



by Andrew J. Tuck

Strategic Considerations for Appellees in the Federal Courts of Appeals

It is common for attorneys on appeal to treat the role of appellee as purely defensive—wait for the appellant to strike with its opening brief and respond with counterarguments in a response brief. This strategy overlooks both a trap for the unwary appellee and a potentially powerful weapon for the appellee.

First, the trap for the unwary follows from two well-accepted rules—(1) the appellee can raise alternative arguments in defense of the judgment below that the trial court either rejected or ignored (the so-called right for any reason rule), and (2) the appellant waives any argument in favor of reversal not raised in its opening brief. The logical combination of these two rules is that an appellee waives any arguments not raised under the right for any reason rule in its opening brief. This combination has the potential to be particularly devastating where a party wins in the trial court despite losing on a potentially meritorious argument, then simply defends the appeal without affirmatively raising the issues on which he lost. In that situation, in the event the appellate court reverses, the appellee may have forgone the opportunity to have appellate review of the issue on which he lost.

Second, in certain circumstances, the appellee can file a cross-appeal. A cross-appeal is a powerful weapon for the appellee because it gives the appellee an extra brief—the surreply—and the ever-important last word before oral argument or decision.

This article briefly summarizes these two strategic considerations, describes when each applies, and collects relevant rules and cases in various federal courts of appeals.

Appellate Waiver by the Appellee

Appellee waiver flows from two well-accepted rules. First, an appellant waives any argument in favor of reversal by not raising that argument in its opening brief.¹ Second, the appellee need not simply respond to the arguments raised in an appellant's brief; instead "an appellee may rely upon any matter appearing

in the record in support of the judgment below."² Therefore, in its response brief the appellee can affirmatively raise arguments from the court below that the trial court either rejected or ignored. This practice provides the appellee with two powerful advantages: (1) it allows the appellee to present the court additional avenues to affirm the beneficial judgment, and (2) it forces the appellant to spend valuable pages in its reply brief responding to new issues rather than supporting its initial brief's arguments in favor of reversal.

The logical combination of these two rules—appellant waiver-by-omission and "right for any reason"—presents a trap for the unwary appellee. As the U.S. Court of Appeals for the Eleventh Circuit recently held, if the appellee fails to raise an issue in its response brief, it is deemed to have abandoned that issue.³ In *Hamilton v. Southland Christian School*, as succinctly stated by Judge Ed Carnes, "[a] woman of childbearing age was hired as a teacher at a small Christian school. Then she got pregnant, married, and fired—in that order. Then she filed a lawsuit. She lost on summary judgment."⁴ The trial court had rejected the school's argument that the employment law "ministerial exception" barred the former teacher's suit.⁵ The school defended the lower court's judgment on appeal, but did not use the right for any reason rule to raise the ministerial exception as an alternative ground for affirming the judgment.⁶ After briefing was complete in *Hamilton*, the U.S. Supreme Court issued an opinion supporting the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.⁷ The school in *Hamilton* filed a notice of supplemental authority directing the Eleventh Circuit to the Supreme Court's decision in *Hosanna-Tabor*.⁸ The parties also addressed the ministerial exception at oral argument.⁹ The court, nonetheless, refused to consider the issue:

The requirement that issues be raised in a party's brief on appeal promotes careful and correct decision making. It ensures that the opposing party has an opportunity to

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reflect upon and respond in writing to the arguments that his adversary is raising. And it gives the appellate court the benefit of written arguments and provides the court and the parties with an opportunity to prepare for oral argument with the opposing positions and arguments in mind.¹⁰

late consideration of the waived arguments in a subsequent appeal.

In summary, appellees in all circuits can and should affirmatively raise issues decided adversely to their client (or ignored by the trial court) under the right for any reason rule. The practice is procedurally proper, presents the court additional



Two other circuits—the U.S. Courts of Appeals for the Seventh and Tenth Circuits—have (in passing and without analysis) reached somewhat similar conclusions regarding appellee waiver. In the U.S. Court of Appeals for the Fourth Circuit, Judge Hamilton has dissented and urged application of an appellee-waiver rule.¹¹

In contrast, the U.S. Courts of Appeals for the Second, Fourth, Fifth, and Sixth Circuits refuse to apply a waiver rule to appellees.¹² These courts have allowed application of the right for any reason rule even where the alternative argument in favor of affirming is first raised at oral argument.¹³

Additionally, in the U.S. Courts of Appeals for the Third, Eighth, District of Columbia (D.C.), and Federal Circuits, an appellee's failure to raise alternative grounds for affirmance under the right for any reason rule will have no effect on its ability to assert those grounds in the district court on reversal or in a second appeal.¹⁴ These courts reason that applying a waiver rule to prevent appellees from raising arguments in subsequent appeals that could have been raised under the right for any reason rule in a previous appeal is inappropriate because “[a]ppellees do not select the issues to be appealed” and “are at a procedural disadvantage in appeals because they can neither file reply briefs nor choose when to appeal.”¹⁵ Though not explicitly accepting a rule that appellees do not waive arguments in their initial appeal by failing to raise them, these courts’ reasoning suggests they would not apply such a rule, and confirm that even were such a rule applied, it would not bar eventual appel-

reasons why a beneficial judgment was correct, and lessens the impact of the appellant’s reply brief by forcing the appellant to address new issues in reply rather than supporting its arguments in favor of reversal. In addition, in the Eleventh Circuit, and possibly in the Seventh and Tenth Circuits, failing to raise right for any reason arguments could result in waiver.

Cross-Appeals

Cross-appeals are a potent weapon for an appellee for the simple reason that they provide the appellee an additional brief, and the additional brief comes last in time.¹⁶ Once the losing party files a notice of appeal, the appellee can choose to file a brief in response, or file a cross-appeal.¹⁷ The appellee must file a cross-appeal to raise an issue that will alter the judgment in the appellee’s favor.¹⁸ Without a cross-appeal, “the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.”¹⁹ Said differently, a party granted the entirety of the relief it sought in the trial court is not “aggrieved” for purposes of appellate standing, and therefore cannot file its own appeal.²⁰

There are multiple ways a prevailing party can seek to amend the judgment in its favor, necessitating a cross-appeal: seeking to enlarge or reduce the measure of damages,²¹ seeking enhanced damages or punitive damages,²² seeking attorneys fees (or an alternative measure of fees),²³ challenging an award of attorneys fees,²⁴ or seeking an alternative prejudgment interest rate.²⁵ An appellee can also cross-appeal where a challenged

portion of the lower court's ruling would have collateral estoppel effect in subsequent litigation.²⁶

In addition, some circuits permit an appellee to file a conditional cross-appeal.²⁷ The conditional cross-appeal preserves issues that *could* become adverse to the appellee should the appellate court vacate or modify the district court's judgment on related issues.²⁸ Other courts, however, have explicitly rejected conditional cross-appeals.²⁹

Other than the few circuits allowing a conditional cross-appeal, a cross-appeal that does not seek to expand or modify a judgment in the cross-appellant's favor is generally improper.³⁰ Moreover, courts disfavor cross-appeals, as Judge Frank H. Easterbrook has explained:

An appellee should always carefully consider whether there is a good-faith basis to file a cross-appeal and balance the possible exercise of that right against the reasons courts have articulated for disfavoring cross-appeals.

Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.³¹

In summary, an appellee derives the procedural benefit of an additional brief from a cross-appeal, and appellees risk waiving the ability to challenge undesirable portions of a favorable judgment by not cross-appealing. Therefore, an appellee should always carefully consider whether there is a good-faith basis to file a cross-appeal and balance the possible exercise of that right against the reasons courts have articulated for disfavoring cross-appeals.

Conclusion

In its response brief, an appellee should raise any strong alternative arguments supporting the judgment in its favor, even those rejected or ignored by the trial court, using the right for any reason rule. Not only is it beneficial to raise the alternative arguments, failure to raise these arguments will, in some circuits, result in a waiver. In addition, in analyzing the appeal, an appellee should determine whether it can arguably be considered to be requesting an alteration of the favorable judgment. If it can, there is a good-faith basis to file a cross-appeal, and the appellee should balance the procedural benefits to be gained by filing a cross-appeal against the disruptive issues that have caused some courts to disfavor cross-appeals. ☉

Endnotes

¹FED. R. APP. P. 28(a)(9)(A) (1999); e.g., *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999).

²*Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); see also *United States v. American Ry. Express Co.*, 265 U.S. 425, 435

(1924) ("it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it").

³*Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012).

⁴*Id.* at 1317.

⁵*Id.* at 1318.

⁶*Id.*

⁷132 S. Ct. 694, 706 (2012).

⁸*Id.* at 1319.

⁹*Id.*

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¹⁰*Id.*

¹¹*Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007); *Parker v. Franklin County Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012); *Hillman v. Internal Revenue Serv.*, 263 F.3d 338, 344-45 (4th Cir. 2001) (Hamilton, J., dissenting).

¹²*International Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994) ("The [right for any reason] rule applies even when the alternate grounds were not asserted until the court's questioning at oral argument."); accord *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210, 214 n.2 (6th Cir. 2011); *Hillman*, 263 F.3d at 343 n.6; *Shell Off-shore, Inc. v. Director, Office of Workers' Comp. Programs, Dep't of Labor*, 122 F.3d 312, 317 (5th Cir. 1997). *But see Burnley v. City of San Antonio*, 470 F.3d 189, 200 n.10 (5th Cir. 2006) (appellee waived argument for appellate attorneys fees by failing to sufficiently brief).

¹³*International Ore*, 38 F.3d at 1286.

¹⁴*Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995); accord *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007); *Kessler v. National Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997).

¹⁵*Laitram*, 115 F.3d at 954.

¹⁶See generally FED. R. APP. P. 28.1 (1999).

¹⁷*Id.* 28(b), 28.1(c)(2).

¹⁸*Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937); FED. R. APP. P. 28.1(c)(2).

¹⁹*United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924).

²⁰*Klamath Strategic Inv. Fund v. United States*, 568 F.3d 537, 546 (5th Cir. 2009); see also *Perez v. Ledesma*, 401 U.S. 82, 87 n.3 (1971).

²¹See *International Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994) (refusing to address appellee argument in favor of additional damages because appellee did not cross appeal); *Zapico v. Bucyrus-Erie*

Co., 579 F.2d 714, 725-26 (2d Cir. 1978) (Friendly, J.) (refusing to reduce damages because party failed to cross-appeal); *Aerospace Servs. Int'l v. LPA Group*, 57 F.3d 1002, 1004 n.3 (11th Cir. 1995) (requiring cross-appeal to challenge calculation of damage).

²²*Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 955 (Fed. Cir. 1997).

²³*Id.*

²⁴*Chowaniec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 130-31 (7th Cir. 1991).

²⁵*Speaks v. Trikorka Lloyd P.T.*, 838 F.2d 1436, 1439 (5th Cir. 1988).

²⁶*In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1993) (recognizing that prevailing party has standing to challenge lower court's rulings that would have adverse collateral estoppel effect, but refusing to apply that rule to trial court's personal jurisdiction ruling, which would not have such an effect); *cf. Camreta v. Greene*, 131 S. Ct. 2020, 2028-33 (2011) (holding that Supreme Court can review appeals from § 1983 defendants who were

held to have violated the U.S. Constitution but were entitled to qualified immunity).

²⁷*E.g., Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1153 (10th Cir. 2010), *cert. denied*, No. 10-1377, 2012 WL 2368857 (U.S. June 25, 2012); *Hartman v. Duffey*, 19 F.3d 1459, 1465 (D.C. Cir. 1994).

²⁸*Cook*, 618 F.3d at 1153.

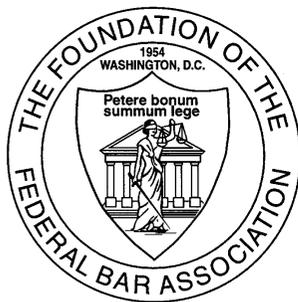
²⁹*See, e.g., Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 437 F.3d 1376, 1378 (Fed. Cir. 2006).

³⁰*Aventis Pharma S.A. v. Hospira, Inc.*, 637 F.3d 1341, 1343 (Fed. Cir. 2011), *aff'd*, 675 F.3d 1324 (Fed. Cir. 2012); *Marcatante v. City of Chicago, Ill.*, 657 F.3d 433, 438 (7th Cir. 2011); *Mitchell Partners, Ltd. P'ship. v. Irex Corp.*, 656 F.3d 201, 208 n.7 (3d Cir. 2011); *National Union Fire Ins. Co. of Pittsburg, Pa. v. West Lake Acad.*, 548 F.3d 8, 23 (1st Cir. 2008); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281 (10th Cir. 2006); *In re Sims*, 994 F.2d 210, 214 (5th Cir. 1993).

³¹*Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987); *accord Nautilus Group, Inc.*, 437 F.3d at 1377.

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