Trial Practice and Procedure

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I. INTRODUCTION

This Article surveys the year 2002 decisions of the United States Court of Appeals for the Eleventh Circuit that have a significant impact on issues relating to federal trial practice and procedure.

II. FEDERAL CIVIL PROCEDURE

In *Chrysler Financial Corp. v. Powe*,[1] the court considered a matter of first impression: Does Federal Rule of Civil Procedure 23(f) allow parties to petition the court of appeals for direct review of a bankruptcy judge's order granting class certification?[2] Chrysler Financial Corporation, First Union Mortgage Corporation, and PNC Mortgage Corporation (the "corporations") were defendants in separate bankruptcy cases before the United States Bankruptcy Court for the Southern District of Alabama. Plaintiffs in each case were bankruptcy debtors who claimed the corporations violated the bankruptcy code by collecting attorney fees from them and other debtors. The bankruptcy judge granted class

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1. 312 F.3d 1241 (11th Cir. 2002).
2. *Id.* at 1242.

certification in each case. The corporations responded by petitioning the court of appeals to review the class certification pursuant to Federal Rule of Civil Procedure 23(f) and Federal Rule of Bankruptcy Procedure 7023(f).[3]

The corporations argued that the court of appeals was authorized to review the bankruptcy court's class certification because the bankruptcy rules adopted Federal Rule of Civil Procedure 23(f)[4] through Federal Rule of Bankruptcy Procedure 9032.[5] "Bankruptcy Rule 9002 provides that [the terms] . . . '[d]istrict court,' 'trial court,' 'court,' 'district judge,' [and] 'judge' mean[] 'bankruptcy judge' if the case or proceeding is pending before a 'bankruptcy judge.'"[6] Therefore, the corporations argued that Bankruptcy Rule 7023(f) should be read as follows:

> A court of appeals may in its discretion permit an appeal from an order of a *bankruptcy judge* granting or denying class action certification under this rule if application is made to it within ten days after the entry of the order. An appeal does not stay proceedings in the *bankruptcy court* unless the *bankruptcy judge* or the court of appeals so orders.[7]

The court of appeals began its analysis of the corporations' interpretation by examining the advisory committee's note to Rule 23(f).[8] The court found that Rule 23 was adopted pursuant to the power conferred upon the Supreme Court by 28 U.S.C. § 1292(e).[9] Section 1292 empowers the Supreme Court to provide interlocutory appeals to the courts of appeals "in accordance with [§] 2072."[10] Pursuant to 28 U.S.C. § 2072,[11] the Supreme Court establishes rules of practice and

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3. *Id.*

4. Federal Rule of Civil Procedure 23(f) states:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

5. 312 F.3d at 1243-44. Federal Rule of Bankruptcy Procedure 9032 provides, "The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules." FED. R. BANKR. P. 9032.

6. 312 F.3d at 1244 (citing FED. R. BANKR. P. 9002(4)).

7. *Id.*

8. *Id.*

9. *Id.* 28 U.S.C. § 1292(e) (2000).

10. 312 F.3d at 1244.

11. 28 U.S.C. § 2072.

procedure in the courts of appeals and the district courts.[12] A different provision, 28 U.S.C. § 2075,[13] empowers the Supreme Court to prescribe rules for the bankruptcy courts.[14] As a result, the court of appeals determined that "[a] reading of § 2072 to grant authority to prescribe bankruptcy rules would make the entirety of § 2075 irrelevant."[15] The court found that such a reading would be "inconsistent with the canons of statutory construction."[16]

In addition, the Eleventh Circuit found that the purpose behind Rule 23(f) would not be thwarted if a class certification order by a bankruptcy court could not be appealed directly to the court of appeals.[17] District courts already possess "discretion to entertain an interlocutory appeal from the bankruptcy court . . . [thus], the appellate avenue addressed by Rule 23(f) is already available to petitioners through an interlocutory appeal to the district court."[18]

The court also determined that allowing an appeal to the court of appeals for class certifications would create jurisdictional uncertainty because a defendant could petition the court of appeals for review under Rule 23(f) or a district court under 28 U.S.C. § 158(a).[19] Based on the above considerations, the Eleventh Circuit dismissed the corporations' petition and held that Federal Rule of Civil Procedure 23(f) did not create a basis for interlocutory jurisdiction in the court of appeals for a bankruptcy court's order granting class certification.[20]

III. CIVIL RIGHTS

In *Williams v. Motorola, Inc.*,[21] the Eleventh Circuit addressed another matter of first impression: Whether individuals can maintain a claim under the Americans with Disabilities Act ("ADA")[22] without proving they are actually disabled.[23] This case arose after Motorola terminated the employment of Melanie Williams. Williams responded by filing a lawsuit, alleging Motorola violated the ADA as well as other

12. 312 F.3d at 1244.
13. 28 U.S.C. § 2075.
14. 312 F.3d at 1244.
15. *Id.* at 1245.
16. *Id.*
17. *Id.*
18. *Id.* at 1245-46.
19. *Id.* at 1246 (citing 28 U.S.C. § 158(a)).
20. *Id.* at 1246-47.
21. 303 F.3d 1284 (11th Cir. 2002).
22. 42 U.S.C. §§ 12,101-12,213 (2000).
23. 303 F.3d at 1290.

federal and state statutes.[24] Williams's ADA claim alleged that Motorola "perceived" that she had a disability and terminated her based on that perception.[25] The district court held that Williams did not establish her "perception" claim and therefore granted Motorola's motion for judgment as a matter of law on the ADA claim.[26]

The Eleventh Circuit reviewed the district court's grant of Motorola's motion "'in the light most favorable to [Williams].'"[27] In a matter of first impression, the court agreed with Williams's contention that she did not actually need to be disabled to raise an ADA claim and held that "a plaintiff may maintain a claim under the ADA of being perceived as disabled without proof of actually being disabled."[28] The Eleventh Circuit found that this decision was consistent with results reached in other circuits.[29]

However, the court also held that plaintiffs still must make a prima facie case of discrimination by "show[ing] a disability (whether real or perceived), that she was otherwise qualified to perform the essential functions of the job, and she was discriminated against based upon the (real or perceived) disability."[30] The Eleventh Circuit found that the record clearly showed that Motorola terminated Williams "because of her inability to work with others," not because of any perceived disability.[31] Therefore, the court affirmed the district court's grant for a judgment as a matter of law on her ADA claims.[32] Thus, the Eleventh Circuit determined that while an actual disability is not required for an ADA claim, the claimant still must make a prima facie case of discrimination.[33]

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24. *Id.* at 1288. In addition to her ADA claim, Williams alleged claims under the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §§ 1161-1168 (2000); the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-6 (2000); as well as state law claims for breach of contract, invasion of privacy, defamation, and intentional infliction of emotional distress. *Id.* at 1287-88.

25. *Id.* at 1290.

26. *Id.*

27. *Id.* at 1289 (quoting Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989)).

28. *Id.* at 1290.

29. *Id.*

30. *Id.*

31. *Id.* at 1291.

32. *Id.*

33. *Id.* at 1290.

IV. LEAVE TO AMEND

In *Wagner v. Daewoo Heavy Industries America Corp.*,[34] the Eleventh Circuit held that "[a] district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court."[35] This en banc decision overruled *Bank v. Pitt*,[36] and the court held that the new rule applied prospectively only.[37]

Wagner came to the Eleventh Circuit after plaintiff Andrew J. Wagner appealed the district court's dismissal of his case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[38] An Eleventh Circuit panel vacated the dismissal and held that the district court should have given Wagner an opportunity to amend his complaint based on precedent established in *Bank*.[39] In *Bank* the court held that "'[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.'"[40] In *Wagner* the Eleventh Circuit determined that a new rule was needed to improve efficiency and the "concept of finality."[41] The court therefore vacated the panel's decision and remanded the case to the district court with instructions to grant Wagner leave to amend his complaint.[42]

The court found that the *Bank* rule gave plaintiffs "two bites at the apple."[43] If a district court granted a motion to dismiss under Rule 12(b)(6), the plaintiff faced no risk in appealing.[44] As the court observed, "If we reversed the district court, the plaintiff's appeal was successful. His appeal, however, also was successful if we affirmed the district court, because we would then remand the case to the district

34. 314 F.3d 541 (11th Cir. 2002).
35. *Id.* at 542 (footnote omitted).
36. 928 F.2d 1108 (11th Cir. 1991).
37. 314 F.3d at 542.
38. Federal Rule of Civil Procedure 12(b)(6) allows defendants to make a motion to dismiss for plaintiff's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).
39. 314 F.3d at 541-42.
40. *Id.* at 542 (quoting *Bank*, 928 F.2d at 1112).
41. *Id.*
42. *Id.* at 545.
43. *Id.* at 543.
44. *Id.*

court and instruct the court to permit the plaintiff to amend his complaint."[45]

The court in *Bank* intended to facilitate "the Federal Rules' fundamental goal that disputes be resolved on the merits, rather than on the pleadings."[46] Instead, the *Bank* rule effectively transformed Rule 12(b)(6) appeals into interlocutory appeals, as the district court would have to engage in additional proceedings after any court of appeals decision.[47] To avoid the additional litigation created by the *Bank* rule and to bring the Eleventh Circuit "in line with the majority of [its] sister circuits," the court overruled *Bank* and eliminated the requirement that district courts grant a represented plaintiff leave to amend sua sponte.[48]

The court in *Wagner* then had to decide whether to apply the new rule retroactively or prospectively.[49] While the Eleventh Circuit generally applies new rules of law retroactively, the court found that this new rule satisfied the requirements for prospective application because it overruled clear past precedent.[50] The court also found that it would be inequitable to apply the new rule in the instant case because Wagner and other plaintiffs may have relied upon *Bank*; therefore, the court did not want to "punish those parties for following the clearly established precedent of this Circuit."[51] Based on this analysis, the court held that its new rule "applies only to cases in which the notice of appeal was filed after the date of this decision [December 10, 2002]."[52]

V. PRIVATE RIGHT OF ACTION

A. Air Carrier Access Act of 1986

In *Love v. Delta Air Lines*,[53] the Eleventh Circuit announced a new standard for determining whether a private right of action exists under federal statutes.[54] The specific issue before the court was whether the Air Carrier Access Act of 1986 ("ACAA")[55] created a private right of

45. *Id.* (footnote omitted).
46. 928 F.2d at 1112 n.6.
47. 314 F.3d at 543.
48. *Id.* at 543-44.
49. *Id.* at 544.
50. *Id.*
51. *Id.* at 545.
52. *Id.*
53. 310 F.3d 1347 (11th Cir. 2002).
54. *Id.* at 1352-53.
55. 49 U.S.C. § 41,705 (2000). The ACAA provides, "In providing air transportation, an air carrier . . . may not discriminate against an otherwise qualified individual on the

action. Cynthia Love claimed Delta Air Lines violated the ACAA by not appropriately accommodating her needs as a wheelchair user.[56] The district court found that the ACAA implied a private right of action but denied Love's and Delta's motions for summary judgment because genuine issues of material fact existed.[57] The Eleventh Circuit then granted Love's petition for interlocutory appeal to determine whether the ACAA implied a private cause of action.[58]

The Eleventh Circuit had previously relied on the four factors articulated by the Supreme Court in *Cort v. Ash*[59] to determine if a private right of action existed under federal law.[60] However, the court found that the Supreme Court's decision in *Alexander v. Sandoval*[61] clarified the approach for such determinations.[62] In *Sandoval* the Supreme Court stated,

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative*. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has

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following grounds: (1) the individual has a physical or mental impairment that substantially limits one or more major life activities." *Id.* § 41,705(a).

56. Love is paralyzed and confined to a wheelchair as a result of childhood polio. Love claimed that Delta failed to provide an accessible call button to page a flight attendant, failed to provide her an aisle chair, provided inadequate restroom facilities, and failed to provide adequately trained personnel. 310 F.3d at 1349-50.

57. *Id.* at 1350-51.

58. *Id.*

59. 422 U.S. 66 (1975). In *Cort v. Ash*, the Supreme Court established a four-part test for determining whether a federal statute created a private cause of action:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Love, 310 F.3d at 1351 (quoting *Cort*, 422 U.S. at 78).

60. 310 F.3d at 1351.

61. 532 U.S. 275 (2001).

62. 310 F.3d at 1351.

> not created them may be a proper function for common-law courts, but not for federal tribunals.[63]

The Eleventh Circuit interpreted this to mean that legislative intent forms the entire basis for deciding whether a private right of action exists.[64] *Sandoval* thus eliminated three of the four steps of the *Cort* analysis.[65] The Eleventh Circuit found that the discarded steps "remain relevant *only* insofar as they provide evidence of whether Congress intended to create a private cause of action."[66]

The court then listed the four sources that are relevant in determining legislative intent.[67] First, the Eleventh Circuit instructed that courts are to "look to the statutory text for 'rights-creating language.'"[68] "'Rights-creating language' is language 'explicitly confer[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case,' or language identifying 'the class for whose especial benefit the statute was enacted.'"[69] The court specified that rights-creating language is typically not found "'in criminal statutes . . . and other laws enacted for the protections of the general public'"[70] or in "'[s]tatutes that focus on the person regulated rather than the individuals protected.'"[71]

The next step in the analysis is to "examine the statutory structure within which the provision in question is embedded."[72] The Eleventh Circuit stated that courts should not imply a private right of action if the statute provides "a discernible enforcement mechanism" such as authorizing a federal agency to enforce a statute's regulations.[73] The Eleventh Circuit based this conclusion on the Supreme Court's opinion that "'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'"[74]

If the statutory text and structure have not conclusively resolved whether a private right of action exists, then the Eleventh Circuit directs courts to "turn to the legislative history and context within which a

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63. *Id.* at 1352 (quoting *Sandoval*, 532 U.S. at 286-87).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1352-54.
68. *Id.* at 1352 (quoting *Sandoval*, 532 U.S. at 288).
69. *Id.* (citations omitted) (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 690 (1979); Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)) (alterations in original).
70. *Id.* (quoting *Cannon*, 441 U.S. at 690).
71. *Id.* at 1353 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).
72. *Id.*
73. *Id.*
74. *Id.* (quoting *Sandoval*, 532 U.S. at 290).

statute was passed."[75] However, the court noted that legislative history is viewed with skepticism in the Eleventh Circuit: "'Congressional intent to create a private right of action will not be presumed. There must be clear evidence of Congress's intent to create a cause of action.'"[76]

If a statute's text, structure, and history do not reveal that Congress intended to create a private right of action, then regulations that interpret the statute may be examined, but only to "provide evidence of what private rights Congress intended to create."[77] The regulations by themselves may not create or confer a private right, and "'regulations that go beyond what the statute itself requires' are not enforceable through a private right of action."[78]

The Eleventh Circuit then applied this analysis to the ACAA to determine if Love had a private right of action.[79] The court began by noting that the ACAA "does not *expressly* provide a private entitlement to sue in district court."[80] Next, the court found that the ACAA and its related regulations created their own enforcement mechanisms that granted authority to the Department of Transportation to investigate and impose sanctions for ACAA violations.[81] Under those regulations, an individual "with 'a substantial interest'" in an ACAA violation may seek review of the Department of Transportation's order in a federal court of appeals.[82] The court held that these enforcement mechanisms "'preclude[d] a finding of congressional intent to create a private right of action.'"[83]

Because the court found that the text and structure of the ACAA did not create a private right of action, it did not review the ACAA's legislative history further.[84] The court thus concluded that the district court erred by finding that the ACAA created a private right of action.[85]

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75. *Id.*
76. *Id.* (quoting McDonald v. S. Farm Bureau Life Ins. Co., 291 F.3d 718, 723 (11th Cir. 2002)).
77. *Id.* at 1354.
78. *Id.* (quoting *Sandoval*, 532 U.S. at 293 n.8).
79. *Id.*
80. *Id.*
81. *Id.* at 1354-55.
82. *Id.* at 1356 (quoting 49 U.S.C. § 46,110(a)).
83. *Id.* at 1358 (quoting *Sandoval*, 532 U.S. at 290).
84. *Id.* at 1359.
85. *Id.* at 1360.

B. Federal Insurance Contributions Act

Before its decision in *Love*, the Eleventh Circuit decided *McDonald v. Southern Farm Bureau Life Insurance Co.*[86] and held that the Federal Insurance Contributions Act ("FICA")[87] did not create a private cause of action for FICA violations.[88] Most Americans are familiar with the tax on wages established by FICA. For individuals in a traditional employee-employer relationship, the tax is divided equally between the employee and the employer. The self-employed and independent contractors must pay the entire amount themselves.[89]

Craig McDonald was an insurance agent for Southern Farm Bureau Life Insurance ("SFB"). McDonald filed a class action lawsuit in the United States District Court for the Northern District of Georgia claiming that SFB wrongly classified him and other agents as independent contractors when they were common law employees. As a result, McDonald claimed that SFB should have paid half of his FICA taxes. The district court determined that no private right of action exists under FICA and, therefore, granted SFB's motion to dismiss McDonald's case for failure to state a claim.[90]

The Eleventh Circuit stated that the sole question in its de novo review of the district court's decision was "whether a private cause of action can be *implied* under the [FICA] statute."[91] To answer this question, the court relied on the Supreme Court's decision in *Cort v. Ash*.[92]

As discussed above, the Eleventh Circuit subsequently adopted the Supreme Court's decision in *Sandoval* as the proper analysis for determining whether a private cause of action exists.[93] However, there is significant overlap between the decisions in *Cort* and *Sandoval*, such that the Eleventh Circuit's analysis in *McDonald* still merits attention.

The key analysis under *Cort*, as in *Sandoval*, was "'whether Congress intended to create, either expressly or by implication, a private cause of action.'"[94] The court found that "[n]othing in the language of the statute, its structure, or its legislative history provides any hint that

86. 291 F.3d 718 (11th Cir. 2002).
87. 26 U.S.C. §§ 3101-3128 (2000).
88. 291 F.3d at 721.
89. *Id.*
90. *Id.* at 721-22.
91. *Id.* at 722.
92. *Id.* (citing *Cort*, 422 U.S. at 78).
93. *Id.* at 723 (citing *Sandoval*, 232 U.S. at 286).
94. *Id.* (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979)).

Congress envisioned private lawsuits to enforce the provisions of this tax-collection law."[95] McDonald's only argument was that allowing a private right of action under FICA would be consistent with the purposes of the FICA-funded Social Security Act.[96] The court held that this observation was "plainly insufficient" to demonstrate legislative intent to create a private right of action under FICA.[97] Because the court determined that Congress did not intend to create a private right of action under FICA, it affirmed the district court's order dismissing McDonald's complaint.[98]

VI. BURDEN OF PROOF

In *Ford v. Garcia*,[99] the Eleventh Circuit held that plaintiffs bear the burden of proof in a civil action involving the "command responsibility doctrine" under the Torture Victim Protection Act ("TVPA").[100] This case arose from tragic circumstances. In December of 1980, three American nuns were performing missionary work in El Salvador while that country was in the midst of a violent civil war. Five members of the Salvadoran National Guard tortured and murdered the nuns. Immediately before and during the time of the murders, General Carlos Casanova was the Director of the Salvadoran National Guard and General Jose Garcia was El Salvador's Minister of Defense.[101]

Nineteen years after the nuns' murders, their survivors filed suit against Casanova and Garcia under the TVPA. The TVPA allows victims or their representatives to bring civil actions against military commanders in federal district courts under the international law doctrine of "command responsibility."[102] The doctrine of command responsibility creates liability for individuals "'with higher authority who authorized, tolerated or knowingly ignored'" torture, summary execution, or disappearances.[103] Casanova and Garcia conceded that they knew of human rights abuses by the Salvadoran National Guard that took place while they held positions of authority, but they contended that the troops were not in their control when the murders occurred.[104]

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95. *Id.* at 724.
96. *Id.*; *see* 42 U.S.C. § 301-1397jj (2000).
97. 291 F.3d at 724.
98. *Id.* at 726.
99. 289 F.3d 1283 (11th Cir. 2002).
100. *Id.* at 1292; *see* 28 U.S.C. § 1350 (2000).
101. 289 F.3d at 1286.
102. *Id.*
103. *Id.* at 1286 n.2 (quoting S. REP. NO. 102-249, at 9 (1991)).
104. *Id.*

After the jury returned a verdict in favor of Garcia and Casanova, plaintiffs appealed and argued that the jury instructions misstated the law by requiring them to prove that defendants had "effective command" over the National Guardsmen.[105] Plaintiffs contended that defendants' claim that they did not have effective command over their troops was an affirmative defense requiring defendants to prove that they lacked the requisite control.[106]

Citing statutes of the International Criminal Tribunal for the Former Yugoslavia[107] and the International Criminal Tribunal for Rwanda[108] as precedent, the Eleventh Circuit held that the district court properly allocated the burden of proof regarding the effective control of the troops to plaintiffs.[109] The court held that plaintiffs carried the burden "to prove that the defendant failed to take necessary and reasonable measures to prevent the crime or punish the guilty troops."[110] Therefore, the Eleventh Circuit held that there was no plain error in the jury charge given by the district court.[111]

VII. WARSAW CONVENTION

In *Marotte v. American Airlines, Inc.*,[112] the Eleventh Circuit resolved another matter of first impression for the circuit: What constitutes "embarking" under the Warsaw Convention?[113] This case arose from an incident in the Miami Airport when Richard Marotte and his family were returning to New York from the Bahamas. While Marotte and his wife were attempting to board their American Airlines flight to New York, they became involved in a heated dispute with an American Airlines employee. When Marotte and his family attempted to pass through a glass door that led to the jetway, the employee either hit or pushed Marotte, knocked him to the ground, kneeled on top of him, and ripped up his family's tickets and boarding passes.[114]

Nearly four years after the incident, but before Florida's statute of limitations expired, the Marottes filed a complaint against American

105. *Id.* at 1287, 1290.
106. *Id.* at 1290.
107. Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, Art. 7(3) (May 25, 1993).
108. Statute of the Int'l Criminal Tribunal for Rwanda, Art. 6(3) (Nov. 8, 1994).
109. 289 F.3d at 1289 n.7, 1292.
110. *Id.* at 1293.
111. *Id.*
112. 296 F.3d 1255 (11th Cir. 2002).
113. *Id.* at 1257-58.
114. *Id.*

Airlines.[115] American Airlines was granted summary judgment on the grounds that the action was controlled by the Warsaw Convention and its two-year statute of limitations because the Marottes were "in the course of embarking" on their flight.[116]

Whether the Marottes were "embarking" or not was the determinative issue because "[t]he Supreme Court has held that the Warsaw Convention is the exclusive mechanism of recovery for personal injuries suffered on board an aircraft or in the course of embarking or disembarking from an airplane."[117] The Marottes appealed the district court's decision and claimed that they were not "embarking" when the incident occurred.[118] As the Warsaw Convention does not define the term "embarking," it was left to the court "to define the contours of the term."[119]

The Eleventh Circuit relied on the opinions of other circuits in determining whether the Warsaw Convention applied to the Marottes.[120] The court found that "three factors are particularly relevant: (1) the passenger's activity at the time of the accident; (2) the passenger's whereabouts at the time of the accident; and (3) the amount of control exercised by the carrier at the moment of the injury."[121] The court found that "no single factor is dispositive."[122] In addition to these factors, the court also determined that "a close connection between the accident and the physical act of boarding the aircraft is required."[123]

Based on this analytical framework, the court held that the Marottes were indeed in the process of embarking on their flight at the time of the accident.[124] The court found: (1) that the Marottes "had satisfied almost all of the conditions precedent to boarding," (2) that there was an "extremely close spatial relationship between the attack and the aircraft," (3) that American Airlines "exerted much control over the Marottes," particularly through the physical restraint of Marotte by the American Airlines employee, and (4) that "the flight in which the Marottes were attempting to board was imminent."[125] Based on this

115. *Id.* at 1258.
116. *Id.*
117. *Id.* at 1259 (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999)).
118. *Id.*
119. *Id.*
120. *Id.* at 1260.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1260-61.

analysis, the court concluded that the Warsaw Convention governed the incident.[126] Therefore, its two-year statute of limitations applied and barred the Marottes' claims.[127]

VIII. APPLICATION OF THE TELECOMMUNICATIONS ACT OF 1996 TO LOCAL GOVERNMENT DECISIONS

In *Preferred Sites, LLC v. Troup County*,[128] the Eleventh Circuit answered several questions of first impression regarding the application of the Telecommunications Act of 1996 ("TCA")[129] to local government decisions.[130] The three issues addressed by the court were: (1) what constitutes the timely filing of a lawsuit under the TCA, (2) what constitutes "substantial evidence" to support the denial of a construction permit, (3) and what is the proper remedy for a violation of the TCA?[131]

This case arose after Troup County, Georgia denied Preferred Sites's application for a permit to construct a communication tower. Preferred Sites filed suit, claiming that the county's denial did not comply with the TCA, which Congress enacted to protect the telecommunications industry from inconsistent zoning requirements.[132] One of the TCA's protections requires that "decisions to deny approval for the placement, construction, or modification of personal wireless service facilities must be both 'in writing and supported by substantial evidence contained in a written record.'"[133]

The district court held that Troup County's denial of Preferred Sites's construction permit was not supported by substantial evidence; therefore, the court granted summary judgment to Preferred Sites and ordered the county to approve the permit. The county appealed the decision and raised the issues of whether Preferred Sites's suit was timely filed, whether its decision was supported by substantial evidence, and whether Preferred Sites was entitled to mandamus relief.[134]

The Eleventh Circuit first addressed the county's contention that Preferred Sites's complaint was untimely filed.[135] Under the TCA, a party can challenge a local authority's final action pursuant to the TCA

126. *Id.* at 1261.
127. *Id.*
128. 296 F.3d 1210 (11th Cir. 2002).
129. Telecomm. Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.).
130. 296 F.3d at 1212.
131. *Id.* at 1216.
132. *Id.* at 1212-14.
133. *Id.* at 1215 (quoting 47 U.S.C. § 332(c)(7)(B)(iii) (1994)).
134. *Id.* at 1214, 1216.
135. *Id.* at 1216.

"as long as the challenge is filed within [thirty] days of the final action."[136] The county argued that the thirty days to challenge a decision began to run when the county's zoning board made an oral decision at a public hearing to reject the permit. Preferred Sites instead filed its complaint within thirty days of receiving written notification of the county's denial.[137]

The court determined that the TCA's requirement that "'any *decision* by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities *shall be in writing*'" made the issuance of a written decision the "final action" to which parties must respond within thirty days.[138] As the court reasoned, "Putting the decision in writing is the last action the authority is statutorily required to take; therefore, the issuance of the written decision is logically the 'final action.'"[139] Because Preferred Sites filed its complaint within thirty days after the written notice was issued, the court held that their complaint was timely filed.[140]

The second issue addressed by the court was whether the county's decision was based on "substantial evidence contained in the written record."[141] While the TCA requires that decisions be based on "substantial evidence," the statute does not define that term.[142] The court noted that "'substantial evidence' is a legal term of art, so we presume Congress intended for us to apply its established meaning."[143] The court then stated, "'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[144]

The only pieces of evidence in the written record showing opposition to Preferred Sites's permit application were five petitions with the names of fifty-eight citizens. However, only two of the petitions indicated that the purpose of the petition was to oppose the construction of the Preferred Sites tower.[145] The court concluded, "[T]he scant evidence of opposition to the construction of [Preferred Sites's] proposed tower did not amount to substantial evidence."[146]

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136. *Id.* (citing 47 U.S.C. § 332(c)(7)(B)(v)).
137. *Id.*
138. *Id.* at 1216-17 (quoting 47 U.S.C. § 332(c)(7)(B)(iii)).
139. *Id.* at 1217.
140. *Id.* at 1222.
141. *Id.* at 1218.
142. *Id.*
143. *Id.*
144. *Id.* (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).
145. *Id.* at 1219.
146. *Id.*

Having found that Preferred Sites timely filed its complaint and that the county did not have substantial evidence to support the permit denial, the court addressed whether the district court properly awarded equitable relief by ordering the county to approve the permit.[147] The court recognized that the language of the TCA does not create a remedy for violations.[148] However, the court also determined that the district court could grant equitable relief pursuant to 28 U.S.C. § 1651.[149] Therefore, the court affirmed the district court's decision ordering the issuance of the permit as an appropriate remedy for the county's violation of the TCA.[150]

IX. CONCLUSION

This year's review of Eleventh Circuit cases contains a significant number of issues of first impression. The Authors hope this Article will assist the bench and bar with the ongoing complexities of federal court practice.

147. *Id.* at 1220.
148. *Id.*
149. *Id.* (citing 28 U.S.C. § 1651 (2000)).
150. *Id.*