

# Appellate Practice and Procedure

by K. Todd Butler\*

## I. INTRODUCTION

This Article reviews appellate procedural issues that the Eleventh Circuit Court of Appeals addressed in the cases it decided in 2002. It is divided into four general sections: Timeliness of Appeal, Appellate Jurisdiction, Certifications to State Supreme Courts, and Standards of Review. Section IV, Certifications to State Supreme Courts, which identifies cases the Eleventh Circuit has certified questions of law to the supreme courts of the various states, is a new feature that is being added to this annual Article. The Eleventh Circuit has indicated that because state courts should have the opportunity to interpret or modify existing state law, the Eleventh Circuit will take an approach that minimizes federal courts, making what it describes as “*Erie* ‘guesses.’”<sup>1</sup> Accordingly, the Eleventh Circuit has held that a federal court should certify a question to the state’s highest court whenever any doubt exists about the application of state law.<sup>2</sup>

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1. See *Keener v. Convergys Corp.*, 312 F.3d 1236, 1241 (11th Cir. 2002). The *Erie* “guess” to which the Eleventh Circuit refers is based on the *Erie* doctrine established in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Under the *Erie* doctrine, there is no general federal common law, and when a federal court considers a question of state law, it is required to follow precedent established by the state’s highest court. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 5.3.5, at 308-10 (1994). When the state’s highest court has established no precedent with respect to the question of state law, the federal court sits as if it were a state court subordinate to the state’s highest court and while “giving “proper regard” to relevant rulings of other courts of the [s]tate,” it may determine the interpretation of state law that it believes the state’s highest court would apply. *Id.* at 310 (quoting *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967)).

2. *Keener*, 312 F.3d at 1241.

## II. TIMELINESS OF APPEAL

In *Vencor Hospitals, Inc. v. Standard Life & Accident Insurance Co.*,<sup>3</sup> the court of appeals rejected an attempt to use Federal Rule of Civil Procedure 60(b)<sup>4</sup> to circumvent the time limits for filing a notice of appeal as established in Federal Rule of Appellate Procedure 4(a)(6).<sup>5</sup> Defendant Standard Life had issued a Medicare supplement policy to plaintiff Vencor Hospital's patient, Etha Good. Plaintiff argued that defendant should have reimbursed it for services rendered to Good at plaintiff's standard rates, and defendant argued that its policy provided reimbursement only at the discounted Medicare rate. The district court

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3. 279 F.3d 1306 (11th Cir. 2002).

4. Federal Rule of Civil Procedure 60(b) provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FED. R. CIV. P. 60(b) (citing 28 U.S.C. § 1655 (2000)).

5. 279 F.3d at 1311. Federal Rule of Appellate Procedure 4(a)(6) provides:

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

FED. R. APP. R. 4(a)(6).

held that defendant's policy unambiguously limited defendant to reimbursement at the Medicare rate. Plaintiff filed a timely motion for the district court to reconsider its summary judgment order, and the district court issued an order denying plaintiff's motion for reconsideration, but neither plaintiff nor defendant ever received notice of the district court's order. Plaintiff filed its motion on October 26, 1999.<sup>6</sup>

On October 2, 2000, plaintiff filed a motion for relief from the summary judgment based on the opinion of the D.C. Circuit in *Vencor, Inc. v. Physicians Mutual Insurance Co.*,<sup>7</sup> issued May 23, 2000.<sup>8</sup> In its October 6, 2000 order denying relief from summary judgment, the district court held that the D.C. Circuit's ruling did not change the basis upon which it granted summary judgment to Standard Life<sup>9</sup> and further noted that it had denied plaintiff's earlier motion for reconsideration of the order granting summary judgment.<sup>10</sup> This was the first notice that plaintiff received that the motion for reconsideration had been denied, and on October 17, 2000, plaintiff filed its motion for relief from judgment under Rule 60(b).<sup>11</sup>

The Eleventh Circuit stated that prior to 1991, it would have been appropriate to attempt to avoid the effect of the district court's summary judgment through Rule 60(b), which "allows a district court to relieve a party from final judgment for 'mistake, inadvertence, surprise, or excusable neglect, . . . or . . . any other reason justifying relief from the operation of the judgment.'"<sup>12</sup> If the court refused to grant relief from judgment, that refusal could then become the basis for an appeal, regardless of how much time had passed since entry of the order granting the judgment from which the party sought relief. After 1991, however, Federal Rule of Appellate Procedure 4(a) imposed defined time limits on a party's opportunity to file a notice of appeal, even

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6. 279 F.3d at 1308.

7. 211 F.3d 1323 (D.C. Cir. 2000).

8. 279 F.3d at 1308 n.1.

9. The district court granted summary judgment to Standard Life based on the language of Standard Life's contract with its insured. *Id.* at 1308. In *Vencor Hospital, Inc. v. Physicians Mutual Insurance Co.*, the D.C. Circuit did not address the language of the contract between Physician's Mutual Insurance and Vencor's patient. The D.C. Circuit stated that the language of the Medicare statute does not prohibit a medical services provider from charging its standard rate for services rendered to a patient after the patient's Medicare benefits are exhausted. *See generally Vencor Hosp., Inc.*, 211 F.3d at 1323-27.

10. *Standard Life Acc. Ins. Co.*, 279 F.3d at 1308 n.1.

11. *Id.* at 1308.

12. *Id.* at 1310 (quoting FED. R. CIV. P. 60(b)).

“where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.”<sup>13</sup>

Rule 4(a)(6) gives a party an opportunity to reopen the time for filing a notice of appeal, but it allows a maximum of 180 days after entry of the judgment from which the party seeks appeal.<sup>14</sup> Allowing a party to appeal a district court’s denial of a motion for relief from judgment pursuant to Rule 60(b) more than 180 days after entry of judgment would have the effect of circumventing the intended purpose of Rule 4(a)(6).<sup>15</sup>

The Eleventh Circuit also addressed the effect of Rule 4 in *Birmingham Fire Fighters Ass’n 117 v. Jefferson County*.<sup>16</sup> In this case, plaintiffs appealed the district court’s denial of their motion requesting modification of a decree entered in the case five years earlier.<sup>17</sup> The court stated that in the interests of efficiency and finality, the underlying policy of Rule 4 of the Federal Rules of Appellate Procedure requires a timely appeal.<sup>18</sup> As in *Vencor Hospitals*, the Eleventh Circuit held that a party cannot avoid the effect of Rule 4(a)(6) by asking the district court to undo an order it entered more than 180 days earlier and then seeking to appeal the district court’s refusal to do so.<sup>19</sup> The Court said that “[t]he time limits of Rule 4 have more steel in them than that.”<sup>20</sup>

### III. APPELLATE JURISDICTION

In a case growing out of a common body of litigation and with the same name as a case discussed above, *Birmingham Fire Fighters Ass’n 117 v. Jefferson County*,<sup>21</sup> the Eleventh Circuit addressed its jurisdiction to hear an appeal brought pursuant to 28 U.S.C. § 1292(a)(1),<sup>22</sup> which allows the court to hear an appeal from an order if the order modifies an injunction.<sup>23</sup> Appellant class argued that the court had

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13. *Id.* (quoting FED. R. APP. P. 4, advisory committee’s notes to 1991 amendment).

14. *Id.* at 1310-11.

15. *Id.* at 1311.

16. 290 F.3d 1250 (11th Cir. 2002).

17. *Id.* at 1253.

18. *Id.* at 1254.

19. *Id.*

20. *Id.*

21. 280 F.3d 1289 (11th Cir. 2002).

22. 28 U.S.C. § 1291(a)(1) (2000).

23. 280 F.3d at 1292-95. Section 1292(a)(1) provides that the jurisdiction of the courts of appeal includes the following:

jurisdiction over its appeal under § 1292(a)(1) because the district court's interpretation, or clarification, of language in an earlier decree ran so contrary to the earlier decree's plain language that it constituted a modification of the decree.<sup>24</sup> The court undertook a functional analysis of the district court's "clarification" to determine whether it constituted the functional equivalent of a modification.<sup>25</sup> An order will be held to functionally modify an earlier injunctive order if it "actually changes the legal relationship of the parties to the [original] decree<sup>26</sup> . . . [by] 'chang[ing] the command of the earlier injunction, relax[ing] its prohibitions, or releas[ing] any respondent from its grip.'<sup>27</sup> In conducting such an analysis of the district court's order, however, the court of appeals is not interested in whether the district court may have simply erred in its interpretation of the earlier order. "Congress did not intend for [§ 1292(a)(1)] to open the flood gates of piecemeal appeals."<sup>28</sup> The court will thus hold that an order interpreting or clarifying an earlier injunction is actually a modification only when the misinterpretation is so blatantly or obviously wrong that the misinterpretation leaps from the page.<sup>29</sup>

The question of appellate jurisdiction is also raised if a party was improperly before the district court, such as in *United States v. City of Miami*,<sup>30</sup> in which the Eleventh Circuit reviewed the district court's denial of the Miami Community Police Benevolence Association's motion to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).<sup>31</sup> If a party that does not otherwise have standing

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Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(a)(1).

24. 280 F.3d at 1292.

25. *Id.* at 1293. The court also stated that it was not bound by the district court's characterization of its own order as a clarification or interpretation, as distinguished from a modification. *Id.* at 1292.

26. *Id.* at 1293 (citing *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 957 (7th Cir. 1999)).

27. *Id.* (quoting *Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990)).

28. *Id.* (quoting *United States v. City of Hialeah*, 140 F.3d 968, 973 (11th Cir. 1998)).

29. *Id.* See also *Sierra Club v. Meiburg*, 296 F.3d 1021, 1028-29 (11th Cir. 2002) (relying on *Birmingham Fire Fighters Ass'n 117*, 280 F.3d at 1293).

30. 278 F.3d 1174 (11th Cir. 2002).

31. *Id.* at 1175. Federal Rule of Civil Procedure 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene;

fails to qualify as a party having the right to intervene, then the appellate court lacks jurisdiction to hear the party's appeal.<sup>32</sup> Under its "anomalous rule," however, the Eleventh Circuit exercises provisional jurisdiction to determine whether the district court correctly denied the Association's motion to intervene.<sup>33</sup> The "anomalous rule" gives the court "jurisdiction to determine whether the district court erred in denying a motion to intervene."<sup>34</sup> If the court finds that the district court's determination was correct, then the Eleventh Circuit will be obliged to dismiss the appeal for want of jurisdiction.<sup>35</sup> If, on the other hand, the appellate court finds that the district court's decision was incorrect, then the order denying the motion to intervene as a matter of right will be reversed.<sup>36</sup> The court affirmed the district court in *City of Miami*,<sup>37</sup> but presumably the case would have been remanded to the district court for further proceedings with the Association as a plaintiff if the court had found that the district court erred in denying the Association's motion.

The anomalous rule applies, however, only when the question on appeal is whether the district court improperly denied a motion to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a).<sup>38</sup> The anomalous rule does not apply if the motion the district court denied was for permissive intervention under Rule 24(b).<sup>39</sup> Denial of a motion for permissive intervention "is neither a final decision nor an appealable interlocutory order because such an order does not substantially affect the movant's rights."<sup>40</sup> The Eleventh Circuit thus lacks jurisdiction over a district court's denial of a motion for permissive intervention.

Federal appellate jurisdiction is typically limited to those cases in which a district court has entered a final order.<sup>41</sup> In *MCI Telecommu-*

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or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a).

32. 278 F.3d at 1178.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1179.

38. *Davis v. Butts*, 290 F.3d 1297, 1299 (11th Cir. 2002).

39. *Id.* at 1299.

40. *Id.* (quoting *Meek v. Metro. Dade County*, 985 F.2d 1471, 1476 (11th Cir. 1993)).

41. *See* 28 U.S.C. § 1291 (2002).

*nications Corp. v. BellSouth Telecommunications, Inc.*,<sup>42</sup> the district court's final order reversed the decision of a state administrative agency.<sup>43</sup> Typically, a decision remanded to an administrative agency that requires the agency to proceed under a "certain legal" standard or for further evidentiary considerations is not a final order over which the court of appeals would have jurisdiction.<sup>44</sup> Under the "collateral order" doctrine, however, an appellate court can exercise appellate jurisdiction over a remand order to an administrative agency if the order forces the administrative agency to conform its decision to the district court's mandate.<sup>45</sup> In *MCI Telecommunications* the Eleventh Circuit held that because the district court's order required the state administrative agency to conform its rulings to the district court's mandate, the collateral order doctrine applied.<sup>46</sup> The order was final for the agency because the agency did not have standing to appeal, and the court of appeals exercised jurisdiction accordingly.<sup>47</sup>

In *Sanchez-Velasco v. Secretary of Department of Corrections*,<sup>48</sup> the Eleventh Circuit reviewed a district court decision dismissing a habeas corpus appeal filed by the Capital Collateral Regional Counsel ("CCRC") of Florida on behalf of a death row inmate. The district court held that CCRC met the second prong of the *Whitmore*<sup>49</sup> test to determine whether a party has "next friend" standing to sue on behalf of another.<sup>50</sup> The second prong of the *Whitmore* test requires a person seeking next friend standing to show that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate," and it may be the case that "a 'next friend' must have some significant relationship with the real party in interest."<sup>51</sup> However, the district court denied the habeas petition that CCRC filed on the death row inmate's behalf because it found the inmate competent and thus responsible for deciding whether to bring his own habeas petition.<sup>52</sup> CCRC could not meet the first prong of the *Whitmore* test that requires one seeking next friend standing to give an adequate explanation of why the complainant cannot

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42. 298 F.3d 1269 (11th Cir. 2002).

43. *Id.* at 1271.

44. *Id.* (citing *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989)).

45. *Id.*

46. *Id.*

47. *Id.*

48. 287 F.3d 1015 (11th Cir. 2002).

49. *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990).

50. 287 F.3d at 1025.

51. *Id.* (quoting *Whitmore*, 495 U.S. at 163-64).

52. The inmate had insisted throughout the proceeding that he did not want to pursue the petition and that he wanted the sentence of death to be carried out. *Id.* at 1024.

bring his own suit, such as inaccessibility, mental incompetence, or some other disability, like being a minor.<sup>53</sup> On appeal, the Eleventh Circuit reviewed not only the district court's finding that the first *Whitmore* prong of explanation had not been met, but it reviewed the question of whether the second prong had been met.<sup>54</sup> Appellant argued that because appellee had not filed a cross-appeal, the court should not consider appellee's contention in its brief and oral argument to the Eleventh Circuit that not only had the first prong not been met, but neither the first nor second prong had been met.<sup>55</sup>

The court stated that "[a]n appellee may, without cross-appealing, urge in support of a result that has been appealed by the other party any ground leading to the same result, even if that ground is inconsistent with the district court's reasoning."<sup>56</sup> "[W]ithout filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below."<sup>57</sup> The court emphasized the fact that appellee had consistently argued, throughout all phases of the litigation, that CCRC had failed to meet either prong of the *Whitmore* test.<sup>58</sup> Also, the court noted that because CCRC's habeas petition implicated the limited jurisdiction of federal courts under Article III of the United States Constitution,<sup>59</sup> the court was obliged to consider all challenges to CCRC's standing, regardless of whether the parties themselves initiated the challenges.<sup>60</sup>

Finally, the Eleventh Circuit Court of Appeals, like all federal courts, is a court of limited jurisdiction, and it must review all issues of federal jurisdiction that parties raise. In *Leonard v. Enterprise Rent a Car*,<sup>61</sup> the court stated that it must take note of a district court's lack of jurisdiction.<sup>62</sup> Plaintiffs had initiated the action in state court, but it was removed to the federal district court pursuant to federal diversity jurisdiction provided by 28 U.S.C. § 1332.<sup>63</sup> The district court then treated defendant's affirmative defense that the complaint failed to state a claim as if it were a motion pursuant to Rule 12(b)(6)<sup>64</sup> and dismissed

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53. *Id.* at 1025.

54. *Id.*

55. *Id.* at 1026.

56. *Id.* (citing *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479 (1999)).

57. *Id.* (quoting *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982)).

58. *Id.* at 1025-26.

59. U.S. CONST. art. III.

60. 287 F.3d at 1026.

61. 279 F.3d 967 (11th Cir. 2002).

62. *Id.* at 972.

63. *Id.* at 970-71 (relying on 28 U.S.C. § 1332 (2000)).

64. FED. R. CIV. P. 12(b)(6).

the complaint. On appeal plaintiffs argued that they should not have been compelled to litigate this case in federal court in the first place because the amount in controversy did not exceed the requisite amount of \$75,000 and, therefore, the district court lacked subject matter jurisdiction to hear the case.<sup>65</sup> Because it is a court of limited jurisdiction like the district court, the court of appeals stated that it is obligated to notice the district court's lack of subject matter jurisdiction.<sup>66</sup> The court must first review any jurisdictional issues that an appellant raises.<sup>67</sup> If the court determines that the district court rendered a judgment that it lacked subject matter jurisdiction, the court will vacate the district court's judgment and remand the case to the district court with instructions to further remand the case to the state court for adjudication.<sup>68</sup>

#### IV. CERTIFICATIONS TO STATE SUPREME COURTS

In *Liberty Mutual Insurance Co. v. C-Staff, Inc.*,<sup>69</sup> the Eleventh Circuit certified a question to the Supreme Court of Georgia.<sup>70</sup> After conducting post-judgment discovery, a judgment creditor attempted to implead additional parties in its enforcement action against its judgment debtor. The judgment creditor alleged that it had identified these additional parties as fraudulent transferees or alter egos of the judgment debtor.<sup>71</sup> However, section 9-11-69 of the Official Code of Georgia Annotated ("O.C.G.A.")<sup>72</sup> does not expressly state whether such impleader is permissible, nor is there governing Georgia case law.<sup>73</sup> The court accordingly certified the question: "Pursuant to O.C.G.A. § 9-11-69, may a judgment creditor initiate supplementary proceedings to the execution of a judgment wherein third-parties, alleged to be fraudulent transferees, alter egos or successors of a judgment debtor, are impleaded as defendants to the action?"<sup>74</sup>

Two questions were certified to the Supreme Court of Alabama in *Federal Insurance Co. v. Traveler's Casualty & Surety Co.*<sup>75</sup> In *Federal* an excess insurer became liable for \$3.6 million on a \$4.6 million verdict

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65. 279 F.3d at 971.

66. *Id.* at 972.

67. *Id.*

68. *Id.* at 974.

69. 280 F.3d 1337 (11th Cir. 2002).

70. *Id.* at 1339.

71. *Id.*

72. O.C.G.A. § 9-11-69 (1993).

73. 280 F.3d at 1340.

74. *Id.*

75. 280 F.3d 1356 (11th Cir. 2002).

after the primary insurer refused to settle the case for \$350,000 in pretrial negotiations. The primary insurer was obligated to pay the first \$1 million of the verdict. The excess insurer sought subrogation to the rights of the insured against the primary insurer for the primary insurer's alleged breach of its duties of good faith in settlement, deciding whether to settle, and keeping the insured (or in this case, the secondary insurer) "informed of settlement negotiations and adverse defense developments."<sup>76</sup> The Eleventh Circuit found no clear and controlling precedent in Alabama law on whether an excess insurer could be subrogated to the rights of an insured against a primary insurer, nor did it find precedent on whether a primary insurer owes a duty to an excess insurer.<sup>77</sup> The Eleventh Circuit accordingly certified these questions to the Alabama Supreme Court.<sup>78</sup>

In *Mosquito Control District of Florida v. Coregis Insurance Co.*,<sup>79</sup> defendant insurance company refused to provide a defense for the Florida Keyes Mosquito Control District when a former District employee filed a petition against the District before the Monroe County Career Service Counsel ("MCCSC").<sup>80</sup> The Eleventh Circuit certified the questions whether, within the contemplation of the language of the insurance policy defendant issued, (1) the MCCSC was a "court of law" and (2) the petition was for "money damages."<sup>81</sup>

In *Swire Pacific Holdings, Inc. v. Zurich Insurance Co.*,<sup>82</sup> a diversity case filed in the Southern District of Florida, the owner and developer of a Florida high-rise condominium sued the issuer of its Builder's Risk Policy to recover costs it incurred in correcting design defects in the condominium. At issue were the Builder's Risk Policy's Design Defects Exclusion Clause and the Sue and Labor Clause. The district court granted the insurer's motion for summary judgment, holding that while the Design Defects Exclusion Clause contained an exception for ensuing loss, or loss resulting from a design defect, the policy did not cover the cost of correcting a design defect. The effect of the Design Defects Exclusion Clause was roughly congruent with products liability law, which typically allows recovery for injuries to person and to property other than the defective product, while the loss of the value of the defective product itself must be recovered pursuant to warranty. The

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76. *Id.* at 1356-57.

77. *Id.* at 1356.

78. *Id.*

79. 281 F.3d 1207 (11th Cir. 2002).

80. *Id.* at 1208.

81. *Id.*

82. 284 F.3d 1228 (11th Cir. 2002).

district court further held that the Sue and Labor Clause, which allowed the insured to incur costs compensable under the policy to prevent further loss to the insurer, applied only to covered losses.<sup>83</sup> The Eleventh Circuit noted that there were several decisions supporting the district court's holding with respect to the Design Defects Exclusion Clause, but observed that none of the decisions was made under Florida law.<sup>84</sup> Likewise, there were several conflicting decisions with respect to the district court's holding on the policy's Sue and Labor Clause, but none of these was controlling with respect to a case governed by Florida law.<sup>85</sup> Because Zurich indicated to the court that the policy provisions in question were commonplace and could be found in thousands of similar policies throughout Florida,<sup>86</sup> the Eleventh Circuit certified the following questions to the Supreme Court of Florida:

Whether the policy's Design Defect Exclusion Clause bars coverage for the cost of repairing the structural deficiencies in the condominium building; If the first question is answered in the affirmative, whether the policy's Sue and Labor Clause applies only in the case of an actual, covered loss; [and] If the second question is answered in the negative, whether the policy's Sue and Labor Clause covers the cost of repairing the structural deficiencies in the condominium building.<sup>87</sup>

In *United States v. Pepper's Steel & Alloys, Inc.*,<sup>88</sup> the Eleventh Circuit certified the question to the Florida Supreme Court of whether Florida Statutes chapter 627.428<sup>89</sup> allows recovery for attorney fees incurred to enforce a settlement agreement with an insurance company.<sup>90</sup> Florida law normally provides that each party is responsible for its own attorney fees, but chapter 627.428 allows an insured party prevailing against an insurer to recover attorney fees.<sup>91</sup> The Florida Supreme Court has held that chapter 627.428 allows a party to recover attorney fees in reaching a settlement with the insurer, but it has made no determination with respect to the applicability of the statute to enforcement of the settlement.<sup>92</sup>

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83. *Id.* at 1229-31.

84. *Id.* at 1231-32.

85. *Id.* at 1232-33.

86. *Id.* at 1229.

87. *Id.* at 1234.

88. 289 F.3d 741 (11th Cir. 2002).

89. FLA. STAT. ch. 627.428 (2002).

90. 289 F.3d at 744.

91. *Id.* at 742-43 (relying on FLA. STAT. 627.428).

92. *Id.* at 743 (citing *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983)).

## V. STANDARDS OF REVIEW

In *Miller v. Kenworth of Dothan, Inc.*,<sup>93</sup> a race discrimination case under Title VII,<sup>94</sup> defendant Kenworth moved for judgment as a matter of law at the close of the evidence.<sup>95</sup> The trial court denied defendant's motion, and the Eleventh Circuit Court of Appeals articulated its standards for conducting de novo review of the trial court's decision, stating that if it determines that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions" about the evidence, then it will find that a trial court should have denied judgment as a matter of law.<sup>96</sup> The court will find that a trial court should have granted judgment as a matter of law only if it concludes that "the facts and inferences point overwhelmingly in favor of [the moving party], such that reasonable people could not arrive at a contrary verdict."<sup>97</sup> Finally, the Eleventh Circuit upheld the trial court's denial of judgment as a matter of law, but it reversed the trial court's submission of punitive damages to the jury.<sup>98</sup>

An order for a new trial entered after the jury returns its verdict will be reviewed with an eye towards determining whether there is sufficient evidence to support the jury's verdict.<sup>99</sup> If the evidence presented at trial was a sufficient basis upon which a reasonable jury might have based its verdict, then the district court's order for a new trial will be reversed.<sup>100</sup>

The Eleventh Circuit conducts a de novo review of a trial court's application of statutory law and will reverse a trial court's order granting summary judgment if it holds that the statute should have been applied differently.<sup>101</sup> In *Patton v. Triad Guaranty Insurance*

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93. 277 F.3d 1269 (11th Cir. 2002).

94. 42 U.S.C. §§ 2000e-1 to 2000e-17 (2002).

95. 277 F.3d at 1274. See also FED. R. CIV. P. 50. Pursuant to Rule 50(a), parties may move for judgment as a matter of law during trial after a party has been fully heard on an issue, or at any time prior to submission of the case to the jury. FED. R. CIV. P. 50(a)(1) & (2). If the trial court does not grant the motion for judgment as a matter of law prior to submitting the case to the jury, the moving party may renew its motion, if it files to renew its motion not later than ten days after the trial court's entry of judgment on the verdict. FED. R. CIV. P. 50(b).

96. 277 F.3d at 1275 (quoting *Walker v. NationsBank*, 53 F.3d 1548, 1555 (11th Cir. 1995)).

97. *Id.* (brackets in original) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997) (citation omitted)).

98. *Id.* at 1280.

99. *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1264 (11th Cir. 2002).

100. *Id.*

101. *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296, 1300 (11th Cir. 2002).

*Corp.*,<sup>102</sup> the court reversed the district court's application of section 1012 of the McCarran-Ferguson Act.<sup>103</sup> The district court held that the McCarran-Ferguson Act proscriptively prohibited the Real Estate Settlement Procedures Act ("RESPA")<sup>104</sup> from interfering with a kickback<sup>105</sup> that defendant Triad Guaranty paid to plaintiff's lender, Premier Lending Corporation.<sup>106</sup> Reversing the district court's grant of summary judgment, the Eleventh Circuit held that the McCarran-Ferguson Act insulates insurance, not from all federal regulation, but from inadvertent federal regulation only.<sup>107</sup> Likewise, in *Dupree v. Palmer*,<sup>108</sup> the Eleventh Circuit conducted a de novo review of the district court's interpretation of the Prison Litigation Reform Act.<sup>109</sup>

Typically the court of appeals conducts a de novo review of a district court's grant of summary judgment, but in *OSI, Inc. v. United States*,<sup>110</sup> the Eleventh Circuit vacated a summary judgment order because the district court had merely indicated that it agreed with defendant's position.<sup>111</sup> The court remanded the case to the district court, indicating that the district court should conduct a comprehensive analysis of the relevant facts and legal issues.<sup>112</sup>

If a district court dismisses a case for lack of personal jurisdiction, the Eleventh Circuit will review the district court's decision de novo.<sup>113</sup> District court decisions on subject matter jurisdiction are reviewed de novo as well.<sup>114</sup> However, the findings of fact upon which the district court makes its jurisdictional determination will be reviewed for clear

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102. 277 F.3d 1294 (11th Cir. 2002).

103. *Id.* at 1295. The McCarran-Ferguson Act is codified at 15 U.S.C. §§ 1011-1015 (2000).

104. 12 U.S.C. §§ 2601-2617 (2000).

105. In RESPA, Congress sought "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

106. 277 F.3d at 1295-96.

107. *Id.* at 1297 (citing *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 40-41 (1996)). The Court also emphasized the final phrase of section 1012 of the McCarran-Ferguson Act: "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee upon such business, *unless such Act specifically relates to the business of insurance.*" *Id.* (quoting 15 U.S.C. § 1012).

108. 284 F.3d 1234 (11th Cir. 2002).

109. *Id.* at 1235. The Prison Litigation Reform Act is codified at 42 U.S.C. § 1997e (2000).

110. 285 F.3d 947 (11th Cir. 2002).

111. *Id.* at 953.

112. *Id.*

113. *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1268 (11th Cir. 2002).

114. *See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1336 (11th Cir. 2002).

error.<sup>115</sup> For example, a district court's findings with regard to a party's domicile for the purposes of determining diversity jurisdiction will be reviewed for clear error.<sup>116</sup>

The court also conducts a de novo review of dismissal under Federal Rule of Civil Procedure 12(b)(6), applying the same standard as the district court and accepting all of the allegations set forth in the complaint as true for purposes of the motion.<sup>117</sup> Likewise, the court conducts a de novo review of an order granting judgment on the pleadings pursuant to Rule 12(c).<sup>118</sup> With respect to the interpretation of an agreement, the court will conduct its review under traditional contract principles subject to a de novo standard.<sup>119</sup>

In reviewing de novo a district court's grant of summary judgment, the court will view the evidence in the light most favorable to the party opposing the motion.<sup>120</sup> It reviews the denial of post-judgment motions under an abuse of discretion standard.<sup>121</sup> In reviewing the district court's certification of a class for abuse of discretion, the Eleventh Circuit asks whether the district court applied the wrong legal standard, which necessarily entails abuse of discretion, or whether the district court made findings of fact that are clearly erroneous.<sup>122</sup> "If 'the district court properly exercised its discretion within the parameters of [Federal Rule of Civil Procedure 23], the court's determination should stand.'"<sup>123</sup>

The court of appeals will review a district court's ultimate decision to grant or deny a preliminary injunction for abuse of discretion, but the determinations of law made in reaching that decision will be reviewed de novo.<sup>124</sup> The court will review a grant of summary judgment under the de novo standard, but the court will accept any findings of fact the

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115. *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002).

116. *Id.*

117. *Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002) (citing *Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999); *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc)).

118. *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002) (citing FED. R. CIV. P. 12(c)).

119. *Frankenmuth Mut. Ins. Co. v. Escambia County, Fla.*, 289 F.3d 723, 728 (11th Cir. 2002).

120. *Green v. Union Foundry Co.*, 281 F.3d 1229, 1233 (11th Cir. 2002) (citing *Patrick v. Floyd Med. Ctr.*, 201 F.3d 1313, 1315 (11th Cir. 2000)).

121. *Id.* (citing *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000)).

122. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002).

123. *Id.* (quoting *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir. 1996) (citation omitted)).

124. *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333, 1335 (11th Cir. 2002) (citing *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996)).

district court made unless they are clearly erroneous.<sup>125</sup> If a district court determines that evidence of damages is relevant and thus admissible, the Eleventh Circuit will review the district court's decision for abuse of discretion, but a district court's order of judgment as a matter of law with respect to damages will be reviewed de novo.<sup>126</sup> A district court's ruling admitting expert evidence will be reviewed for abuse of discretion.<sup>127</sup> Dismissal of a petition for a writ of habeas corpus will be reviewed de novo, and a decision on equitable tolling of the time to file a petition for a writ of habeas corpus will be reviewed de novo, but the district court's determination of the relevant facts in making its decision with respect to the writ of habeas corpus and equitable tolling will be reviewed for clear error.<sup>128</sup> Under the clear error standard, the Eleventh Circuit will affirm the district court's decision unless the record lacks substantial evidence supporting the district court's determination.<sup>129</sup> An award of attorney fees will be reviewed for abuse of discretion, and the factual findings relevant to the district court's award of attorney fees will be reviewed for clear error, but the legal standards upon which the award of attorney fees was based will be reviewed de novo.<sup>130</sup>

A trial court's award of prejudgment interest will be reviewed for abuse of discretion.<sup>131</sup> Likewise, a trial court's refusal or reduction of prejudgment interest will be reviewed for abuse of discretion.<sup>132</sup> The Eleventh Circuit will allow a district court broad discretion to determine whether to add parties pursuant to permissive joinder, and it will review the district court's decision for abuse of that discretion.<sup>133</sup> A decision, pursuant to the *Younger*<sup>134</sup> doctrine, to abstain from hearing a case, will be reviewed for abuse of discretion.<sup>135</sup> A district court's discovery

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125. *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 720 (11th Cir. 2002).

126. *Nat'l R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 286 F.3d 1233, 1244 (11th Cir. 2002).

127. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002).

128. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir. 2002).

129. *Id.*

130. *Loggerhead Turtle v. Council of Volusia County*, 307 F.3d 1318, 1322 (11th Cir. 2002) (citing *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1276-77 (11th Cir. 1999); *Head v. Medford*, 62 F.3d 351, 354 (11th Cir. 1995)).

131. *Maytronics, Ltd. v. Aqua Vac Systems, Inc.*, 277 F.3d 1317, 1320 (11th Cir. 2002).

132. *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1298 (11th Cir. 2002).

133. *Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002).

134. *Younger v. Harris*, 401 U.S. 37 (1971).

135. *For Your Eyes Alone, Inc. v. City of Columbus*, 281 F.3d 1209, 1216-17 (11th Cir. 2002).

orders<sup>136</sup> and a district court's denial of a motion for a new trial, also will be reviewed for abuse of discretion.<sup>137</sup> In addition, a district court's Rule 11<sup>138</sup> determination will be reviewed for abuse of discretion.<sup>139</sup>

The court will employ a deferential standard in reviewing a district court's jury instructions.<sup>140</sup> In *Johnson v. Breeden*,<sup>141</sup> the court stated that so long as jury instructions accurately reflect the law and are sufficient to inform the jury of the issues involved without misleading the jury, the court will refrain from hair-splitting to allow the district court wide discretion in style and wording of the instructions.<sup>142</sup> However, unless the appealing party objected to a jury instruction prior to the jury's retirement for deliberations, the court will not apply the deferential standard of review.<sup>143</sup> If a party fails to make an objection at trial, the court will review an assignment of error upon appeal under the standard generally referred to as the "plain error" standard.<sup>144</sup> The court will look to see whether the district court committed "error 'so fundamental as to result in a miscarriage of justice' if relief is not granted."<sup>145</sup> The plain error standard requires the appellant to establish that "(1) an error occurred; (2) the error was plain; (3) it affected substantial rights; and (4) it seriously affected the fairness of the judicial proceedings."<sup>146</sup> The court will award "great deference" to the district court's ruling on whether a party has established a prima facie case for a *Batson*<sup>147</sup> challenge,<sup>148</sup> and it will review the district court's determination of whether the striking party's nondiscriminatory answers are credible for clear error.<sup>149</sup>

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136. *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1274 (11th Cir. 2002).

137. *Jones v. CSX Transp.*, 287 F.3d 1341, 1344 (11th Cir. 2002) (citing *Lambert v. Fulton County*, 253 F.3d 588, 595 (11th Cir. 2001)).

138. FED. R. CIV. P. 11.

139. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1195 (11th Cir. 2002).

140. *Johnson v. Breeden*, 280 F.3d 1308, 1314 (11th Cir. 2002).

141. 280 F.3d 1308 (11th Cir. 2002).

142. *Id.* at 1314 (citations omitted).

143. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1287-88 (11th Cir. 2002).

144. *Id.* at 1288.

145. *Id.* (quoting *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1414 (11th Cir. 1986)).

146. *Id.* (citing *United States v. Humphrey*, 164 F.3d 585, 588 n.3 (11th Cir. 1999)).

147. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

148. *United States v. Brown*, 299 F.3d 1252, 1255 (11th Cir. 2002) (citation omitted).

149. *Id.*