Motions for Summary Affirmance in the Seventh Circuit

By Ronald D. Menna, Jr.

If you represent an Appellee before the Seventh Circuit and the Appellant's Brief is so deficient that no appealable issue has been raised, do you have to wait to raise the issue in the Appellee's Brief? Simply put, no. The Seventh Circuit allows an Appellee to move simplify the appeal process by allowing a summary affirmance. Thus, in the right case, an Appellee can achieve an affirmance without having to file a full Brief or having the need for oral argument.

The Federal Rules of Appellate Procedure ("FRAP") do not specifically provide for a summary affirmance. Generally the power to decide these motions is found in the statutory authority to decide appeals[1], the FRAP's provisions allowing the Court to be flexible and to decide motions.[2] The Seventh Circuit's Practitioner's Handbook for Appeals also notes that motions for summary affirmance may be granted.[3]

Summary proceedings are an exception to the normal course of considering an appeal and, in any situation, ought to be employed only when the appropriateness of such a course is clear and only with great solicitude for the substantial rights of the parties.[4] "A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified. To summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented."[5] However, summary disposition is appropriate, "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists."[6] That is, "Motions papers, in con-

1. 28 U.S.C. § 2106 (giving federal appellate courts the broad authority to "affirm …any judgment, decree, or order of a court lawfully brought before it for review … as may be just under the circumstances").
2. Fed. R. App. P. 2 (permitting an appellate court to "suspend" its rules for "good cause," and to "order proceedings as it directs"); 7th Cir. R. 2 (same); Fed. R. App. P. 27 (motion practice); *see also, Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (citing Fed. R. App. P. 2 as a basis for the Court's authority to decide motions for summary disposition).
3. Seventh Circuit Practitioner's Handbook for Appeals, IX. Motions and Docket Control, p. 73 (2014 Ed.) ("On occasion, when the motion papers, in conjunction with the record and the district court's opinion, show the appropriate disposition of the appeal with sufficient clarity that a call for briefs would be nothing but an invitation for the parties to waste their money and the court's time, the court on its own initiative, and with the agreement of the entire motions panel, may summarily affirm (or reverse) the district court's judgment even though the motion does not ask for such relief.") (Found at, http://www.ca7.uscourts.gov/forms/Handbook.pdf, last visited August 9, 2016.)
4. *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1994) (Citation omitted).
5. *See, Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987); see also, Seventh Circuit Practitioner's Handbook for Appeals, IX. Motions and Docket Control, p. 73 (2014 Ed.) ("summary disposition will be granted when the "briefs would be nothing but an invitation for the parties to waste their money and the court's time") (Found at, http://www.ca7.uscourts.gov/forms/Handbook.pdf, last visited August 9, 2016.)
6. *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994).

junction with the record and the district court's opinion, may show the appropriate disposition with sufficient clarity that a call for briefs would be nothing but an invitation for the parties to waste their money and the court's time."[7]

The Seventh Circuit's standard was set forth in *United States v. Fortner*,[8] where the Court held:

> "Motions for summary affirmance generally should be confined to certain limited circumstances. Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone. Summary affirmance may also be in order when the arguments in the opening brief are incomprehensible or completely insubstantial. Finally, summary affirmance may be appropriate when a recent appellate decision directly resolves the appeal. When a motion for summary affirmance is appropriate, it should be filed earlier rather than later – not right before the merits brief is due.
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> "Short of the foregoing (or substantially similar) situations, the government and other appellees should follow the usual process: file a merits brief and argue the case in the ordinary course. This appeal may be straightforward, but we are not convinced that it is so insubstantial that full briefing would not assist the merits panel that decides it."

Other Circuits have held that the motion is appropriate where there is no "substantial" question for the Court to decide.[9] Motions for summary affirmance based upon a deficient Appellant's Brief are rarely granted.[10]

Unlike other Circuits, the Seventh Circuit does not have any local rule regarding when a motion for summary affirmance can or must be filed.[11] In the usual case the motion should be filed well in advance of the Appellee's Brief due date. In *Ramos v. Ashcroft*,[12] the Court denied a motion for summary affirmance that was filed the day the Appellee's Brief was due, holding:

> "Filing motions in lieu of briefs, a form of self-help extension, has become increasingly common but is not authorized by any rule, either national or local. It is fine to file a motion to affirm, to dismiss for want of jurisdiction, to transfer to another circuit, and so on; the problem lies in the belief that any motion automatically defers the deadline for filing the brief. A brief must be tendered when due. If a party needs more time, a request for an extension must be filed in advance of the due date. If extra time has not been granted in advance, then the litigant must file its brief as scheduled…If events justify a last-minute motion concerning jurisdiction, venue, sanctions, or any other subject, then that motion may accompany the brief; a motion is not a substitute for a brief."

The *Fortner* Court, which denied a motion filed five days before the merits brief was due, also held that if the basis for a summary affirmance is discovered shortly before the Appellee's brief is due, then "a last-minute motion, if necessary, should be

7. *Mather v. Mundelein*, 869 F.2d 356, 357 (7th Cir. 1989).
8. *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (citations omitted).
9. *See, Joshua*, 17 F.3d at 380 (summary disposition is proper "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists"); *Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985) (granting a motion for summary reversal because the merits of the appeal were "clear"); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969) (summary disposition is appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," or where "the appeal is frivolous") (citations omitted).
10. *See, Collins v. Illinois*, 554 F.3d 693, 696 (7th Cir. 2009) (Appellant's "brief, however, substantially complies with Rule 28, [citation omitted], and the content of the brief is enough to satisfy us that summary affirmance is not appropriate in this case."); *compare, In re Leventhal*, 2013 U.S. App. LEXIS 4767, *1-2 (7th Cir. February 6, 2013) ("This court has, however, carefully reviewed the orders of the district court and the bankruptcy court, and the appellant's brief. Based on this review, the court has determined that further briefing would not be helpful. … The appellant's brief does not present any substantial reason to doubt the soundness of the opinions written by the district and bankruptcy judge.").
11. *See*, D.C. Circuit Handbook of Practice and Internal Procedures, VII. Motions Practice, p. 28 (as Amended through March 1, 2016) (dispositive motions must be filed within 45 days from docketing) (Found at https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/HandbookMarch2016Final.pdf, last visited August 9, 2016); 3rd Cir. R. 27.4(b) (motion for summary action should be filed before the appellant's brief is due); 4th Cir. R. 27(f) ("Motions for summary disposition should be made only after briefs are filed."); 9th Cir. R. 3-6 (the motion for summary disposition can be filed "At any time before the completion of briefing"); 10th Cir. R. 27.2(A)(3)(a) (motions must be filed within 14 days of the filing of the notice of appeal, unless good cause is shown).
12. *Ramos v. Ashcroft*, 371 F.3d 948, 949-50 (7th Cir. 2004) (emphasis in original).

About the Author

Ronald D. Menna, Jr. is a principal in the Chicago law firm of Fischel & Kahn, Ltd., with a focus on civil appeals, and chancery and commercial litigation. He is the Chair of the DCBA Appellate Law and Practice Section. He earned his B.A. in Political Science and Economics from the University of the South and his juris doctor from the University Of Illinois College Of Law.

filed along with a timely brief, not in place of it."[13] However, in *Dupuy v. McEwen*,[14] the Court explained that *Fortner* Court was concerned about the last minute nature of the motion then before it. It also noted that, as quoted above, *Fortner* provides three examples in which a last minute motion is proper.[15]

Finally, as a practical matter, these motions should not be filed lightly. The Seventh Circuit has repeatedly held that if the correct circumstances are not present, they are a waste of the Court's time and resources.[16] Thus, motions for summary affirmance can be a useful tool in quickly and efficiently resolving an appeal where the Appellant is clearly entitled to relief and the Court can decide the issue on the papers and record. If successful, you will be able to obtain an affirmance without having to file a full brief on the merits or attend oral argument. ☐

13. *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006).
14. *Dupuy v. McEwen*, 495 F.3d 807, 808 (7th Cir. 2007).
15. *Id.; see also*, Seventh Circuit Practitioner's Handbook for Appeals, IX. Motions and Docket Control, p. 73 (2014 Ed.) ("Counsel are reminded that a brief must be filed with due. If events justify a last-minute motion concerning jurisdiction, venue, sanctions, or any other subject, that motion may accompany the brief; a motion is not a substitute for a brief. *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004)." (Underline in original.)) (Found at, http://www.ca7.uscourts.gov/forms/Handbook.pdf, last visited August 9, 2016.)
16. *United States v. Lloyd*, 398 F.3d 978, 980 (7th Cir. 2005) (Appellant's motion to dismiss "also creates busywork for the court and its staff. … By then seven appellate judges (plus two or three staff attorneys) could have become involved in three waves of motions and briefs. And for what? Just because one attorney let an appeal get too close to a briefing deadline and decided to file a three-page motion in lieu of a ten-page brief?"); *Fortner*, 455 F.3d at 754 (motions for summary affirmance are disfavored in part because, if denied, they may increase from three to six the number of judges who must consider the merits); *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 728 (7th Cir. 2006 (same).