

Properly Joining in a Co-Party's Brief or Motion to Avoid Waiver Issues: Further Considerations for Fact-Specific Arguments

November 11, 2021

We [previously wrote](#) about the requirements for joining in a co-party's brief or motion to avoid waiver issues. Since our original post, federal appellate courts have continued to hold that a party who seeks to adopt the arguments of co-party to an appeal pursuant to Federal Rule of Appellate Procedure 28(i) must specifically and explicitly identify those issues and arguments it wishes to adopt. Many courts strictly enforce this requirement, as they refuse to "[scour\[\] the record](#)" to determine which issues are applicable.

Litigants must also beware that not all arguments are transferable to a co-party under Rule 28(i). For example, in [Gil Ramirez Group LLC v. Marshall](#), the Fifth Circuit explained that it is improper for an appellant to adopt by reference "fact-specific challenges to a verdict" and held that the defendants could not adopt their co-defendant's statutory defenses or his challenges to the sufficiency of the evidence. The adoption of legal arguments concerning impossibility, evidentiary objections, and a challenge to the jury instructions, on the other hand, was valid. Similarly, in the criminal context, the Eleventh Circuit recently held in [United States v. Gilmore](#) that while co-defendants could adopt the legal arguments regarding whether certain crimes constituted crimes of violence, challenges to the sufficiency of the evidence could not because of their fact-specific nature.

A less common, but still relevant, concern is whether the adoption of another party's arguments could violate the applicable word limit. The Eighth Circuit in [In re Target Corporation Customer Data Security Breach Litigation](#) answered that question in the negative, at least where Rule 28(i) has been properly invoked. The court explained that the adoption of briefs generally does not cause the problems word limits are designed to avoid, as "courts and parties already have to read and respond

to the briefs being adopted.” The decision, however, included a dissent citing prior case law holding that incorporation under Rule 28(i) cannot be used to exceed the word count.

In short, as always, be aware of the potential waiver risks when adopting another party’s arguments and explain with specificity how those arguments apply to your client, both factually and legally. Take equal care to ensure that those arguments and issues are in fact transferrable to your client.

Authored By



Dean A. Morande



Rachel A. Oostendorp

Related Practices

[Appellate & Trial Support](#)
[Litigation and Trials](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.