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Issue Preservation Below the Line

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Appellate practitioners have all been there: You find a winning argument . . . but it might not be preserved for review. Here are four tips for handling one variation on an all-too-common theme—that is, your golden issue appears only in a footnote in the briefing below.

Tip No. 1: Scrutinize the Record for the District Court "Passing" on Your Question

Issues are often said to be preserved for appeal if they were "pressed or passed upon below." *E.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992). So, if the district court "passed" on your question even though it was raised in a footnote, it is generally considered preserved for appellate review. For instance, in *Alphonse Hotel Corp. v. Tran*, the appellant had raised an issue in the district court only in a citation-less footnote, but the U.S. Court of Appeals for the Second Circuit addressed it anyway "[b]ecause the district court explicitly considered and rejected" it. 828 F.3d 146, 156 n.3 (2d Cir. 2016).

Remember that it might not be obvious where the court passed on your issue, so try to think outside the box. For example, look at hearing transcripts rather than just written opinions, and don't forget about minute orders hiding in plain sight on the docket. If you are new to the case on appeal, be sure to consult trial counsel and the client—they can guide your review of the record and point you toward any atypical places where the court may have addressed your issue.

Tip No. 2: Show That Your Footnote Developed an Argument

If the trial court didn't "pass" on your question, you are left to argue that the footnote "pressed" the issue. The ultimate question is whether "the lower court [was] fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

So, the more the footnote *developed* an *argument*—as opposed to just mentioning the issue or asserting a position—the stronger your case for preservation.

CSX Transportation, Inc. v. General Mills, Inc. illustrates the point. 846 F.3d 1333 (11th Cir. 2017). There, General Mills had refused to indemnify CSX, arguing that a prior jury verdict collaterally estopped CSX from shifting any responsibility to General Mills. The district court briefing focused on *federal* estoppel law—but in a three-sentence footnote, CSX alternatively argued that *state* law should apply, citing numerous cases for support. The district court applied federal law and ruled for General Mills, without addressing CSX's footnote.

Applicability of state law was CSX's lead argument on appeal, and the U.S. Court of Appeals for the Eleventh Circuit held that CSX's footnote sufficiently "pressed" the issue below. Rather than a "fleeting" reference, "the footnote presented a full argument. It cited relevant authority and reasoned by syllogism." *Id.* at 1337. "That the argument appeared in a footnote," the Eleventh Circuit said, "does not affect our conclusion." *Id*. The court then ultimately agreed with CSX on the merits.

Tip No. 3: Know Your Court and Its Feelings About Footnotes

Not every court will necessarily take the functionalist approach the Eleventh Circuit did in *CSX*. For instance, some courts take a hard line on arguments made in footnotes of *appellate* briefs. As Raffi Melkonian has noted elsewhere, "the Fifth Circuit is a hard no" on footnote arguments; the Seventh Circuit can be similarly strict. And because courts often analogize issue *preservation* in the district court to issue *presentation* in the court of appeals, a strict approach to one can translate into a strict approach to the other. Thus, in *United States v. Greenfield*, the Second Circuit cited a case about footnotes in appellate briefs to hold that an argument "raised . . . only in a footnote before the District Court" was forfeited. 831 F.3d 106, 118 n.9 (2d Cir. 2016).

But there are few hard-and-fast rules. Many courts still focus on how the argument is presented without giving its location dispositive weight. And most circuits will have cases utilizing both approaches. So, while the Second Circuit sometimes applies a categorical anti-footnote rule, it sometimes instead emphasizes that the argument was, for example, "adverted to in a perfunctory manner." *Tolbert v. Queens Coll*., 242 F.3d 58, 75 (2d Cir. 2001). Well-prepared advocates can exploit that ambiguity to marshal examples of their court employing a functional approach to footnotes.

Tip No. 4: Persuade the Court to Reach the Issue Regardless

If you are not feeling optimistic, don't give up all hope. Courts of appeals will occasionally address an argument they think was forfeited—especially if it presents a pure question of law. If applicable, it can also help to note that your opponent never argued forfeiture below—that is, that they forfeited their forfeiture argument. Or, better yet, point out that they also responded to the merits below, demonstrating the issue was "pressed." Finally, while it may sound simple, arguing the substance well can go a long way. Although issue preservation is technically separate from the merits, the stronger the argument is, the more hesitant judges will be to toss it out on nonmerits grounds.

Conclusion

Obviously, the safest bet for avoiding forfeiture is not having an argument in a footnote in the first place—even if it saves space on the page, dropping anything of substance below the line creates unnecessary risk on appeal. But sometimes an argument's merit or importance isn't apparent until long after the footnote's ink is dry. If you find yourself in that situation, these tips can help you defend that winning argument as preserved for appeal.