

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

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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

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