

# Don't Abandon All Hope on Appeal

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It is crucial for an appellant drafting an initial brief to adequately identify and describe all claims and issues the appellant intends to raise for appellate review. Apart from the obvious advantage of providing as much clarity to the appellate court as possible, the delineation of the issues on appeal more importantly ensures that no arguments are abandoned. The most egregious example of abandonment occurs when the appellant neglects to raise a claim in the initial brief and instead raises it for the first time in the reply brief. However, a more subtle example of abandonment occurs when the appellant mentions an issue in the initial brief but “makes only passing references to it, references it as mere background to main arguments, or buries it within other arguments.”<sup>[1]</sup> In either scenario, the appellate court will decline to consider the issue, even if the issue was otherwise properly preserved in the lower tribunal. This may seem a harsh result; however, the purpose of the rule is to “avoid confusion as to the issues that are in play and those that are not.”<sup>[2]</sup> As aptly explained by one appellate court, the reasons for this rule are two-fold. First, to allow consideration of an argument that was not clearly raised in the initial brief “would be manifestly unfair to the appellee who ... has no opportunity for a written response.”<sup>[3]</sup> Second, the rule protects the appellate court from issuing “an improvident or ill-advised opinion” because it did not have the benefit of an adversarial process. The best practice to avoid the abandonment of any claims or issues on appeal is to make sure that each issue is identified plainly and prominently in a section of the initial brief that is “demarcated by a boldface heading or by some equivalent notation.”<sup>[4]</sup> Nevertheless, if an appellant realizes it has inadvertently abandoned an argument by failing to sufficiently raise it in the initial brief, all hope is not lost. The appellant can still request that the appellate court consider the abandoned claim by arguing that any of the following exceptions apply:

- The abandoned claim involves a pure question of law, and the refusal to consider it would result in a miscarriage of justice.
- Substantial justice is at stake.
- The resolution of the abandoned claim is beyond any doubt.

- The abandoned claim presents significant questions of general impact or great public concern.
- Despite not being raised in the initial brief, the abandoned claim was nevertheless raised in the appellee’s answer brief.[\[5\]](#)

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[\[1\]](#) *Berry v. Crestwood Healthcare LP*, No. 22-11129, 2023 WL 7095309, at \*8 (11th Cir. Oct. 27, 2023). [\[2\]](#) *United States v. Willis*, 649 F.3d 1248, 1254 (11th Cir. 2011). [\[3\]](#) *United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019). [\[4\]](#) *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). [\[5\]](#) See *Kellner v. NCL (Bahamas), Ltd.*, 753 F. App’x 662, 667 (11th Cir. 2018); *United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007).

## Authored By



Peter D. Webster



Christopher J. Norris

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