Appellate Practice and Procedure

by K. Todd Butler*

This Article reviews federal appellate procedure developments in the Eleventh Circuit during the 2004 calendar year. As is the case each year, perhaps the most important procedural matter the Eleventh Circuit Court of Appeals considered was its own federal subject matter jurisdiction and that of the district courts in the Eleventh Circuit. If a matter is within the subject matter jurisdiction of the federal courts, or the federal appellate jurisdiction of the Eleventh Circuit, then the final order rule, along with the exceptions to the final order rule, dominate the consideration of whether a decision is subject to review. The applicability of the final order rule and its exceptions is discussed in this Article, along with questions pertaining to the proper preservation of matters in the district court for appeal and the presentation of those matters on appeal. Furthermore, this Article addresses the court's decision in *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*,[1] which affords an opportunity to discuss some of the technical requirements for briefs filed in the Eleventh Circuit.

I. FEDERAL APPELLATE SUBJECT MATTER JURISDICTION

The Eleventh Circuit, a United States federal court, is a court of limited jurisdiction that is at all times obligated to examine and challenge its own jurisdiction or the jurisdiction of district courts in actions it reviews.[2] The question of standing, for example, is a threshold question with respect to the power of the court to adjudicate the case and can be raised on appeal regardless of whether it was raised

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1. 377 F.3d 1164 (11th Cir. 2004).

2. *See* Rolling Greens MHP, L.P. v. Comcast SCH Holdings, L.L.C., 374 F.3d 1020, 1021 (11th Cir. 2004).

in the district court.[3] In each case the Eleventh Circuit decides, the court must conclude that it has subject matter jurisdiction over the questions presented on appeal. There are several examples of the Eleventh Circuit's review of its subject matter jurisdiction in 2004 that bear discussion. One such example is *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*,[4] a case in which the court raised the issue of subject matter jurisdiction *sua sponte*.[5] Other examples include *Versa Products, Inc. v. Home Depot, Inc.*[6] and *Chuang v. United States Attorney General*[7] in which the Eleventh Circuit addressed the role of statutes in determinations of federal appellate jurisdiction.[8]

In *Rolling Greens*, a case ostensibly before the court pursuant to diversity jurisdiction, the Eleventh Circuit noted that no allegations or findings in the record existed to indicate that the partners in plaintiff limited partnership were completely diverse from the members of defendant limited liability company.[9] The facts stated in the parties' filings were sufficient only to determine that the two parties were legal entities organized under the laws of two different states.[10] The court held that federal diversity jurisdiction requires that each partner of a party limited partnership be diverse from each member of a party limited liability company.[11] The Eleventh Circuit then remanded the case to the trial court for the limited purpose of determining diversity of citizenship in accord with the Eleventh Circuit's holding.[12]

Under Article III of the United States Constitution,[13] a federal court has jurisdiction only to the extent that the United States Congress, which has the power to create jurisdiction, has in fact created jurisdiction by statute.[14] In 2004 the Eleventh Circuit heard two cases in which a statute restricted opportunities for parties to appeal.[15] In *Versa Products, Inc.*, the court addressed the jurisdictional limitations created by 28 U.S.C. § 1294.[16] Section 1294 provides that, with the

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3. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1002-03 (11th Cir. 2004).
4. 374 F.3d 1020 (11th Cir. 2004).
5. *Id.* at 1021.
6. 387 F.3d 1325 (11th Cir. 2004).
7. 382 F.3d 1299 (11th Cir. 2004).
8. *Versa Prods., Inc.*, 387 F.3d at 1327; *Chuang*, 382 F.3d at 1301.
9. 374 F.3d at 1020.
10. *Id.* at 1021.
11. *Id.* at 1020-21.
12. *Id.*
13. U.S. CONST. art. III.
14. *Id.*
15. *Versa Prods., Inc.*, 387 F.3d at 1325; *Chuang*, 382 F.3d at 1299.
16. 387 F.3d at 1327; 28 U.S.C. § 1294 (2000).

exception of the District Courts of the Canal Zone, the Virgin Islands, and Guam, an appeal from the decision of a district court must be taken to the court of appeals for the circuit where the district court is located.[17] The court in *Versa Products, Inc.* held that under § 1294, the Eleventh Circuit lacked jurisdiction to review an order of the United States District Court for the Eastern District of Missouri transferring a case to the United States District Court for the Northern District of Georgia because the Eastern District of Missouri is located in the Eighth Circuit rather than the Eleventh Circuit.[18] For practical purposes, the decision in *Versa Products, Inc.* creates a bar on appeals of orders of district courts ouside the Eleventh Circuit to district courts inside the Eleventh Circuit.[19] In *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*,[20] the Eleventh Circuit proposed that a party might preserve the right to appeal through the extraordinary writ of mandamus.[21]

In *Chuang*, the second case in which the Eleventh Circuit addressed statutory restrictions on appeals, the court held it retained jurisdiction to review the constitutionality of statutes restricting jurisdiction.[22] Federal statute 8 U.S.C. § 1252[23] denies any court jurisdiction to review a final order deporting an alien who has been convicted of committing an "aggravated felony."[24] In *Chuang* the court's jurisdiction was limited to reviewing whether a crime the petitioner had been convicted of fell within the statutory definition of "aggravated felony."[25] Nevertheless, the court had jurisdiction to review the constitutionality of the statute as applied to petitioner's circumstances.[26] Petitioner argued that by being denied the benefit of a waiver as a deportable alien, as opposed to an excludable alien who has the benefit of the waiver, he was denied his right to equal protection of the laws guaranteed by the Fifth Amendment of the United States Constitution.[27] The Eleventh Circuit,

17. 28 U.S.C. § 1294(1).
18. *Versa Prods., Inc.*, 387 F.3d at 1327.
19. *See id.*
20. 689 F.2d 982 (11th Cir. 1982).
21. *Id.* at 987-88.
22. 382 F.3d at 1303.
23. 8 U.S.C. § 1252 (2000 & Supp. 2002).
24. *Id.* § 1252(a)(2)(C); *Chuang*, 382 F.3d at 1301. For the purposes of United States immigration law, the term "aggravated felony" is defined by 8 U.S.C. § 1101(a)(43) (2000 & Supp. 2002).
25. 382 F.3d at 1301.
26. *Id.* at 1303.
27. U.S. CONST. amend. V.

thus, had jurisdiction to consider his argument.[28] The court agreed with petitioner.[29]

II. DECISIONS SUBJECT TO APPELLATE REVIEW

In 2004 the Eleventh Circuit may have weakened the plaintiff's role as master of the case with its decisions in *Versa Products, Inc. v. Home Depot, Inc.*[30] and *Ortega Trujillo v. Banco Central Del Ecuador*.[31] One of a plaintiff's greatest assets has long been the ability to dismiss a case within the statute of limitations without prejudice and file it again with a more precise set of pleadings or in a more appropriate venue.[32] This asset was diluted with the adoption of Federal Rule of Civil Procedure 41(a)(2).[33] The Rule provides that if the defendant has answered or filed a motion for summary judgment, or unless the parties stipulate to dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."[34] In both *Versa Products, Inc.* and *Ortega Trujillo*, the district court imposed terms and conditions requiring the plaintiffs to pay the defendants' attorney fees and litigation expenses prior to re-filing their claims.[35] These conditions acted as a practical bar to subsequent filings if the cases were voluntarily dismissed. Nevertheless, regardless of whether such terms and conditions *practically* barred subsequent filing, the Eleventh Circuit stated that the terms and conditions were not a *legal* bar.[36] Thus, an order conditioning voluntary dismissal without prejudice on payment of attorney fees and litigation expenses is not a final order subject to review.[37]

Federal statute 23 U.S.C. § 1291[38] provides, in general, only final decisions or orders are subject to appellate review.[39] In 2004 the Eleventh Circuit repeated the definition of "final" for the purpose of appeal: "'A final decision is one which ends the litigation on the merits

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28. *Chuang*, 382 F.3d at 1302-03.
29. *Id.*
30. 387 F.3d 1325 (11th Cir. 2004).
31. 379 F.3d 1298 (11th Cir. 2004).
32. *Versa Prods., Inc.*, 387 F.3d at 1327.
33. FED. R. CIV. P. 41(a)(2).
34. *Id.*
35. *Versa Prods. Inc.*, 387 F.3d at 1327; *Ortega Trujillo*, 379 F.3d at 1300.
36. *Versa Prods. Inc.*, 387 F.3d at 1327-38; *Ortega Trujillo*, 379 F.3d at 1301.
37. 28 U.S.C. § 1291 (2000) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").
38. *Id.*
39. *Id.*

and leaves nothing for the court to do but execute the judgment.'"[40] Nevertheless, exceptions to the final order rule exist, one of which is provided at 28 U.S.C. § 1292.[41] Except for matters that must be appealed to the Court of Appeals for the Federal Circuit,[42] courts of appeal have jurisdiction over "[i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ."[43] Temporary restraining orders are not within the scope of the code section,[44] but the name a district court gives an order does not determine whether it is a preliminary or permanent injunction that may be appealed or a temporary restraining order that may not be appealed.[45] In *AT&T Broadband v. Tech Communications, Inc.*,[46] the Eleventh Circuit stated that an order designated as a "temporary restraining order" would be treated as a preliminary or permanent injunction, and would be subject to appeal, if three conditions were met: "(1) the duration of the relief sought or granted exceeds that allowed by a [temporary restraining order] (ten days), (2) the notice and hearing sought or afforded suggest that the relief sought was a preliminary injunction, and (3) the requested relief seeks to change the status quo."[47]

Federal statute 28 U.S.C. § 1291[48] contemplates final orders subject to appeal, but there are other orders, which are not strictly within the scope of § 1291, that may also be appealed. The policy underlying appellate jurisdiction to review these orders is essentially the same as the policy underlying the distinction between interlocutory injunctions that are subject to review and temporary restraining orders that are not. As the Supreme Court stated in *Cohen v. Beneficial Industrial Loan Corp.*,[49] there exists a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the

40. AT&T Broadband v. Tech Communications, Inc., 381 F.3d 1309, 1314 (11th Cir. 2004) (quoting Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983)).

41. 28 U.S.C. § 1292 (2000); *see, e.g., id.* §§ 1292(c)-(d).

42. *See id.* §§ 1292(c)-(d).

43. *Id.* § 1292(a)(1).

44. *AT&T Broadband*, 381 F.3d at 1314 (citing Fernandez-Roque v. Smith, 671 F.2d 426, 429 (11th Cir. 1982)).

45. *Id.*

46. 381 F.3d 1309 (11th Cir. 2004).

47. *Id.* at 1314.

48. 28 U.S.C. § 1291.

49. 337 U.S. 541 (1949).

whole case is adjudicated."[50] This is, of course, an application of 28 U.S.C. § 1291 that demonstrates the Supreme Court's historical willingness to follow a practical application of the statute—a pragmatic interpretation directed at a result that works in the interest of justice, rather than a technical or literal application of the statute's language, regardless of the injustice that may result.[51]

An example of such orders subject to appellate review include the appellate court's jurisdiction to review the district court's denial of a party's motion for intervention of right pursuant to Federal Rule of Civil Procedure 24(a).[52] The denial of the motion to intervene is not a final decision ending the litigation on the merits and leaving the court no option but to execute the judgment, but insofar as the party moving for intervention of right under Rule 24(a) is concerned, an order denying the motion has that result.[53] Pursuant to the anomalous rule, the court of appeals has jurisdiction to review the district court's denial of intervention of right and will correct the district court's error if intervention was wrongly denied.[54] If, on the other hand, the district court correctly denied the motion to intervene of right, then the appellate court's jurisdiction over the question "evaporates."[55] The appellate court can then take no action other than to dismiss the appeal, hence the name "anomalous" rule.[56]

Also, while the grant of a motion for summary judgment terminates litigation on the merits, leaving nothing for the court to do but execute the judgment, denial of a defendant's motion for summary judgment is normally not considered a final decision ending litigation.[57] Thus, as a rule, a party denied summary judgment may not appeal the decision. However, if a government employee moves for summary judgment based on qualified immunity, the denial is subject to immediate appellate review to the extent qualified immunity turns on a question of law.[58] Government officials enjoy qualified immunity from civil prosecution for conduct in the performance of a discretionary governmental function, provided the conduct complained of does not violate clearly established

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50. *Id.* at 546.
51. *Id.*
52. Stone v. First Union Corp., 371 F.3d 1305, 1308 (11th Cir. 2004); FED. R. CIV. P. 24(a).
53. *Stone*, 371 F.3d at 1308.
54. *Id.*
55. *Id.*
56. *Id. See* AAL High Yield Bond Fund v. Deloitte & Touche, LLP, 361 F.3d 1305, 1309-11 (11th Cir. 2004).
57. *Stone*, 371 F.3d at 1308.
58. O'Rourke v. Hayes, 378 F.3d 1201, 1205 n.2 (11th Cir. 2004).

constitutional or statutory rights.[59] If sovereign immunity, whether qualified or absolute, applies to a government official, then such immunity constitutes the privilege not to be prosecuted at all. Thus, immediate review of an order having the effect of denying the privilege afforded by an immunity doctrine is appropriate because immunity is irrevocably denied once the government official is required to stand trial.[60]

III. PRESERVATION AND PRESENTATION OF MATTERS FOR APPEAL

The Eleventh Circuit decisions in 2004 demonstrate the importance of the attention that practitioners must give to the future appellate process while in district court. The practitioner must address subject matter jurisdiction issues in initial forum selection decisions. Once those decisions are made, the federal courts can raise issues challenging them at any time. Other issues must be preserved in the record before they will be considered on appeal. Personal jurisdiction, as opposed to subject matter jurisdiction, is one example. Personal jurisdiction questions involve rights of the litigants, which the litigants may waive.[61] If a defendant contends that the court does not have jurisdiction of its person, then the defendant is obliged to raise that matter as an affirmative defense in responsive pleadings or in a motion filed pursuant to Rule 12 of the Federal Rules of Civil Procedure.[62] If no such affirmative defense is alleged, or no Rule 12 motion is filed, then any right to avoid prosecution based on the court's lack of personal jurisdiction is waived.[63]

In *Palmer v. Braun*,[64] the Eleventh Circuit made it clear that if the defendant contends that the district court lacks jurisdiction of his person, the defendant must make that defense explicit, or at least more explicit than a challenge to personal jurisdiction that may be generally implied in a motion attacking venue.[65] Defendant in *Palmer* challenged venue by filing a three-page motion entitled "Motion to Dismiss or for Change of Venue," but the body of the motion made no reference to the

59. BLACK'S LAW DICTIONARY 766 (8th ed. 2004).

60. *See O'Rourke*, 378 F.3d at 1206.

61. Palmer v. Braun, 376 F.3d 1254, 1258-59 (11th Cir. 2004).

62. *Id.* at 1259; FED. R. CIV. P. 12.

63. *Palmer*, 376 F.3d at 1259. The defendant may, of course, allow the case to go into default and hope that a later court having in rem jurisdiction of its property, and called upon to execute the default judgment, will agree with its assessment of the personal jurisdiction issue.

64. 376 F.3d 1254 (11th Cir. 2004).

65. *Id.* at 1259.

personal jurisdiction issue he raised on appeal.[66] Later, in his arguments to the Eleventh Circuit, defendant argued that his challenge to venue was a personal jurisdiction challenge. Presumably defendant believed that his venue challenge was substantively equivalent to a challenge of personal jurisdiction. Though questions of venue and personal jurisdiction involve common factors, venue and personal jurisdiction are not substantively identical matters.[67] Thus, "a motion challenging venue is not effective to preserve the issue of personal jurisdiction."[68] If the defendant merely challenges venue, without asserting the affirmative defense of personal jurisdiction in the answer or a Rule 12 motion, then the defendant has effectively consented to the district court's personal jurisdiction. Consequently, the appellate court will not allow the defendant to expand his venue argument to encompass personal jurisdiction.[69]

The preservation of other issues for appeal, in addition to the defense of personal jurisdiction, was raised in several other cases reported by the Eleventh Circuit in 2004. In *Miller v. King*,[70] a disabled prison inmate successfully raised several issues on appeal.[71] The Eleventh Circuit agreed with some of appellant inmate's arguments, reversed the District Court for the Southern District of Georgia, and remanded the case with respect to the individual defendant.[72] The disabled inmate might also have successfully alleged claims under the federal Rehabilitation Act of 1973,[73] but the Eleventh Circuit held that failure to raise such claims in the district court barred appellant from raising them on appeal.[74]

Furthermore, in *Access Now, Inc. v. Southwest Airlines Co.*,[75] the Eleventh Circuit noted that arguments made with respect to specific issues must be made in the district court to be considered on appeal.[76] Likewise, the arguments must be properly briefed to the appellate court.[77] Plaintiff in *Access Now, Inc.*, alleged violations of Title III of the Americans with Disabilities Act ("ADA"),[78] which, among other

66. *Id.* at 1258-59.
67. *Id.* at 1259.
68. *Id.* (citing Guardian Title Co. v. Sulmeyer, 417 F.2d 1290, 1292 (9th Cir. 1969)).
69. *Id.*
70. 384 F.3d 1248 (11th Cir. 2004).
71. *Id.* at 1259.
72. *Id.* at 1278.
73. 29 U.S.C. § 794(a) (2000).
74. *Miller*, 384 F.3d at 1258 n.7.
75. 385 F.3d 1324 (11th Cir. 2004).
76. *Id.* at 1330-31.
77. *Id.*
78. 42 U.S.C. § 12181 (2000).

things, requires private entities owning, leasing, leasing to, or operating a public accommodations to afford "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" to all persons regardless of disability.[79] In proceedings before the United States District Court for the Southern District of Florida, plaintiff's allegations and arguments in response to defendant's motion to dismiss focused solely on the inaccessibility of a website as a place of public accommodation, but plaintiff made no connection between the website and other places of public accommodation.[80] The court for the Southern District of Florida held that "'the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of "places of public accommodation[,]"'"[81] and dismissed the case with prejudice.[82]

On appeal, plaintiff in *Access Now, Inc.* did not challenge the Southern District Court's interpretation of the statutory language, but rather argued the alternative theory of recovery that defendant's website was connected to defendant's business as a whole, and that as a whole, defendant's business was a public accommodation as contemplated by the ADA.[83] The Eleventh Circuit refused to consider either argument on appeal.[84] Eleventh Circuit case law establishes that even an issue properly preserved by objection, argument, or other perfection of the record at trial will be deemed abandoned if it is not specifically and clearly identified in the party's brief on appeal.[85] There was no argument in plaintiff appellant's brief that the district court was wrong in its determination that an internet website was not a place of public accommodation, so any right to argue that the website was a place of public accommodation was deemed abandoned on appeal.[86] Rather, appellant argued on appeal only that defendant's business as a whole, to which the website was connected, was a public accommodation to

79. *Id.* § 12182(a).

80. *Access Now, Inc.*, 385 F.3d at 1327-28.

81. *Id.* at 1328 (quoting Access Now, Inc. v. Southwest Airlines Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002)).

82. *Id.* (citing *Access Now, Inc.*, 227 F. Supp. 2d at 1322).

83. *Id.* at 1328-29.

84. *Id.* at 1329-30.

85. *Id.* at 1330. Note that the briefing process is critical to the appellate court's review of issues. Even if properly preserved in the district court, an issue addressed at oral argument will not be reviewed unless the party proposed the issue as a controlling question of law in the petition to appeal, or in the party's brief. *See* McFarlin v. Conseco Servs. LLC, 381 F.3d 1251, 1263 (11th Cir. 2004).

86. *Access Now*, 385 F.3d at 1328.

which he was denied access because of his disability.[87] However, the Eleventh Circuit would not consider this argument because it was not made in the district court.[88]

The court did note in *Access Now, Inc.*, however, that the rule against the appellate court considering arguments not presented in the district court is not jurisdictional.[89] A circuit court has discretion to consider arguments and issues not presented in the district court, but it may do so only under special circumstances.[90] The court avoids considering new matters, if at all possible, because when it does so it risks deviating from "the essential nature, purpose, and competence of an appellate court," which is to "review claims of judicial error in the trial courts."[91] The court noted that five factors govern whether an issue not raised in the district court will be considered on appeal:

> First, an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake. Fourth, a federal appellate court is justified in resolving an issue not passed on below . . . where the proper resolution is beyond any doubt. Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.[92]

None of these factors applied in *Access Now, Inc.*[93]

In addition, parties must also perfect the record with respect to their objections to jury instructions or be barred from arguing the jury instruction on appeal.[94] However, two exceptions apply to this rule.[95] The appellate court may consider a party's arguments regarding a jury instruction when (1) the party has previously made its position clear to the court and it is apparent that the party's further objections would be

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87. *Id.* at 1330-31.
88. *Id.*
89. *Id* at 1332.
90. *Id.*
91. *Id.* at 1331.
92. *Id.* at 1332 (quoting Wright v. Hanna Steel Corp., 270 F.3d 1336, 1342 (11th Cir. 2001)).
93. *Id.*
94. SEC v. Diversified Corp. Consulting Group, 378 F.3d 1219, 1227 (11th Cir. 2004).
95. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1017-18.

futile, or (2) when it is necessary to consider the argument to "'correct a fundamental error or prevent a miscarriage of justice.'"[96]

IV. FORM AND CONTENT OF APPELLATE BRIEFS

In addition to substantive requirements, the Federal Rules of Appellate Procedure provide exacting technical requirements that must be carefully followed for briefs filed with federal circuit courts of appeal.[97] In *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*,[98] the Eleventh Circuit addressed, for the first time, the practice of "incorporating by reference" arguments made elsewhere.[99] Incorporation by reference is common in civil practice, and Rule 10(c) of the Federal Rules of Civil Procedure[100] specifically provides for incorporating statements made in pleadings by reference to other documents.[101] This rule is liberally applied.[102] Appellate parties need to be aware that Rule 10(c) does not apply in the appellate process. Rule 28(i) of the Federal Rules of Appellate Procedure[103] is the specific rule for "adopting by reference," to the extent it is allowed in the appellate process.[104] Rule 28(i) provides that, "[i]n a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and *any party may adopt by reference a part of another's brief.* Parties may also join in reply briefs."[105] Rule

96. *Id.* at 1018 (quoting Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329 (11th Cir. 1999); Landsman Packing Co. v. Continental Can Co., 864 F.2d 721, 726 (11th Cir. 1989)).

97. *See, e.g.*, FED. R. APP. P. 28(i).

98. 377 F.3d 1164 (11th Cir. 2004).

99. *Id.* at 1167 n.4.

100. FED. R. CIV. P. 10(c).

101. *Id.*

102. CHARLES ALAN WRIGHT & ARTHUR P. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 (3d ed. 2004).

103. FED. R. APP. P. 28(i).

104. *Four Seasons*, 377 F.3d at 1167 n.4.

105. FED. R. APP. P. 28(i) (emphasis added). The Rules of the Eleventh Circuit also require parties employing FED. R. APP. P. 28(i) to include a detailed statement of the briefs of other parties that are being adopted, and which portions of those briefs are being adopted. 11TH CIR. R. 28-1(f). Eleventh Circuit Internal Operating Procedures further specify that absent a written motion granted by the court, "[t]he adoption by reference of any part of the brief of another party pursuant to [FED. R. APP. P. 28(i)] does not fulfill the obligation of a party to file a separate brief which conforms to 11th Cir. R. 28-2[.]" 11TH CIR. R. 28 I.O.P. 3.

28(i) of the Federal Rules of Appellate Procedure is clearly more restrictive than Rule 10(c) of the Federal Rules of Civil Procedure.[106]

In *Four Seasons* the Eleventh Circuit discussed the inappropriateness of broadly adopting or incorporating arguments or materials by reference in briefs submitted in the appellate forum.[107] If parties were allowed to liberally incorporate arguments and statements from documents filed in the district court, then it would have the two-fold effect of negating the rules governing space limitations and the rules governing parties' duties to make their arguments to the appellate court.[108] In *Four Seasons* the party who inappropriately incorporated materials from the record went so far as to state that it was incorporating additional arguments presented to the district court, which it was unable to include in its appellate brief because of space limitations.[109] To illustrate the stringent space limitations in federal appellate briefs, the Federal Rules of Appellate Procedure require the appellant and appellee to limit themselves to thirty pages each in their principal briefs, and fifteen pages in any reply briefs that may be allowed.[110] Further, the briefs must be on eight and one half by eleven inch paper; the text must be written in a plain, roman-style type face with serifs; any proportionally spaced typeface used must be fourteen-point or larger font; and any monospaced typeface used may contain no more than ten and a half characters per inch.[111]

The Federal Rules of Appellate Procedure also specifically require parties to state their contentions on appeal and the reasons for their contentions.[112] The Eleventh Circuit stated that by incorporating arguments by reference to documents filed in the district court, parties fail to fulfill their duties under Rule 28(a)(9).[113] The court stated that

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106. Rule 10(c) of the Federal Rules of Civil Procedure provides that: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." FED. R. CIV. P. 10(c).

107. 377 F.3d at 1167-68 n.4.

108. *Id.*

109. *Id.*

110. FED. R. APP. P. 32.

111. *Id.* Rule 32 is the "assembly manual" for putting an appellate brief together. Practitioners should also refer to the corresponding Local Rules of the Eleventh Circuit and the Eleventh Circuit Internal Operating Procedures. Because reviewing a sample of what the finished product should look like is always helpful, upon request, the Eleventh Circuit clerk's office will loan practitioners sample briefs and record excerpts that comply with the form prescribed by the Rules, Local Rules, and Internal Operating procedures. 11th Cir. R. 32 I.O.P. 3(c).

112. FED. R. APP. P. 28(a)(9).

113. *Four Seasons*, 377 F.3d at 1167 n.4.

> [b]y attempting to "incorporate" all of the arguments it made below, and thus exhorting [the Eleventh Circuit] panel to conduct a complete review of its district court brief, [the party], in the words of a sister Circuit, "invites us to unearth its arguments lodged . . . in the [ ] appendix, leaving it to us to skip over repetitive material, to recognize and disregard any arguments that are now irrelevant, and to harmonize the arguments" it has made at various stages of litigation.[114]

The Eleventh Circuit held that in attempting to incorporate by reference its arguments to the district court rather than fully briefing them, the party waived the arguments on appeal.[115]

114. *Id.* at 1167-68 n.4.
115. *Id.* at 1170.

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