8th Cir. 2016) (“Where an appellant specifies one order of the district court in his notice of appeal, but fails to identify another, the notice is not sufficient to confer jurisdiction to review the unmentioned order.”); *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 859 n.2 (9th Cir. 2011) (“On appeal, Valadez-Lopez also argues that the district court erred in granting Yolo County Deputy Public Defender Richard Van Zandt summary judgment on his § 1983 claim. This argument is not properly before us, however, as the relevant notice of appeal only specified ‘the district court’s grant of summary judgment in favor of Defendant Donald Lown.’”); *Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 565 (5th Cir. 2003) (“When an appellant chooses to appeal specific determinations of the district court—rather than simply appealing from an entire judgment—only the specified issues may be raised on appeal.”).

2. **A Notice of Appeal Filed Before a District Court Denies a Post-Judgment Motion Will Not Suffice to Appeal the Order Denying the Post-Judgment Motion**

A party with an adverse judgment can push back the 30-day time period for filing a notice of appeal by filing a timely and qualifying post-judgment motion in the district court. If the district court denies the post-judgment motion, then the 30-day time period to file a notice of appeal pertaining to the underlying judgment runs from that denial. However, if a party files a
notice of appeal before the district court denies the party’s post-judgment motion, then the party must file a new or amended notice of appeal after such post-judgment order if the party also wishes to challenge the denial of the post-judgment motion on appeal.

As an example in the insurance context, in *Witasick v. Minnesota Mutual Life Insurance Co.*, 803 F.3d 184 (3d Cir. 2015), an insured brought suit against insurers based on disability and business overhead expense policies and an insurer’s cooperation with the federal government’s prosecution of the insured for fraud. *Id.* at 187. The insurers moved to dismiss based on a release in the parties’ settlement agreement relating to coverage disputes. *Id.* The district court granted the motion, and the insured appealed. *Id.* The court of appeals noted that the insured “also filed a Rule 59(e) motion challenging the District Court’s dismissal,” but “[b]ecause [the insured] did not file a new or amended notice of appeal encompassing the order denying the Rule 59(e) motion, we lack jurisdiction to consider that order.” *Id.* at 191 n.7.

Other courts of appeals found appellate jurisdiction lacking in similar circumstances. *See United States v. Pam*, 867 F.3d 1191, 1197 n.3 (10th Cir. 2017) (“Mr. Pam did not file an amended notice of appeal incorporating the district court’s denial of his motion to vacate. As a result, we lack jurisdiction to consider the district court’s denial of that motion.”); *Conjugal P’ship Acevedo-Principe v. United States*, 768 F.3d 51, 54 n.1 (1st Cir. 2014) (“Acevedo neither amended his pending notice of appeal nor filed a new notice after the district court’s decision on reconsideration. Hence, we do not consider here the denial of reconsideration.”); *Weatherly v. Ala. State Univ.*, 728 F.3d 1263, 1271 (11th Cir. 2013) (“ASU filed its notice of appeal while the motion at issue was still pending before the district court; thus, the notice of appeal did not designate the district court’s denial of its post-trial motion as subject to appeal.”); *Life Plus Int’l v. Brown*, 317 F.3d 799, 805 (8th Cir. 2003) (“Because no new or amended notice of appeal was filed regarding the posttrial order, we lack jurisdiction to review it.”).

3. A Notice of Appeal That Specifies Only the Order Denying a Post-Judgment Motion Will Not Suffice to Appeal the Underlying Judgment, Although Exceptions Apply

Conversely, a party who files a notice of appeal after a district court’s order denying a post-judgment motion must reference the underlying judgment (and not only the post-judgment order) if the party wishes to challenge the underlying judgment. *See Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 930 (1st Cir. 2014) (“Plaintiff’s notice of appeal makes no reference to the district court’s grant of summary judgment and specifically lists the reconsideration decision. The document cannot fairly be said to give CitiMortgage notice of Plaintiff’s intent to appeal anything but the reconsideration decision and therefore fails to meet Rule 3(c)(1)(B)’s designation requirement as to any other order.”).

Nonetheless, courts often have been willing to rescue such appellants by inferring that they meant to appeal from the underlying judgment as well. As an example in the insurance context, in *Berry v. Banner Life Insurance Co.*, 718 F. App’x 259 (5th Cir. 2018), a putative beneficiary filed suit against a life insurer and decedent’s former spouse seeking to recover proceeds of decedent’s life insurance policy. *Id.* at 261. The former spouse filed a counterclaim against the insurer for negligence. *Id.* The district court granted the insurer’s motion for interpleader and dismissed the insurer from the suit, granted summary judgment in favor of the
former spouse, dismissed the former spouse’s negligence claim against the insurer, denied the former spouse’s motion for leave to amend, and awarded attorney fees in favor of the insurer. *Id.*

The former spouse appealed, and the court of appeals noted that the former spouse’s notice of appeal challenged only the district court’s order denying her post-judgment motion. *Id.* at n.1

The court of appeals nonetheless held that “on appeal [the former spouse] clearly challenges the three rulings underlying that 59(e) motion” and that “[w]e liberally construe [the former spouse’s] appeal because the intent to appeal [the] unmentioned or mislabeled ruling[s] is apparent and there is no prejudice to the opposing party.” *Id.*

Other courts of appeals also have saved appeals in similar circumstances. *See Hallquist v. United Home Loans, Inc.*, 715 F.3d 1040, 1044–45 (8th Cir. 2013) (“This court has jurisdiction over the underlying order if the appellant’s intent to challenge it is clear, and the adverse party will suffer no prejudice if review is permitted.”); *Rojas-Velazquez v. Figueroa-Sancha*, 676 F.3d 206, 209 (1st Cir. 2012) (“This case falls within an exception to the general rule. When the propriety of denying reconsideration is inextricably intertwined with the correctness of the original order, the appellee is perforce alerted to the fact that listing of the former in the notice of appeal will entail testing the cogency of the latter.” (citation and internal quotation marks omitted)).

**B. The Opening Brief on Appeal Must Contain All of the Appellant’s Contentions with Citations to Authorities and the Record**

Federal Rule of Appellate Procedure 28(a)(8)(A) provides that the argument section of the opening brief on appeal must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” As explained below, case law shows that: (1) an argument raised in the opening brief on appeal that merely incorporates by reference arguments made in other documents is inadequate; (2) an argument raised in the opening brief on appeal that fails to cite to relevant legal authorities and record documents is inadequate; and (3) an argument raised in the opening brief on appeal only in a footnote is inadequate.

**1. An Argument Raised in the Opening Brief on Appeal That Merely Incorporates by Reference Arguments Made in Other Documents Is Typically Inadequate**

Incorporation of an argument by reference is usually frowned upon in the federal courts of appeals. As an example in the insurance context, in *Northland Insurance Co. v. Stewart Title Guaranty Co.*, 327 F.3d 448 (6th Cir. 2003), an insurer sought a declaration of no duty to defend or indemnify an insured title company and its officers, under an errors and omissions liability policy, against a title insurance underwriter’s claims including embezzlement and conversion. *Id.* at 451. The district court entered declaratory judgment for the insurer, and the underwriter appealed. *Id.* at 451-52. The court of appeals held that the insurer’s incorporation by reference into its appellate brief of documents and pleadings filed in the district court constituted waiver of the arguments contained in the incorporated documents. *Id.* at 452-53.

Other courts of appeals have reached similar conclusions based on similar reasoning. *See Galvin v. U.S. Bank, N.A.*, 852 F.3d 146, 159 (1st Cir. 2017) (“We consider only the last of these
arguments, as it is the only one the Galvins briefed on appeal. This court does not permit parties
to incorporate by reference arguments they made in memoranda filed in the district court.”); Papp v. Fore-Kast Sales Co., 842 F.3d 805, 815–16 (3d Cir. 2016) (“The only sense in which
Papp makes an argument at all is by reference to what he said somewhere else, trying to
incorporate arguments he made before the District Court. To permit parties to present arguments
in that fashion would effectively nullify the page or word limits imposed by the appellate and
local rules.”); Gutierrez v. Cobos, 841 F.3d 895, 902–03 (10th Cir. 2016) (“[I]ncorporation by
reference of arguments made before the district court is not acceptable appellate procedure.”
(citation and internal quotation marks omitted)); McGowen v. Thaler, 675 F.3d 482, 497 n.56
(5th Cir. 2012) (“[A] party cannot preserve arguments by attempting to incorporate arguments
from earlier briefing” (citation omitted)).

2. An Argument Raised in the Opening Brief on Appeal That Fails to
Cite to Relevant Legal Authorities and Record Documents Is
Typically Inadequate

An argument without citations is usually a recipe for disaster. As an example in the
insurance context, in Sapuppo v. Allstate Floridian Insurance Co., 739 F.3d 678 (11th Cir.
2014), insureds filed a putative class action against their property insurer seeking disgorgement
of profits the insurer allegedly obtained before the state forced it to lower its premiums. Id. at
679. The district court dismissed the complaint, and the insureds appealed. Id. at 679-80. The
court of appeals affirmed. Id. at 683. According to the court of appeals, the appellants did “not
devote even a small part of their opening brief to arguing the merits of the district court’s
alternative holdings” and “[t]he most that can be said is that they make passing references to
those holdings, without advancing any arguments or citing any authorities to establish that they
were error.” Id. at 681. The court of appeals recognized that “[w]e have long held that an
appellant abandons a claim when he either makes only passing references to it or raises it in a
perfunctory manner without supporting arguments and authority.” Id.

Other courts of appeals have reached similar conclusions based on similar reasoning. See
Hensley ex rel. N. Carolina v. Price, 876 F.3d 573, 581 n.5 (4th Cir. 2017) (“[T]he Deputies’
opening brief contains none of the development required by the rule. It contains no argument on
the ‘clearly established’ prong of the qualified immunity test. It contains no citation to cases
actually applying the ‘clearly established’ prong of the qualified immunity test. And it contains
no citations to the record to indicate that the Deputies preserved the argument below.”); Crespo
v. Colvin, 824 F.3d 667, 674 (7th Cir. 2016) (“[P]erfunctory and undeveloped arguments, and
arguments that are unsupported by pertinent authority, are waived (even where those arguments
raise constitutional issues).” (citation and internal quotation marks omitted)); Rodriguez v.
Municipality of San Juan, 659 F.3d 168, 175–76 (1st Cir. 2011) (“Sure, [appellant] uses some
buzzwords and insists that the judge stumbled in ruling on these claims. But he provides neither
the necessary caselaw nor reasoned analysis to show that he is right about any of this. The
upshot is that these claims are waived.”); United States v. Ballard, 779 F.2d 287, 295 (5th Cir.
1986) (“Because Ballard has offered only a bare listing of alleged grounds for a new trial,
without citing supporting authorities or references to the record, these claims are considered
abandoned on appeal. Notice pleading does not suffice for appellate briefs.”).
3. **An Argument Raised in the Opening Brief on Appeal Only in a Footnote Is Typically Inadequate**

Footnotes can be useful tools, but they should not be the sole vehicle for an entire substantive argument on appeal. As an example in the insurance context, in *Paese v. Hartford Life & Accident Insurance Co.*, 449 F.3d 435 (2d Cir. 2006), an insured former employee, purportedly totally disabled from injuries incurred in an automobile collision, sued an employer benefit plan’s disability insurer under ERISA after the insurer terminated the insured’s long-term disability benefits based on a finding of no total disability. *Id.* at 439. The district court entered judgment for the insured, awarding past and future LTD benefits, attorney fees, and costs of conversion and alternative insurance, and the insurer appealed. *Id.* The court of appeals noted that the insurer “claims in a footnote to its reply brief on appeal that it referred to its rights on the change in definition of disability in a footnote to its reply brief before the district court” and held that “[t]his statement in a footnote was insufficient to preserve the argument that the district court could only consider disability benefits under the own occupation standard.” *Id.* at 446 n.3

Other courts of appeals have held similarly. *See United States v. Tracts 31a, Lots 31 & 32, Lafitte’s Landing Phase Two Port Arthur, Jefferson Cty. Tex.*, 852 F.3d 385, 390 n.5 (5th Cir. 2017) (“Stacy also appears to argue, in a footnote, that the district court erred in a fourth respect . . . . However, Stacy does not raise this argument in the body of her brief; therefore, her argument is waived.”); *Recycle for Change v. City of Oakland*, 856 F.3d 666, 673 (9th Cir. 2017) (“RFC waived this argument because it never raised it in its briefs, other than in a terse one-sentence footnote.”); *CTS Corp. v. E.P.A.*, 759 F.3d 52, 64 (D.C. Cir. 2014) (“CTS invokes *Esch* in a conclusory fashion, arguing in a footnote that it could *sua sponte* supplement the record . . . . A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture.”); *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 330 n. (4th Cir. 2013) (“Although the plaintiffs also claim that the district court abused its discretion in denying them jurisdictional discovery, they only mention the issue in a footnote and do not present argument on the point, thus forfeiting the issue.”); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (“This footnote is the only statement that even approaches a substantive argument on novelty in the entire Argument section of SmithKline’s opening brief . . . . [A]rguments raised in footnotes are not preserved.”); *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (“[T]he government raised this argument for the first time on appeal in a footnote in its en banc brief. Arguments raised in a perfunctory manner, such as in a footnote, are waived.”) (citation omitted)); *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 n.17 (1st Cir. 1999) (“Massachusetts raises this argument only in a brief footnote. We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived.”).

**IV. CONCLUSION**

Counsel in insurance coverage disputes must be mindful of waiver issues throughout the life of a litigated case, from inception to appeal. From the filing of a complaint in the district court through briefing in the court of appeals, counsel’s arguments and record delineate the boundaries of appellate review. Presenting timely substantive arguments and establishing a complete record around the court’s decisions to admit or exclude evidence are crucial to preserving errors for review. Once preserved, counsel must also timely raise those asserted
errors in the notice of appeal and then not only present—but properly develop—the relevant arguments in the appellate briefing. Preserving errors in the manner discussed in this paper will maximize coverage counsel’s ability to take full advantage of district court litigation and the appellate process.