

Properly Joining in an Appellate Brief Filed in a Separate Appeal

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We previously posted on Federal Rule of Appellate Procedure 28(i), which is the rule governing the adoption of part or all of another’s brief. We [initially looked at](#) decisions addressing the burden on a party to demonstrate how an adopted argument applies to that party’s specific issues, both legal and factual. We then [followed up with a look](#) at recent decisions refusing to adopt arguments regarding the sufficiency of the evidence as too fact-specific, as well as a potential issue regarding using Rule 28(i) to avoid the briefing word limit. In our third installment, we are looking at the adoption of arguments in a brief *filed in a different appeal*. Often, a similar or the same issue can come up in numerous district courts and percolate up to the courts of appeals. Rather than re-brief the issue multiple times, a party can be tempted to simply adopt an argument that has already been fully briefed in another appeal. That, however, may not be as simple as it sounds. In [Yeh Ho v. Wells Fargo Bank, N. A.](#), the Eleventh Circuit Court of Appeals summarily rejected the appellant’s argument where she failed to present argument in her brief on the issue and she did no more than attempt to adopt an argument in a separate, non-consolidated appeal. According to the court, “Federal Rule of Appellate Procedure 28(i) does not allow parties in non-consolidated appeals to automatically adopt and rely on briefs of another case **unless they separately move for adoption and the motion is granted.**” The Federal Circuit came to a similar conclusion in [Microsoft Corp. v. DataTern Inc.](#), stating that Rule 28(i) “authorizes incorporation of co-party briefing only in the case of consolidated appeals.” In sum, while Rule 28(i) addresses the adoption of another’s brief, there is authority holding that the rule does not apply to briefs filed in separate, non-consolidated appeals. While the best practice would be to recreate the argument in your brief, at a minimum you should move the appellate court to adopt the argument from that separate appeal. And, as noted in our prior posts, you should explain specifically and with particularity how those arguments apply to your case.

Authored By



Dean A. Morande



Rachel A. Oostendorp

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