

# Class Actions

by Thomas M. Byrne\*

In terms of significant class action decisions, 2006 was one of the Eleventh Circuit's busiest years in recent memory. Among other rulings, the court established the ground rules for Federal Rule of Civil Procedure 23(b)(2)<sup>1</sup> classes. The year also presented the court with its first opportunity to address some of the many interpretative questions posed by the Class Action Fairness Act of 2005 ("CAFA").<sup>2</sup>

## I. RULE 23(B)(2)

The Eleventh Circuit entered the controversy on the requirements for certification of a Rule 23(b)(2)<sup>3</sup> class in *Heffner v. Blue Cross & Blue Shield of Alabama, Inc.*,<sup>4</sup> which was probably the court's most significant class action decision during 2006. The court accepted a Rule 23(f)<sup>5</sup> petition for permission to appeal the district court's certification of a

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1. FED. R. CIV. P. 23(b)(2). This rule provides for class certification where Rule 23(a)'s requirements are met and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.*

2. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

3. FED. R. CIV. P. 23(b)(2).

4. 443 F.3d 1330 (11th Cir. 2006), *reh'g and reh'g en banc denied*, 186 F. App'x 983 (11th Cir. 2006). The opinion was written by Judge Ed Carnes, joined by Judge William H. Pryor, Jr. and District Judge J. Owen Forrester, sitting by designation.

5. FED. R. CIV. P. 23(f). This rule provides:

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

*Id.*

Rule 23(b)(2) class of as many as 240,000 participants and beneficiaries of hundreds of group health plans administered by Blue Cross and Blue Shield of Alabama.<sup>6</sup> The underlying claim was that Blue Cross violated the Employee Retirement Income Security Act (“ERISA”)<sup>7</sup> by imposing deductibles that were contrary to the summary plan descriptions. Blue Cross contended that the “no deductible” language was a scrivener’s error.<sup>8</sup>

The court began its analysis by again pointing out that while a court should not have to determine the merits of a claim at the class certification stage, it is appropriate to consider the merits to the degree necessary to determine whether Rule 23’s requirements are satisfied.<sup>9</sup> The court observed that “[a]t first blush, plaintiffs’ claims to recover their deductibles and to obtain other equitable relief seemed to fit neatly into the Rule 23(b)(2) paradigm.”<sup>10</sup> But that was as good as it got for the plaintiffs. Because reliance was a critical element of the plaintiffs’ case, the court determined that Rule 23(b)(2) class certification was inappropriate.<sup>11</sup> Relying on its prior ERISA decisions,<sup>12</sup> the court held that the beneficiary must prove reliance on the summary plan description to prevent an employer from enforcing the contrary terms of a benefit plan.<sup>13</sup> The court noted that the formal plan documents showed, without dispute, that none of the plans provided deductible-free coverage.<sup>14</sup> The court rejected the merits-rooted contention that the summary plan description was “the only ERISA plan document that counts,”<sup>15</sup> an example of how merits determinations necessarily frame arguments about class certification.

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6. *Heffner*, 443 F.3d at 1333.

7. 29 U.S.C. §§ 1001-1461 (2000).

8. *Heffner*, 443 F.3d at 1333-35.

9. The court cited its prior decision in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003). *Heffner*, 443 F.3d at 1337. The merits versus class certification line of demarcation has proven to be one of the most difficult problems in class action law. The Second Circuit’s decision addressing the issue in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), was probably the most significant class action decision of 2006.

10. *Heffner*, 443 F.3d at 1340.

11. *Id.*

12. *Liberty Life Assurance Co. v. Kennedy*, 358 F.3d 1295, 1302 (11th Cir. 2004); *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1155-56 (11th Cir. 2001); *Collins v. Am. Cast Iron Pipe Co.*, 105 F.3d 1368, 1371 (11th Cir. 1997); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

13. *Heffner*, 443 F.3d at 1340.

14. *Id.* at 1341.

15. *Id.*

The court noted that it had previously held that the reliance element of a class claim presents individualized proof problems that preclude class certification in Rule 23(b)(3)<sup>16</sup> class actions but had not decided that issue in a Rule 23(b)(2) case.<sup>17</sup> On that issue, the court agreed with the Fifth Circuit's decision in *Bolin v. Sears, Roebuck & Co.*<sup>18</sup> that Rule 23(b)(2) certification was also precluded in such situations.<sup>19</sup> The court reasoned that even if the plaintiff proved he purchased prescription drugs in reliance on the summary plan description of the deductible arrangement, only he would be entitled to relief on that proof; other class members would not.<sup>20</sup> Therefore, Rule 23(b)(2)'s requirement that "[f]inal injunctive relief or corresponding declaratory relief with respect to the class as a whole" be appropriate would not be met.<sup>21</sup> The court concluded that "[c]ertification under Rule 23(b)(2) is proper when the relief sought necessarily affects all class members."<sup>22</sup> The court determined that injunctive or declaratory relief—and any other equitable relief of a monetary nature based on it—would not automatically flow to the class as a whole even if the named plaintiffs succeeded in proving reliance in their case.<sup>23</sup> The court expressed no opinion on a footnote in the district court's opinion which stated that a class certification would also be proper under Rules 23(b)(1) and (b)(3).<sup>24</sup> The court stated only that the class could not be certified on those grounds "without more analysis and justification."<sup>25</sup>

Outside the context of the prototypical civil rights injunction, courts have struggled with the requirements for certification of a Rule 23(b)(2) class. Many Rule 23(b)(2) declaratory-injunctive relief classes have failed when monetary relief is also sought, on the ground that the injunctive or declaratory relief does not predominate over the monetary relief.<sup>26</sup> The circuits are split, however, on the standard for such

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16. FED. R. CIV. P. 23(b)(3).

17. *Heffner*, 443 F.3d at 1344.

18. 231 F.3d 970, 978 (5th Cir. 2000).

19. *Heffner*, 443 F.3d at 1344.

20. *Id.*

21. *Id.* (quoting FED. R. CIV. P. 23(b)(2)). The court cited favorably *Jones v. American General Life & Accident Insurance Co.*, 213 F.R.D. 689, 702 (S.D. Ga. 2002), a decision to the same effect. *Heffner*, 443 F.3d at 1344.

22. *Heffner*, 443 F.3d at 1345.

23. *Id.* at 1344.

24. *Id.* at 1345.

25. *Id.* at 1346.

26. See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

predominance.<sup>27</sup> Where differences in proof or individualized issues exist pertaining to each class member, courts have rejected certification on several rationales, including failure to meet Rule 23(a)(2)'s commonality requirement,<sup>28</sup> a lack of "cohesiveness,"<sup>29</sup> or failure to meet Rule 23(b)(2)'s requirement that the relief apply to the class as a whole.<sup>30</sup> In *Heffner* the Eleventh Circuit joined the latter camp,<sup>31</sup> even though the language of Rule 23(b)(2) requires a discerning eye to detect a requirement that individualized issues relating to proof of entitlement to relief must not predominate. Rule 23(b)(2), however, does seem to be a somewhat more analytically sound source for such a requirement than the alternative of a more rigorous reading of Rule 23(a)(2)'s<sup>32</sup> usually lax commonality requirement that would apply only to (b)(2) classes. After *Heffner*, it seems that plaintiffs hoping to find an easier road to class certification under Rule 23(b)(2) will find disappointment in the Eleventh Circuit.

## II. THE CAFA TRIO

CAFA,<sup>33</sup> which revolutionized federal jurisdiction over class actions, became effective on February 18, 2005.<sup>34</sup> The first of the court's trio of published 2006 CAFA decisions was *Evans v. Walter Industries, Inc.*,<sup>35</sup>

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27. Compare *Allison*, 151 F.3d at 415 ("monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief"), and *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (same), and *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (same), with *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). See also *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1236 (9th Cir. 2007) (affirming (b)(2) certification of employment discrimination claims, including claims for punitive damages, based on the plaintiffs' testimony that their "primary intention" in bringing the action was to obtain injunctive and declaratory relief).

28. *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-39 (W.D. Tex. 1999) (finding commonality lacking in employment discrimination action where challenged decisions were made locally and under various sets of criteria); *Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221, 231 (M.D. Tenn. 1996) (same).

29. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1998); see also *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 343 (S.D.N.Y. 2002) ("[T]he cohesiveness requirement is greater in a Rule 23(b)(2) class action [than in a 23(b)(3) action], because unnamed class members are bound by the action without the opportunity to opt out." (alteration in original) (quoting AMERICAN LAW OF PRODUCTS LIABILITY 3d § 51:55 (2002))); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 557 (D. Minn. 1999).

30. *Bolin*, 231 F.3d at 978.

31. *Heffner*, 443 F.3d at 1344.

32. FED. R. CIV. P. 23(a)(2).

33. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

34. *Id.*

35. 449 F.3d 1159 (11th Cir. 2006). The court's opinion was written by Judge R. Lanier Anderson III. The opinion was joined by Judges Gerald B. Tjoflat and Joel F. Dubina.

in which the district court had remanded a class action to Alabama state court on the basis of CAFA's "local controversy" exception to CAFA jurisdiction.<sup>36</sup> The court first considered a procedural point—CAFA's requirement that a court of appeals that accepts a discretionary appeal of an order remanding a removed class action must complete all action on the appeal not later than sixty days after the date on which the appeal was filed.<sup>37</sup> The court held that the sixty-day period began to run from the date when the court of appeals granted the application to appeal.<sup>38</sup> The court reasoned that a request for appeal under CAFA was subject to Rule 5 of the Federal Rules of Appellate Procedure,<sup>39</sup> which governs discretionary appeals.<sup>40</sup> That rule provides that the order granting permission to appeal serves as the date of the notice of appeal for purposes of calculating time under the federal appellate rules.<sup>41</sup> The court noted that its holding was consistent with the views of every other circuit to address the issue.<sup>42</sup>

Having determined that it complied with the sixty-day requirement, the court considered burden of proof questions.<sup>43</sup> CAFA's "local controversy" exception provides that a court shall decline to exercise jurisdiction over a class action otherwise covered by CAFA if: (1) more than two-thirds of the members of the proposed plaintiff class are citizens of the state in which the action was originally filed; (2) at least one forum-state defendant is a defendant from whom significant relief is sought by members of the plaintiff class; (3) that forum-state defendant's conduct forms a significant basis for the claims asserted; and (4) the principal injuries resulting from the alleged conduct were incurred in the forum state.<sup>44</sup> The court noted that CAFA's language favors federal jurisdiction over class actions and that its legislative history suggests that Congress intended the local controversy exception

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36. *Id.* at 1164.

37. *Id.* at 1162.

38. *Id.*

39. FED. R. APP. P. 5.

40. *Evans*, 449 F.3d at 1162.

41. *Id.* (citing FED. R. APP. P. 5(d)(2)).

42. *Id.* at 1163 (citing *Patterson v. Dean Morris, L.L.P.*, 444 F.3d 365 (5th Cir. 2006); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1145 (9th Cir. 2006); *see also Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005)).

43. *Id.* at 1164.

44. 28 U.S.C.A. § 1332(d)(4)(A) (West 2006). The local controversy exception also requires that "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." *Id.*

“to be a narrow one.”<sup>45</sup> The court agreed with the district court that the plaintiffs bore the burden of establishing that they fell within CAFA’s local controversy exception.<sup>46</sup> The court also pointed out that CAFA does not change the traditional rule that the party seeking to remove (that is, the defendant) bears the burden of establishing federal jurisdiction.<sup>47</sup>

The parties did not dispute that the defendants carried the burden of establishing that the action met CAFA’s basic jurisdictional requirements; the matter in controversy exceeded \$5 million and minimal diversity existed between the plaintiffs and defendants.<sup>48</sup> The court noted that placing the burden of proof for the “local controversy” exception on the plaintiff was appropriate because the plaintiff was in the best position to know about the composition of the plaintiff class, having defined it.<sup>49</sup> In further support of its opinion, the court cited cases involving actions removed by the Federal Deposit Insurance Corporation (“FDIC”) in which the Eleventh Circuit had held that the burden of establishing the “state action” exception to federal jurisdiction shifted to the party objecting to the FDIC’s removal.<sup>50</sup> The court determined that CAFA’s statutory framework is very similar to the FDIC removal statute.<sup>51</sup> While the court noted it was the first circuit to address the local controversy exception burden requirement,<sup>52</sup> other courts have since agreed with *Evans*.<sup>53</sup>

The court then turned to the merits of the exception as applied to the case before it.<sup>54</sup> The court concluded that the plaintiffs had failed to prove that more than two-thirds of the proposed class members were Alabama citizens.<sup>55</sup> The complaint alleged environmental harms from eighteen defendants extending over a period of at least eighty-five years.<sup>56</sup> The plaintiffs submitted an affidavit showing that of the 5,200

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45. *Evans*, 449 F.3d at 1163. The local controversy exception can also be satisfied by 28 U.S.C.A. § 1332(d)(4)(B) (West 2006), but that subparagraph was not involved in *Evans*.

46. *Evans*, 449 F.3d at 1164.

47. *Id.*

48. *Id.*

49. *Id.* at 1164 n.3.

50. *Id.* (citing *Castleberry v. Goldome Credit Corp.*, 408 F.3d 773 (11th Cir. 2005); *Lazuka v. FDIC*, 931 F.2d 1530 (11th Cir. 1991)).

51. *Id.* at 1164-65.

52. *Id.* at 1165.

53. *Frazier v. Pioneer Americas, LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *see Hart v. FedEx Ground Package Sys., Inc.*, 457 F.3d 675, 680 (7th Cir. 2006); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007).

54. *Evans*, 449 F.3d at 1165.

55. *Id.*

56. *Id.*

known class members, almost ninety-four percent were Alabama residents.<sup>57</sup> However, the court concluded that the underlying methodology was defective because it provided no information about how the persons interviewed were selected and thus provided no reliable information about the extremely broad class.<sup>58</sup>

The court also held that the plaintiffs failed to prove the “significant defendant” prong of the local controversy exception.<sup>59</sup> The district court had held that U.S. Pipe, an Alabama corporation, was a significant defendant. The plaintiffs relied on their complaint and a supporting affidavit by an attorney to establish U.S. Pipe’s significance as a defendant.<sup>60</sup> But the Eleventh Circuit determined that the affidavit did not “provide any enlightenment at all with respect to the significance of the relief that is sought against U.S. Pipe, or its comparative significance relative to the relief sought from the other seventeen named co-defendants.”<sup>61</sup> The court concluded that the plaintiffs’ evidence offered no insight into “whether U.S. Pipe played a significant role in the alleged environmental contamination, as opposed to a lesser role, or even a minimal role.”<sup>62</sup> The court also noted that the limited available facts supported an inference that U.S. Pipe was indeed not a significant defendant as its two facilities in the affected area were either long since closed or somewhat remote from the area occupied by most of the identified class members.<sup>63</sup> The court concluded that the district court had erred in remanding the case to state court.<sup>64</sup> The case suggests that the “significance” of a defendant will be considered in light of both the depth of the defendant’s alleged involvement and the defendant’s significance relative to the other defendants.

A few weeks after *Evans*, another panel of the court issued another CAFA jurisdictional decision in *Miedema v. Maytag Corp.*<sup>65</sup> The issue in *Miedema* was whether the defendant had carried its burden of establishing CAFA’s basic jurisdictional requirements.<sup>66</sup> But before turning to that issue, the court addressed a CAFA anomaly.<sup>67</sup> Literal-

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1167.

61. *Id.*

62. *Id.*

63. *Id.* at 1167-68.

64. *Id.* at 1168.

65. 450 F.3d 1322 (11th Cir. 2006). The opinion for the court was authored by Judge Charles R. Wilson and joined by Judges Ed Carnes and William H. Pryor, Jr.

66. *Id.* at 1325.

67. *Id.* at 1326.

ly, CAFA permits a court of appeals to accept an application to appeal if the application is made to the court of appeals “*not less than* seven days after entry of the [district court’s] order.”<sup>68</sup> The court joined other circuits in reading this language as a typographical error, so that “less” should be read as “more” to avoid an absurd result.<sup>69</sup>

The defendant argued that the burden was on the plaintiff to prove that subject matter jurisdiction was lacking.<sup>70</sup> As the *Evans* panel had done, the court rejected that argument, joining the Seventh and Ninth Circuits.<sup>71</sup> The class action had been filed in Florida state court, alleging that Maytag-manufactured ranges and ovens contained a defective part. The plaintiff asserted that there were thousands of class members and made claims for negligence, breach of express warranty, and unfair trade practices.<sup>72</sup> The Eleventh Circuit reasoned that the district court properly required the defendant, when the plaintiff had not pled a specific amount of damages, to prove by a preponderance of the evidence that the amount in controversy exceeded the jurisdictional amount.<sup>73</sup> When the jurisdictional amount is not apparent from the complaint, the court is to look to the notice of removal and may require that evidence relevant to the amount in controversy be adduced.<sup>74</sup>

Maytag’s notice of removal relied on a declaration that a total of 6,729 models of the ranges and ovens identified in the complaint were sold in Florida and that the total value of the ranges exceeded \$5 million.<sup>75</sup> The district court, however, found that the plaintiff did not claim that all ranges or models identified in the complaint contained the defect.<sup>76</sup> Maytag argued that the district court improperly relied on a post-removal class definition, which the Eleventh Circuit agreed could not be considered in determining subject matter jurisdiction at the time of removal.<sup>77</sup> The court, however, was not convinced that the district court actually relied on the post-removal definition and disregarded that contention.<sup>78</sup> The court observed that the Maytag declaration offered

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68. *Id.* (quoting 28 U.S.C.S. § 1453(c)(1) (LexisNexis Supp. 2006)).

69. *Id.* (citing *Pritchett*, 420 F.3d at 1093 n.2; *Amalgamated Transit Union*, 435 F.3d at 1146, *reh’g en banc denied*, 2006 WL 1525316 (9th Cir. May 31, 2006) (per curiam)).

70. *Id.* at 1328.

71. *Id.* (citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (per curiam)).

72. *Id.* at 1324-25.

73. *Id.* at 1330.

74. *Id.*

75. *Id.* at 1330-31.

76. *Id.* at 1331.

77. *Id.*

78. *Id.*

no explanation of how the 6,729 ranges and ovens had a total value exceeding \$5 million.<sup>79</sup> The declarant was deposed, and it appeared that the value was derived from the most recent suggested retail price for each model type at issue; however, there was no link between the suggested retail price and the damages sought.<sup>80</sup> The court also noted that the 6,729 figure was not based on actual sales data but was an extrapolation from Maytag's receipt of 2,943 product registrations from Florida consumers of the range and oven models at issue.<sup>81</sup> The court concluded that the district court did not err when it found that "great uncertainty remained about the amount in controversy [and] resolved that uncertainty in favor of remand."<sup>82</sup>

In *Tmesys, Inc. v. Eufaula Drugs, Inc.*,<sup>83</sup> the Eleventh Circuit accepted a petition for discretionary review of a remand order pursuant to CAFA's provision for such review.<sup>84</sup> After deciding that it had jurisdiction to consider the discretionary appeal, even though the district court had determined that CAFA did not apply, the court affirmed the district court's determination that state law governs when an action is commenced for CAFA purposes.<sup>85</sup> The district court found that the plaintiff filed its complaint on February 14, 2005, which was prior to CAFA's effective date of February 18, 2005. Therefore, the district court found no jurisdictional basis to remove the case under CAFA.<sup>86</sup> The Eleventh Circuit affirmed the district court's reasoning that Alabama law established that the action was commenced prior to the effective date of CAFA, even though the defendant was not served until after CAFA's effective date.<sup>87</sup>

### III. EFFECT OF PARALLEL OR SUBSEQUENT LITIGATION

In two cases, the court considered complex questions arising from the impact of a class action on parallel or subsequent proceedings. In both cases, the court rejected attempts to enjoin the other proceedings. The

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79. *Id.*

80. *Id.* at 1331-32.

81. *Id.* at 1332.

82. *Id.* For another recent case in which the defendant failed to establish CAFA's jurisdictional amount, see *Condes v. State Farm Mutual Automobile Insurance Co.*, No. 06-C-4607, 2007 WL 317037 (N.D. Ill. Jan. 24, 2007).

83. 462 F.3d 1317 (11th Cir. 2006). The panelists were Judges Stanley F. Birch, Jr., Ed Carnes, and Frank M. Hull.

84. *Id.* at 1319 (citing 28 U.S.C.S. § 1453(c)(1)).

85. *Id.*

86. *Id.* at 1318.

87. *Id.* at 1318, 1319.

first case, *Burr & Forman v. Blair*,<sup>88</sup> produced no majority opinion. Judge Tjoflat wrote a lengthy opinion, in which Judge Cox and District Judge Lloyd George, sitting by designation, declined to join.<sup>89</sup> At the root of the case was an agreement between lawyers to share attorney fees that might be awarded for representing the plaintiffs in two class actions. Two of the lawyers who were parties to the agreement sued the Burr & Forman law firm, which was also a party, for breach of contract in an Alabama circuit court. Burr & Forman then removed the case to district court. The district court remanded the case to the state court for lack of subject matter jurisdiction. The district court, however, exercised supplemental jurisdiction over the contract claim between the lawyers in connection with final disbursement of attorney fees from the federal class action settlement fund. The district court then went on to deny any contract claim under the letter agreement. Notwithstanding the district court's order, the two lawyers continued to prosecute their contract action in state court.<sup>90</sup> Citing the All Writs Act<sup>91</sup> and the Anti-Injunction Act<sup>92</sup> for authority, the district court entered an order preliminarily enjoining the two lawyers from participating in any further state court litigation.<sup>93</sup>

Judge Tjoflat noted that the All Writs Act authorized the issuance of writs to protect “not only ongoing proceedings, but [also] potential future proceedings, as well as already issued orders and judgments.”<sup>94</sup> Judge Tjoflat noted further that “[t]he power to issue writs under the Act is not circumscribed by the identity of the parties immediately before the court; at the court's discretion, writs may be issued to third parties who are in a position to frustrate a court's administration of its jurisdiction.”<sup>95</sup> The Anti-Injunction Act, Judge Tjoflat wrote, “serves as a check on the broad authority recognized by the All Writs Act.”<sup>96</sup> The Anti-Injunction Act prohibits federal courts from utilizing their authority to stay state court proceedings unless one of three narrow exceptions is met.<sup>97</sup> Two of those exceptions were potentially relevant in *Blair*: the exception for district court orders “necessary in aid of its jurisdiction”

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88. 470 F.3d 1019 (11th Cir. 2006).

89. *Id.* at 1021, 1036.

90. *Id.* at 1021-22.

91. 28 U.S.C. § 1651 (2000).

92. 28 U.S.C. § 2283 (2000).

93. *Burr & Forman*, 470 F.3d at 1022.

94. *Id.* at 1026 (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004)).

95. *Id.* at 1026-27.

96. *Id.* at 1027.

97. *Id.*

and the exception “to protect or effectuate its judgments.”<sup>98</sup> Judge Tjoflat observed that the “necessary in aid of its jurisdiction” exception is invoked in two separate situations.<sup>99</sup> The first situation arises where a federal court in an *in rem* proceeding acquires jurisdiction over the *res* before an action involving the same *res* is brought in state court.<sup>100</sup> The other situation arises where “enjoining the state court proceeding is necessary to protect an earlier federal court injunction.”<sup>101</sup> The general rule is still, however, that an injunction cannot be issued to prevent a state action *in personam* involving the same subject matter from proceeding at the same time.<sup>102</sup>

Neither scenario was present in *Blair*, according to Judge Tjoflat.<sup>103</sup> The two lawyers’ contract action was not an *in rem* proceeding.<sup>104</sup> Judge Tjoflat rejected the argument that two prior decisions<sup>105</sup> stood for the proposition that the “necessary in aid of its jurisdiction” exception authorizes a federal court to issue injunctions in all cases where it has retained jurisdiction to enforce a judgment incorporating a complex settlement.<sup>106</sup> He wrote that “[f]or an injunction properly to issue, the matter in controversy in the federal court proceeding must be ‘the virtual equivalent’ of a controversy over disputed *res* in an *in rem* proceeding and the state court proceeding must constitute a threat to the federal court’s resolution of that controversy.”<sup>107</sup> Judge Tjoflat noted that the two lawyers’ contract action against Burr & Forman did not attack the substance of the federal judgment or threaten the plaintiffs’ entitlement to their judgment.<sup>108</sup>

Judge Tjoflat then turned to the “relitigation” exception, by which the court is permitted to protect or effectuate its judgments.<sup>109</sup> An injunction under that exception is appropriate where the state law claims would be precluded by *res judicata*.<sup>110</sup> Judge Tjoflat concluded that the relitigation exception did not apply, reasoning that the district court

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98. *Id.* (quoting 28 U.S.C. § 2283).

99. *Id.* at 1028.

100. *Id.*

101. *Id.* at 1029.

102. *Id.*

103. *Id.* at 1032-33.

104. *Id.* at 1032.

105. *Wesch v. Folsom*, 6 F.3d 1465, 1470-71 (11th Cir. 1993); *Battle v. Liberty Nat’l Life Ins. Co.*, 877 F.2d 877, 880-82 (11th Cir. 1989).

106. *Burr & Forman*, 470 F.3d at 1032.

107. *Id.*

108. *Id.* at 1032-33.

109. *Id.*

110. *Id.* at 1033.

did not have jurisdiction to issue the order denying the two lawyers' attorney fees claims because the district court had remanded the case to state court for lack of diversity jurisdiction.<sup>111</sup>

Concurring in the result only, Judge Cox stated that he agreed with much of Judge Tjoflat's opinion, but tersely concluded that it decided "more than we must decide."<sup>112</sup> Judge Cox agreed that the district court had no jurisdiction over the claims that were the subject of the remand.<sup>113</sup> Hence, neither exception to the Anti-Injunction Act could apply, as the court had no jurisdiction.<sup>114</sup> The unique circumstances giving rise to the case may have been a factor in Judge Cox's reluctance to join in a lengthy opinion covering complex subjects: the district court found it had no jurisdiction over a state court action, yet then proceeded to enjoin it.

The Eleventh Circuit considered a conflict between a federal class action and a state court class action in *In re Bayshore Ford Trucks Sales, Inc.*<sup>115</sup> This time, Judge Tjoflat wrote for a unanimous panel. The case involved a group of heavy truck dealers who brought an action against Ford Motor Company for breach of their dealer agreements with Ford and for violations of federal law. The district court denied their motion for class certification. While their individual cases were being prepared for trial, one of the unnamed class members filed a putative class action in Ohio state court that was practically identical to the claims pending before the district court. The Ohio court then certified the class that the district court had refused to certify. The plaintiffs in the federal action, who were also class members in the Ohio case, then moved to dismiss their case against Ford in the district court. The district court denied their motion and granted Ford's motion to enjoin the Ohio plaintiff from prosecuting the Ohio state court action and to enjoin the federal plaintiffs from participating in the Ohio action. The plaintiffs in the federal action and the plaintiff in the Ohio action separately appealed the district court's injunction.<sup>116</sup>

The Eleventh Circuit vacated the injunction.<sup>117</sup> On appeal, the Ohio plaintiff contended that it never appeared before the district court and that the court lacked jurisdiction to enjoin it from prosecuting the Ohio

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111. *Id.* at 1034-35.

112. *Id.* at 1036 (Cox, J., specially concurring).

113. *Id.*

114. *Id.*

115. 471 F.3d 1233 (11th Cir. 2006). The panel consisted of Judges Gerald B. Tjoflat, Emmett R. Cox, and District Judge Lloyd D. George, sitting by designation. The author's law firm was co-counsel for Ford Motor Company in this action.

116. *Id.* at 1236.

117. *Id.*

action.<sup>118</sup> The Eleventh Circuit held that by filing a successful motion to intervene, the Ohio plaintiff acquiesced in personal jurisdiction in the district court.<sup>119</sup> The court determined that allowing the intervention was in fact erroneous but that any error was invited by the Ohio plaintiff's willful submission to the district court's jurisdiction.<sup>120</sup>

The court then considered the injunction itself, which the district court had found to fall within the "necessary in aid of its jurisdiction" and "relitigation" exceptions to the Anti-Injunction Act's bar on injunctions of state court actions.<sup>121</sup> The court held that the injunction was unnecessary to protect the district court's jurisdiction and specifically rejected the applicability of the "complex multi-state litigation" exception (an issue discussed in Judge Tjoflat's opinion in *Blair*).<sup>122</sup> The court further held that the Ohio litigation "would not displace or frustrate the district court's management of the case now pending before it."<sup>123</sup> The court also rejected the applicability of the relitigation exception, concluding that there was insufficient evidence of finality in the district court's denial of class certification in the federal action.<sup>124</sup>

The court labored to distinguish the Seventh Circuit's decision in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*,<sup>125</sup> which enjoined the prosecution of state class actions after the denial of certification of a nationwide class.<sup>126</sup> The court opined that the Seventh Circuit in that case "was giving preclusive effect to its own judgment [rejecting class certification], not to the district court's order on class certification."<sup>127</sup> The Eleventh Circuit pointed out that Rule 23(c)(1)<sup>128</sup> "specifically empowers district courts to alter or amend class certification orders 'at any time prior to a decision on the merits.'"<sup>129</sup> The court thus determined that finality was lacking even though the district court had rejected the dealers' motion for reconsideration of the

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118. *Id.* at 1245.

119. *Id.* at 1248.

120. *Id.*

121. *Id.* at 1250.

122. *Id.* at 1250-53.

123. *Id.* at 1252. The court again distinguished *Battle*, 877 F.2d 877 and *Wesch*, 6 F.3d 1465. *Id.*

124. *Id.* at 1253-54.

125. 333 F.3d 763 (7th Cir. 2003); *In re Bayshore Ford*, 471 F.3d at 1254 n.39.

126. *In re Bayshore Ford*, 471 F.3d at 1255 (citing *In re Bridgestone / Firestone*, 333 F.3d at 765-66).

127. *Id.* at 1254 n.39.

128. FED. R. CIV. P. 23(c)(1).

129. *In re Bayshore Ford*, 471 F.3d at 1254 (quoting *Prado-Steinman v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000)).

denial of class certification.<sup>130</sup> The court noted that while the district court found no legal basis for reconsideration, its order did not mention whether a different factual basis could produce a different result.<sup>131</sup> Thus, having determined that neither of the exceptions to the Anti-Injunction Act applied, the court concluded that the district court abused its discretion by halting prosecution of the Ohio action.<sup>132</sup>

The court then turned to the district court's injunction of the plaintiff dealers' participation in the Ohio class.<sup>133</sup> The court reasoned that the district court's authority for such an injunction must be derived from the All Writs Act.<sup>134</sup> The court observed no circumstances that would indicate how the dealers' membership in the Ohio class would pose a threat to the district court's management of the litigation before it.<sup>135</sup> Again distinguishing the Seventh Circuit's *Bridgestone/Firestone* decision, the court concluded that the district court's class certification denial lacked the finality needed to serve as the basis for an injunction under the All Writs Act.<sup>136</sup> The court indeed saw the denial of class certification as an invitation to the plaintiffs "to repair to another forum."<sup>137</sup> The court's opinion evinces a reluctance to ascribe preclusive effect to class certification orders, but is unlikely to be the final word on the subject.

#### IV. CLASS SETTLEMENT PROCEEDINGS

In an unpublished opinion<sup>138</sup> in *Brown ex rel. O'Neil v. Bush*,<sup>139</sup> the court considered the requirements for timely intervention in a class action.<sup>140</sup> The proposed intervenors were objectors to a class action settlement brought against the governor of Florida and various state officials. The original plaintiffs were people with mental disabilities who

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130. *Id.* at 1253-54.

131. *Id.* at 1254.

132. *Id.* at 1255.

133. *Id.*

134. *Id.*

135. *Id.* at 1257.

136. *Id.* at 1255-57.

137. *Id.* The court, however, refused to issue a writ of mandamus to the district court to permit the dismissal of their federal action, noting that a plaintiff holds no right to such dismissal without prejudice. *Id.* at 1258-59. "If nothing else, that the parties' extensive discovery had concluded and the case was ready for trial counseled the denial of the Dealers' motion." *Id.* at 1259.

138. 11TH CIR. R. 36-2 provides that the court's "[u]npublished opinions are not considered binding precedent, but they may be cited as persuasive authority."

139. 194 F. App'x 879 (11th Cir. 2006) (per curiam). The panel consisted of Judges Joel F. Dubina, Phyllis A. Kravitch, and District Judge Richard Mills, sitting by designation.

140. *Id.* at 882.

sought less restrictive community-based placements rather than placements in residential institutions. As part of a class settlement, the parties agreed to procure community-based placements and to close two residential facilities. The objectors, residents of one of the facilities that was to be closed, were not members of the class. The objectors saw a newspaper article reporting the potential closure of the facility. At the scheduled fairness hearing, the objectors' counsel asserted his clients' objections to closing the facility, orally moved to intervene to contest the settlement agreement, and sought decertification of the class.<sup>141</sup>

The Eleventh Circuit noted that all of the objectors either learned of the facility's possible closure from a newspaper article published several months before the fairness hearing or through a court-ordered notice to all residents and their families and guardians, which was mailed seven weeks before the fairness hearing.<sup>142</sup> The court stated that "the court-ordered notification explicitly stated that all objections must be filed by November 24[,] . . . [but] the [o]bjectors . . . did not file a motion to intervene before the November 24 deadline for objections."<sup>143</sup> Instead, the objectors waited until the fairness hearing was in progress, at which time they made an oral motion to intervene.<sup>144</sup> The court held that "seven weeks is not too short of a time for an interested party to file a motion to intervene."<sup>145</sup> The court also concluded that it was not an abuse of discretion for the district court to find that the potential prejudice to the objectors from the denial of their motion to intervene did not outweigh the significant prejudice to the parties that would result from allowing the intervention.<sup>146</sup> The court noted that the objectors were still able to present their concerns to the court at the fairness hearing and could pursue actions under existing law to protect any right they may have to continue to reside in the facility.<sup>147</sup> Considering these factors, the court affirmed the district court's finding that the motion was untimely and determined that there was no abuse of discretion in the denial of intervention.<sup>148</sup>

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141. *Id.* at 880-81.

142. *Id.* at 882.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 883.

147. *Id.*

148. *Id.* at 883-84.