## **Trial Practice and Procedure**

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#### I. INTRODUCTION

The 2005 survey period yielded several noteworthy decisions relating to federal trial practice and procedure, many of which concerned issues of first impression in the Eleventh Circuit Court of Appeals. This Article analyzes several recent developments in the Eleventh Circuit, including significant rulings in the areas of arbitration, civil procedure, statutory interpretation, personal jurisdiction, subject matter jurisdiction, and other issues of interest to the trial practitioner.

### II. JURISDICTION

A. Exercise of Supplemental Jurisdiction in Diversity Actions Over Plaintiffs Whose Claims Do Not Meet the Statutory Amount in Controversy Requirement

The consolidated appeals in Exxon Mobil Corp. v. Allapattah Services, Inc. 1 came before the United States Supreme Court on writs of certiorari from the First and Eleventh Circuit Courts of Appeal, and required the Court to determine whether federal courts in diversity actions may exercise supplemental jurisdiction under 28 U.S.C. § 1367<sup>2</sup> over additional plaintiffs whose claims do not meet the amount in controversy

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<sup>1. 125</sup> S. Ct. 2611 (2005).

<sup>2. 28</sup> U.S.C. § 1367 (2000).

requirement, even if their claims are part of the same case as plaintiffs whose claims do exceed the statutory minimum.<sup>3</sup>

In *Allapattah Services, Inc. v. Exxon Mobil Corp.*, the Eleventh Circuit upheld the exercise of supplemental jurisdiction over class members whose claims did not meet the statutory minimum, as long as the district court had original jurisdiction over the claims of at least one class representative. However, in *Ortega v. Star-Kist Foods, Inc.*, the First Circuit held that \$ 1367 authorizes supplemental jurisdiction only when the district court has original jurisdiction over the entire action, and that original jurisdiction was lacking in a diversity case if even one plaintiff failed to satisfy the amount in controversy requirement. Affirming the Eleventh Circuit's holding, the majority concluded that where the other elements of jurisdiction are present and at least one named plaintiff satisfies the amount in controversy requirement, section 1367 authorizes supplemental jurisdiction over the claims of other plaintiffs in the same case, even if their claims were for less than the jurisdictional amount.

The Court first cited the longstanding principle that "once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy." Before the enactment of section 1367, the Court held in *Clark v. Paul Grey, Inc.* 10 that every plaintiff in a diversity action must separately satisfy the amount in controversy requirement in order for federal subject matter jurisdiction to exist. 11 The Court reaffirmed this rule in the class action context in *Zahn v. International Paper*, 12 holding that "any plaintiff without the jurisdic-

- 3. Exxon, 125 S. Ct. at 2615.
- 4. 333 F.3d 1248 (11th Cir. 2003).
- 5. Exxon, 125 S. Ct. at 2616 (citing Allapattah Servs., Inc., 133 F.3d at 1256). This approach is in accord with the views of the Fourth, Sixth, and Seventh Circuit Courts of Appeal. The Fifth and Ninth Circuits had adopted a similar analysis of § 1367, holding that, in a diversity class action, the unnamed class members need not meet the amount in controversy requirements provided that the named class members did.
  - 6. 370 F.3d 124 (1st Cir. 2004).
- 7. Exxon, 125 S. Ct. at 2616 (citing Ortega, 370 F.3d at 124). The First Circuit's view of  $\S$  1367 is shared by the Third, Eighth, and Tenth Circuit Courts of Appeal. Id. at 2617 (citations omitted).
  - 8. Id. at 2615.
  - 9. Id. at 2617 (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966)).
  - 10. 306 U.S. 583 (1939).
- 11. Exxon, 125 S. Ct. at 2618. Although Clark was a federal question case, at the time it was decided the federal question jurisdiction statute had an amount in controversy requirement analogous to the requirement in diversity cases. *Id.* 
  - 12. 414 U.S. 291 (1973).

tional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." However, in *Finley v. United States*, <sup>14</sup> the Court held that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." In sum, before section 1367 was enacted the Court had consistently held that if the district court had original jurisdiction over at least one claim, then the existing jurisdictional statutes implicitly authorized supplemental jurisdiction over all other claims between the same parties arising out of the same case or controversy. <sup>16</sup> But the statutes did not authorize supplemental jurisdiction over additional claims involving other parties. <sup>17</sup>

Congress enacted section 1367 in 1990 and "[all] parties to this litigation and all courts to consider the question agree that section 1367 overturned the result in *Finley*." Section 1367 was meant to confer a broad grant of supplemental jurisdiction that would extend to claims concerning joinder or intervention of additional parties, as well as additional claims. Thus, the question before the Court in *Exxon* was whether federal courts have original jurisdiction over diversity cases in which the claims of some, but not all, plaintiffs satisfy the amount in controversy requirement. Description of the court o

The majority first noted that if a district court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over the entire civil action.<sup>21</sup> The majority dismissed the "indivisibility theory," which stated that all claims in the complaint must stand or fall as a single, indivisible civil action, as well as the "contamination theory," which stated that the inclusion of a claim or party falling outside the district court's original jurisdiction contaminated every other claim in the complaint so as to deprive the court of jurisdiction altogether.<sup>22</sup> The majority dismissed these theories as inconsistent with the purpose of supplemental jurisdiction, which would be unnecessary if a district court was required to have original jurisdiction over every claim in the

<sup>13.</sup> Exxon, 125 S. Ct. at 2618 (quoting Zhan, 414 U.S. at 300).

<sup>14. 490</sup> U.S. 545 (1989).

<sup>15.</sup> Exxon, 125 S. Ct. at 2619 (quoting Finley, 490 U.S. at 556).

<sup>16.</sup> Id. at 2619 (citing Gibbs, 383 U.S. at 725).

<sup>17.</sup> *Id.* at 2619 (citing *Clark*, 306 U.S. at 590; *Zhan*, 414 U.S. at 300-01; and *Finley*, 490 U.S. at 556).

<sup>18.</sup> Id. at 2619-20.

<sup>19.</sup> Id. at 2620 (citing 28 U.S.C. § 1367(a)).

<sup>20.</sup> Id.

<sup>21.</sup> Id.

<sup>22.</sup> Id. at 2621.

complaint.<sup>23</sup> Thus, the majority held that district courts have original jurisdiction over actions containing multiple claims that are all part of the same case or controversy, even if some of the claims are not within the court's original jurisdiction.<sup>24</sup> Thus, district courts have diversity jurisdiction in cases where some, but not all, of the plaintiffs allege a sufficient amount in controversy.<sup>25</sup> As a result, the majority determined that section 1367 unambiguously overruled *Clark*, *Zahn*, and *Finley* and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same case or controversy.<sup>26</sup> Noting that this holding was supported by section 1367's plain text, the majority saw no need to look to other interpretive tools, such as the legislative history behind the enactment of the statute.<sup>27</sup>

Dissenting, Justice Ginsburg, while agreeing that section 1367 was designed to overturn *Finley*, criticized the majority's expansive interpretation of the statue to overrule the pre-*Finley* holdings in *Clark* and *Zhan*. The dissent reasoned that by overruling *Clark* and *Zhan*, the majority opened the door for co-plaintiffs or class members to easily circumvent the amount in controversy requirement and gain access to federal courts despite having jurisdictionally insufficient claims. Justice Ginsburg noted that a narrower construction of section 1367 was consistent with the Court's prior holdings in multi-party cases, including class actions, which had "unyieldingly adhered to the nonaggregation rule" requiring each plaintiff to independently meet the amount in controversy requirement. The section of the section of

Justice Stevens joined in Justice Ginsburg's dissent, but wrote separately to criticize the majority's refusal to consider the legislative history of section 1367.<sup>31</sup> Justice Stevens cited language from House Reports that expressly stated that section 1367 was not intended to upset the holdings in *Zhan* and *Clark*, and actually was meant to preserve and codify the "pre-*Finley* understandings of the authorization

<sup>23.</sup> *Id.* at 2621-22. These theories were also belied by the Supreme Court's practice of allowing federal courts to cure jurisdictional defects by dismissing the offending parties rather than dismissing the entire action. *Id.* at 2672.

<sup>24.</sup> Id. at 2624-25.

<sup>25.</sup> Id. at 2625.

<sup>26.</sup> *Id.* This holding was subject only to the enumerated exceptions in section 1367(b), which were not applicable to the cases before the court. *Id.* 

<sup>27.</sup> Id

<sup>28.</sup> Id. at 2631-32 (Stevens, O'Connor, Ginsburg & Breyer, JJ., dissenting).

<sup>29.</sup> Id. at 2632 (Stevens, O'Connor, Ginsburg & Breyer, JJ., dissenting).

<sup>30.</sup> Id. at 2636 (Stevens, O'Connor, Ginsburg & Breyer, JJ., dissenting).

<sup>31.</sup> Id. at 2628 (Stevens, O'Connor, Ginsburg & Breyer, JJ., dissenting).

for and limits on other forms of supplemental jurisdiction."<sup>32</sup> Because the House Report explicitly rejected a broad reading of section 1367, Justice Stevens opined that the "sweeping purpose that the Court's decision imputes to Congress bears no resemblance to the House Report's description of the statute."<sup>33</sup>

## B. Citizenship of Corporations for Purposes of Diversity Jurisdiction

In *MacGinnitie v. Hobbs Group, LLC*,<sup>34</sup> the Eleventh Circuit held, as a matter of first impression, that its "total activities" test for determining a corporation's principal place of business for diversity purposes also applied to determine the citizenship of a defendant corporation that once operated in the same state as the plaintiff, but had since been purchased by and integrated into an out-of-state corporation.<sup>35</sup> The court further concluded that where the defendant corporation's principal place of business was in the same state as the purchasing corporation, complete diversity of citizenship exists in a suit against the defendant corporation by a citizen of the corporation's former home state.<sup>36</sup>

In 1998 Defendant/Appellee Hobbs Group, LLC ("Hobbs"), an insurance brokerage firm, hired plaintiff Douglas J. MacGinnitie ("MacGinnitie") as its senior vice president and general counsel. Hobbs was a Delaware corporation that maintained its principal place of business in Georgia until 2002. Defendant Hilb, Rogal and Hobbs Company ("HRH"), also an insurance brokerage firm, purchased Hobbs in 2002. HRH was incorporated and had its principal place of business in Virginia.<sup>37</sup>

After MacGinnitie resigned from HRH in September 2003, he and a partner opened a competing insurance brokerage business. MacGinnitie then filed an action in Georgia state court arising out of certain restrictive covenants in his employment agreement with Hobbs, seeking declaratory and injunctive relief. The defendants removed the case on the grounds of diversity jurisdiction. MacGinnitie filed a motion for remand, which the district court denied. MacGinnitie appealed, arguing that complete diversity of citizenship did not exist at the time his complaint was filed. MacGinnitie, a Georgia citizen, contended that Hobbs' principal place of business was in Georgia at the time suit was filed because Hobbs was an "inactive" corporation, and the principal

<sup>32.</sup> Id. at 2629 (Stevens & Breyer, JJ., dissenting).

<sup>33.</sup> Id. at 2629-30 (Stevens & Breyer, JJ., dissenting).

<sup>34. 420</sup> F.3d 1234 (11th Cir. 2005).

<sup>35.</sup> Id. at 1237.

<sup>36.</sup> Id.

<sup>37.</sup> Id.

place of business of an inactive corporation remains the same as its last principal place of business while the corporation was still active.<sup>38</sup>

Acknowledging that the question of an inactive corporation's principal place of business was an issue of first impression in the Eleventh Circuit, the court concluded that it need not reach that issue because the "existing total activities test is sufficient to resolve the question before us." Under the total activities test, if a corporation conducts the majority of its physical operations in a particular state, that state will contain its principal place of business; however, if a corporation's physical activities are negligible or are disbursed across several states, the "nerve center," or corporate offices, will be the principal place of business. The district court found that at the time the suit was filed:

Hobbs continued to exist only as an active corporate holding company . . . that was directed and controlled from HRH's corporate headquarters in Virginia. Every decision necessary to realize the strategic advantage offered by Hobbs' continued, passive existence was and continues to be made in HRH's Virginia corporate headquarters by HRH officers. Thus, at the time [MacGinnitie] filed [his] complaint, the "nerve center" of Hobbs, for purposes of determining diversity, could only be in Virginia. 41

The Eleventh Circuit agreed, determining that MacGinnitie had offered no evidence to suggest that the district court's factual findings regarding Hobbs' "nerve center" were erroneous. 42 The Eleventh Circuit also noted that Hobbs was not an inactive corporation in the sense that other circuits had used that term. 43 Specifically, the court held that Hobbs was not inactive because, although its activity in Georgia had ceased at the time suit was filed, it had been engaged in other business activities under HRH's direction in Virginia. 44 Thus, the court agreed that complete diversity of citizenship existed because Hobbs was a citizen of Virginia, not Georgia, at the time the action was filed. 45

<sup>38.</sup> Id. at 1238-39.

<sup>39.</sup> Id. at 1240.

<sup>40.</sup> Id. at 1239 (citation omitted).

<sup>41.</sup> Id. at 1240.

<sup>42.</sup> Id.

<sup>43.</sup> *Id.* MacGinnitie cited two lines of cases from other circuits in support of his "inactive corporation" argument. He first referred to the Second Circuit's view that an inactive corporation is, as a matter of law, a citizen of the state where it "last transacted business." He also cited the Fourth and Fifth Circuits' conclusions that an inactive corporation is a citizen of the state of its last place of business unless "a substantial amount of time" has passed since it became inactive. *Id.* 

<sup>44.</sup> Id.

<sup>45.</sup> Id.

#### C. Amount in Controversy for Purposes of Diversity Jurisdiction

In another issue of first impression, the Eleventh Circuit in *Peebles v*. Merrill Lynch, Pierce, Fenner & Smith, Inc. 46 determined whether a federal court has diversity jurisdiction over an action where a party seeks to vacate a zero dollar arbitration award, and seeks a new arbitration in which he will demand more than the minimum amount in controversy. 47 Peebles opened an investment account with the defendants in 1997, only to learn that the defendants had promoted purchases of certain stocks by issuing falsely favorable reports about companies for whom the defendants' banking division was acting as the investment Relying on these false reports, Peebles invested in these companies and ultimately lost more than \$1 million. In July 2001 Peebles filed a statement of claim and submitted his claims against defendants to arbitration pursuant to an arbitration agreement between The arbitration panel ultimately issued a zero dollar the parties. arbitration award, dismissing all of Peebles's claims and requests for relief, and denying all parties' requests for attorney fees. 48

Peebles subsequently filed a petition in Florida state court, requesting that the arbitration award be vacated and that the matter be remanded for a new hearing before a new arbitration panel. The defendants removed the case to district court on the grounds of diversity jurisdiction. Peebles objected, contending that the minimum amount in controversy was not met. The district court retained jurisdiction, holding that the amount in controversy was satisfied because Peebles requested a new hearing where a different panel would consider his multi-million dollar damages claims.<sup>49</sup>

On appeal, Peebles contended that he was seeking a new arbitration rather than monetary relief, and further argued that in all matters involving petitions to vacate arbitration awards, the amount in controversy is the amount of the arbitration award, not the amount sought in the underlying action. Defendants argued that because Peebles sought to vacate the zero dollar arbitration award and have the case remanded for a new arbitration on his multi-million dollar claims for damages, the amount in controversy was the sum sought in Peebles's statement of claim, not the arbitration award sought to be vacated. The statement of claim, not the arbitration award sought to be vacated.

<sup>46. 431</sup> F.3d 1320 (2005).

<sup>47.</sup> Id. at 1325.

<sup>48.</sup> Id. at 1322-23.

<sup>49.</sup> Id. at 1323-24.

<sup>50.</sup> Id. at 1325.

<sup>51.</sup> Id.

The Eleventh Circuit thus had to determine whether the amount in controversy was controlled by the amount of damages claimed in Peebles's original action, or the amount of the arbitration award.<sup>52</sup>

Agreeing with the defendants, the Eleventh Circuit held that federal subject matter jurisdiction existed because Peebles was seeking to vacate the arbitration award *and* wanted a new arbitration hearing where he would demand a sum in excess of the amount in controversy.<sup>53</sup> Because Peebles's multi-million dollar claims far exceeded the \$75,000 statutory minimum and there was no dispute as to the parties' diversity of citizenship, the Eleventh Circuit affirmed the district court's exercise of jurisdiction over Peebles's claims under 28 U.S.C. § 1332.<sup>54</sup>

## D. Personal Jurisdiction Over Insurer Based on Inclusion of Forum State in Policy's Territory-of-Coverage Clause

In *Allstate Indemnity & Co. v. McGow*, <sup>55</sup> the Eleventh Circuit held that an insurer was subject to personal jurisdiction in a state that was included in the insurance policy's territory-of-coverage clause. <sup>56</sup> The claims arose out of an automobile accident in Georgia in which the plaintiff, John Michael McGow ("McGow"), was injured by Billy McCurry ("McCurry"), an uninsured motorist. McGow was a Michigan resident and McCurry was a Georgia resident at the time of the accident. Defendant Auto Club Insurance Group of Michigan ("Auto Club") was one of three insurers who had issued McGow an automobile insurance policy that included uninsured motorist coverage ("UM"). <sup>57</sup>

McGow filed suit in Georgia state court seeking UM insurance benefits from Auto Club and other insurers. Following removal, Auto Club filed a motion to dismiss, contending that the district court lacked personal jurisdiction over Auto Club and that its policy provided no coverage to McGow. The district court found that it had personal jurisdiction over Auto Club and denied Auto Club's motion to dismiss.<sup>58</sup>

On appeal, the Eleventh Circuit noted that Auto Club issued McGow an automobile insurance policy that covered all of the United States, and that the automobile accident at issue occurred in Georgia, and resulted

<sup>52.</sup> Id.

<sup>53.</sup> Id.

<sup>54.</sup> *Id.* at 1326; 28 U.S.C. § 1332 (2000). The court also noted that this approach was consistent with other circuits, including the First and Ninth Circuits, which have had occasion to address this question. *Peebles*, 431 F.3d at 1325.

<sup>55. 412</sup> F.3d 1207 (11th Cir. 2005).

<sup>56.</sup> Id. at 1210.

<sup>57.</sup> Id.

<sup>58.</sup> Id. at 1213.

in litigation in Georgia.<sup>59</sup> Auto Club's appeal, therefore, presented the issue of whether a state can properly exercise personal jurisdiction over an insurer whose only relevant contacts with the forum are the inclusion of the forum state within the covered territory of the insurance policy, and the occurrence of the relevant accident in the forum state.<sup>60</sup>

The Eleventh Circuit agreed with the district court's conclusion that sufficient minimum contacts existed between Auto Club and Georgia so as to satisfy the requirements of due process. The court acknowledged that Georgia's Long Arm Statute, section 9-10-91 of the Official Code of Georgia Annotated ("O.C.G.A."), conferred personal jurisdiction over non-resident defendants to the maximum extent permitted by due process. The turn, due process requires that a non-resident defendant have certain minimum contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." In finding sufficient minimum contacts between Auto Club and Georgia, the district court analyzed whether Auto Club's contacts with Georgia satisfied the following three criteria:

First, the contacts must be related to the plaintiff's cause of action or have given rise to it. Second, the contacts must involve some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum, thus invoking the benefits and protections of its laws. Third, the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there. <sup>65</sup>

Auto Club's contacts with Georgia satisfied all three criteria. First, Auto Club's inclusion of Georgia within its covered territory for UM coverage was related to McGow's cause of action for damages covered by the policy. Second, Auto Club purposefully availed itself of the privileges and benefits of providing insurance coverage in Georgia. Agreeing with the Eighth, Sixth, Fourth, and Ninth Circuits, which had all determined that a territory-of-coverage clause alone constitutes purposeful availment for purposes of subjecting an insurer to suit in the

<sup>59.</sup> Id. at 1214.

<sup>60.</sup> Id.

<sup>61.</sup> *Id*.

<sup>62.</sup> O.C.G.A. § 9-10-91 (1982 & Supp. 2005).

<sup>63.</sup> *McGow*, 412 F.3d at 1214 (citing Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738, 746 (11th Cir. 2002)).

<sup>64.</sup> Id. (quoting Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1264, 1274 (11th Cir. 2002)).

<sup>65.</sup> Id. (quoting Francosteel Corp. v. M/V Charm, 19 F.3d 624, 627 (11th Cir. 1994)).

<sup>66.</sup> Id.

<sup>67.</sup> Id.

forum, the Eleventh Circuit held that by including Georgia within its covered territory, Auto Club purposefully sought to provide coverage for accidents occurring in Georgia, with full knowledge that (1) litigation could result in Georgia, (2) "Auto Club could be haled into court in Georgia," and (3) Auto Club could be "required to make payments in Georgia based on that coverage." If Auto Club wished to avoid suit in Georgia, the court noted that Auto Club could have excluded Georgia from the "policy territory" defined in the policy, with the full knowledge that such a limitation could make its policy less marketable. Because Auto Club purposely included Georgia in its coverage territory in order to charge higher premiums, Auto Club purposefully availed itself of the privileges of conducting business in Georgia.

The court further held that Auto Club reasonably could have foreseen being haled into court in Georgia because Georgia was a covered territory under the policy. Auto Club should have recognized that an accident could occur in Georgia, thus requiring Auto Club to litigate in Georgia. Citing the Fourth Circuit's opinion in *Rossman v. State Farm Mutual Auto Insurance Co.*, the Eleventh Circuit noted that "insurance by its nature involves the assertion of claims, and resort to litigation is often necessary." Thus, not only was it foreseeable that Auto Club might be sued in Georgia in connection with an accident in Georgia covered by its policy, but the "expectation of being haled into court in [Georgia] is an express feature of its policy."

Accordingly, the Eleventh Circuit concluded that the exercise of jurisdiction over Auto Club did not violate traditional notions of fair play and substantial justice.<sup>76</sup> In so holding, the court considered:

(a) "the burden on the defendant," (b) "the forum state's interest in adjudicating the dispute," (c) "the plaintiff's interest in obtaining convenient and effective relief," (d) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and

<sup>68.</sup> *Id.* at 1214-15 (citing Rossman v. State Farm Mutual Auto Ins. Co., 832 F.2d 282, 287 (4th Cir. 1987)). The court noted that insurers presumably offer this type of broad coverage to induce customers to buy their policies and to pay higher premiums for them. *Id.* at 1215 (citing *Rossman*, 832 F.2d at 287). Thus, the benefits occurring to the insurer are neither fortuitous nor incidental. *Id.* 

<sup>69.</sup> Id. (quoting Rossman, 832 F.2d at 287).

<sup>70.</sup> Id.

<sup>71.</sup> *Id*.

<sup>72.</sup> Id.

<sup>73. 832</sup> F.2d 282 (4th Cir. 1987).

<sup>74.</sup> McGow, 412 F.3d at 1215 (quoting Rossman, 832 F.2d at 286).

<sup>75.</sup> Id. (quoting Rossman, 832 F.2d at 286).

<sup>76.</sup> Id. at 1215-16.

(e) "the shared interest of the several states in furthering fundamental substantive social policies."  $^{77}$ 

Because the accident occurred in Georgia, McCurry was a resident of Georgia, and Auto Club's policy provided insurance coverage to McGow in Georgia, 78 the court "easily conclude[d] that the minimal inconvenience to Auto Club in defending the action in Georgia does not violate traditional notions of fair play and substantial justice." 79

The Eleventh Circuit acknowledged the Tenth Circuit's reluctance to extend personal jurisdiction to an insurer based purely on the territory-of-coverage clause. <sup>80</sup> In the Tenth Circuit's view, the "foreseeability of being haled into court" analysis had never been a sufficient benchmark under Supreme Court precedent for the exercise of personal jurisdiction under the due process clause. <sup>81</sup> The Tenth Circuit criticized the *Rossman* analysis, arguing that it improperly based its holding on the fact that the defendant did not *exclude* the forum state from coverage, when in fact minimum contacts should be based on the defendant's affirmative actions creating a connection with the forum state. <sup>82</sup> However, the Eleventh Circuit pointed as follows:

[The] Tenth Circuit's criticism misses the point that the insurer . . . did more than foresee that its customers would drive in other states; it charged its premiums and made profits on that basis. Further, the insurers affirmatively included the forum state (and every other state) within their covered territory; they did not merely decline to exclude them.  $^{83}$ 

Thus, the court concluded that, by including a state within the covered territory and charging premiums on that basis, the insurer purposefully availed itself of the benefits of that state and established sufficient contacts with the forum to justify the exercise of personal jurisdiction in that state.<sup>84</sup>

<sup>77.</sup> Id. at 1216 (quoting Meier, 288 F.3d at 1276).

<sup>78.</sup> Id.

<sup>79.</sup> *Id.* (citing OMI Holdings, Inc. V. Royal Ins. Co. of Canada, 149 F.3d 1086, 1093-95 (10th Cir. 1998)).

<sup>80.</sup> Id. at 1216 n.5.

<sup>81.</sup> Id. (citing OMI Holdings, Inc., 149 F.3d at 1094).

<sup>82.</sup> Id. (citing OMI Holdings, Inc., 149 F.3d at 1094).

<sup>83.</sup> Id.

<sup>84.</sup> Id.

#### III. ARBITRATION

A. Enforceability of Arbitration Agreement Containing a Class Action Waiver Provision

In *Jenkins v. First American Cash Advance*, <sup>85</sup> the Eleventh Circuit addressed the enforceability of an arbitration agreement containing a class action waiver provision. <sup>86</sup> The plaintiff, Charlene Jenkins ("Jenkins"), entered into at least eight "payday lending" transactions with First National Bank in Brookings ("FNB"), a national bank with its principal offices in South Dakota, and First American Cash Advance of Georgia, LLC ("First American"), which was located in Georgia and managed and serviced loans to FNB. <sup>87</sup> The "payday loans" at issue concerned small dollar, short-term loans with high interest rates. <sup>88</sup> Each of the loans to Jenkins was for less than five hundred dollars, had maturity dates between seven and fourteen days, and charged interest rates averaging approximately 469 percent annually. <sup>89</sup>

Every time she took out a loan, Jenkins signed an arbitration agreement, which provided that "all disputes" between the parties would be resolved in binding arbitration. Jenkins also agreed as part of each loan not to participate in a class action against the defendants either as a class representative or class member. The parties stipulated in the agreement that the agreements to arbitrate were

<sup>85. 400</sup> F.3d 868 (11th Cir. 2005).

<sup>86.</sup> Id. at 870.

<sup>87.</sup> *Id.* at 870-71. Customers, like Jenkins, seeking to obtain a loan from FNB would fill out a loan application at First American's offices, which First American would then electronically transmit to FNB for review. FNB would then analyze the loan application and make the final decision on whether to extend credit to the customer. If FNB approved the loan application, it would send a consent loan agreement, which included a promissory note and arbitration agreement, to First American. To obtain the loan, the customer would have to sign and date both the promissory note and the arbitration agreement. *Id.* at 871.

<sup>88.</sup> Id.

<sup>89.</sup> *Id.* In such transactions, a borrower typically receives a modest cash advance, which becomes due for repayment within a short period of time, usually about fourteen days. As security for the loan, the borrower gives a payday lender a check in the amount of the cash advance, plus the interest charged by the lender. The interest rates in payday lending transactions typically compute to an annual percentage rate of about 520 to 780 percent, based on interest rates from 20 percent to 30 percent for a two-week advance. If the borrower has not repaid the lender by the due date, the lender can negotiate a check, or the borrower can extend the loan's due date by paying a fee. *Id.* at 871.

<sup>90.</sup> Id. at 872.

<sup>91.</sup> Id. at 870, 872.

governed by the Federal Arbitration Act ("FAA")<sup>92</sup> and that the underlying transactions involved interstate commerce.<sup>93</sup> The arbitration agreements did allow either party to "seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction."<sup>94</sup>

Jenkins filed a purported class action in a Georgia state court alleging that the defendants' payday loan agreements violated Georgia's usury statutes<sup>95</sup> and Georgia's RICO Act.<sup>96</sup> The defendants removed the case to the United States District Court for the Southern District of Georgia and moved to stay the court action and compel arbitration pursuant to the FAA.<sup>97</sup> The district court found that the FAA applied to Jenkins' loan transactions, but denied the defendants' motion to compel arbitration on the ground that the arbitration agreements were unenforceable because they were unconscionable.<sup>98</sup>

On appeal, the Eleventh Circuit addressed whether the FAA applied to Jenkins' loan agreements, whether the arbitration agreements themselves were unconscionable, and whether the arbitration agreements were unenforceable because the underlying payday loans were illegal and void ab initio under Georgia law.<sup>99</sup> First, with respect to applicability of the FAA to the loan agreements, the Eleventh Circuit cited the "liberal federal policy favoring arbitration agreements" and the Supreme Court's interpretation of the term "involving commerce" in the FAA "as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress's Commerce Clause power." Because the lending transactions were between Jenkins, a Georgia resident, and FNB, a national bank located in South Dakota, 101 the court noted a "sufficient [nexus to] interstate commerce to satisfy the definition of

<sup>92. 9</sup> U.S.C. §§ 1-16 (2000).

<sup>93.</sup> Jenkins, 400 F.3d at 871

<sup>94.</sup> *Id.* at 872. The agreements did, however, require appeals from this small claim tribunal to be resolved by arbitration. *Id.* 

<sup>95.</sup> O.C.G.A. §§ 7-4-1 to -30 (1982).

<sup>96.</sup> O.C.G.A. § 16-14-1 to -15 (1982); Jenkins, 400 F.3d at 872-73.

<sup>97.</sup> Jenkins, 400 F.3d at 873. Removal was appropriate in this case based on the United States Supreme Court's holding in Beneficial National Bank v. Anderson, 539 U.S. 1 (2003), which held that actions for usury against a national bank can be removed to federal court because the National Bank Act, 12 U.S.C. §§ 85-86 (2000), preempts state usury laws in such situations. Jenkins, 400 F.3d at 873 n.3. Because Jenkins charged a national bank with violating Georgia usury laws, removal was proper. Id.

<sup>98.</sup> Jenkins, 400 F.3d at 873.

<sup>99.</sup> Id. at 873-74.

<sup>100.</sup> Id. at 874 (quoting Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003)).

<sup>101.</sup> *Id* 

involving commerce within the meaning of [the FAA]." $^{102}$  Second, the district court refused to enforce the arbitration agreements, finding that they were procedurally and substantively unconscionable. $^{103}$  The Eleventh Circuit reversed on all points. $^{104}$ 

1. Bargaining Power and Adhesion. Before considering whether the entire agreement was an adhesion contract, the Eleventh Circuit first had to determine whether that issue was a proper one for the court to decide. Citing the Supreme Court's seminal case, Prima Paint Corp. v. Flood & Conklin Manufacturing Co., the Eleventh Circuit first noted the critical distinction between challenges to an entire transaction generally, and specific challenges to an arbitration provision contained therein. In Prima Paint, the Supreme Court interpreted Section 4 of the FAA and held that if the making of the arbitration agreement itself was in question, the court should decide whether the parties agreed to arbitrate. However, challenges to the underlying contract or transaction generally, rather than to the arbitration clause specifically, were to be resolved by the arbitrator and not the court.

Following *Prima Paint* and its progeny in the Eleventh Circuit, <sup>110</sup> the court concluded that Jenkins's adhesion claims were for the arbitrator to decide, not the court, because they did not relate to the arbitration agreements specifically, but instead alleged that the overall loan transactions in general were adhesive. <sup>111</sup> Similarly, the court rejected Jenkins's argument that the arbitration agreements were unenforceable because the underlying payday transactions were illegal

<sup>102.</sup> *Id.* at 874-75 (quoting Jenkins v. First Am. Cash Advance of Ga., LLC, 313 F. Supp. 2d 1370, 1373 (S.D. Ga. 2003)). Because courts determine whether interstate commerce exists under the FAA on a case-by-case analysis, the court also rejected Jenkins's argument that the FAA did not apply based on the Georgia legislature's recent pronouncement that payday lending does not involve interstate commerce. *Id.* at 874 n.6.

<sup>103.</sup> *Id.* at 875. "Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves." *Id.* (quoting NEC Techs, Inc. v. Nelson, 267 Ga. 390, 390, 478 S.E.2d 769, 771 (Ga. 1996)).

<sup>104.</sup> Id. at 876.

<sup>105.</sup> Id.

<sup>106. 388</sup> U.S. 395 (1967).

<sup>107.</sup> Jenkins, 400 F.3d at 876 (citing Prima Paint Corp., 388 U.S. at 403-04).

<sup>108.</sup> Id. (citing 9 U.S.C. § 4 (2000)).

<sup>109.</sup> Id. at 877 (citing Prima Paint Corp., 388 U.S. at 406).

<sup>110.</sup> See, e.g., Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002); Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992); John B. Goodman Ltd. P'ship v. THF Constr., 321 F.3d 1094 (11th Cir. 2003).

<sup>111.</sup> Jenkins, 400 F.3d at 877.

and void ab initio.<sup>112</sup> Relying on its very similar decision in *Bess v. Check Express*, <sup>113</sup> the court determined that Jenkins's argument that the agreement was void challenged the validity of the underlying payday lending transaction generally, not the arbitration agreement specifically, and thus was a question for the arbitrator, not the court.<sup>114</sup>

2. Class Action Waiver. Unlike the adhesion and void ab initio arguments, the court held that Jenkins's challenge to the arbitration agreements on the ground that the class action waiver rendered the agreements unconscionable was properly decided by the district court. 115 The Eleventh Circuit first cited its prior holdings establishing arbitration agreements that precluded class action relief to be valid and enforceable. 116 The court also rejected Jenkins's contention that precluding class action relief would have the practical effect of immunizing the defendants, noting that Jenkins was able to pursue all of her substantive rights in arbitration.<sup>117</sup> The court disagreed with the district court's finding that consumers would be unable to obtain legal representation without the class action vehicle, noting instead that the arbitration agreements expressly allowed Jenkins to recover attorney fees and expenses "if allowed by statute or applicable law." Thus, Jenkins could presumably recover her attorney fees and costs if she prevailed on her Georgia RICO claim in arbitration, because that statute allowed for attorney fees to be awarded to the prevailing party. 119 The court also cited to opinions of other circuits enforcing class action waivers, noting that class action waivers did not "'necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors." 120 Thus, the presence of a class action waiver in the arbitration agreements did not render them substantively unconscionable. 121

**3.** Access to Small Claims Tribunal. Finally, the Eleventh Circuit disagreed with the notion that the arbitration agreements lacked

<sup>112.</sup> Id. at 881-82.

<sup>113. 294</sup> F.3d 1298 (11th Cir. 2002).

<sup>114.</sup> Jenkins, 400 F.3d at 887.

<sup>115.</sup> *Id.* "Under section four of the FAA, a federal court may adjudicate this claim because it applies to the Arbitration Agreements themselves, and thus, it places the making of the Arbitration Agreements in issue." *Id.* (citing 9 U.S.C. § 4 (2000)).

<sup>116.</sup> Id. at 877-78 (citing Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 819 (11th Cir. 2001)).

<sup>117.</sup> Id. at 878.

<sup>118.</sup> *Id*.

<sup>119.</sup> Id.

<sup>120.</sup> Id. (quoting Johnson v. West Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000)).

<sup>121.</sup> *Id*.

mutuality based on Jenkins's argument that the provision allowing access to small claims tribunals only benefited the lender defendants. Instead, the court noted that such provisions were intended to benefit, not injure, consumers in that both parties had equal access to these tribunals, consumer protection principles were in place, and a wide range of relief was available to consumers in these tribunals. Because this provision was equally binding on both parties and did not "grossly favor" the payday lender, the court held the small claims tribunal provision to be mutual and bilateral, contrary to the district court's "unsupported speculation that the consumers' ability to pursue an action in a small claims tribunal is illusory." 124

# B. Employment Contracts that are Exempt from the FAA's Mandatory Arbitration Provisions under 9 U.S.C. § 1

In Hill v. Rent-A-Car Center, Inc., 125 the Eleventh Circuit decided whether a worker moving goods in interstate commerce was a worker "engaged in foreign or interstate commerce" whose employment contract was exempt from the mandatory arbitration provisions of the Federal Arbitration Act ("FAA"). 126 Plaintiff LaShan D. Hill ("Hill"), an account manager for Defendant Rent-A-Car Center, Inc. ("RAC"), filed suit in the Northern District of Alabama asserting racial discrimination claims against RAC. 127 RAC moved to compel arbitration and for a stay of the district court action under the FAA and Hill's contractual agreement to arbitrate any employment-related claims against RAC. 128 Hill opposed arbitration, arguing that because his job duties involved transporting and delivering goods to out-of-state customers, he fell within the exemption from arbitration for workers engaged in foreign or interstate commerce in § 1 of the FAA ("FAA § 1"). FAA § 1 exempts arbitration agreements contained in "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 129 The district court granted RAC's motion to compel arbitration and the Eleventh Circuit affirmed. 130

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122. Id. at 878-79.
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<sup>123.</sup> Id. at 879.

<sup>124.</sup> Id. at 879-80.

<sup>125. 398</sup> F.3d 1286 (11th Cir. 2005).

<sup>126.</sup> Id. at 1288 (citing 9 U.S.C. § 1).

<sup>127.</sup> Id.

<sup>128.</sup> Id.

<sup>129.</sup> Id. (quoting 9 U.S.C. § 1).

<sup>130.</sup> Id.

Having concluded that the district court's order compelling arbitration constituted a "final [appealable] order," the Eleventh Circuit addressed the question whether Hill was a member of the "class of workers engaged in . . . interstate commerce," which would qualify his employment contract for FAA § 1 exemption. The court relied on *Circuit City v. Adams*, where the Supreme Court held that Congress intended the general term "other class of workers" to be limited in scope by the specific terms "seamen" and "railroad employees." The Supreme Court further concluded that the FAA's "engaged in commerce" language should be narrowly construed to apply only to "transportation workers," not to employment contracts generally, and that the FAA's mandatory arbitration provisions were applicable to all contracts of employment except those involving "transportation workers" because they were members of the heavily regulated transportation industry.

Guided by *Circuit City*, the Eleventh Circuit agreed that the arbitration exemption in FAA § 1 was meant to apply to workers in the transportation industry, rather than workers who incidentally transported goods among the states as a part of their jobs in otherwise unregulated industries. Because Hill was not a "transportation worker," his employment contract was not subject to FAA § 1 exemption. Specifically, the court stated that "[t]o broaden the scope of [FAA] § 1's arbitration exemption to encompass any employment disputes of a worker employed by a company whose business dealings happen to cross state lines, would allow [FAA] § 1's exception to swallow the [FAA's] general policy requiring the enforcement of arbitration agreements....

<sup>131.</sup> *Id.* Although a stay pending the result of arbitration is considered an interlocutory order that may not be appealed under the FAA, an appeal may be taken from a "final decision with respect to an arbitration." *Id.* (citing 9 U.S.C. § 16(o)(3) (1990)).

<sup>132.</sup> Id. at 1289.

<sup>133. 532</sup> U.S. 105 (2001).

<sup>134.</sup> Hill, 398 F.3d at 1289 (citing Circuit City, 532 U.S. at 115). The court arrived at this conclusion by relying on "a general rule of statutory interpretation, ejusdem generis, which provides that general words following specific words in statutes should be interpreted to be similar in nature to the specific words they follow." Id. (citing Circuit City, 532 U.S. at 114-15).

<sup>135.</sup> *Id.* (citing *Circuit City*, 532 U.S. at 119). In sum, the Supreme Court held that the FAA's mandatory arbitration provisions were applicable to all contracts of employment except those involving "transportation workers." *Id.* (citing *Circuit City*, 532 U.S. at 119).

<sup>136.</sup> Id. (citing Circuit City, 532 U.S. at 120-21).

<sup>137.</sup> Id.

<sup>138.</sup> Id. at 1290.

<sup>139.</sup> Id.

#### IV. CIVIL PROCEDURE

A. District Courts' Discretion to Extend Time for Service of Process Under Federal Rule of Civil Procedure 4(m)<sup>140</sup>

In *Horenkamp v. Van Winkle & Co.*, <sup>141</sup> the Eleventh Circuit was required to decide whether district courts have discretion under Federal Rule of Civil Procedure 4(m)<sup>142</sup> to extend the time for service of process even in the absence of good cause. <sup>143</sup> The plaintiff filed her complaint on October 27, 2003 and three days later mailed the defendant a request for waiver of service that was never returned. <sup>144</sup> Mistakenly believing that she had until March 26, 2004 to perfect service, the plaintiff sent the defendant a second request for waiver of service on February 26, 2004, 122 days after the complaint was filed. <sup>145</sup> The plaintiff finally served the defendant on March 24, 2004, 29 days after the 120 day time limit for service of process under Rule 4(m) had expired. <sup>146</sup>

Defendant moved to dismiss the complaint for failure to timely perfect service of process.<sup>147</sup> The district court noted that under Rule 4(m), a plaintiff's failure to timely perfect service of process may be excused for "good cause." The district court also found that the plaintiff did not show good cause because her failure to timely serve the defendant was due to her mistake. Nonetheless, the district court denied the motion to dismiss and excused the plaintiff's untimeliness. 150

On appeal, the Eleventh Circuit analyzed the evolution of Rule 4(m) to determine whether district courts have, or ever had, the discretion to extend the time for service of process without a showing of good cause.<sup>151</sup> Prior to 1993, Rule 4(j) provided as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why

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140. FED. R. CIV. P. 4(m).
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<sup>141. 402</sup> F.3d 1129 (11th Cir. 2005).

<sup>142.</sup> FED. R. CIV. P. 4(m).

<sup>143.</sup> Horenkamp, 402 F.3d at 1131.

<sup>144.</sup> *Id.* at 1130.

<sup>145.</sup> Id.

<sup>146.</sup> Id. (citing FED. R. CIV. P. 4(m)).

<sup>147.</sup> *Id*.

<sup>148.</sup> Id.

<sup>149.</sup> Id.

<sup>150.</sup> Id. at 1131.

<sup>151.</sup> Id.

such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.  $^{152}$ 

Thus, Rule 4(j) was clear that a court was *required* to dismiss an untimely served complaint absent a showing of good cause. However, Rule 4(j) was amended in 1993, redesignated as Rule 4(m), and now reads as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period . . . . <sup>154</sup>

Although the Eleventh Circuit had not addressed this issue directly, it acknowledged that several district courts in the Eleventh Circuit, as well as a majority of other circuit courts, had interpreted the 1993 amendment to grant district court discretion to extend the time for service, even in the absence of good cause. <sup>155</sup>

Additionally, the court relied on *Henderson v. United States*,<sup>156</sup> wherein the United States Supreme Court stated, in dicta, that the 1993 amendment to Rule 4 affords the district courts this discretion.<sup>157</sup> In adopting this interpretation, the Eleventh Circuit noted that its sister circuits and the Supreme Court had relied on the Advisory Committee's notes to Rule 4, which stated that the 1993 amendment "authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown." The court also looked to the Advisory Committee's notes for guidance as to what factors

<sup>152.</sup> Id. (quoting FED. R. CIV. P. 4(j)).

<sup>153.</sup> Id.

<sup>154.</sup> Id. (quoting FED. R. CIV. P. 4(m)).

<sup>155.</sup> Id.

<sup>156. 517</sup> U.S. 654 (1996).

<sup>157.</sup> Horenkamp, 402 F.3d at 1132.

In *Henderson*, the Court said that under the "...1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period 'even if there is not good cause shown'.... The Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow."

Id. (quoting Henderson, 517 U.S. at 663).

<sup>158.</sup> *Id.* Recognizing that the Advisory Committee's interpretations are not binding on the court, the court did note that such interpretations "are nearly universally accorded great weight in interpreting federal rules." *Id.* 

may justify the grant of an extension of time for service of process in the absence of good cause. The Committee explained: "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service."

The district court found that if it were to dismiss the plaintiff's complaint, even without prejudice, the plaintiff's claims would be foreclosed because of the applicable statute of limitations. Noting that the various requests for waiver of service put the defendant on notice of the suit, and that the defendant eventually had been properly served, the district court exercised its discretion to grant the extension of time in order to preserve plaintiff's claims. The Eleventh Circuit affirmed, holding that although the running of the statute of limitations does not require a district court to extend the time for service of process under the Rule 4(m), the circumstances in this case militated in favor of the exercise of the district court's discretion to do so. 162

## B. Circumstances where District Courts Should Decline to Exercise Jurisdiction Over Declaratory Judgment Action in Favor of a Parallel State Court Action

In Ameritas Variable Life Insurance Co. v. Roach, 163 the Eleventh Circuit had its first opportunity to address the circumstances under which a district court should dismiss a declaratory judgment action when there is a parallel state court action concerning the same claims. 164 In March 2002, Brook Roach ("Mr. Roach") met with an agent of Acacia National Life Insurance ("Acacia"), an affiliate of Ameritas Variable Life Insurance Company ("Ameritas"), and applied for a life insurance policy. 165 Acacia issued a life insurance policy (the "Policy") to Mr. Roach which included a suicide provision, providing that if Mr. Roach committed suicide within two years after the effective policy date, the insurance company would only pay "the premiums received, less any partial surrenders and indebtedness." 166 Mr. Roach then assigned all of his benefits, interest, and rights existing under his

<sup>159.</sup> *Id* 

 $<sup>160.\</sup> Id.$  at 1132-33 (citing Fed. R. Civ. P. 4(m), Advisory Committee Note, 1993 Amendments).

<sup>161.</sup> Id. at 1133.

<sup>162.</sup> Id.

<sup>163. 411</sup> F.3d 1328 (11th Cir. 2005).

<sup>164.</sup> Id. at 1329.

<sup>165.</sup> Id.

<sup>166.</sup> Id.

existing policy to Acacia, and Ameritas subsequently assumed all rights, obligations, and liabilities under the Policy. 167

Mr. Roach died of an apparent suicide on March 23, 2004. <sup>168</sup> The defendant and beneficiary under the policy, Susan Roach ("Roach"), filed a claim with Ameritas to recover death benefits under the Policy. <sup>169</sup> On September 1, 2004, Ameritas brought a diversity action in district court under the Declaratory Judgment Act, <sup>170</sup> seeking a declaration of the parties' rights and obligations under the Policy (the "Federal Action"). Roach subsequently filed a state court action against Ameritas, Acacia, and its agent (the "State Court Action"), asserting claims for breach of the insurance contract, negligence, and negligent supervision and hiring. <sup>171</sup> Roach simultaneously filed a motion to dismiss in the Federal Action, asking the court to dismiss the Federal Action in favor of the parallel State Court Action. <sup>172</sup>

Determining that the State Court Action was the more appropriate forum in which to hear the complete controversy, the district court granted Roach's motion to dismiss. 173 The Eleventh Circuit affirmed, noting that the Declaratory Judgment Act is "an enabling Act, which confers a discretion on courts rather than an absolute right upon the litigant." Citing the Supreme Court's opinion in Brillhart v. Excess Insurance Co., 175 the court concluded that "it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties."176 Guided by the Supreme Court's admonitions and the "'same considerations of federalism, efficiency, and comity that traditionally inform a federal court's discretionary decision whether to abstain from exercising jurisdiction over state law claims in the face of parallel litigation in the state courts," the Eleventh Circuit set forth the following factors for consideration to aid district courts in balancing state and federal interests:

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167. Id.
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<sup>168.</sup> Id. at 1330.

<sup>169.</sup> Id.

<sup>170. 28</sup> U.S.C. §§ 2201-2202 (2000 & Supp. III 2003).

<sup>171.</sup> Roach, 411 F.3d at 1330.

<sup>172.</sup> Id.

<sup>173.</sup> Id.

<sup>174.</sup> Id. (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995)).

<sup>175. 316</sup> U.S. 491 (1942).

<sup>176.</sup> Ameritas, 411 F.3d at 1330 (quoting Brillhart, 316 U.S. at 495).

<sup>177.</sup>  $\mathit{Id}$ . at 1331 (quoting Centennial Life Ins. v. Poston, 88 F.3d 255, 257 (4th Cir. 1996)).

- 1. [T]he strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts;
- 2. [W]hether the judgment in the federal declaratory action would settle the controversy;
- 3. [W]hether the federal declaratory action would serve a useful purpose in clarifying the legal relations at issue;
- 4. [W]hether the declaratory remedy is being used merely for the purpose of "procedural fencing"—that is, to provide an arena for a race for res judicata or to achieve a federal hearing in a case otherwise not removable:
- 5. [W]hether the use of a declaratory action would increase the friction between [the] federal and state courts and improperly encroach on state jurisdiction;
- 6. [W]hether there is an alternative remedy that is better or more effective;
- 7. [W]hether the underlying factual issues are important to an informed resolution of the case;
- 8. [W]hether the state trial court is in a better position to evaluate those factual issues than is a federal court; and
- 9. [W]hether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common law or statutory law dictates a resolution of the declaratory judgment action. <sup>178</sup>

Affirming the dismissal of the Federal Action, the Eleventh Circuit noted that the Federal Action concerned an incomplete set of parties and claims, whereas the State Court Action encompassed the complete controversy.<sup>179</sup> Because the State Court Action included all of the parties to the dispute and the claims were controlled by state law, the Eleventh Circuit approved the district court's finding that there was no need to reach out for expanded jurisdiction, even assuming it was permissible.<sup>180</sup> Determining that the district court adequately considered "whether the claims of all of the parties in interest [could] satisfactorily be adjudicated in [the declaratory action], whether necessary parties have been joined, [and] whether such parties are amenable to process [in the declaratory action]," the Eleventh Circuit

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<sup>178.</sup> *Id.* at 1331 n.4. Noting that it had not previously set out the criteria to be applied in cases where district courts are faced with a declaratory action brought on the basis of diversity while a subsequent parallel lawsuit is instituted in state court, the Eleventh Circuit noted that its list of factors "is neither absolute nor is any one factor controlling," but are "merely guideposts" to aid district courts in determining when to decline to exercise their discretion to accept jurisdiction of such a controversy. *Id.* at 1331.

<sup>179.</sup> *Id*.

<sup>180.</sup> Id. at 1331 n.5.

held that the district court rightly abstained from exercising its discretion to accept jurisdiction over the Federal Action in favor of the parallel State Court Action. 181

#### V. APPELLATE PROCEDURE AND JURISDICTION

A. Circumstances Under Which a Losing Plaintiff in a Civil Rights Action May Be Required to Post a Federal Rule of Appellate Procedure 7 Bond that Includes the Defendant's Anticipated Attorney Fees on Appeal

In another case of first impression, the Eleventh Circuit in Young, Darrel Sims, Mark Steven Greer, Morris Pickett v. New Process Steel, LP<sup>182</sup> examined whether a district court may require a losing plaintiff in a civil rights case to post a bond under Federal Rule of Appellate Procedure 7 ("Rule 7")<sup>183</sup> that includes the defendant's anticipated appellate attorney fees as a condition to the appeal. <sup>184</sup> The plaintiffs, who lost their racial discrimination lawsuit, first argued that the district court could not require an appeal bond under any circumstances. <sup>185</sup> Alternatively, the plaintiffs argued that the court could not require them to post a bond to secure the defendant's attorney fees on appeal without first finding that the would-be appeal was frivolous, unreasonable, or groundless. <sup>186</sup> Although the Eleventh Circuit rejected the plaintiffs' primary position, it noted that their secondary argument had merit. <sup>187</sup>

The plaintiffs lost a jury trial in a suit against their employer, New Process Steel, LP, where the plaintiffs asserted racial discrimination claims under 42 U.S.C. § 1981<sup>188</sup> and Title VII of the Civil Rights Act of 1964. After the plaintiffs filed notices of appeal, the district court entered an order *sua sponte* which stated as follows:

Pursuant to *Rule 7*, *Federal Rule of Appellate Procedure*, this court would require appellant to file a bond or provide other security in an amount necessary to ensure payment of costs on appeal if the potential costs taxable on appeal can be fairly approximated. If appellee wishes

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181. Id. at 1332 (quoting Brillhart, 316 U.S. at 495).
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<sup>182. 419</sup> F.3d 1201 (11th Cir. 2005).

<sup>183.</sup> FED. R. APP. P. 7.

<sup>184.</sup> Young, 419 F.3d at 1202.

<sup>185.</sup> Id.

<sup>186.</sup> *Id*.

<sup>187.</sup> Id. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

<sup>188. 42</sup> U.S.C. § 1981 (2000).

<sup>189. 42</sup> U.S.C. §§ 2000e to 2000e-17 (2000); Young, 419 F.3d at 1202.

to invoke  $Rule\ 7$ , it shall within fourteen (14) days submit evidentiary materials to support the fixing of a bond amount. <sup>190</sup>

Taking the hint from the district court, the defendant immediately filed a motion to require the plaintiffs to post a bond under Rule 7, seeking to have it cover the defendant's anticipated attorney fees on appeal as well as the other costs it would incur. The defendant's motion was accompanied by affidavits estimating the amount of the defendant's anticipated attorney fees. The court granted the motion in its entirety and required the plaintiffs to post a bond in the amount of \$61,000 as a pre-requisite to their appeal. All but \$1,000 of that amount was to cover the defendant's estimated attorney fees on appeal. <sup>191</sup>

The defendant's motion neither alleged nor implied that the plaintiffs' appeal would be frivolous, unreasonable, or groundless. 192 Indeed, the district court expressly disavowed the need for such a finding, relying on its prior holding in Pedraza v. United Guaranty Corp., 193 which dictated that the fixing of a Rule 7 bond "does not require the court to predict whether or not a defendant will prevail on appeal, or to require that defendant demonstrate that the appeal is frivolous." 194 plaintiffs appealed the district court's requirement of the Rule 7 bond. 195 Without oral argument, an Eleventh Circuit panel vacated the order requiring the bond and remanded with instructions that the court not include the defendant's anticipated attorney fees in a Rule 7 bond, absent a finding that the plaintiffs' appeal would be frivolous, unreasonable, or groundless. 196 The defendant filed a petition for rehearing en banc, and the original panel vacated its opinion and set the case for oral argument. 197

On re-hearing, the court looked first to the plain language of Rule 7, which states that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Although the Rule does not define the term "costs," the Eleventh Circuit "went a long way toward doing so, at least for cases where a fee shifting statute

<sup>190.</sup> Young, 419 F.3d at 1202-03.

<sup>191.</sup> Id. at 1203.

<sup>192.</sup> Id.

<sup>193. 313</sup> F.3d 1323 (11th Cir. 2002).

<sup>194.</sup> Young, 419 F.3d at 1203.

<sup>195.</sup> Id. Plaintiff's putative appeal on the merits was stayed pending the appeal of the bond issue. Id.

<sup>196.</sup> Id. (citing Young v. New Process Steel, LP, 125 Fed. Appx. 977 (11th Cir. 2004)).

<sup>197.</sup> Id.

<sup>198.</sup> Id. (quoting FED. R. APP. P. 7).

is involved, in [its] *Pedraza* decision," where it explained that the word "costs" for Rule 7 purposes should draw its meaning from the fee-shifting statute applicable to the underlying case. <sup>199</sup>

Pedraza arose under the Real Estate Settlement Procedures Act ("RESPA"), 200 which contained a fee-shifting provision 201 stating that "the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees." In this context, the Eleventh Circuit explained that the words "together with" meant that attorney fees were recoverable "in addition to costs, not as part of costs." Thus, the court concluded that in a RESPA case, the district court could not order the appellants to post a Rule 7 bond that included anticipated appellate attorney fees because RESPA's fee-shifting provision did not include attorney fees in its definition of costs. 204

To explain its holding in Pedraza, the Eleventh Circuit gave an example of its converse, which stated that, for example, a district court could order a losing plaintiff to post a Rule 7 bond that included anticipated appellate attorney fees if 42 U.S.C. §  $1988^{205}$  was the underlying fee-shifting statute. Because section 1988 expressly allows the court to award the prevailing party "a reasonable attorney's fee as part of the costs," the term "costs" does include anticipated appellate attorney fees in situations where section 1988 is the applicable fee-shifting statute.  $^{207}$ 

Despite section 1988's party neutral language, the plaintiffs cited the Supreme Court's holding in *Christiansburg* in support of their claim that "'a prevailing [civil rights] plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances,' [but] a district court should not award attorney's fees to a prevailing civil rights defendant absent 'a finding that the plaintiff's action was frivolous, unreasonable, or without

<sup>199.</sup> Id. at 1203-04 (citing Pedraza, 313 F.3d at 1333).

<sup>200. 12</sup> U.S.C. §§ 2601-2617 (2000).

<sup>201. 12</sup> U.S.C. § 2607(a).

<sup>202.</sup> Young, 419 F.3d at 1204 (quoting 12 U.S.C. § 2607(d)(5)).

<sup>203.</sup> Id. (citing Pedraza, 313 F.3d at 1333-34) (emphasis added).

<sup>204.</sup> Id. (citing Pedraza, 313 F.3d at 1334-35).

<sup>205. 42</sup> U.S.C. § 1988 (2000 & Supp. III 2003).

<sup>206.</sup> Young, 419 F.3d at 1204 (citing *Pedraza*, 313 F.3d at 1333-35). The Eleventh Circuit held that this example had direct relevance to the instant case because section 1988 is the provision that governs fee shifting in this case, as it does in civil rights cases generally. *Id.* 

<sup>207.</sup> *Id.* (citing 42 U.S.C. § 1988(b)). Further, the Eleventh Circuit held that *Pedraza*'s statement about section 1988 was neither incidental nor obiter dictum, "but instead illustrates the nature and extent of the rule that was actually used to decide the case." *Id.* 

foundation." The Eleventh Circuit held that Christiansburg did not support plaintiffs' "absolutist position," which would hold that attorney fees can never be included in the bond an appealing plaintiff can be required to post in a case covered by section 1988.<sup>209</sup> However, the court also concluded that it could "faithfully follow the Christiansburg decision by holding that the same restrictions applied by it to the award of attorney's fees under section 1988 [could] also apply to the inclusion of attorney's fees in a Rule 7 cost bond."210 For instance, the court announced an exception to the general rule set forth in Christiansburg which allowed a court to award attorney fees under section 1988 to a prevailing defendant where the court determined that "the plaintiff's action was frivolous, unreasonable, or without foundation."211 Supreme Court justified this exception, stating that "'while Congress wanted to clear the way for suits to be brought under [the underlying civil rights] Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis."212 Concluding that a plaintiff who is unsuccessful in a civil rights suit at trial should not be free from the burden of an appellate bond that includes anticipated attorney fees where the appeal is likely to be frivolous, unreasonable, or without foundation, 213 the Eleventh Circuit held as follows:

[A] district court may not require an unsuccessful plaintiff in a civil rights case to post an appellate bond that includes not only ordinary costs[,] but also the defendant's anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation. If the court does make that determination, it has discretion to grant the defendant's motion and require the plaintiff to post a bond in the amount of the defendant's anticipated costs including appellate attorney's fees.<sup>214</sup>

 $<sup>208.\</sup> Id.$  at 1205 (quoting Christiansburg, 434 U.S. at 421) (citation omitted). The plaintiffs claimed that Pedraza's statement about the proper interpretation of Rule 7 in cases concerning section 1988 was wrong because it was inconsistent with what the plaintiffs contend is section 1988's plaintiff-friendly purpose. Id.

<sup>209.</sup> Id.

<sup>210.</sup> Id. The court noted that this holding was supported by the clear language of Rule 7 and section 1988, neither of which make any distinction between plaintiffs and defendants. Id. at 1250. Indeed, the court opined that the "same policy reasons are at play in both [the Rule 7 and section 1988] contexts." Id. at 1205.

<sup>211.</sup> Id. (quoting Christianburg, 434 U.S. at 421).

<sup>212.</sup> Id. at 1206 (quoting Christianburg, 434 U.S. at 420).

<sup>213.</sup> Id.

<sup>214.</sup> Id. at 1207-08.

B. Appealability of Order Compelling Arbitration and Dismissing Complaint Where Court Retained Jurisdiction Over Pending Motion for Sanctions

In *Jackson v. Cintas Corp.*, <sup>215</sup> the court considered a jurisdictional question of first impression in the Eleventh Circuit: "whether an order compelling arbitration and dismissing a complaint, but retaining jurisdiction over a motion for sanctions, is a final, appealable decision." Noting that the dismissal disposed of the entire case on the merits and the motion for sanctions raised only a collateral issue, the Eleventh Circuit held that the dismissal was a final, appealable order. <sup>217</sup>

As a condition of plaintiff Krista Jackson's ("Jackson") employment as a sales representative with Defendant Cintas Corp. ("Cintas"), Jackson signed an employment agreement containing an arbitration clause. <sup>218</sup> Jackson admitted that she read the agreement and noticed the arbitration clause, but claimed that she did not understand the meaning of arbitration. <sup>219</sup> She claimed that she believed she was required to negotiate all claims with Cintas, but that she retained the right to sue if negotiations failed. <sup>220</sup>

After termination of her employment, Jackson sued Cintas alleging discrimination under various federal statutes. Cintas moved to dismiss or, in the alternative, to stay Jackson's lawsuit pending the outcome of arbitration. Jackson argued that the arbitration agreement was unconscionable and thus unenforceable. She also sought discovery under Federal Rule of Civil Procedure 56(f)<sup>223</sup> to establish that Cintas used the employment agreement selectively, and to establish that the agreement was illusory and lacked consideration. When

<sup>215. 425</sup> F.3d 1313 (11th Cir. 2005).

<sup>216.</sup> Id. at 1315.

<sup>217.</sup> Id.

<sup>218.</sup> *Id.* Jackson's employment agreement "provided for arbitration as the exclusive method for resolution of all claims of Jackson against Cintas." *Id.* 

<sup>219.</sup> Id.

<sup>220.</sup> Id.

<sup>221.</sup> *Id.* Jackson asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. 2003), the Pregnancy Discrimination Act, 42 U.S.C. § 2000e (2000 & Supp. III 2003), the Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000 & Supp. III 2003), the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681v (2000 & Supp. III 2003), the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2000 & Supp. III 2003) and 42 U.S.C. § 1981(a) (2000).

<sup>222.</sup> Jackson, 425 F.3d at 1315.

<sup>223.</sup> FED. R. CIV. P. 56(f).

<sup>224.</sup> Jackson, 425 F.3d at 1315.

she later moved to compel this discovery, Cintas filed a motion for sanctions under Federal Rule of Civil Procedure 11.<sup>225</sup> The district court compelled arbitration and dismissed the complaint, but retained jurisdiction over the motion for sanctions.<sup>226</sup>

On appeal, before considering the merits, the Eleventh Circuit first determined that the order dismissing the complaint and compelling arbitration was final and appealable even though the district court retained jurisdiction over the motion for sanctions.<sup>227</sup> The court first cited the language of the Federal Arbitration Act ("FAA"), 228 which allowed an immediate appeal from any "final decision with respect to Under the FAA, a decision is "final" if the court "'dispose[s] of the entire case on the merits and [leaves] no part of it pending before the court."230 Thus, when the district court compelled arbitration, dismissed the complaint, and entered a judgment, it disposed of the entire case on the merits and left no issues remaining before it.<sup>231</sup> Although it retained jurisdiction to decide the motion for sanctions, that motion raised issues that were "collateral to the merits of an appeal."232 The court noted that "every other circuit [that has considered this issue] has held that the pendency of a motion for sanctions after a dismissal on the merits does not bar appellate jurisdiction."233 Therefore, the Eleventh Circuit held that it had jurisdiction to decide the merits of the appeal.<sup>234</sup>

## VI. EMPLOYMENT

## A. Definition of Successor Employer or Successor in Interest for Veteran's Right to Re-Employment Under USERRA

In Coffman v. Chugach Support Services, Inc., 235 the court addressed which entities can be considered successor employers for purposes of a

<sup>225.</sup> FED. R. CIV. P. 11; Jackson, 425 F.3d at 1315.

<sup>226.</sup> Jackson, 425 F.3d at 1315-16.

<sup>227.</sup> Id. at 1316-17.

<sup>228. 9</sup> U.S.C. §§ 1-16 (2000).

<sup>229.</sup> Jackson, 425 F.3d at 1316 (quoting 9 U.S.C. § 16(a)(3)).

<sup>230.</sup> Id. (quoting Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 86 (2000)).

<sup>231.</sup> Id.

<sup>232.</sup> *Id.* "A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." *Id.* (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199-200 (1988)).

<sup>233.</sup> Id. (citations omitted).

<sup>234.</sup> Id. at 1317.

<sup>235. 411</sup> F.3d 1231 (11th Cir. 2005).

veteran's right to re-employment under the Uniformed Services Employment and Re-Employment Rights Act of 1944 ("USERRA"). <sup>236</sup> Coffman was hired by Del-Jen, Inc. ("Del-Jen") in October 1997 to work as a hazardous materials specialist at Tyndall Air Force Base in Panama City, Florida, and was later promoted to a management position. Del-Jen had a contract to provide base support services at Tyndall, and through November 2001 Coffman worked for Del-Jen while also serving in the Air Force Reserve. In November 2001 the Air Force ordered Coffman to return to active military duty for one year. Coffman notified Del-Jen about his return to active service and Del-Jen subsequently hired a temporary replacement for Coffman during his absence. <sup>237</sup>

While Coffman was away on active duty, the Air Force awarded the Tyndall base support services contract to Chugach, replacing Del-Jen as the primary contractor.<sup>238</sup> In anticipation of Chugach taking over, Coffman sent Chugach his resumé, service orders, and a letter explaining his interest in retaining, and returning to, his former management Chugach representatives interviewed Coffman and were surprised to learn that Coffman had held a non-union position as a manager prior to his reactivation. The parties discussed an available position at Chugach that was similar to Coffman's previous position with Del-Jen, although the Chugach position was a non-management union position. The Chugach representatives believed Coffman was looking for a management position, and Chugach did not have an available position that was comparable to Coffman's former management position with Del-Jen. The Chugach representatives also believed that Del-Jen would be re-hiring Coffman upon his return. Ultimately, Chugach chose not to hire Coffman. Although Coffman was the only employee on military leave at the time of the transition from Del-Jen to Chugach, the Chugach representatives averred that Coffman's military status had nothing to do with Chugach's hiring decision.<sup>239</sup>

After Coffman's honorable discharge from active military service, he returned to Tyndall and began working for Del-Jen as a vehicle control coordinator. Coffman subsequently mailed a letter to Chugach's president requesting to be reinstated to his preactivation management position, specifically mentioning his pre-employment rights under

<sup>236.</sup> Coffman, 411 F.3d at 1234; 38 U.S.C. § 4301-4337 (1994).

<sup>237.</sup> Coffman, 411 F.3d at 1232.

<sup>238.</sup> *Id.* at 1233. Although Chugach's services were similar to those Del-Jen had provided at Tyndall, both Chugach and Del-Jen maintained separate contracts with the Air Force and Del-Jen became a subcontractor with Chugach on the project at Tyndall. *Id.* at 1223.

<sup>239.</sup> Id. at 1233.

USERRA. Chugach denied his request, asserting that Del-Jen's decision to bring him back to a position of comparable pay and status satisfied the requirements of USERRA.<sup>240</sup>

Coffman sued Chugach and Del-Jen seeking damages, attorney fees, and reinstatement to his former position under USERRA, alleging that Chugach's refusal to re-hire him violated the USERRA anti-discrimination and re-employment provisions. The District Court for the Northern District of Florida granted Chugach's motion for summary judgment, finding that: (1) Chugach was not liable to Coffman as a successor in interest or successor employer, and therefore owed no duty to reemploy Coffman under USERRA; and (2) Coffman had not established a prima facie case of discrimination against Chugach on the basis of his active military service. 242

On appeal the Eleventh Circuit first addressed, in an issue of first impression, the question of successor in interest or successor employer liability under USERRA.<sup>243</sup> The court noted that the congressional intent behind USERRA was to prohibit employment discrimination on the basis of military service, as well as to provide prompt re-employment to those individuals who engage in non-career service in the military.<sup>244</sup> Specifically, USERRA § 4311<sup>245</sup> ("§ 4311") "prohibits employers from discriminating against employees on the basis of military service," whereas § 4312 "addresses the right of reemployment for persons who serve in the military."<sup>246</sup> Section 4312 "does not require an employee to show any discriminatory animus," unlike § 4311.<sup>247</sup>

Under USERRA, the term "employer" is defined to include a "successor in interest" to a plaintiff's previous employer, but it does not define "successor in interest." However, the court held that the legislative history of USERRA states that the multifactor analysis utilized by the court in *Leib v. Georgia-Pacific Corp.* 249 is to be the model for successor

<sup>240.</sup> Id. at 1234.

<sup>241.</sup> Id. Count II alleged that Del-Jen violated the USERRA anti-discrimination provision as well, although Coffman and Del-Jen eventually settled their dispute. Id.

<sup>242.</sup> Id.

<sup>243.</sup> Id. at 1235.

<sup>244.</sup> Id. at 1234 (citing 38 U.S.C. § 4301 (2000)).

<sup>245. 38</sup> U.S.C. § 4311 (2000).

<sup>246.</sup> Coffman, 411 F.3d at 1234-35.

<sup>247.</sup> Id. at 1235.

<sup>248.</sup> *Id.* at 1236 (citing 38 U.S.C. § 4303(4)(1)(IV) (2000)). The successor's notice or awareness of a re-employment rights claim at the time of merger or acquisition should not be a factor in this analysis. *Id.* at 1836.

<sup>249. 925</sup> F.2d 240 (8th Cir. 1991)

in interest issues. In *Leib*, the Eighth Circuit concluded that "a multi-factor, business continuity approach [was] the most consistent with Congress'[s] intent." The test includes an examination of "whether there is (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of work force, (4) similarity of jobs and working conditions, (5) similarity of supervisory personnel, (6) similarity in machinery, equipment, and production methods, and (7) similarity of products or services." Coffman argued that the district court focused only on the "ownership and control" test in concluding that Chugach was not a successor in interest to Del-Jen. Chugach "claim[ed] that it [was] neither the successor in interest or successor employer to Del-Jen[,] . . . [and was therefore] not liable to reemploy Coffman" under USERRA "because there was no predecessor successor relationship between Chugach and Del-Jen in the form of a merger or transfer of assets."

Agreeing that a determination of successor liability under USERRA requires an analysis of all of the *Leib* factors, the Eleventh Circuit nonetheless noted that such analysis was unnecessary and improper when no merger or transfer of assets had ever transpired between the two subject companies. Determining a merger or transfer of assets between the predecessor and successor companies to be "one of the fundamental requirements for consideration of the imposition of successor liability," the court held that because there was no merger or transfer of assets between Del-Jen and Chugach, successor liability could not be imposed on Chugach under USERRA's re-employment provisions. <sup>256</sup>

The court also rejected Coffman's request for the court to use its equitable powers to fulfill USERRA's remedial purpose by reinstating Coffman to his pre-activation position.<sup>257</sup> Although the court acknowledged that USERRA "is to be liberally construed for the benefit of those who left private life to serve their country," and that equitable principles undoubtedly underlie the doctrine of successor liability, the court noted that even the cases Coffman cited concerned asset acquisitions or

<sup>250.</sup> Coffman, 411 F.3d at 1236.

<sup>251.</sup> Id. (quoting Leib, 925 F.2d at 245).

<sup>252.</sup> Id. (quoting Leib, 925 F.2d at 247).

<sup>253.</sup> *Id.* at 1237. Coffman contended that a review of the multifactor test demonstrated that Chugach was a successor in interest to Del-Jen, and was thus required to re-employ Coffman under USERRA. *Id.* 

<sup>254.</sup> Id.

<sup>255.</sup> Id.

<sup>256.</sup> Id. (citation omitted).

<sup>257.</sup> Id. at 1238.

transfers between the subject predecessor and successor companies. <sup>258</sup> Because there was no predecessor/successor relationship between the former employer—Del-Jen—and the employer alleged to have violated USERRA—Chugach—the court concluded that Chugach could not be considered the successor in interest or successor employer to Del-Jen and, as such, owed no duty to re-employ Coffman under § 4312 or § 4313 of USERRA. <sup>259</sup>

The court also held that Coffman had not established a prima facie case of discrimination on the basis of his active military status under USERRA  $\S$  4311. Section 4311 clearly mandates proof of a discriminatory motive, unlike  $\S$  4312. In order to establish his prima facie case, Coffman was required to show that his military status was a motivating factor in Chugach's decision not to hire him. Specifically, military status constitutes a motivating factor if the defendant "relied on, took into account, considered, or conditioned its decision" on that consideration.

Although there was a close proximity in time between Coffman's military service and Chugach's decision not to hire him, Chugach did not express hostility toward service members and, indeed, had hired both military and non-military personnel. Further, Chugach representatives testified that they did not consider Coffman's military status in their hiring decision. Rather, they stated that the management position Coffman was seeking was simply not available at Chugach. Because Coffman failed to present any evidence to show that Chugach "relied on, took into account, considered, or conditioned its decision" not to hire Coffman on the basis of his active military service, Coffman could not establish a prima facie case under USERRA § 4311.

<sup>258.</sup> Id. (internal citations omitted).

<sup>259.</sup> Id.

<sup>260.</sup> *Id*.

<sup>261.</sup> Id. (citations omitted).

<sup>262.</sup> *Id.* (citation omitted). A motivating factor does not have to be the sole cause of the employment action, but need only be one of the factors that a truthful employer would list if asked for the reasons behind its hiring decision. *Id.* 

<sup>263.</sup> Id. at 1239.

<sup>264.</sup> Id.

<sup>265.</sup> *Id*.

<sup>266.</sup> Id.

## VII. MISCELLANEOUS

## A. Test for Determining Public Officials' Violation of the First Amendment Right Against Retaliation

In another issue of first impression, the Eleventh Circuit, in *Bennett v. Hendrix*, <sup>267</sup> was called on to determine the precise test for determining when and whether a public official's actions violate a plaintiff's rights against retaliation in violation of the First Amendment. <sup>268</sup> The plaintiffs in the underlying case were local business owners who supported a 1998 referendum that would have established a countywide police force and thereby diminished the power of the Forsyth County, Georgia Sheriff's Department. The Sheriff opposed the referendum because if it passed, most of the department's powers would have been transferred to the county police and the Sheriff would have been placed under the supervision of county officials. The plaintiffs alleged that the Sheriff and his deputies subsequently engaged in a campaign of retaliation and intimidation against them based on their support of the referendum, which was designed to intimidate them from opposing the Sheriff's re-election that year. <sup>269</sup>

In 2000 the plaintiffs filed suit in the Northern District of Georgia under 42 U.S.C. § 1983<sup>270</sup> alleging violations of the First, Fourth<sup>271</sup> and Fourteenth<sup>272</sup> Amendments, several state tort laws, and a conspiracy to violate plaintiffs' civil rights. The district court denied the defendants' motion for summary judgment on the plaintiffs' claim of retaliation in violation of the First Amendment, finding that the defendants were not entitled to qualified immunity from suit because they had violated the plaintiffs' constitutional rights which were clearly established at the time of the violation.<sup>273</sup>

On appeal, the Eleventh Circuit revisited the "well established" procedure for assessing qualified immunity, concluding that "[g]overnment officials acting within their discretionary authority are not eligible for qualified immunity from suit when the facts . . . 'show that the [officials'] conduct violated a constitutional right' . . . [that] was clearly

<sup>267. 423</sup> F.3d 1247 (11th Cir. 2005).

<sup>268.</sup> Id. at 1250; U.S. CONST. amend. I.

<sup>269.</sup> Bennett, 423 F.3d at 1248-49.

<sup>270. 42</sup> U.S.C. § 1983 (1996).

<sup>271.</sup> U.S. CONST. amend IV.

<sup>272.</sup> U.S. CONST. amend XIV.

<sup>273.</sup> Bennett, 423 F.3d at 1249.

established" at the time of the violation.<sup>274</sup> Although the Eleventh Circuit had not adopted a precise test for determining when a defendants' actions violated a plaintiff's First Amendment right against retaliation, the court noted that the "commonly accepted formulation" used by other circuits required plaintiffs to establish that: (1) the "speech or act was constitutionally protected[,]" (2) "the . . . retaliatory conduct adversely affected the protected speech[,]" and (3) "a causal connection [exists] between the retaliatory actions and the adverse effect on speech."<sup>275</sup> Because the defendants conceded that the plaintiffs' speech was constitutionally protected, and never indicated that they would have undertaken their retaliatory actions absent the plaintiffs' opposition to the referendum, <sup>276</sup> the court only had to determine whether the retaliatory conduct adversely affected the protected speech."<sup>277</sup>

The Eleventh Circuit adopted the "objective test" for proving a retaliation claim, a test that had been adopted by every other circuit. This test provides that "a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of *First Amendment* rights. This objective standard provided notice to government officials of when retaliatory actions could violate a plaintiff's First Amendment rights, whereas "'a subjective standard [c]ould expose public officials to liability in some cases, but not in others, for the very same conduct . . . ." The court preferred the "ordinary firmness" test because it protected the interests of both government officials and private citizens.

Additionally, the "ordinary firmness" test still required private citizens to establish that the retaliatory acts would deter persons of ordinary firmness from exercising their First Amendment rights.<sup>282</sup> This test allowed for a "weeding out" function when the injuries complained of were trivial or amounted to no more than a minimal inconvenience to

<sup>274</sup>. Id. at 1249-50 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). Having determined that the defendants were acting within the scope of their discretionary authority in connection with the retaliatory conduct, the burden shifted to the plaintiffs to establish a constitutional violation. Id. at 1250.

<sup>275.</sup> Id. at 1250.

<sup>276.</sup> Id. at 1250 n.3.

<sup>277.</sup> Id. at 1250.

<sup>278.</sup> Id.

 $<sup>279.\ \ \,</sup> Id.$  (quoting Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005)).

<sup>280.</sup> Id. at 1251-52 (quoting Constantine, 411 F.3d at 500).

<sup>281.</sup> Id. at 1252.

<sup>282.</sup> Id.

the exercise of First Amendment rights. <sup>283</sup> The court disagreed with the defendants' argument that the ordinary firmness test allowed the plaintiffs to state a claim even when they had not suffered an injury in fact. <sup>284</sup> Because the objective "ordinary firmness" test requires the plaintiffs to show that the defendants' retaliatory acts adversely affected them, the court determined this to be an injury sufficiently adverse to give rise to Article III<sup>285</sup> standing. <sup>286</sup> Finally, the court noted that the ordinary firmness test was consistent with previous Eleventh Circuit decisions which held that plaintiffs need not prove actual, current chill in order to prove irreparable injury or retaliation. <sup>287</sup>

Having adopted the objective ordinary firmness test, the Court readily concluded that the plaintiffs in the case at bar had alleged facts that a jury could find would deter persons of ordinary firmness from the exercise of their First Amendment rights.<sup>288</sup> The court also concluded that, at the time of the defendants' alleged actions, the law was clearly established that retaliation by state officials against private citizens for exercising their First Amendment rights was actionable.<sup>289</sup> The court thus held that the defendants were on notice and had "fair warning" that retaliating against the plaintiffs for their support of a political referendum would violate the plaintiffs' constitutional rights and could lead to liability under § 1983.290 Because the defendants' conduct violated the plaintiffs' constitutional rights that were clearly established at the time of the alleged violations, the Eleventh Circuit affirmed the district court's order denying the defendants' qualified immunity from suit.291

<sup>283.</sup> Id. at 1253.

<sup>284.</sup> *Id.* The court criticized the defendants' reliance on retaliation in the public employment context, stating that different interests are at stake there in that private citizens plainly cannot suffer adverse employment actions at the hands of public officials who are not their employers. *Id.* at 1255.

<sup>285.</sup> U.S. CONST. art. III.

<sup>286.</sup> Bennett, 423 F.3d at 1254.

<sup>287.</sup> *Id.* For example, in *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983), the Eleventh Circuit held that plaintiffs could establish redressable injury in the form of "current deprivation" of rights by showing direct retaliation by the state for a plaintiff's exercise of First Amendment freedoms in the past. *Cate*, 707 F.2d at 1186.

<sup>288.</sup> Bennett, 423 F.3d at 1254. Moreover, the plaintiffs had testified that they were, in fact, actually chilled in the exercise of their rights because they did not participate in the 2000 election to the degree that they would have but for the defendants' retaliatory actions. *Id.* 

<sup>289.</sup> Id. at 1255.

<sup>290.</sup> Id. at 1256.

<sup>291.</sup> Id.

## B. BankWest, Inc. v. Baker

The court, in this appeal, addressed the question of whether the State of Georgia, through enactment of a payday lending statute, O.C.G.A. section 16-17-1 (the "Act"), <sup>292</sup> can regulate a narrow segment of agency agreements between in-state payday stores and out-of-state banks, or whether the Act is preempted by section 27(a) of the Federal Deposit Insurance Act, 1("FDIA"). <sup>293</sup>

"Payday loans" are small loans with interest rates averaging between 400 to 500 percent annually and that are due for repayment on the borrower's next pay period.<sup>294</sup> The Act targeted Georgia businesses and precluded in-state payday stores from directly making payday loans in Georgia.<sup>295</sup> To avoid this prohibition, payday stores began entering into agency agreements whereby they would procure payday loans for out-of-state banks while retaining the predominate economic interest in the loans.<sup>296</sup> To stop this practice, the Act restricted in-state payday stores from acting as agents for out-of-state banks in the limited circumstance where the agency agreement grants the in-state agent "the predominate economic interest" in the bank's payday loan—where the payday stores receive more than fifty percent of the revenues received from the loan.<sup>297</sup> The Act prohibits this specific type of agency agreement to prevent in-state payday stores from circumventing Georgia's usury laws and reaping enormous revenues from payday loans.<sup>298</sup>

The plaintiffs in the underlying case included local payday stores as well as out-of-state banks that had no physical locations in Georgia, but offered payday loans in Georgia by contracting with the local payday stores. The payday stores are not banks or subsidiaries of banks, but are independent businesses with physical locations in Georgia. Georgia's usury laws presented a problem for the payday stores in that they prohibited the stores from charging more than the sixteen percent

<sup>292.</sup> O.C.G.A. § 16-17-1 to -10 (1982 & Supp. 2005).

<sup>293.</sup> BankWest, Inc. v. Baker, 411 F.3d 1289, 1292 (11th Cir. 2005); 12 U.S.C. § 1831d(a) (2000).

<sup>294. 411</sup> F.3d at 1292-93.

<sup>295.</sup> Id. at 1292.

<sup>296.</sup> Id. at 1293.

<sup>297.</sup> Id. at 1292.

<sup>298.</sup> *Id.* Georgia's right to preclude in-state stores or even in-state banks from making payday loans at these high interest rates was not challenged.

<sup>299.</sup> Id.

<sup>300.</sup> Id.

maximum annual percentage rate ("APR") established by Georgia law.<sup>301</sup> In contrast, section 27(a) of the FDIA allowed state-chartered banks to charge the interest rate allowed under the laws of its charter state in any other state where it does business.<sup>302</sup> Because banks that were not chartered in Georgia were not limited by Georgia's sixteen percent APR cap, the plaintiff payday stores entered into arrangements with out-of-state banks so that they could market and procure loans in Georgia at the higher interest rates allowed in the out-of-state banks' charter states.<sup>303</sup> Significantly, these agency agreements allocated at least eighty-one percent of the loan revenues generated by the finance charges to the payday stores.<sup>304</sup> Thus, under these agency agreements, the plaintiff payday stores indisputably had the predominate economic interest in the revenues generated by the payday loans.<sup>305</sup>

Immediately after the Act was enacted, the plaintiffs filed suit seeking injunctions against enforcement of the Act, and sought declaratory judgments that the provisions of the Act applicable to them were unconstitutional and were preempted by federal law. The district court denied the plaintiffs' motions. On appeal, the plaintiffs asked the Eleventh Circuit to consider whether the Act is preempted by section 27(a) of the FDIA, whether the Act violates the Constitution's Dormant Commerce Clause, and whether the Act violates the Federal Arbitration Act (FAA").

The Eleventh Circuit first ruled out "field preemption," ruling that it was clear that the FDIA was not intended to "occupy the field of state bank regulation." The court interpreted the FDIA to be clear that while state banks are subject to some federal regulation, the states remain the "primary regulatory authority" over state-chartered banks. The court further concluded that there was no "conflict preemption" because this was not a case "where compliance with both the state and federal laws is impossible." Specifically, the out-of-

<sup>301.</sup> *Id.* (citing O.C.G.A. § 7-4-2(a)(2) (2004)). These restrictions applied to loans for \$3,000 or less. *Id.* at 1293.

<sup>302.</sup> Id.

<sup>303.</sup> Id. at 1293-94.

<sup>304.</sup> Id. at 1296.

<sup>305.</sup> Id.

<sup>306.</sup> Id. at 1299.

 $<sup>307.\;\;</sup>$  U.S. Const. art. I, § 8, cl. 3.

<sup>308.</sup> BankWest, 411 F.3d at 1300; 9 U.S.C §§ 1-16 (2000).

<sup>309.</sup> BankWest, 411 F.3d at 1301.

<sup>310.</sup> Id. (citing 12 U.S.C. §§ 1813(r), 1820(h)1(a), 1831(a)(I) (2000)).

<sup>311.</sup> *Id.* at 1302. Conflict preemption arises either when "it is impossible to comply with both federal and state law" or "when state law stands as an obstacle to achieving the

state banks were free to charge Georgia borrowers their home state interest rates as authorized by section 27(a) of the FDIA without being subject to any liability under the Act. Additionally, the Act did not prohibit out-of-state banks from using independent agents, such as payday stores, to make payday loans at their home state interest rates in Georgia. Rather, the Act was intended to prevent Georgia payday stores from circumventing Georgia's unchallenged usury laws by restricting out-of-state banks from using one limited type of agency agreement. 14

Acknowledging that the FDIA clearly preempted some forms of state law, the court then had to determine whether the Act fell within the scope of the express preemption of section 27(a).315 Determining congressional intent to be the "touchstone in every preemption case," the court held that section 27(a) should be narrowly construed to be consistent with "federal concerns and the historic primacy of state regulation" of state-chartered banks. 316 The court first stated that the plain language of section 27(a) refers only to state banks, and did not address non-bank businesses, such as payday stores, at all. 317 Further, the language of section 27(a) did not mention any term of the loans other than interest rates, nor did it mention any collateral activity associated with the loan such as marketing, advertising, solicitation, collection practices or any aspect of the loan procurement process. 318 Noting that nothing in the language of section 27(a) addressed which local, non-bank vendors may properly act as agents in loan transactions, or under what circumstances such vendors may so act, the court concluded that the scope of section 27(a)'s express preemption did not extend to the agency agreements at issue.319

Acknowledging that Georgia's ability to regulate the local payday stores was undisputed, the court had to determine whether the Act contained a prohibited interest-rate limitation on loans between the out-of-state banks and Georgia borrowers, or permitted an agency regulation only when non-bank payday stores operating in Georgia may properly serve as agents for those out-of-state banks.<sup>320</sup>

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objectives of the federal law." Id.
312. Id.
313. Id.
314. Id. at 1302-03.
315. Id. at 1303 (citing 12 U.S.C. § 1831(d)(a)).
316. Id.
317. Id. at 1304.
318. Id.
319. Id. at 1304-05.
320. Id. (citing O.C.G.A. § 16-17-2(b)(4) (1982 & Supp. 2005)).
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In concluding that O.C.G.A. section 16-17-2(b)(4), which precludes instate payday stores from acting as agents for out-of-state banks when the payday store retains the predominate economic interest in the payday loan, was a permitted agency limitation that applies to the agency agreement between in-state payday stores and out-of-state banks, the court emphasized that nothing in the Act's text placed any direct limitation on the interest rates an out-of-state bank could charge individual borrowers on any loan in Georgia. Indeed, out-of-state banks were permitted to charge the same home state interest rates in Georgia as they were before the Act was enacted. Concluding that the Act constituted nothing more than an narrow agency limitation on contracts between in-state payday stores and out-of-state banks, the court held that compliance with the Act would not alter the existing business model other than to require that the payday store receive only fifty percent of the revenues from the payday loan.

Finally, the plain language of section 27(a) referred only to "state banks" and did not attempt to restrict an out-of-state bank's ability to use any local, non-bank vendors as agents, or to have any form of agency relationship with non-bank vendors.<sup>324</sup> Because section 27(a) did not preempt a state's power to regulate local, non-bank entities operating within the state as independent contractors or agents for an out-of-state bank, the court concluded that section 27(a) did not expressly preempt O.C.G.A. section 16-17-2(b)(4).<sup>325</sup>

The court then turned to O.C.G.A. section 16-17-2(d) to determine whether, although this code section exempted out-of-state banks from direct liability, it could somehow be used to prosecute an out-of-state bank as an "aider and abettor" of an in-state payday store's violation of the Act. <sup>326</sup> In light of the state's power to keep in-state payday stores from circumventing Georgia's usury laws by entering into the prohibited agency agreements at issue, the court held that Georgia could not be prohibited from reasonably punishing those who aid and abet such violations. <sup>327</sup> Further, section 27(a) did not preempt state legislation imposing penalties on payday stores who entered into illegal agency agreements, or the out-of-state banks who aided and abetted such

<sup>321.</sup> Id. at 1306.

<sup>322.</sup> Id.

<sup>323.</sup> Id.

<sup>324.</sup> Id.

<sup>325.</sup> Id.

<sup>326.</sup> *Id.* Specifically, the third sentence in subsection (d) of this subsection states that "any person who aids or abets such (a direct) violation" of the Act is guilty of misdemeanor. *Id.* (quoting O.C.G.A. § 16-17-2(d) (1982 & Supp. 2005)).

<sup>327.</sup> Id. at 1308.

violations.<sup>328</sup> Because punishing these violations is precisely what section 16-17-2(d) was intended to do, the court held it was not preempted by section 27(a) of the FDIA.<sup>329</sup>

Finally, the Court turned to section 16-17-3 of the Act which provided that: (1) violators shall be barred from collecting the indebtedness created by the illegal loan transactions; (2) any such loan transactions were void ab initio; and (3) violators shall be liable for civil damages to the borrower for three times the amount of any interest or other charges. The court first noted that this section's civil damage penalty and prohibition on collection-of-indebtedness did not apply to out-of-state banks because out-of-state banks were specifically exempt from liability under the Act. However, out-of-state banks were impacted by the portion of section 16-17-3, which would void a payday loan that was procured in the bank's name through a prohibited agency agreement. Section 16-17-3 which would void a payday loan that was procured in the bank's name through a prohibited agency agreement.

Emphasizing that the payday loan would not be void because of the interest rate on the loan, but rather because it was procured under a prohibited agency agreement, the court saw "no reason to preclude Georgia from punishing violations of its agency rule. . . ."<sup>333</sup> If the payday stores' loan procurement practices violated Georgia's consumer protection laws, then Georgia had the power to void the loan because it was illegally procured.<sup>334</sup> The court thus warned out-of-state banks that, should they elect to procure payday loans through prohibited agency agreements in violation of Georgia law, any such loans would be void.<sup>335</sup>

The Act was also challenged on the grounds that it violated the dormant aspect of the Constitution's Commerce Clause, 336 which prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. 337 The court first analyzed whether the Act "advance[d] a legitimate local purpose that

<sup>328.</sup> Id.

<sup>329.</sup> Id.

<sup>330.</sup> Id. (citing O.C.G.A. § 16-17-3).

<sup>331.</sup> Id.

 $<sup>332. \</sup>quad Id.$ 

<sup>333.</sup> Id. at 1308-09.

<sup>334.</sup> Id. at 1309.

<sup>335.</sup> Id. at 1309 n.27.

<sup>336.</sup> *Id.* at 1309. The "dormant" or "negative" aspect of the Commerce Clause serves as a "substantive restriction on permissible state regulation of interstate commerce" in that it prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id.* 

<sup>337.</sup> Id.

cannot be adequately served by reasonable, nondiscriminatory alternatives."<sup>338</sup> If the Act only indirectly affected interstate commerce and regulated both in-state and out-of-state interests equally, the court was required to examine "'whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.'"<sup>339</sup>

The court noted that the Act did not violate the Dormant Commerce Clause because it placed fewer restrictions on out-of-state banks than it did on Georgia-based banks. For example, the Act made no attempt to regulate the interest rate that out-of-state banks could charge borrowers in Georgia, although in-state banks were limited by Georgia's sixteen percent cap. Additionally, out-of-state banks were still permitted to use in-state payday stores as agents, provided they did not give the payday store the predominate economic interest in the payday loans. In contrast, in-state banks could not use payday stores to charge more than the sixteen percent cap, no matter what the in-state banks paid the payday stores.

Finally, the plaintiffs argued that section 16-17-2(c)(2), <sup>344</sup> which declared arbitration clauses in payday loan contracts void if the payday loan contract was unconscionable, was preempted by the FAA. <sup>345</sup> The court did not reach the merits of this argument because it concluded that the plaintiffs lacked standing to challenge the Act's arbitration provisions. <sup>346</sup> The court noted that:

In the context of a plaintiff's challenge to the enforceability of an arbitration clause in a loan agreement, we have held that the plaintiff must allege that an arbitration between the lender and the borrower is imminent or "certainly impending." It is not enough that there may be an arbitration and that the statute may be applied if there is.<sup>347</sup>

Rather, the Court found that the party seeking an injunction must show that arbitration is imminent or certainly impending, and must also show

 $<sup>338.\</sup> Id.$  at 1310 (citation omitted). Where a statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

<sup>339.</sup> BankWest, 411 F.3d at 1310 (quoting Brown-Forman, 476 U.S. at 579).

 $<sup>340. \</sup>quad Id.$ 

<sup>341.</sup> Id.

<sup>342.</sup> Id.

<sup>343.</sup> Id.

<sup>344.</sup> O.C.G.A. § 16-7-2(c)(2).

<sup>345.</sup> BankWest, 411 F.3d at 1310.

<sup>346.</sup> Id.

<sup>347.</sup> Id. at 1311.

harm to its interest in enforcing the agreement that is actual or imminent. Here, the plaintiffs neither alleged that any breaches of the loan agreements had occurred or were imminent, nor had they alleged that arbitrations would follow. Because the plaintiffs failed to demonstrate "imminent or certainly impending" injury from arbitration under O.C.G.A. section 16-17-2(c)(2), they lacked standing to challenge this provision. <sup>350</sup>

Dissenting, Judge Carnes stated that "the real defect" in the majority opinion lay in its express preemption analysis.<sup>351</sup> Unlike the majority, Judge Carnes emphasized that "Congress'[s] preemptive command is explicitly stated in the statutory language" of section 27(a) of the Judge Carnes interpreted the language of section 27(a) to mean that, to the extent that "any state constitution or statute" attempts to regulate or restrict the right of an out-of-state bank to charge an interest rate permitted under the laws of its charter state, that state law is preempted.<sup>353</sup> Further, Judge Carnes opined that the majority should have interpreted the statutory phrase "any loan" to mean all loans without exception, and because loans that out-of-state banks make through in-state agents fall within the broad scope of the term "any loan," section 27(a) would preempt any state law that attempted to regulate or restrict the interest rates that may be charged on those loans. 354 Judge Carnes also criticized the majority's characterization of section 27(a) as "quite narrow," which implied that the states could regulate any activity of out-of-state banks that Congress did not specifically mention despite the "broad language of § 27(a)." Specifically, Judge Carnes noted that by allowing regulation of in-state agents of out-of-state banks, Georgia was de facto being allowed to regulate the out-of-state banks in contravention of federal law. 356

### VIII. CONCLUSION

The 2005 survey period yielded several noteworthy decisions, many of which concerned issues of first impression in the Eleventh Circuit.

<sup>348.</sup> Id.

<sup>349.</sup> *Id.* "Maybe there will be breaches, and maybe in connection with those breaches someone will elect arbitration, and maybe if that happens the Georgia statutory provision in question will be asserted and applied. But maybe is not enough." *Id.* 

<sup>350.</sup> Id.

<sup>351.</sup> Id. at 1314 (Carnes, J., dissenting).

<sup>352.</sup> Id. (Carnes, J., dissenting).

<sup>353.</sup> Id. (Carnes, J., dissenting).

<sup>354.</sup> Id. at 1315-16 (Carnes, J., dissenting).

<sup>355.</sup> Id. at 1316 (Carnes, J., dissenting).

<sup>356.</sup> Id. (Carnes, J., dissenting).

## TRIAL PRACTICE & PROCEDURE

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While this survey is not intended to be exhaustive, the authors have attempted to provide material that will be useful to practitioners by providing them with relevant updates in the area of federal trial practice and procedure.