Trial Practice and Procedure

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I. INTRODUCTION

The 2007 survey period yielded several noteworthy decisions by the United States Court of Appeals for the Eleventh Circuit relating to federal trial practice and procedure, many of which concerned issues of first impression. This Article analyzes recent developments in the Eleventh Circuit, including significant rulings in the areas of class actions, civil procedure, subject matter jurisdiction, statutory interpretation, and other issues of interest to trial practitioners.

II. CLASS ACTIONS

A. Whether, and Under What Circumstances, a Class Action Waiver Contained in an Arbitration Provision May Be Deemed Unconscionable and Unenforceable as a Matter of Law

In *Dale v. Comcast Corp.*,[1] the Eleventh Circuit held that "the enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances."[2] In so holding, the Eleventh Circuit distinguished this case from its prior precedent, in which the

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1. 498 F.3d 1216 (11th Cir. 2007).
2. *Id.* at 1224.

court held that arbitration agreements precluding class action relief were valid and enforceable.[3]

The plaintiffs were Georgia residents and subscribers of the defendant, Comcast Corporation ("Comcast"), a cable television provider. The plaintiffs filed a class action lawsuit against Comcast, alleging violations of state law based on the Cable Communications Policy Act of 1984 (the "Cable Act").[4] The subscribers alleged that Comcast improperly calculated certain "pass-through franchise fees" and thus charged its customers more than it actually paid in franchise fees based on actual revenues.[5] Comcast removed the action to the United States District Court for the Northern District of Georgia and filed a motion to compel arbitration and dismiss, arguing that the subscribers' individual claims were governed by written arbitration agreements contained in annual notices that the subscribers received.[6] The arbitration agreements contained a class action waiver clause prohibiting subscribers from bringing claims on a class action or consolidated basis.[7] Comcast argued that the subscribers accepted the arbitration agreements, including the class action waivers, by their continued subscription to Comcast's services after receiving the notices. The subscribers disputed having received the notices or having agreed to the arbitration provi-

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3. *Id.* at 1221 ("[I]in at least two other cases, [the court] found arbitration agreements precluding class action relief to be valid and enforceable." (citing Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005); Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 819 (11th Cir. 2001))).

4. *Id.* at 1217; 47 U.S.C. §§ 521-542 (2000). The Cable Act authorized local governments to charge cable operators a franchise fee for the use of public rights of way, provided the fee does not exceed five percent of the cable operators' gross revenue. 47 U.S.C. §§ 542(a)-(b) (2000). The Cable Act permits cable operators, in turn, to pass the franchise fees through to their subscribers. *Id.*

5. *Dale*, 498 F.3d at 1217-18 (internal quotation marks omitted) (citing 47 U.S.C. § 542). The class asserted claims of unjust enrichment and money had and received and sought an accounting of funds wrongfully withheld, repayment of excess franchise, and declaratory and injunctive relief. *Id.* at 1218.

6. *Id.* at 1218. "Comcast argued that each subscriber received its 2004 'Policies and Procedures,' an annual notice containing a mandatory arbitration provision, with his or her December invoice or in a welcome kit given to each new subscriber at the time of service installation." *Id.*

7. *Id.* The arbitration agreement at issue, entitled "Mandatory & Binding Arbitration," included a class action waiver provision that stated as follows:

> All parties to the arbitration must be individually named. There shall be no right or authority for any claims to be arbitrated or litigated on a class-action or consolidated basis or on basis [sic] involving claims brought in a purported representative capacity on behalf of the general public (such as a private attorney general), other subscribers, or other persons similarly situated.

Id. (alteration in original) (internal quotation marks omitted).

sions and requested a jury trial on the issue of whether they each had entered into an arbitration agreement with Comcast. The subscribers also argued that even if the arbitration provision constituted an agreement to arbitrate, the class action waiver was unconscionable and, therefore, unenforceable.[8]

On September 19, 2006, the district court granted Comcast's motion to compel arbitration and denied the subscribers' request for a jury trial. The district court found that the arbitration provision was binding and that the class action waiver was not unconscionable. The subscribers appealed, arguing that the district court erred in failing to find the class action waiver unconscionable. The Eleventh Circuit had to determine whether the arbitration provision's class action waiver was unconscionable, and thus unenforceable, as a matter of Georgia law.[9] If the court determined that the class action waiver was unenforceable, then the entire arbitration agreement would be unenforceable pursuant to the arbitration provision's severability clause, thereby allowing the subscribers to maintain their action in federal court.[10]

The subscribers argued that Comcast's class action waiver was unenforceable because it was substantively unconscionable under Georgia law.[11] The subscribers cited opinions from the United States

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8. *Id.*

9. *Id.* at 1218-19. The court noted that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000), "'allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically.'" *Dale*, 498 F.3d at 1219 (quoting Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002)). The court also determined that it had jurisdiction to decide this issue because the subscribers' unconscionability argument placed the enforceability of the arbitration provision itself into issue. *Id.* at 1219 n.2 (citing *Bess*, 294 F.3d at 1306).

10. *Dale*, 498 F.3d at 1219. The severability clause in the arbitration agreement stated: "In [sic] the class action waiver clause is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable." *Id.* at 1219 n.3 (internal quotation marks omitted).

11. *Id.* at 1219. The court noted that Georgia law recognizes both procedural unconscionability, which addresses the process of making a contract, as well as substantive unconscionability, which looks to the contractual terms themselves. *Id.* (citing NEC Techs., Inc. v. Nelson, 267 Ga. 390, 391, 478 S.E.2d 769, 771 (1996)). The court also noted that under Georgia law,

> "[t]he basic test for determining unconscionability is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."

Id. (internal quotation marks omitted) (quoting *NEC Techs., Inc.*, 267 Ga. at 391, 478 S.E.2d at 771). The court further observed that "[t]o determine substantive unconscionability, courts focus on 'matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and

Supreme Court[12] and the Eleventh Circuit[13] recognizing that public policy supports the need for class actions for certain types of claims.[14] The subscribers argued that if Comcast's class action waiver was held to be valid, they would effectively be denied any remedy because, even if successful on their claims, the subscribers individually stood to recover only a very small amount.[15] The subscribers also pointed out that even though the arbitration provision required Comcast, upon written request, to advance arbitration filing fees and arbitrator costs and expenses, it nonetheless held the subscribers responsible for additional costs, including attorney fees and expert witness fees. Moreover, if Comcast prevailed, the arbitration provision required the subscribers to reimburse Comcast for advanced fees up to the amount the subscribers would have paid to file the claim in state court. Given the cost of arbitration as compared to the potential recovery, the subscribers argued that a single plaintiff would not proceed to arbitration, and that the class action waiver was unconscionable, because it would "allow Comcast to continue unabated its alleged practice of overcharging customers."[16]

Comcast argued that the Eleventh Circuit's decision in *Caley v. Gulfstream Aerospace Corp.*[17] disposed of the subscribers' substantive unconscionability argument.[18] In *Caley* the Eleventh Circuit considered whether a dispute resolution policy ("DRP"), which required employees to submit certain employment related claims to arbitration, was unconscionable under Georgia law.[19] The plaintiffs in *Caley* claimed the DRP was substantively unconscionable because, among other things,

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similar public policy concerns.'" *Id.* (quoting *NEC Techs., Inc.*, 267 Ga. at 392, 478 S.E.2d at 772).

12. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (recognizing that the policy permitting class actions is to create incentive for plaintiffs to bring actions because solo actions would result in small recoveries).

13. *In re* Charter Co., 876 F.2d 866, 871 (11th Cir. 1989) (recognizing that the cost of pursuing a solo action is a disincentive for plaintiffs to prosecute without the class action mechanism).

14. *Dale*, 498 F.3d at 1219-20.

15. *Id.* at 1220. The subscribers contended that during January, February, and March of 2005, Comcast charged $629,000 in franchise fees to its Fulton County, Georgia subscribers, but paid only $590,000 to the local government. This action resulted in a total overcharge of $39,000, or $0.66 per subscriber ($39,000 divided by an estimated 58,900 Fulton County subscribers) over the three-month period. Thus, over the applicable four-year statute of limitations, the subscribers estimated that Comcast charged each of them $10.56 in excess fees ($0.66 every three months for four years). *Id.*

16. *Id.*

17. 428 F.3d 1359 (11th Cir. 2005).

18. *Dale*, 498 F.3d at 1220.

19. 428 F.3d at 1377-79.

it prohibited class actions.[20] In *Dale* the Eleventh Circuit disagreed with Comcast and held that its prior decision in *Caley* did not require it to conclude that the class action waiver at issue in the instant case was enforceable.[21] Rather, as the court in *Dale* observed, the court in *Caley* determined only that under the specific facts of that case, the DRP prohibiting class actions was enforceable—it did not conclude that every class action waiver was or would be enforceable under Georgia law.[22] The Eleventh Circuit also distinguished its holding in *Caley* on the grounds that *Caley* did not involve a factual scenario "in which a remedy was effectively foreclosed because of the negligible amount of recovery when compared to the cost of bringing an arbitration action."[23] The court further noted that each of the claims in *Caley* provided for the recovery of attorney fees, expert costs, or both in the event that the plaintiff prevailed.[24]

Although the court recognized that it had found arbitration agreements precluding class action relief to be valid and enforceable in at least two other cases, both of those actions were claims for which attorney fees and other costs were recoverable.[25] The Eleventh Circuit

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20. *Id.* at 1373. The court in *Dale* quoted from its brief discussion of this argument in *Caley*, as follows:

> "As the Supreme Court has explained, the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition, characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims. The DRP's prohibition of class actions and discovery limitations are consistent with the goals of simplicity, informality and expedition touted by the Supreme Court."

Dale, 498 F.3d at 1220-21 (quoting *Caley*, 428 F.3d at 1378).

21. *Id.* at 1221.

22. *Id.* (citing *Caley*, 428 F.3d at 1379).

23. *Id.*

24. *Id.*

25. *Id.* (citing *Jenkins*, 400 F.3d at 877-78; *Randolph*, 244 F.3d at 819). Both *Jenkins* and *Randolph* involved claims that permitted recovery of attorney fees and other costs. For example, in *Jenkins* the plaintiff filed a class action lawsuit, alleging that certain "payday" loan agreements violated Georgia's usury statutes and section 16-4-4 of the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO"), O.C.G.A. § 16-4-4 (2007). *Jenkins*, 400 F.3d at 872-73. Each time the plaintiff obtained a payday loan, she signed an arbitration agreement in which she agreed to arbitrate claims, or assert them in a small claims tribunal, and to waive class action relief. *Id.* at 870. The district court determined that the arbitration agreements were substantively unconscionable because they precluded borrowers from either "'instigating or participating'" in class action suits. *Id.* at 877 (quoting Jenkins v. First Am. Cash Advance of Ga., LLC, 313 F. Supp. 2d 1370, 1375 (S.D. Ga. 2003)). As the court in *Dale* noted, the court in *Jenkins* determined that "'[a] class action is the only way that borrowers with claims as small as the individual loan transactions [at issue in this case] can obtain relief,' and speculated that a borrower who attempts to pursue a single claim would 'probably' be unable to find affordable representa-

held that unlike the plaintiffs in those cases, the subscribers in *Dale* could not recover attorney fees under the Cable Act for the specific violations alleged.[26] Although the subscribers had asserted state law claims under which they may have been able to recover attorney fees and costs,[27] the Eleventh Circuit held that the potential recovery of attorney fees and litigation costs under Georgia law did "not provide the same incentive for an attorney to represent an individual plaintiff as the automatic, or likely, award of fees and costs available to a prevailing plaintiff for the claims asserted" in the other cases in which the court had enforced class action waiver provisions.[28] The court thus found itself "in unchartered territory" and looked to sister circuit decisions addressing the enforceability of class action waivers for guidance.[29]

The court found the First Circuit's opinion in *Kristian v. Comcast Corp.*,[30] which addressed the enforceability of arbitration agreements

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tion." *Dale*, 498 F.3d at 1222 (brackets in original) (quoting *Jenkins*, 400 F.3d at 877).

In *Randolph* the Eleventh Circuit addressed whether an arbitration agreement that bars pursuit of class-wide relief for violations of the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f (2000), was unenforceable for that reason. *Randolph*, 244 F.3d at 816. The opinion did not discuss whether the class action waiver was unconscionable, but whether it was inconsistent with the statutory text and legislative history of TILA. *Id.* at 816-19. The court specifically noted that "the public policy goals of TILA can be vindicated through arbitration, and the statute contains other incentives—statutory damages and attorneys fees—for bringing TILA claims." *Id.* at 818.

In *Jenkins* the Eleventh Circuit determined that the class action waiver was not unconscionable, noting that it had previously held in *Randolph* that "'a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA.'" *Jenkins*, 400 F.3d at 877-78 (quoting *Randolph*, 244 F.3d at 819). In *Jenkins* the Eleventh Circuit also determined that the district court's contention that customers would likely be unable to obtain legal representation without the class action vehicle was unfounded because under Georgia's RICO Act, the plaintiff could recover attorney fees and costs if she prevailed. *Id.* at 878. The Eleventh Circuit stated that "when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent . . . debtors in arbitration," and therefore concluded that "precluding class action relief [would] not have the practical effect of immunizing [the defendants, and] inclusion of a class action waiver in the Arbitration Agreements did not render those Agreements substantively unconscionable." *Id.*

26. *Dale*, 498 F.3d at 1222.

27. Georgia law provides that a jury may award litigation expenses and attorney fees "where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith in making the contract, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." O.C.G.A. § 13-6-11 (1982 & Supp. 2007).

28. *Dale*, 498 F.3d at 1222-23. The court noted that under Georgia law, "'[t]he expenses of litigation generally shall not be allowed as part of the damages.'" *Id.* (brackets in original) (quoting O.C.G.A. § 13-6-11).

29. *Id.* at 1223.

30. 446 F.3d 25 (1st Cir. 2006).

invoked by Comcast against a group of Boston subscribers suing Comcast for violations of state and federal antitrust law, to be instructive.[31] In *Kristian* the subscribers argued that the arbitration agreements prevented them from vindicating their statutory rights by prohibiting the use of the class mechanism.[32] The First Circuit noted that "the legitimacy of the arbitral forum rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.'"[33] The First Circuit further noted that the bar on class arbitration threatened this presumption given the "complexity of an antitrust case generally, and the complexity and cost required to prosecute a case against Comcast specifically."[34] The First Circuit struck down the class action waiver, determining that without some form of class mechanism, a consumer antitrust plaintiff would not sue at all and that "Comcast [would] be essentially shielded from private consumer antitrust enforcement liability, even in cases where it ha[d] violated the law."[35]

Although the subscribers in *Dale* did not argue that the class action waiver prevented them from vindicating their statutory rights, the Eleventh Circuit nonetheless determined that without the benefit of a class action mechanism, the subscribers would effectively be precluded from suing Comcast for the specific violations of the Cable Act.[36] The court stated that it would be difficult for a single subscriber to obtain representation because: (1) the cost of vindicating an individual subscriber's claim, when compared to his or her potential recovery, was too great; (2) the Cable Act did not provide for the recovery of attorney fees or related costs for the violations alleged by the subscribers; and (3) Georgia law allowed fees and costs only to be awarded where bad faith was shown.[37] This would allow Comcast to engage in potentially illegal unchecked market behavior, and the court determined that corporations should not be permitted to use class action waivers as a means to free

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31. *Dale*, 498 F.3d at 1223 (citing *Kristian*, 446 F.3d at 29).

32. 446 F.3d at 37.

33. *Id.* at 54 (quoting Rosenberg v. Merrill Lynch, Pierece, Fenner & Smith, Inc., 170 F.3d 1, 14 (1st Cir. 1999)).

34. *Id.* at 58.

35. *Id.* at 61. *But see* Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174-75 (5th Cir. 2004) (holding a class action waiver enforceable despite its potential to immunize defendants from low-value claims, but emphasizing that the relevant state law's prohibition of class actions was a "highly relevant factor in considering the equities of the arbitration clauses").

36. 498 F.3d at 1224.

37. *Id.*

themselves from liability for small value claims.[38] In sum, the court held "that the enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances."[39] The court further held that relevant circumstances may include, without limitation,

> the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect [sic] the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.[40]

B. Identifying the Requirements for Federal Subject Matter Jurisdiction Under the "Mass Action" Provision of the Class Action Fairness Act of 2005 ("CAFA") and Determining Which Party Bears the Burden of Proving Jurisdiction in a Removed Case Involving Unspecified Damages Under CAFA

In *Lowery v. Alabama Power Co.*,[41] the Eleventh Circuit examined several issues concerning the interpretation of CAFA,[42] and each issue was a matter of first impression.[43] First, the court held that any defendant authorized to remove an action to federal court under CAFA may remove the action as a whole, regardless of whether other defendants were authorized to remove their claims.[44] Next, the court identified the four threshold requirements for establishing federal subject matter jurisdiction under CAFA's "mass action" provision.[45]

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38. *Id.*

39. *Id.*

40. *Id.* Based on the totality of the circumstances, the Eleventh Circuit concluded that the Comcast class action waiver was unconscionable to the extent that it prohibited the subscribers from bringing a class action suit alleging state law claims based on the violation of the Cable Act's franchise fee provisions, 47 U.S.C. § 542. *Dale*, 498 F.3d at 1224. Further, because the class action waiver could not be severed from the arbitration agreement, the entire arbitration provision was rendered unenforceable. *Id.*

41. 483 F.3d 1184 (11th Cir. 2007).

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

43. 483 F.3d at 1187.

44. *Id.* at 1196.

45. *Id.* at 1202-03. "Where the parties are minimally diverse, the action consists of 100 plaintiffs or more, the plaintiffs' claims share common questions of law or fact, and the potential aggregate value of all the claims exceeds $5,000,000, the action may be removed to federal court as a mass action." *Id.* at 1221.

Finally, the court reaffirmed that the removing defendant, under CAFA, bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.[46] It further held that a defendant is not entitled to conduct jurisdictional discovery to meet this burden, and the district court should not allow or conduct such discovery on its own initiative.[47]

The plaintiffs were Alabama residents who filed suit against several corporate defendants in an Alabama state court, alleging various state law tort claims and demanding damages of $1.25 million each.[48] The plaintiffs amended their complaint three times over three years, adding more than 400 plaintiffs and amending their prayers for relief to request damages "in excess of the [court's] minimum jurisdictional limit."[49] The final amended complaint added new defendants, including Alabama Power Company.[50] The plaintiffs could have brought the suit as a class action but did not do so.[51]

Alabama Power filed a notice of removal in the United States District Court for the Northern District of Alabama under CAFA's mass action provision.[52] Alabama Power contended that the district court had diversity of citizenship subject matter jurisdiction because[53] the complaint contained claims of more than 100 persons, each claim was for an amount exceeding $75,000, the claims totaled more than $5 million,[54] and the claims involved common questions of law or fact.[55]

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46. *Id.* at 1208, 1211.

47. *Id.* at 1216-18.

48. *Id.* at 1187-88. The plaintiffs alleged that the twelve defendant corporations, along with 120 fictitious entities, discharged particulates and gases into the atmosphere and ground water that caused the plaintiffs to suffer personal injuries. *Id.*

49. *Id.* at 1188 (brackets in original) (internal quotation marks omitted).

50. The third and final amended complaint was filed on June 20, 2006. *Id.*

51. *Id.* at 1188 n.4 (citing ALA. R. CIV. P. 23).

52. *Id.* (citing 28 U.S.C. § 1332(d)(11) (2000 & Supp. V 2005)).

53. *Id.* at 1188.

> Prior to CAFA, the Supreme Court had interpreted the "diversity" requirement of § 1332(a) to require that each named member of the plaintiff class be diverse from each of the defendants. The new § 1332(d) replaces [the] modified "complete diversity" requirement with a "minimal diversity" requirement under which, for purposes of establishing jurisdiction, only one member of the plaintiff class—named or unnamed—must be diverse from any one defendant.

Id. at 1194 n. 24 (citations omitted).

54. *Id.* at 1188.

> Before CAFA, the claims of a class of plaintiffs were not permitted to be aggregated for purposes of satisfying the jurisdictional amount requirement of § 1332(a) and, therefore, federal courts did not have jurisdiction over the claims of any individual plaintiffs that failed to satisfy the jurisdictional amount. CAFA replaces this "non-aggregation" principle with an amount in controversy

The plaintiffs filed a motion to remand, asserting that Alabama Power had not met its burden of establishing federal jurisdiction because nothing in the notice of removal or the complaint indicated the specific amount of damages sought. Alabama Power supplemented its notice of removal and requested leave to conduct limited jurisdictional discovery if the court determined the amended notice of removal did not establish the $5 million minimum.[56] The plaintiffs subsequently withdrew their motion to remand and conceded jurisdiction, but the district court nonetheless ordered the plaintiffs to file the names of all the plaintiffs whose claims could reasonably be expected to exceed $75,000.[57]

The plaintiffs immediately responded to the district court's order, claiming they lacked sufficient information to determine whether each claim was worth $75,000, and moved the court to either set aside its order or accept their response as adequate. The plaintiffs then renewed their motion to remand, contending that Alabama Power had not met its burden of showing each plaintiff's claims exceeded $75,000.[58] The district court granted the plaintiffs' motion and remanded the case to state court, stating that CAFA had not changed the rule that "'when a state court complaint is uncertain or silent on the amount being sought, the removing defendant under 28 U.S.C. § 1332 has the burden of proving the jurisdictional amount by a preponderance of the evidence.'"[59] The district court found that the defendants failed to prove that CAFA's jurisdictional amount was satisfied because they had shown neither that one plaintiff had claims in excess of $75,000 nor that all of the plaintiffs' claims combined exceeded $5 million.[60]

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requirement that explicitly permits aggregation of claims.

Id. at 1194 n.24 (citations omitted) (citing 28 U.S.C. § 1332(d)(6)).

55. *Id.* at 1188. "CAFA gives the district courts subject matter jurisdiction to entertain a 'mass action' removed from state court provided that the action has been brought by 100 or more plaintiffs whose combined claims total in excess of $5,000,000." *Id.* at 1188 n.7.

56. *Id.* at 1188-89. In their supplement to the notice of removal, the defendants argued that subject matter jurisdiction existed because (1) the case involved claims of more than 100 persons, (2) each plaintiff's claim would need to yield only $12,500 to reach the required minimum of $5 million, and (3) the plaintiffs in recent Alabama mass tort actions had received jury verdicts or settlements for more than $5 million. *Id.* at 1189.

57. *Id.* at 1190.

58. *Id.* at 1191.

59. *Id.* at 1191-92 (quoting Lowery v. Honeywell Int'l, Inc., 460 F. Supp. 2d 1288, 1296 (N.D. Ala. 2006)).

60. *Id.* at 1192. The district court also held, as a threshold matter, that it lacked jurisdiction over the claims against the defendants who had been made parties to the action prior to CAFA's February 18, 2005 effective date. *Id.*

On appeal,[61] the Eleventh Circuit first addressed whether the pre-CAFA defendants could properly join in Alabama Power's removal.[62] The court looked at CAFA's plain language and concluded that removal under CAFA encompasses all of the claims in the "action" as a whole, not simply the claims against a removing defendant.[63] The court noted that both the substantive and procedural sections of CAFA refer to removal of the class action[64] and further that a mass action shall be deemed a class action under CAFA's removal provisions.[65] The court determined that a class action that is removable under CAFA may be removed by any defendant without the consent of all of the defendants.[66] The court concluded that these provisions, read together, establish that one defendant may remove the entire action, including claims against all defendants; thus the district court erred in holding that the pre-CAFA defendants were not properly included in the removal.[67]

The court then turned to the plaintiffs' argument that this action did not qualify as a mass action under CAFA.[68] The defendants contended that although the action was not certified as a class action under state or federal law, it was still deemed a class action for purposes of CAFA because CAFA does not apply exclusively to class actions certified under Federal Rule of Civil Procedure 23[69] or its state analogues, and it satisfied CAFA's mass action provisions, found at 28 U.S.C. § 1332(d)-

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61. Appeal from a district court order granting remand to state court is allowed by § 1453(c)(1) of CAFA. *Id.* at 1192 n.21 (citing 28 U.S.C. § 1453(c)(1) (2000)).

62. *Id.* at 1194. The plaintiffs argued, and the district court determined, that because the action "commenced" against the pre-CAFA defendants before CAFA's February 18, 2005 effective date, the pre-CAFA defendants could not join in the removal. *Id.*

63. *Id.* at 1196. The court noted that CAFA's "reference to 'actions,' as opposed to 'claims,' suggests that removal under CAFA is broadly inclusive." *Id.* (citing Braud v. Transp. Serv. Co., 445 F.3d 801, 808 (5th Cir. 2006)).

64. *Id.* (quoting 28 U.S.C. § 1332(d)(11)(A)).

65. *Id.* (quoting 28 U.S.C. § 1453(b)).

66. *Id.* (citing 28 U.S.C. § 1453(b)).

67. *Id.* at 1196-97.

68. *Id.* at 1198. CAFA defines a mass action as "any civil action (except a civil action within the scope of [28 U.S.C. § 1711(2) (Supp. V 2005)]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)]." 28 U.S.C. § 1332(d)(11)(B)(i). Under § 1711(2) class actions are defined as those certified either under Federal Rule of Civil Procedure 23 or a state equivalent to Rule 23. 28 U.S.C. § 1711(2); FED. R. CIV. P. 23. Class actions under § 1711(2) could qualify for CAFA's expanded jurisdictional thresholds without resorting to the mass action provisions in § 1332(d)(11). *Lowery*, 483 F.3d at 1202.

69. FED. R. CIV. P. 23.

(11).[70] These provisions extend diversity jurisdiction to certain actions brought individually by large groups of plaintiffs, even though the actions are not certified as a class under state or federal law.[71]

Noting that "[t]he proper interpretation of CAFA's mass action provisions is a matter of first impression in this circuit," the court held that a mass action is to be treated as a class action under CAFA if it meets certain statutory prerequisites.[72] For a mass action to qualify for CAFA diversity jurisdiction, the plaintiffs' claims must exceed an aggregate of $5 million, and the parties must be minimally diverse.[73] The court also addressed the numerosity requirement, deciding that a mass action must involve the proposed "'monetary relief claims of 100 or more persons,'"[74] and the commonality requirement, deciding that "'the plaintiffs' claims [must] involve common questions of law or fact.'"[75]

The court then turned to the final clause of § 1332(d)(11)(B)(i)'s definition of a mass action, which provides conditions under which jurisdiction will exist in a mass action and states "'*except* that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements under

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70. *Lowery*, 483 F.3d at 1198 (citing 28 U.S.C. § 1332(d)(11)).

71. *Id.* (citing 28 U.S.C. § 1332(d)(11)).

72. *Id.* at 1198-99 (citing 28 U.S.C. § 1332(d)(11)(A)). A mass action is only deemed a class action "if it otherwise meets the provisions" of §§ 1332(d)(2) through (10). 28 U.S.C. § 1332(d)(11)(A). Some of these incorporated provisions

> act to limit CAFA's expansion of federal diversity jurisdiction by authorizing a district court to decline jurisdiction over certain cases that may lack significant interstate impact, or by creating an exception to jurisdiction for matters likely to be purely local controversies. Other provisions create additional exceptions to jurisdiction in suits against states and state officials and in certain securities litigation. Some provide guidance on the treatment of citizenship under CAFA [while] some provisions, despite being incorporated into the mass action context . . . seem to have no application to mass actions.

Lowery, 483 F.3d at 1199-1200 (footnotes omitted) (citing 28 U.S.C. §§ 1332(d)(3)-(9)).

73. *Lowery*, 483 F.3d at 1201 (citing 28 U.S.C. §§ 1332(d)(2), (6)).

74. *Id.* at 1202 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). The court noted that "[t]his provision . . . appears to limit mass actions to suits seeking monetary relief," and thus the definition "does not extend to actions seeking solely equitable relief." *Id.* at 1202 n.45.

75. *Id.* at 1202 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). "Combining the requirements drawn from § 1332(d)(11)(B)(i)'s definition of a mass action and those drawn from § 1332(d)(11)(A)'s incorporation of CAFA's class action requirements into the mass action context," the court identified the following "four requirements for an action to be deemed a mass action" under CAFA: (1) an amount in controversy of an aggregate of $5 million; (2) minimal diversity; (3) a numerosity requirement for the monetary claims of 100 or more plaintiffs; and (4) a commonality requirement that the plaintiffs' claims involve common questions of law or fact. *Id.* at 1202-03.

subsection (a).'"[76] The defendants argued that Congress intended the word "except" to create an exception to mass action diversity jurisdiction, such that even if the district court has jurisdiction over the action, it will lack jurisdiction over individual plaintiffs whose claims do not exceed the $75,000 minimum.[77] The plaintiffs argued that Congress intended the word "except" to mean "only," such that the $75,000 provision functions as an additional primary requirement for subject matter jurisdiction. The plaintiffs thus concluded that jurisdiction over a mass action would only be proper if the four mass action requirements are met, *and* each of the individual plaintiffs' claims exceeds $75,000.[78] The district court noted the tension between the $75,000 provision and the other mass action provisions, but agreed with the plaintiffs and reasoned that "[i]f there is internal inconsistency in CAFA, that inconsistency must be resolved by giving predominance to the language that limits jurisdiction, and not to language that would expand it."[79]

The Eleventh Circuit disagreed with this approach, holding that the interpretation given by the district court and urged by the plaintiffs failed to give effect to every word and clause in CAFA because it rendered the $5 million aggregate amount in controversy threshold "mere surplusage."[80] The court determined that if the plaintiffs' individual claims could not be removed unless the claims of each plaintiff exceed $75,000, the aggregate value of the claims of each of the 100 plaintiffs would be, at a minimum, $7.5 million.[81] The court held that "[t]his approach negates the need for the $5,000,000 aggregate amount in controversy requirement of § 1332(d)(2), which is applied to mass actions through § 1332(d)(11)(A)."[82]

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76. *Id.* at 1203 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)).

77. The defendants argued that the claims of these plaintiffs must be remanded to state court.

78. *Id.* at 1203-04.

79. *Lowery*, 460 F. Supp. 2d at 1294.

80. *Lowery*, 483 F.3d at 1204-05. In reaching this conclusion, the Eleventh Circuit utilized two well-established rules of statutory construction—(1) that it must "construe the statute to give effect, if possible, to every word and clause" and (2) that it "must view the provision in the context of the statute as a whole." *Id.* at 1204.

81. *Id.* at 1204.

82. *Id.* The court also held that the district court's interpretation ran afoul of the legislative history of § 1332(d)(11). *Id.* at 1204-05. In so holding, the Eleventh Circuit cited the Senate Judiciary Committee Report, S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, which "squarely confronts how the tension between the mass action provisions is to be resolved." *Lowery*, 483 F.3d at 1206. The Committee Report provided in pertinent part as follows:

> "If a mass action satisfies the criteria set forth in [§ 1332(d)(11)] (that is, it involves the monetary relief claims of 100 or more persons that are proposed to

The court also disagreed with the defendants' approach, which suggested that a district court could retain jurisdiction over an action even if, eliminating individual claims, the total number of the plaintiffs in the action fell below 100, or the aggregate total of the remaining plaintiffs' claims fell below $5 million.[83] Although the court did not decide whether the $75,000 provision created an additional threshold requirement that the party bearing the burden of establishing the court's jurisdiction must prove at the outset, the court did decide that the $75,000 provision did not supplant CAFA's plainly expressed $5 million aggregate requirement by requiring a per-plaintiff minimum threshold requirement that would ultimately require a showing of claims worth $7.5 million in the aggregate.[84]

On the issue of which party has the burden of proof, the court reaffirmed the rule it announced in *Miedema v. Maytag Corp.*[85] and *Evans v. Walter Industries, Inc.*[86] when it joined the Second, Third, Seventh, and Ninth Circuits in following the settled practice of placing the burden of establishing federal subject matter jurisdiction on the removing defendant.[87] After establishing that CAFA does not shift the burden of proof in removal actions, the court in *Lowery* had to determine the standard by which it measured the sufficiency of the defendants' showing that the plaintiffs' claims exceeded $5 million in the aggregate.[88] The court first noted that in a removal context where damages are unspecified, "the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence,"[89] but the

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> be tried jointly on the ground that the claims involve common questions of law or fact and it meets the tests for federal diversity jurisdiction otherwise established by the legislation), it may be removed to a federal court . . . . [I]t is the Committee's intent that any claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court. Subsequent remands of individual claims not meeting the section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement. However, so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdictional [sic] over the action."

Id. at 1206 (quoting S. REP. NO. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44).

83. *Lowery*, 483 F.3d at 1204.

84. *Id.* at 1206-07.

85. 450 F.3d 1322, 1328 (11th Cir. 2006).

86. 449 F.3d 1159, 1164 (11th Cir. 2006).

87. *Lowery*, 483 F.3d at 1208.

88. *Id.*

89. *Id.* (citing Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356-57 (11th Cir. 1996)).

court acknowledged that in this case, damages were unspecified and only the bare pleadings were available, and thus it could not apply the preponderance standard meaningfully.[90] Thus, the court looked to the removal-remand scheme set forth in 28 U.S.C. §§ 1446(b)[91] and 1447(c)[92] and concluded that a district court is required to determine the propriety of removal solely on the basis of the removing documents.[93] "If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand."[94] The court thus held that the district court must consider the documents that the defendant received from the plaintiff, whether a complaint or a later received paper, to determine if that document and the notice of removal

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> Specifically, the removing defendant must establish the amount in controversy by "[t]he greater weight of the evidence, . . . [a] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Id. at 1209 (alteration in original) (brackets in original) (quoting BLACK'S LAW DICTIONARY 1220 (8th ed. 2004)).

90. *Id.* at 1210. The court noted,

> We have no evidence before us by which to make any informed assessment of the amount in controversy. All we have are the representations relating to jurisdiction in the notice of removal and the allegations of the plaintiffs' third amended complaint. As such, any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon.

Id. at 1210-11 (citing Lindsey v. Ala. Tel. Co., 576 F.2d 593, 595 (5th Cir. 1978)).

91. 28 U.S.C. § 1446(b) (2000). Section 1446(b) provides, in pertinent part, as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .

Id.

92. 28 U.S.C. § 1447(c). Section 1447(c) provides, in pertinent part, as follows:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Id.

93. *Lowery*, 483 F.3d at 1211.

94. *Id.*

unambiguously establish federal jurisdiction.[95] If the notice of removal and accompanying documents are insufficient to establish the jurisdictional requirements necessary for removal, "neither the defendants nor the [district] court may speculate in an attempt to make up for the notice's failings."[96]

Accordingly, the court held that a district court, when faced with insufficient evidence to establish jurisdiction, could not invoke discovery to supplement that evidence in assessing the propriety of removal.[97] Determining that "the defendant is not excused from the duty to show by fact, and not mere conclusory allegation, that federal jurisdiction exists," the court held that "by removing the action, [the defendant] has represented to the court that the case belongs before it."[98] Because the

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95. *Id.* at 1213 (citing 28 U.S.C. § 1446(b)).

96. *Id.* at 1214-15 (citing *Lindsey*, 576 F.2d at 595). The court further noted that the defendant's counsel is bound by Rule 11 of the Federal Rules of Civil Procedure to file a notice of removal only when counsel can do so in good faith. *Id.* at 1215 (citing FED. R. CIV. P. 11). Thus, the court found it

> highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one [at bar]—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice—without seriously testing the limits of compliance with Rule 11.

Id. In such a case, the court determined that the defendant would need some "other paper" to provide the grounds for removal under § 1446(b), and "[i]n the absence of such a document, the defendant's appraisal of the amount in controversy may be purely speculative" and would not ordinarily provide grounds for his counsel to sign a notice of removal in good faith. *Id.*

97. *Id.* at 1215. In so holding, the court noted that "[p]ost-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck" by the language and the purpose of Rules 8(a) and 11 of the Federal Rules of Civil Procedure. *Id.*; FED. R. CIV. P. 8(a), 11. Rule 8(a) provides, in pertinent part, that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the grounds upon which the court's jurisdiction depends." FED. R. CIV. P. 8(a). Rule 11 provides, in pertinent part, that

> [b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading . . . an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the claims, defenses, and other legal contentions therein are warranted by existing law [and] the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

FED. R. CIV. P. 11(b), (b)(2), (b)(3).

98. *Lowery*, 483 F.3d at 1217. The court noted,

> Having made this representation, the defendant is no less subject to Rule 11 than a plaintiff who files a claim originally. Thus, a defendant that files a notice of removal prior to receiving clear evidence that the action satisfies the jurisdictional

court held that allowing post-removal jurisdictional discovery "impermissibly lightens the defendant's burden of establishing jurisdiction," the court decided that district courts should neither grant leave for the defendants to engage in such discovery nor should they engage in their own jurisdictional discovery.[99] The court further held that the defendants' request for post-removal jurisdictional discovery was "tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists [and t]he natural consequence of such an admission is remand to state court."[100] On the merits of the case at bar, the court held that because the defendants were unable to establish that the plaintiffs' claims exceeded $5 million in the aggregate, the defendants were "unable to meet their burden of establishing the requirements for federal jurisdiction over a mass action" under CAFA.[101]

C. Whether a District Court Has the Authority to Circumvent the Ten-Day Deadline of Federal Rule of Civil Procedure 23(f) for Obtaining Interlocutory Review of an Order Denying Class Certification by Vacating and Reentering that Order After the Original Deadline for Seeking Interlocutory Relief Has Expired

In *Jenkins v. BellSouth Corp.*,[102] the Eleventh Circuit dealt with an issue of first impression regarding a district court's power to circumvent the ten-day deadline found in Federal Rule of Civil Procedure 23(f).[103] Rule 23(f) allows a court of appeals to grant plaintiffs an interlocutory review of a district court's order denying class certification, so long as the plaintiff applies for the review within ten days after the order is entered.[104] The Eleventh Circuit held that a district court may not circumvent this ten-day deadline by vacating and reentering the order,

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> requirements, and then later faces a motion to remand, is in the same position as a plaintiff in an original action facing a motion to dismiss.

Id. (footnote omitted).

99. *Id.* at 1218.

100. *Id.* at 1217-18.

101. *Id.* at 1221.

102. 491 F.3d 1288 (11th Cir. 2007).

103. Rule 23(f) provides, in pertinent part, that "[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." FED. R. CIV. P. 23(f).

104. *Id.*

so as to establish a new ten-day deadline, after the original deadline for seeking interlocutory relief expires.[105]

The plaintiffs, current and former employees of defendant BellSouth Corporation, commenced this putative class action by filing a complaint against BellSouth in the United States District Court for the Northern District of Alabama, alleging that BellSouth had engaged in a pattern and practice of racial discrimination in promotions and compensation. On September 19, 2006, the district court denied class certification. On October 3, 2006, the employees filed a motion for reconsideration of that order, which the district court denied on November 7, 2006. On November 24, 2006, the employees filed a petition in the Eleventh Circuit under Rule 23(f) for permission to appeal the district court's order denying the motion for reconsideration.[106] The Eleventh Circuit dismissed the petition as untimely.[107] The employees then moved the district court to vacate and reenter its November 7, 2006 order denying their motion to reconsider class certification.[108] On March 5, 2007, the district court granted the employees' motion, vacated its November 7, 2006 order and reentered an identical order. On March 14, 2007, the employees filed a second petition in the Eleventh Circuit under Rule 23(f), seeking permission to appeal the district court's March 5, 2007 order denying the employees' motion to reconsider class certification.[109]

Discussing whether the employees' second petition was timely, the Eleventh Circuit noted that under Rule 23(f), "'[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class certification under this rule *if application is made to it within ten days after entry of the order*.'"[110] The court also noted that Rule 23(f)'s ten-day deadline "provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."[111] Because "[a] motion for reconsidera-

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105. *Jenkins*, 491 F.3d at 1289. In so holding, the Eleventh Circuit joined the Tenth, Seventh, and Fifth Circuit Courts of Appeals on this issue. *Id.* at 1291.

106. *Id.* at 1289.

107. *Id.* (citing FED. R. CIV. P. 23(f)).

108. *Id.* Because it was undisputed that the employees' motion was due on November 22, 2006, which was the day before Thanksgiving, the employees premised their argument on excusable neglect from an alleged mistake by a courier service. Specifically, the employees alleged that on November 21, 2006, they engaged a courier service to deliver the motion to the court by overnight delivery, but the motion was not delivered until November 24, 2006, the day after Thanksgiving Day. *Id.* at 1289-90.

109. *Id.* at 1290.

110. *Id.* (emphasis added) (quoting FED. R. CIV. P. 23(f)).

111. *Id.* (citing FED. R. CIV. P. 23(f) advisory committee's note). "'The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly

tion filed in the district court within ten days after the certification order tolls the deadline for filing a petition under Rule 23(f) until the district court rules on the motion,"[112] the court held that the single window of opportunity for the employees to seek interlocutory review of the district court's denial of class certification closed on November 22, 2006, ten days from the entry of the district court's original November 7, 2006 order denying the employees' motion to reconsider class certification.[113] The district court's March 5, 2007 order was irrelevant to the court's analysis because "the district court was without the authority to circumvent [Rule 23(f)'s] ten-day deadline for obtaining interlocutory review of its order denying class certification by vacating and reentering that order after the original deadline for seeking interlocutory relief under Rule 23(f) had expired."[114]

The court rejected the employees' argument that 28 U.S.C. § 1292-(b),[115] which allows a district court to vacate and reenter a certification order to allow a new period for filing a petition for interlocutory appeal, should guide the court's interpretation of Rule 23(f).[116] Determining

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in making the preliminary determination whether to permit appeal.'" *Id.* (quoting FED. R. CIV. P. 23(f) advisory committee's note). The court also cited *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999), in which the Seventh Circuit held that Rule 23(f) provides "'only one window of potential disruption,' which is 'deliberately small.'" *Jenkins*, 491 F.3d at 1290 (quoting *Gary*, 188 F.3d at 893).

112. *Jenkins*, 491 F.3d at 1290 (citing Shin v. Cobb County Bd. of Educ., 248 F.3d 1061, 1064-65 (11th Cir. 2001)).

113. *Id.* at 1292.

114. *Id.*

115. 28 U.S.C. § 1292(b) (2000). Section 1292(b) provides in pertinent part as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

Id.

116. *Jenkins*, 491 F.3d at 1290. The Eleventh Circuit acknowledged that "[e]very circuit that has considered the issue" agrees that a district court can reconsider the criteria of § 1292(b), "'reenter the interlocutory order and thus trigger a new ten-day period.'" *Id.* (quoting Aparicio v. Swan Lake, 643 F.2d 1109, 1112 (5th Cir. Unit A Apr. 1981)). The court also cited several cases in support of its contention that every circuit agrees on this issue. *Id.* at 1290-91 (citing *In re* City of Memphis, 293 F.3d 345, 350 (6th Cir. 2002); Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 867 (4th Cir. 2001); English v. Cody, 146 F.3d 1257, 1259 n.1 (10th Cir. 1998); Marisol *ex rel.* Forbes v. Giuliani, 104 F.3d 524, 528-29 (2d Cir. 1996); *In re* Benny, 812 F.2d 1133, 1137 (9th Cir. 1987); Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 247-48 (7th Cir. 1981); Braden v. Univ. of Pittsburgh, 552 F.2d 948, 954-55

that Rule 23(f) "'departs from the § 1292(b) model in two significant ways,'"[117] the court noted that unlike § 1292(b), Rule 23(f) neither requires district courts to certify the class certification ruling for appeal[118] nor requires the class certification order to "'"involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."'"[119]

The Eleventh Circuit cited the Seventh Circuit's decision in *Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*,[120] which held that "'when a class-certification order is an arguable candidate for a Rule 23(f) appeal, the appellants may not use section 1292(b) to circumvent the 10-day limitation in Rule 23(f).'"[121] The court noted that the Seventh, Tenth, and Fifth Circuit Courts of Appeal had "rejected other attempts to circumvent the ten-day deadline of Rule 23(f)."[122] The court further noted that "in enforcing the deadline of Rule 23(f), what counts ordinarily is the original order denying or granting class certification, not a later order that maintains the status quo."[123] The court therefore dismissed the employees' second petition

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(3d Cir. 1977) (en banc); *In re* La Providencia Dev. Corp., 515 F.2d 94, 95 n.1 (1st Cir. 1975)).

117. *Id.* at 1291 (quoting FED. R. CIV. P. 23(f) advisory committee's note and citing CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1802.2 (3d ed. 2005)).

118. *Id.* (citing FED. R. CIV. P. 23(f) advisory committee's notes). "Under section 1292(b), both the district court and the court of appeals exercise discretion about granting interlocutory review, but under Rule 23(f) only the court of appeals exercises that kind of discretion." *Id.*

119. *Id.* (brackets in original) (quoting FED. R. CIV. P. 23(f) advisory committee's notes (quoting 28 U.S.C. § 1292(b)). The court noted that "[u]nder Rule 23(f), in contrast [to § 1292(b)], '[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.'" *Id.* (third brackets in original) (quoting FED. R. CIV. P. 23(f), advisory committee's note).

120. 202 F.3d 957 (7th Cir. 2000).

121. *Jenkins*, 491 F.3d at 1291 (quoting *Richardson Elecs.*, 202 F.3d at 959).

122. *Id.* The Tenth Circuit, in *Delta Airlines v. Butler*, 383 F.3d 1143 (10th Cir. 2004), held that district courts do not have the authority to grant a motion that extends the time period under Rule 23(f). *Id.* at 1145. The Seventh Circuit, in *Gary*, held that the limitations period for interlocutory review is not tolled by a filing of a late or successive motion to reconsider. 188 F.3d at 893. Lastly, the Fifth Circuit, in *McNamara v. Felderhof*, 410 F.3d 277 (5th Cir. 2005), ruled that Rule 23(f)'s ten-day period cannot be tolled by a late motion for reconsideration, no matter how the motion is styled. *Id.* at 281.

123. *Jenkins*, 491 F.3d at 1291 (citing Carpenter v. Boeing Co., 456 F.3d 1183, 1191 (10th Cir. 2006)). The court quoted from the Tenth Circuit, which stated that "'[a]n order that leaves class-action status unchanged from what was determined by a prior order is not an order granting or denying class action certification.'" *Id.* (internal quotation marks omitted) (quoting *Carpenter*, 456 F.3d at 1191). According to the court, the Fifth Circuit reached the same conclusion. *Id.* (citing *McNamara*, 410 F.3d at 281).

as untimely but stated that its decision "does not leave the employees without an avenue for relief."[124] "They can appeal the denial of class certification following the entry of a final judgment."[125] "What they cannot do at this late date is pursue an interlocutory appeal."[126]

III. CIVIL PROCEDURE

A. Whether the Claims in an Amended Complaint Supersede the Claims in the Original Complaint for the Purpose of Determining Federal Subject Matter Jurisdiction

In *Pintando v. Miami-Dade Housing Agency*,[127] the Eleventh Circuit held for the first time in a published opinion[128] that a district court must look to the claims asserted in the amended complaint to determine whether the court has federal subject matter jurisdiction.[129] Specifically, the Eleventh Circuit held that the district court will be divested of subject matter jurisdiction when subject matter jurisdiction is based on a federal question and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367,[130] and the plaintiff amends his or her complaint to omit the federal law claim originally giving rise to the district court's supplemental jurisdiction of the remaining state law claims.[131]

The plaintiff, Juan Manuel Pintando, filed his original complaint against the Miami-Dade Housing Authority ("MDHA") in the United States District Court for the Southern District of Florida, alleging violations of Title VII of the Civil Rights Act of 1964[132] and two Florida laws.[133] Pintando alleged that the district court had supplemental jurisdiction over his state law claims pursuant to 28 U.S.C. § 1367.[134]

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124. *Id.* at 1292.

125. *Id.* (citing 28 U.S.C. § 1291 (2000)).

126. *Id.*

127. 501 F.3d 1241 (11th Cir. 2007) (per curiam).

128. The Eleventh Circuit had addressed the jurisdictional issue at bar in its unpublished opinion in *Riley v. Fairbanks Capital Corp.*, 222 F. App'x 897 (11th Cir. 2007).

129. *Pintando*, 501 F.3d at 1243.

130. 28 U.S.C. § 1367 (2000).

131. *Pintando*, 501 F.3d at 1242.

132. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

133. *Pintando*, 501 F.3d at 1242. Although it is not discussed in the opinion, it appears that federal subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332 did not exist because both Pintando and MDHA were citizens of Florida.

134. *Id.* Section 1367(a) provides, in pertinent part, that

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are

After MDHA moved for summary judgment on all counts, Pintando moved to amend his complaint to "drop his federal law claim under Title VII . . . so that he may continue to pursue only his state law claims."[135] The district court granted the motion, and Pintando filed an amended complaint asserting only the state law claims. Although no violation of federal law was alleged in the amended complaint, Pintando contended that the district court still had supplemental jurisdiction over the case. In its order granting summary judgment to MDHA on both state law claims, the district court acknowledged that Pintando's amended complaint did not contain a federal law claim, but concluded that it retained supplemental jurisdiction over the remaining state law claims.[136]

On appeal, the Eleventh Circuit noted that before deciding the merits of the case, it must ensure that it has subject matter jurisdiction.[137] The court agreed that the district court had jurisdiction over the case after Pintando filed his first complaint because the Title VII claim was properly before the district court, and the state law claims were part of the same nucleus of operative facts.[138] This allowed the district court to properly exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.[139] However, after Pintando amended his complaint, there was no longer a federal question as grounds for supplemental jurisdiction.[140] Thus, the question before the court was whether the district court continued to maintain subject matter jurisdiction over Pintando's state law claims after he amended his complaint to remove all of the federal law claims.[141]

Holding that the district court should have looked to the amended complaint to determine subject matter jurisdiction, the Eleventh Circuit cited the general rule that "'[a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment,

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> so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

135. *Pintando*, 501 F.3d at 1242 (alteration in original) (internal quotation marks omitted). Pintando moved to amend his complaint pursuant to Federal Rule of Civil Procedure 15(a). *Id.*; FED. R. CIV. P. 15(a).

136. *Pintando*, 501 F.3d at 1242.

137. *Id.* (citing Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C., 374 F.3d 1020, 1021 (11th Cir. 2004)).

138. *Id.* (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).

139. *Id.*

140. *Id.*

141. *Id.*

and is no longer a part of the pleader's averments against his adversary.'"[142] Once the district court accepted the amended complaint, the original complaint was superseded, and there was no longer a federal claim on which the district court could exercise supplemental jurisdiction over the state law claims.[143] The court also cited the United States Supreme Court's 2007 opinion in *Rockwell International Corp. v. United States*,[144] for the premise that "'when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.'"[145] The Supreme Court in *Rockwell* cited opinions from the Seventh Circuit, which held that subject matter jurisdiction must be determined by looking to the amended complaint to determine if there was a "'federal claim to which [the] state claims could be supplemental,'"[146] and the Fifth Circuit, which held that jurisdiction must be determined by looking at the amended complaint because "'the plaintiff must be held to the jurisdictional consequences of a voluntary abandonment of claims that would otherwise provide federal jurisdiction.'"[147]

Following *Rockwell* the Eleventh Circuit in *Pintando* vacated the district court's order for summary judgment and remanded the case to be dismissed without prejudice.[148] The court held that "[w]hen Pintando amended his complaint and failed to include a Title VII claim or any other federal claim, the basis for the district court's subject-matter

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142. *Id.* at 1243 (brackets in original) (quoting Dresdner Bank AG, Dresdner Bank AG in Hamburg v. M/V Olympia Voyager, 463 F.3d 1210, 1215 (11th Cir. 2006)). "'Under the Federal Rules, an amended complaint supersedes the original complaint.'" *Id.* (quoting Fritz v. Standard Sec. Life Ins. Co., 676 F.2d 1356, 1358 (11th Cir. 1982)).

143. *Id.*

144. 127 S. Ct. 1397 (2007).

145. *Pintando*, 501 F.3d at 1243 (quoting *Rockwell*, 127 S. Ct. at 1409). In *Rockwell* the Supreme Court concluded that the withdrawal of allegations in an amended complaint that had formed the basis of federal jurisdiction defeats jurisdiction. 127 S. Ct. at 1409.

146. *Pintando*, 501 F.3d at 1243 (brackets in original) (internal quotation marks omitted) (quoting Wellness Cmty. Nat'l v. Wellness House, 70 F.3d 46, 50 (7th Cir. 1995)).

147. *Id.* (quoting Boelens v. Redman Homes, Inc., 759 F.2d 504, 508 (5th Cir. 1985)).

148. *Id.* at 1244 (citing Scarfo v. Ginsberg, 175 F.3d 957, 962 (11th Cir. 1999)). The court quoted *Scarfo* for the proposition that "if a 'district court determines that subject[-]matter jurisdiction over a plaintiff's federal claims does not exist, [the] court[] must dismiss a plaintiff's state law claims.'" *Id.* (brackets in original) (quoting *Scarfo*, 175 F.3d at 962).

jurisdiction ceased to exist."[149] Therefore, the district court should have dismissed Pintando's claims without prejudice.[150]

B. Whether a District Court Must Consider All Factors that May Warrant an Extension of Time to Effect Service Pursuant to Federal Rule of Civil Procedure 4(m) if the Plaintiff Has Failed to Show Good Cause for Failing to Timely Effect Service

In *Lepone-Dempsey v. Carroll County Commissioners*,[151] the Eleventh Circuit held that when a plaintiff fails to show good cause for failing to effect timely service pursuant to Federal Rule of Civil Procedure 4(m),[152] the district court must consider whether any circumstances, such as the running of a statute of limitations, warrant an extension of time to effect service under Rule 4(m).[153] Only after considering such factors may the district court dismiss the case without prejudice for failure to effect timely service.[154]

On April 17, 2003, the plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983[155] in the United States District Court for the Northern District of Georgia, asserting that certain individual and governmental

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149. *Id.* at 1243-44. In reaching this holding, the Eleventh Circuit differentiated between a situation in which the plaintiff voluntarily amends the complaint to eliminate the federal law claim and a situation in which a district court dismisses the federal claim that created the original jurisdiction. *Id.* at 1242-43. The court acknowledged that a district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it had original jurisdiction, but the court noted that this situation was not analogous to a situation in which the plaintiff had voluntarily removed the federal law claim from the amended complaint. *Id.* The court also distinguished cases involving voluntary dismissals of federal law claims from cases removed to federal court under 28 U.S.C. § 1447(c) (2000), holding that in removed cases the district court must look at the case at the time of removal to determine whether it had subject matter jurisdiction, and that later changes to the pleadings do not impact the court's exercise of supplemental jurisdiction. *Pintando*, 501 F.3d at 1244 n.2. The United States Supreme Court noted this distinction in *Rockwell*, when it held that "removal cases raise forum-manipulation concerns that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment." 127 S. Ct. at 1409 n.6.

150. *Pintando*, 501 F.3d at 1244 (citing *Scarfo*, 175 F.3d at 962).

151. 476 F.3d 1277 (11th Cir. 2007).

152. FED. R. CIV. P. 4(m). This rule requires a plaintiff to properly serve a defendant with a summons and complaint within 120 days of the filing of the complaint. *Id.*

153. 476 F.3d at 1282.

154. *Id.* In so holding, the Eleventh Circuit agreed with the holdings of the Seventh, Fifth, Tenth, and Third Circuit Courts of Appeals. *See id.* at 1282 (citing Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 341 (7th Cir. 1996); Thompson v. Brown, 91 F.3d 20, 22 (5th Cir. 1996); Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995); Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1307-08 (3d Cir. 1995)).

155. 42 U.S.C. § 1983 (2000).

defendants, including the City of Villa Rica, violated the plaintiffs' constitutional rights. On July 31, 2003, the plaintiffs' counsel asked the city attorney to accept service on behalf of the defendants, and he allegedly agreed. On that same day, the plaintiffs' counsel mailed the city attorney copies of the complaint, summons, and request for waiver of service forms, but the city attorney never returned them. The plaintiffs did not otherwise attempt to serve the defendants, and none of the defendants filed answers to the complaint.[156]

On December 23, 2003, the defendants moved to dismiss the complaint, arguing that the plaintiffs had failed to timely effect service.[157] The district court granted the motion and dismissed the complaint without prejudice, finding that the plaintiffs had not timely served the defendants and had not shown good cause for their failure to do so.[158] The plaintiffs filed a motion for reconsideration, asking the district court for an extension of time to serve the defendants to avoid being barred from refiling suit due to the statute of limitations. The district court denied the plaintiffs' motion without addressing the effect of the statute of limitations on the plaintiffs' claims. The dismissal, although without prejudice, effectively barred the plaintiffs from refiling suit against the defendants because the statute of limitations had run.[159]

On appeal, the Eleventh Circuit acknowledged that the plaintiffs were responsible for serving the defendants within 120 days after filing the complaint pursuant to Rule 4(m).[160] The court also acknowledged that when a plaintiff fails to timely effect service pursuant to Rule 4(m), the district court may dismiss the action without prejudice, or "'if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.'"[161] Although Eleventh Circuit precedent provided that good cause exists "'only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service,'"[162] the court noted that district courts

156. *Lepone-Dempsey*, 476 F.3d at 1279.

157. The defendants argued that the plaintiffs were required to serve the defendants on or before August 15, 2003—120 days from the filing of the plaintiffs' complaint. *Id.* at 1279-80.

158. The plaintiffs argued that the defendants' motion should have been denied because the city attorney had agreed to waive formal service. In the alternative, the plaintiffs asked the district court for an extension of time to effect service. *Id.* at 1280.

159. *Id.*

160. *Id.* at 1280-81.

161. *Id.* at 1281 (quoting FED. R. CIV. P. 4(m)).

162. *Id.* (brackets in original) (quoting Prisco v. Frank, 929 F.2d 603, 604 (11th Cir. 1991) (per curiam)).

have discretion to extend the time for service even in the absence of good cause.[163]

The Eleventh Circuit agreed with the district court that the plaintiffs failed to demonstrate good cause for failing to timely serve the defendants,[164] and the court acknowledged that it had not ever "specifically stated that a district court must consider whether any factors warrant an extension of time absent a showing of good cause."[165] However, the court noted that "[o]ther circuits have held that if a plaintiff fails to show good cause, the district court must still consider whether any additional factors, such as the running of a statute of limitations, would warrant a permissive extension of time" to effect service.[166] Relying on the Advisory Committee's Notes to Rule 4(m), the court held that an extension of time for service may be justified in situations when the applicable statute of limitations would bar refiling the action.[167] Consequently, the Eleventh Circuit reversed the dismissal, reasoning that (1) the dismissal effectively barred the plaintiffs' claims because of the effect of the statute of limitations and (2) the district court "did not clearly consider, after finding that the plaintiffs failed to demonstrate good cause, whether a permissive extension of time was warranted under the facts of [the] case."[168]

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163. *Id.* (citing Horenkamp v. Van Winkle & Co., 402 F.3d 1129, 1132 (11th Cir. 2005)).

164. *Id.* Although the court noted that plaintiffs may have had good reason to believe that they could rely on the city attorney's assertion that he would sign and return the waiver forms, the plaintiffs were nonetheless responsible for formally serving the defendants when the waiver forms were not returned. *Id.* at 1282. The court further noted that the waiver of service procedure set forth in Rule 4(d) did not apply to local governments, such as the City of Villa Rica, in the first place. *Id.* at 1281.

165. *Id.* at 1282.

166. *Id.* (citing *Panaras*, 94 F.3d at 341; *Thompson*, 91 F.3d at 22; *Espinoza*, 52 F.3d at 840-41; *Petrucelli*, 46 F.3d at 1307-08).

167. *Id.* (citing FED. R. CIV. P. 4(m) advisory committee's note).

168. *Id.* Although the running of the statute of limitations did not require the district court to extend time for service of process under Rule 4(m), the Eleventh Circuit determined that it was nonetheless "incumbent upon the district court to at least consider this factor" in making its decision. *Id.*

IV. ARBITRATION

A. Whether § 11(a) of the Federal Arbitration Act, Which Allows a District Court to Correct an "Evident Material Mistake in the Description of any Person, Thing, or Property Referred to in the Award," Covers a Mistake by a Party that Was Not Brought to the Attention of the Arbitration Panel Before the Panel Rendered the Award

The appeal in *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*,[169] presented two primary questions, including one that had divided the circuit courts about the interpretation of the Federal Arbitration Act ("FAA"):[170]

> (1) whether section 11(a) of the [FAA], which allows a district court to correct an "evident material mistake in the description of any person, thing, or property referred to in the award," embraces a mistake by a party that was not brought to the attention of the arbitration panel before the panel rendered the award; and (2) whether state or federal law governs the availability and amount of prejudgment interest in an action to confirm an arbitration award when jurisdiction is based on diversity of citizenship.[171]

This action arose after the appellants, AIG Baker Sterling Heights, LLC and A.B. Olathe II (collectively "Baker"), agreed with American Multi-Cinema, Inc. ("American") to arbitrate a dispute over real estate taxes owed on property that American leased from Baker. In the arbitration, American erroneously admitted that it owed Baker $226,771.76 for its share of real estate taxes for the year 2002. After the arbitration panel awarded Baker $866,425.18, which included the $226,771.76 for American's share of the 2002 taxes, American discovered it had already paid these taxes in the greater amount of $248,624.57 when it paid the tax assessor directly rather than paying Baker. Although American admitted that it did not provide this information to the arbitration panel before the panel rendered its award, American contended that it was entitled to a credit for this $248,624.57 payment and that Baker's award should be reduced accordingly.[172]

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169. 508 F.3d 995 (11th Cir. 2007).

170. 9 U.S.C. §§ 1-16 (2000).

171. *AIG Baker Sterling Heights, LLC*, 508 F.3d at 997 (quoting 9 U.S.C. § 11(a) (2000)).

172. *Id.* at 997-98. American contended that its erroneous admission to the arbitration panel did not reflect the $248,624.57 payment to the tax assessor because American "did not realize its mistake until it was preparing to pay the arbitration award." *Id.* at 998

Baker filed an action in the United States District Court for the Northern District of Alabama for confirmation of the award and for prejudgment interest. American filed an answer and a counterclaim in the district court along with a motion to correct the award with the arbitration panel.[173] The district court denied Baker's request for confirmation and granted American's motion for modification on the basis of an "evident material mistake."[174] The district court reduced the balance of Baker's award by $248,624.57 and exercised its discretion not to award prejudgment interest, and Baker appealed.[175]

1. The District Court Did Not Have Authority to Modify the Arbitration Award. On appeal, Baker first argued that the district court exceeded its authority in modifying Baker's award under the FAA.[176] The district court relied on § 11(a) of the FAA, which allows a district court to modify an arbitration award when there was "'an evident material mistake in the description of any person, thing, or property referred to in the award.'"[177] The district court modified Baker's award because it found the failure of the stipulated facts to reflect American's $248,624.57 payment to the tax assessor to be an "evident material mistake."[178]

The Eleventh Circuit first noted that § 11(a)'s plain language embraces only an evident material mistake that appears "in the award."[179] Because the arbitration panel crafts the award, only the panel can make a mistake in the award, and the panel did not make a "'mistake'" because it did not "'understand [anything] wrongly'" or

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(internal quotation marks omitted).

173. *Id.* at 997-98. American also filed a separate action in the United States District Court for the Western District of Missouri to modify the award. This action was transferred to the Northern District of Alabama, and it was consolidated with Baker's action seeking confirmation. The arbitration panel concluded that American's motion to correct the award was untimely. *Id.*

174. *Id.* at 998 (internal quotation marks omitted).

175. *Id.* at 998-99.

176. *Id.* at 999.

177. *AIG Baker Sterling Heights, LLC*, 508 F.3d at 999 (quoting 9 U.S.C. § 11(a)).

178. *Id.* at 998.

179. *Id.* (citing 9 U.S.C. § 11(a)). The Eleventh Circuit further held that it would reach the same conclusion even assuming the language of § 11(a) was ambiguous. *Id.* at 1000. The court noted that the words of § 11(a) had an established meaning at the time that they were adopted from the State of New York's arbitration law that was enacted in 1920, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. 7501-7514 (McKinney 1998 & Supp. 2008)), which provided that a mistake or miscalculation which would justify modification of an award must have appeared in the award "'on its face.'" *AIG Baker Sterling Heights, LLC*, 508 F.3d at 1000-01 (quoting *In re* Burke, 84 N.E. 405, 406 (N.Y. 1908)).

"'recognize or identify [anything] incorrectly.'"[180] Rather, the panel "lacked knowledge" about the tax payment because American never provided this information to the panel before it rendered its award.[181] Although "[t]he arbitration award that Baker received may [have been] a product of ignorance attributable to an oversight by American," the court held that the award did not contain an evident material mistake under § 11(a) of the FAA.[182]

The Eleventh Circuit held that this reading of § 11(a) was consistent with the purpose of the FAA, which is "'to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.'"[183] The court noted that "judicial review of arbitration decisions is 'among the narrowest known to the law,'"[184] and "[t]hat narrow review is why a court cannot vacate an arbitration award for fraud based on information available before or during the arbitration that the parties, through lack of diligence, failed to discover."[185]

2. State Law Governs the Availability and Amount of Prejudgment Interest. The second issue before the court was whether state or federal law governed the availability and amount of prejudgment interest in diversity cases involving the FAA.[186] The court first

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180. *AIG Baker Sterling Heights, LLC*, 508 F.3d at 999 (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 759 (1984)).

181. *Id.*

182. *Id.* at 999-1000. In so holding, the Eleventh Circuit rejected American's reliance on the Fourth Circuit's holding in *Transnitro, Inc. v. M/V Wave*, 943 F.2d 471 (4th Cir. 1991), which interpreted § 11(a) to embrace mistakes made by parties that were never brought to the arbitration panel's attention. *AIG Baker Sterling Heights, LLC*, 508 F.3d at 100 (citing *Transnitro*, 943 F.2d at 474). Determining that the holding in *Transnitro* was erroneous, the Eleventh Circuit looked to the Fourth Circuit's more recent holding in *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998), which was consistent with the Eleventh Circuit's interpretation and "held that a mistake 'was not evident because it did not appear on the face of the arbitration award.'" *AIG Baker Sterling Heights, LLC*, 508 F.3d at 1000 (internal quotation marks omitted) (quoting *Apex Plumbing Supply, Inc.*, 142 F.3d at 194).

183. *AIG Baker Sterling Heights, LLC*, 508 F.3d at 1001 (quoting Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005)).

184. *Id.* (quoting Del Casal v. E. Airlines, Inc., 634 F.2d 295, 298 (5th Cir. Unit B Jan. 1981)).

185. *Id.* (citing Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988)).

186. *Id.* at 997. The court noted that the district court's rationale for not awarding prejudgment interest could be read in two ways: (1) "[e]ither the district court determined that it had discretion to decline to grant prejudgment interest under federal law," or (2) "it determined that prejudgment interest [was] unavailable because the award was modified

determined that because the district court's jurisdiction was based on diversity of citizenship, state law governed Baker's entitlement to prejudgment interest.[187] Thus, the Eleventh Circuit held that the district court erred to the extent it exercised jurisdiction under federal law to decline to award prejudgment interest.[188] Although "[a]n exception to this general rule exists when 'affirmative countervailing federal interests are at stake that warrant application of federal law,'"[189] the court noted that the FAA, which "'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet . . . does not create . . . independent federal-question jurisdiction,'" does not place countervailing federal interests at stake.[190] The Eleventh Circuit thus joined the Fifth Circuit and the Ninth Circuit in holding that state law governs the availability and amount of prejudgment interest in diversity cases involving the FAA.[191]

Finally, the Eleventh Circuit held that the district court erred to the extent that it found that prejudgment interest was unavailable because the arbitration award was modified rather than confirmed.[192] Because a judgment entered on an arbitration award under the FAA has the force and effect of a judgment recovered in any other civil action regardless of whether the court enters an order "'confirming, modifying,

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rather than confirmed." *Id.* at 1001. Determining that the district court erred under either possible reading, the Eleventh Circuit addressed each of the readings in turn. *Id.*

187. *Id.* at 1001. "In diversity cases, the availability and amount of prejudgment interest is ordinarily governed by state law." *Id.* (citing Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058, 1066-67 (11th Cir. 1996)).

188. *Id.* The Eleventh Circuit rejected American's argument that federal law governs the availability and amount of prejudgment interest whenever federal law provides a rule of decision. *Id.* at 1002. American relied on an admiralty case, and the Eleventh Circuit has held that "admiralty law is a context in which a countervailing federal interest—'the federal interest in uniformity'—sometimes requires a choice of federal common law rather than state law." *Id.* (quoting Mink v. Genmar Indus. Inc., 29 F.3d 1543, 1548 (11th Cir. 1994)).

189. *Id.* at 1001-02 (internal quotation marks omitted) (quoting Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1307 (11th Cir. 2002)).

190. *Id.* at 1002 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)). The court held that "[i]n the absence of a federal interest that requires the application of federal law, the existence of a federal rule of decision in a diversity case does not affect the question whether the availability and amount of prejudgment interest is governed by state or federal law." *Id.*

191. *Id.* (citing Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1329 (5th Cir. 1994); Northrop Corp. v. Triad Int'l Mktg. S.A., 842 F.2d 1154, 1155 (9th Cir. 1988)).

192. *Id.*

or correcting the award,'"[193] the court held that the district court erred to the extent it ruled otherwise.[194]

V. SECURITIES

A. Whether Investors in an Arm's-Length Merger Can Recover Under Section 11 of the Securities Act of 1933 If They Make a Legally Binding Investment Commitment Before the Issuance of a Defective Registration Statement

In *APA Excelsior III L.P. v. Premiere Technologies, Inc.*,[195] the Eleventh Circuit held, as a matter of first impression, that investors involved in an arm's-length merger transaction are not entitled to recover under the fraud provisions of section 11 of the Securities Act of 1933[196] if they make a legally binding investment commitment before the issuance of a defective registration statement.[197]

The dispute arose out of a merger between Xpedite Systems, Inc. ("Xpedite") and Premiere Technologies, Inc. ("Premiere"). The plaintiffs were former shareholders of Xpedite. Xpedite began a due diligence investigation of Premiere after it expressed interest in acquiring Xpedite.[198] Although the plaintiffs were sophisticated investors with due diligence rights, they failed to exercise these rights in any meaningful way.[199] Despite their superficial due diligence, Xpedite's board

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193. *Id.* (quoting 9 U.S.C. § 13 (2000)).

194. *Id.* at 1003. The Eleventh Circuit noted that its "decision that state law governs the availability and amount of prejudgment interest is not the end of the matter," but on remand, the district court must determine, under the applicable choice-of-law rules, which state law governs the availability and amount of interest. *Id.*

195. 476 F.3d 1261 (11th Cir. 2007).

196. 15 U.S.C. § 77k (2000).

197. 476 F.3d at 1267, 1277.

198. *Id.* at 1263-64. Premiere provided telecommunication services including voice messaging, conference calling, and telephone calling-card related services. *Id.*

199. *Id.* at 1264. For example, the plaintiffs did not (1) direct anyone to examine Premiere's key telephone calling card customers, (2) negotiate for specific warranties concerning the calling card business, or (3) direct anyone to perform due diligence concerning the technical capacity of the calling card business's software platform. The plaintiffs were also informed by Xpedite's former CEO that Premiere's contract and business dealings with a particular telephone calling card customer, DigiTEC 2000, Inc. ("DigiTEC"), were important to Premiere's revenues. However, the plaintiffs neither recalled performing any examination of the DigiTEC account, nor did they recall directing anyone to make contact with that company as part of the due diligence efforts. Further, although the plaintiffs believed Xpedite's due diligence team had access to Premiere's accounts receivable for the telephone calling card business, the plaintiffs did not review them personally or direct anyone else to do so. *Id.*

entered into a merger agreement with Premiere on November 13, 1997, and voted unanimously to recommend the merger to Xpedite shareholders. Premiere required the plaintiffs to execute stockholder agreements in which they granted irrevocable proxies to Premiere to vote their Xpedite stock in favor of the merger.[200] Premiere also required the plaintiffs to execute affiliate letters in which the plaintiffs warranted that they understood that Premiere was "under no obligation to file a registration statement with the [Securities and Exchange Commission ('SEC')] covering the disposition of [their] shares."[201]

More than two months later, on January 28, 1998, Premiere's registration statement for the Xpedite merger became effective. On February 27, 1998, a majority of Xpedite's and Premiere's shareholders voted to approve the merger. On June 9 and 10, 1998, Premiere announced that it would have a shortfall in its revenues and would take a charge against its bad debt reserve. The information in the announcement was not mentioned in the registration statement. On June 10, 1998, the price of Premiere stock dropped from $14.4375 per share to $10.375 per share.[202]

In November 1998 the plaintiffs filed suit against Premiere, asserting claims for breach of contract, negligent misrepresentation, and violations of several different provisions of the Securities Act. The plaintiffs claimed that the decline in stock price was the result of other false and misleading statements or omissions about Premiere's financial condition in the registration statement.[203] The plaintiffs alleged that these misstatements and omissions were material and violated section 11 of the Securities Act, which provides a cause of action for persons who acquire securities in reliance upon a false or misleading registration statement and creates a presumption of reliance that any person

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200. *Id.*

201. *Id.* at 1264-65 (brackets in original) (emphasis omitted) (internal quotation marks omitted). The affiliate letters set forth potential limitations on the transferability of the Premiere securities that the plaintiffs would receive upon consummation of the merger. *Id.* at 1264.

202. *Id.* at 1265. This drop in stock price constituted a "one-day decline of 28 percent and an overall decline of 69 percent from the merger price." *Id.*

203. The plaintiffs alleged that Premiere (1) overstated its prior acquisitions of, and attempts to integrate, two voice messaging businesses; (2) misrepresented the status and viability of a product; (3) failed to disclose that Premiere was experiencing dramatic declines in revenues from business relationships with two other entities, DigiTEC and Amway Corporation; and (4) "touted that Premiere had a 'strategy' to become 'the world's leading provider of network based enhanced personal communication services,' yet Premiere lacked sufficient internal controls and management capability to manage its growth and integrate its acquisitions," or to properly assess customer credit risks. *Id.*

acquiring such securities was legally harmed by the defective registration statement.[204]

The district court granted summary judgment to the defendants on some of the plaintiffs' Securities Act claims, finding that the plaintiffs lacked standing under the Securities Act because they acquired the securities through a private offering. The district court also granted summary judgment to the defendants on the plaintiffs' misrepresentation claims, concluding that the plaintiffs could not establish that they reasonably relied upon the alleged misrepresentations.[205] The plaintiffs appealed and set the stage for the first appeal, in which the Eleventh Circuit affirmed summary judgment for the defendants on the misrepresentation claims but reversed summary judgment on the lack of standing for the Securities Act claims, noting that "the securities had been obtained via an 'integrated' (and thus public) offering."[206] Notably, the court determined that the defendants did not make the related (and seemingly more attractive) argument that because the plaintiffs made their investment commitment before the issuance of the registration statement, the plaintiffs could not have relied upon the registration statement and should not be entitled to maintain their claims under section 11.[207]

Following remand to the district court, the defendants filed a renewed motion for summary judgment based on the Eleventh Circuit's discussion of the potential bar to the plaintiffs' section 11 claim alluded to in its prior opinion.[208] The district court granted the defendants' renewed motion, finding that "[i]n light of the timing of Plaintiffs' commitment and their sophistication and access to inside information, coupled with their failure to conduct meaningful due diligence," the plaintiffs were not within the class of individuals that the Securities Act intended to

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204. *Id.* at 1265, 1270-71 (citing 15 U.S.C. § 77k(a)).

205. *Id.* at 1266. The district court dismissed certain of the plaintiffs' Securities Act claims and their claims for breach of contract. *Id.*

206. *Id.* (quoting APA Excelsior III L.P. v. Premiere Techs., Inc., 122 F. App'x 985 (11th Cir. 2004)). The Eleventh Circuit initially concluded that the plaintiffs' negligent misrepresentation claims failed because the plaintiffs "failed to exercise reasonable due diligence despite the fact they knew or should have known of the general problems of which they complained." *Id.* Specifically, the court determined that the plaintiffs were on notice of the problems with Premiere integrating new acquisitions, the possibility of difficulties in launching several products, and Premiere's general business relationships with licensees; yet the plaintiffs failed to adequately investigate these problem areas. *Id.*

207. *Id.* The Eleventh Circuit stated that this impossibility of reliance concept might "'go to'" the actual merits of a section 11 claim, but because the defendants had not directly raised the issue, the court did not decide it at that point. *Id.* (quoting *APA Excelsior III L.P.*, 122 F. App'x at 16 n.9).

208. *Id.*

protect, and reliance on the allegedly defective registration statement was impossible under the facts of the case.[209] This second summary judgment ruling was at issue in the 2007 appeal.[210]

The Eleventh Circuit recognized that the issue for determination in this appeal, which involved application of the "commitment theory" under section 11, was one of first impression.[211] Under the commitment theory, once an investment decision is made and the parties are committed to the transaction, "'there is little justification for penalizing alleged omissions or misstatements which occur thereafter and which have no effect on the decision.'"[212] Examining the defendants' "impossibility of reliance" argument, the court first looked to the language of section 11 itself, which provides in pertinent part, as follows:

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209. *Id.* at 1266-67. In so holding, the district court relied on *Guenther v. Cooper Life Scis., Inc.*, 759 F. Supp. 1437 (N.D. Cal. 1990), which had been referenced in the Eleventh Circuit's prior opinion. *APA Excelsior III L.P.*, 476 F.3d at 1267.

210. *APA Excelsior III L.P.*, 476 F.3d at 1267.

211. *Id.* "As both the prior panel and district court acknowledged, and as the parties agree, hours of research have not uncovered any case directly on point." *Id.*

212. *Id.* (quoting SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 703-04 (D.D.C. 1978)). The defendants initially advanced a commitment theory argument in a motion to dismiss. The district court disagreed, finding the commitment theory to be inapplicable because the plaintiffs "did not irrevocably commit themselves to the acquisition of Premiere stock by executing the Stockholder Agreements." *Id.* at 1269 (internal quotation marks omitted). In so holding, the district court relied on a line of cases that stood for the general proposition that "in order for the commitment theory to apply, the investment decision and commitment must be irrevocable." *Id.* (citing Westinghouse Elec. Corp. v. '21' Int'l Holdings, Inc., 821 F. Supp. 212, 215-16 (S.D.N.Y. 1993)). The Eleventh Circuit noted that the "commitment theory applies once the investment decision is made and the parties are irrevocably committed to the transaction." *Id.* (citing *Westinghouse*, 821 F. Supp. at 215-16). The court noted that, in its prior decision, it had stated that the plaintiffs "made their investment commitment before the filing of the registration statement and, therefore, reliance on the registration statement would have been impossible." *Id.* The court also observed that the district court found on remand that these statements were not dicta, but instead the statements called the prior holding into question and therefore constituted new law of the case. *Id.* As the Eleventh Circuit observed, in light of this reading of its prior decision, the district court ruled that the plaintiffs made their investment decision and committed to purchase their shares prior to the issuance of the registration statement. *Id.* On appeal, the plaintiffs did not challenge the district court's decision other than to argue that "the timing of their commitment was 'irrelevant' for Section 11 purposes and that impossibility of reliance [was] no bar to their claim." *Id.* Because the plaintiffs did not raise this issue in their initial briefs, the court was not required to decide it. *Id.* Thus, the court accepted the prior panel's conclusion (and the district court's express holding on remand) that the plaintiffs made a binding investment commitment prior to the issuance of the registration statement. *Id.* The court then considered the effect of that holding on the disposition of the instant appeal. *Id.* at 1270.

> "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may [file suit], either at law or in equity, in any court of competent jurisdiction."[213]

Section 11 "creates a presumption that 'any person acquiring such security' was legally harmed by the defective registration statement."[214] Intentional or willful conduct is not required under section 11, and liability will attach even for "'innocent misstatements.'"[215] To recover under the statute, the plaintiff only has to show a material misstatement or omission in the registration statement and "be able to 'trace' the security he acquired to that defective statement."[216]

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213. *Id.* at 1271 (quoting 15 U.S.C. § 77k(a)).

214. *Id.* (quoting 15 U.S.C. § 77k(a) and citing Kirkwood v. Taylor, 590 F. Supp. 1375, 1377 (D. Minn. 1984)).

> The statute then sets out the post-twelve months earnings period requirements: "If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person."

Id. (quoting 15 U.S.C. § 77k(a)). Thus, the presumption of reliance "ends after an earnings statement which covers a period of at least twelve months after the effective date of the registration statement has become available." *Id.*; *accord* Barnes v. Osofsky, 373 F.2d 269, 272 (2d Cir. 1967); *see also* Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227 (S.D.N.Y. 1973). A section 11 plaintiff need not show he or she actually relied on the registration statement unless he or she acquired the security "'after the issuer has made generally available to its security holders an earnings statement covering a period of at least twelve months beginning after the effective date of the registration statement.'" *APA Excelsior III L.P.*, 476 F.3d at 1271 (quoting 15 U.S.C. § 77k(a)). This is because "'there is a conclusive presumption of reliance for any person purchasing the security prior to the expiration of twelve months.'" *Id.* (quoting 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 7.3[4], at 587 (4th ed. 2002)). Because the plaintiffs in the case at bar did not acquire their Premiere stock after the issuance of a twelve-month earnings statement, if the section 11 presumption applied, it would mean reliance is "conclusively presumed." *Id.*

215. *APA Excelsior III L.P.*, 476 F.3d at 1271 (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983)).

216. *Id.* (citing *Huddleston*, 459 U.S. at 382; *Barnes*, 373 F.2d at 273). In other words, the plaintiff "must show that the security was issued under, and was the direct subject of, the prospectus and registration statement being challenged." *Id.* (citing *Barnes*, 373 F.3d

The plaintiffs claimed that reliance was irrelevant because it is not an element of a section 11 claim. The plaintiffs also argued that because their Premiere stock was eventually issued under a defective registration statement and was not stock previously issued and already in the open market, they had established a prima facie case under section 11.[217] The Eleventh Circuit disagreed, holding that the plaintiffs' argument presupposes that the section 11 presumption applies in the first place, which it does not.[218] Because the concept of reliance was important to Congress in drafting section 11,[219] the court had to decide "whether Congress intended this presumption to apply (or whether a purchaser of security falls outside the reach and scope of the statute) when reliance is rendered impossible by virtue of a pre-registration commitment."[220]

Determining Congress did not so intend, the court held that the plaintiffs were not entitled to a presumption of reliance "in light of the timing of their investment decision and commitment."[221] The court stated, "[I]t would be illogical to cloak Plaintiffs with a presumption of reliance. Plaintiffs made their investment decision and were legally committed to the transaction (and thus could not possibly have relied on the registration statement) months before the registration statement was in existence."[222] The court determined that support in the legislative history of section 11, which revealed that Congress did not intend for the presumption of reliance to apply to a situation if there was a binding preregistration commitment.[223] Rather, "Congress assumed that only

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at 273).

217. *Id.* at 1271-73. The plaintiffs argued that section 11 "is the equivalent of a strict liability statute." *Id.* at 1272.

218. *Id.* at 1273. The court agreed with the plaintiffs to the extent that they argued reliance need not be proven; rather, "reliance is ordinarily *presumed*." *Id.* at 1272 (citing *Barnes*, 373 F.2d at 272). The court noted the exception that reliance would need to be proven in cases involving post-earnings statements. *Id.*

219. *Id.* at 1272. The court noted that "[t]he House Report accompanying the version of the bill that ultimately became the Securities Act explains that responsibility under Section 11 is enforced against 'those who purport to issue statements for the public's reliance.'" *Id.* (quoting H.R. REP. NO. 73-85, at 9 (1933)). The Court further noted,

> Congress made clear that the no-fault nature of Section 11 is specifically based on the legal principle that if one of two innocent persons must bear a loss, "he should bear it who has the opportunity to learn the truth and has allowed untruths to be published and *relied upon*. Moreover, he should suffer the loss who occupies a position of trust in the issuing corporation toward the stockholders, rather than the buyer of a stock who must *rely upon* what he is told."

Id. (emphasis added by the court) (quoting S. REP. NO. 73-47, at 5 (1933)).

220. *Id.*

221. *Id.* at 1273.

222. *Id.* (citing Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir. 1980)).

223. *Id.*

those who acquired their stock *after* the effective date of the registration statement would be affected by material defects."[224] The court also decided that the tracing requirements in section 11 that require a plaintiff to trace his or her stock to the defective registration statement to have standing and prevail on a section 11 claim reinforced the conclusion.[225] Thus, the court determined the presumption of reliance "should only apply to those who purchase securities at the time of or after the registration statement."[226]

Finally, the court reiterated that the plaintiffs were investors who "had access to a wide range of inside information and knew of the stock issuance months before the registration statement was filed."[227] The plaintiffs had the opportunity to learn, and were on notice, of the potential problems of which they complained.[228] Because the plaintiffs, "by virtue of their binding commitment decision, effectively 'purchased' their Premiere stock months before the registration statement was filed," the plaintiffs could not have purchased pursuant to the registration statement.[229] Thus, the court affirmed the district court's grant of summary judgment in favor of the defendants, holding that the section 11 presumption of reliance "does not apply in the limited and narrow situation where sophisticated investors participating in an arms-length corporate merger make a legally binding investment commitment months before the filing of a defective registration statement."[230]

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224. *Id.* The court determined Congress "simply eliminated the requirement that they must prove that they had read and relied upon the defective registration statement." *Id.* Section 11's presumption of reliance is justified "because, even though the purchaser may not read and rely on the registration statement, the misstatements and omissions contained therein are reasonably assumed to affect the market price." *Id.* at 1274 (citing H.R. REP. NO. 73-85, at 10).

225. *Id.* at 1276. If stock is purchased before a defective registration statement is issued, the purchaser necessarily falls outside the scope of section 11. *Id.* (citing *Barnes*, 373 F.2d at 273; Turner v. First Wis. Mortgage Trust, 454 F. Supp. 899, 911 (E.D. Wis. 1978)).

226. *Id.* at 1274 (citing H.R. REP. NO. 73-85, at 22). The court found further support for its conclusion in the post-earnings statement exception to the presumption, which "places the burden on the purchaser to show that he actually relied on the defective registration statement if an intervening earnings statement has been issued." *Id.* at 1275. "In other words, Congress made an exception to the Section 11 presumption when 'in all likelihood' the purchase decision was based on factors other than the registration statement." *Id.*

227. *Id.* at 1277.

228. *Id.*

229. *Id.* at 1276. The court pointed out that this was particularly true in the plaintiffs' case, given that no registration statement was even required for their shares under the affiliate letters. *Id.*

230. *Id.* at 1277.

VI. SOCIAL SECURITY

A. Whether the Doctrine of Equitable Tolling is Available to a Claimant Whose District Court Challenge to a Decision of the Commissioner of Social Security Is Barred by the Sixty-Day Statute of Limitations in 42 U.S.C. § 405(g)

In *Jackson v. Astrue*,[231] the Eleventh Circuit held that the doctrine of equitable tolling applied to the sixty-day statute of limitations in 42 U.S.C. § 405(g)[232] when a claimant failed to file her challenge to a decision of the Commissioner of Social Security (the "Commissioner") within that sixty-day period.[233] This code section provides for federal court review of administrative denials of applications for Supplemental Security Income ("SSI"), filed under Title XVI of the Social Security Act ("SSA").[234] The court also held, for the first time in a published opinion, that traditional equitable tolling principles require a claimant to justify an untimely filing by a showing of extraordinary circumstances.[235]

On August 31, 2004, the plaintiff Patricia Jackson applied for SSI benefits for injuries sustained in an automobile accident. On February 3, 2006, an administrative law judge ("ALJ") denied Jackson's petition on the ground that her injuries did not qualify as "disabilities" under the SSA. On April 21, 2006, the SSA's Appeals Council denied Jackson's request for review, at which point the ALJ's decision became final and subject to federal court review under § 405(g).[236] On that same day, the Appeals Council sent a letter to Jackson advising her of its denial of her request for review, wherein it advised Jackson "to file her complaint

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231. 506 F.3d 1349 (11th Cir. 2007).
232. 42 U.S.C. § 405(g) (2000).
233. 506 F.3d at 1353 (citing 42 U.S.C. § 405(g)).
234. *Id.* at 1351; 42 U.S.C. § 1383(c)(3) (2000).
235. *Jackson*, 506 F.3d at 1353.
236. *Id.* at 1351. Section 405(g) provides, in pertinent part, as follows:

> "Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia."

Id. at 1351 n.1 (quoting 42 U.S.C. § 405(g)).

in the United States District Court for the judicial district in which she lives within sixty days from the date of her receipt of the letter."[237] The Appeals Council's letter also informed Jackson that it would assume she received the letter "5 days after the date on it unless you show us that you did not receive it within the 5-day period."[238] According to the Appeals Council's letter and consistent with the sixty-day statute of limitations in § 405(g), Jackson was required to file her complaint in the United States District Court for the Middle District of Alabama on or before June 26, 2006.[239]

Instead, Jackson filed a pro se complaint on June 20, 2006, challenging the Commissioner's denial of her SSI claim in Alabama state court. On July 13, 2006, the state court dismissed Jackson's complaint for lack of jurisdiction. On July 18, 2006, twenty-two days after the sixty-day statute of limitations had expired, Jackson filed a complaint in the United States District Court for the Middle District of Alabama. The Commissioner successfully moved to dismiss Jackson's petition on the ground that the complaint was untimely.[240]

On appeal to the Eleventh Circuit, Jackson argued, this time through counsel, that the district court erred in dismissing her complaint because the doctrine of equitable tolling excused her untimely filing. Jackson argued that Congress explicitly intended for equitable tolling to apply to the SSA's statute of limitations.[241] Citing the SSA's permissive approach to equitable tolling, Jackson also challenged the district court's application of *Burnett v. New York Central Railroad Co.*,[242] a case concerning equitable tolling in the context of the Federal Employer's Liability Act ("FELA"),[243] to the facts of her case.[244]

The Eleventh Circuit agreed with Jackson and held that the doctrine of equitable tolling applied to § 405(g)'s statute of limitations.[245] However, the court further held that traditional equitable tolling principles required Jackson to justify her untimely filing by a showing of extraordinary circumstances.[246] These "extraordinary circumstanc-

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237. *Id.* at 1351-52 (internal quotation marks omitted).
238. *Id.* at 1352 (internal quotation marks omitted).
239. *Id.*
240. *Id.*
241. *Id.*
242. 380 U.S. 424 (1965).
243. 45 U.S.C. § 56 (2000).
244. *Jackson*, 506 F.3d at 1352.
245. *Id.* at 1353 (citing Bowen v. City of New York, 476 U.S. 467, 480 (1986)).
246. *Id.* (citing Waller v. Comm'r, 168 F. App'x 919, 921 (11th Cir. 2006) (per curiam)). The court cited the Supreme Court's opinion in *Bowen v. City of New York*, 476 U.S. 467 (1986), and stated "'that application of a traditional equitable tolling principle to the 60-day

es" may exist when "'the defendant misleads the plaintiff, allowing the statutory period to lapse; or when the plaintiff has no reasonable way of discovering the wrong perpetrated against her.'"[247] The court determined that requiring a claimant to justify equitable tolling of the SSA's statute of limitations by establishing extraordinary circumstances was fully consistent with its approach to equitable tolling in other contexts.[248]

In support of her equitable tolling argument, Jackson first alleged that she had shown "good cause" for her untimely filing as that term is defined in 20 C.F.R. § 416.1411.[249] The court rejected this argument because the good cause standard set forth in that regulation only applies in cases when a claimant requests the Appeals Council to extend the

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requirement of § 405(g) is fully consistent with the congressional purpose and is nowhere eschewed by Congress.'" *Jackson*, 506 F.3d at 1353 (quoting *Bowen*, 476 U.S. at 480).

247. *Jackson*, 506 F.3d at 1353 (quoting *Waller*, 168 F. App'x at 921). The court quoted with approval the Second Circuit's opinion in *Torres v. Barnhardt*, 417 F.3d 276 (2d Cir. 2005), which addressed the applicability of equitable tolling to § 405(g)'s statute of limitations and defined the claimant's burden as follows: "'[T]he doctrine of equitable tolling permits courts to deem filings timely where a litigant can show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way.'" *Jackson*, 506 F.3d at 1353 (brackets in original) (internal quotation marks omitted) (quoting Torres, 417 F.3d at 279)).

248. *Jackson*, 506 F.3d at 1354-55; *see* Cabello v. Fernández-Larios, 402 F.3d 1148, 1154 (11th Cir. 2005) (requiring plaintiffs to demonstrate that extraordinary circumstances prevented them from filing their claims within the ten-year statute of limitations under the Alien Tort Claims Act and the Torture Victim Protection Act, 28 U.S.C. § 1350 (2000)); *In re* Int'l Admin. Servs., Inc., 408 F.3d 689, 700 (11th Cir. 2005) (applying an extraordinary circumstances standard to tolling the statute of limitations under 11 U.S.C. § 546(a)(1) (2000)); Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 660 (11th Cir. 1993) (requiring claimants suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000), to justify equitable tolling of that statute's limitations period by a showing of extraordinary circumstances); Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (applying the extraordinary circumstances standard to claims brought under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2255 (2000) (amended 2008)).

249. *Id.* at 1355 (citing 20 C.F.R. § 416.1411 (2007)). This regulation provides as follows:

> "In determining whether you have shown that you have good cause for missing a deadline to request review we consider—(1) What circumstances kept you from making the request on time; (2) Whether our action misled you; (3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and (4) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review."

Id. at 1355 n.3 (quoting 20 C.F.R. § 416.1411(a)).

deadline for filing a complaint in federal district court.[250] Next, Jackson contended that her limited linguistic and legal experience made it impossible for her to understand that she was required to file her claims in district court.[251] Unpersuaded, the court held that the Appeals Council plainly instructed Jackson that she could file a civil action by filing a complaint in district court.[252] Moreover, the court noted that ignorance of the law did not satisfy the narrow and stringent "extraordinary circumstances" standard.[253]

Third, Jackson argued that the state clerk misled her by processing her case without objection, giving her the impression that she had filed her claim in a court of competent jurisdiction.[254] Disagreeing, the court noted it had previously held that "'to apply equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment.'"[255] Nothing in the record suggested the clerk or the Commissioner deliberately misled Jackson.[256]

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250. *Id.* at 1355 (citing 20 C.F.R. § 416.1482 (2007)). Section 416.1482 provides in relevant part:

> "Any party to the Appeals Council's decision or denial of review, or to an expedited appeals process agreement, may request that the time for filing an action in a Federal district court be extended . . . . The request must be filed with the Appeals Council, or if it concerns an expedited appeals process agreement, with one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411."

Id. at 1355 n.4 (alteration in original) (quoting 20 C.F.R. § 416.1482).

251. *Id.* at 1356.

252. *Id.* The court further noted that "the Appeals Council used words such as 'United States District Court,' 'U.S. Attorney,' 'Federal Rules of Civil Procedure,' and 'Attorney General of the United States, Washington, D.C.,' making it clearer still," in the Eleventh Circuit's opinion, that a civil action had to be filed in a federal court. *Id.*

253. *Id.* (citing Wakefield v. R.R. Ret. Bd., 131 F.3d 967, 970 (11th Cir. 1997); *Sandvik*, 177 F.3d at 1272; Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)).

254. *Id.*

255. *Id.* (quoting *Cabello*, 402 F.3d at 1155).

256. *Id.* The court clarified this point by noting that when no evidence of deliberate concealment exists, but the claimant nevertheless has been misinformed by a court's misleading actions or instructions, the court would equitably toll the relevant statute of limitations. *Id.* at 1356-57. The court cited as examples its decisions in *Spottsville v. Terry*, 476 F.3d 1241, 1245-46 (11th Cir. 2007), *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993), and *Washington v. Ball*, 890 F.2d 413, 415 (11th Cir. 1989) (per curiam), but noted that unlike the claimants in those cases, Jackson had not timely filed her challenge or a motion for an extension in the appropriate court. *Jackson*, 506 F.3d at 1356-57. In addition, she had not been misled by the clerk, and the clerk had not otherwise caused her filing error. *Id.*

Finally, Jackson argued that the district court improperly applied *Burnett* to the facts of her case.[257] In *Burnett* the United States Supreme Court held, in the FELA context, that "'when a plaintiff begins a timely FELA action in a state court having jurisdiction, . . . the FELA limitation is tolled during the pendency of the state suit.'"[258] The Eleventh Circuit interpreted *Burnett* as holding that a statute of limitations can be tolled only by a plaintiff who timely files in a state court "'with competent jurisdiction over his claim.'"[259] The state court in which Jackson filed suit was not a court with competent jurisdiction over Jackson's claim.[260] The court noted that it had numerous opportunities in the past to consider the applicability of equitable tolling to statutes other than FELA, and in each case it had determined that "'filing in a court without competent jurisdiction did not toll the statute of limitations.'"[261] Thus, while allowing equitable tolling of the sixty-day statute of limitations under § 405(g) in the proper circumstances, the Eleventh Circuit affirmed the district court's dismissal of Jackson's complaint, holding that Jackson's failure to demonstrate extraordinary circumstances, such as fraud, misinformation, or deliberate concealment, prevented her from timely filing her § 405(g) case in the district court.[262]

VII. CONCLUSION

The 2007 survey period yielded several noteworthy decisions, many of which involved issues of first impression in the Eleventh Circuit. While this Survey is not intended to be exhaustive, the Authors have attempted to provide material that will be useful to practitioners by providing

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257. *Jackson*, 506 F.3d at 1357.

258. *Id.* (quoting *Burnett*, 380 U.S. at 434-35).

259. *Id.* (quoting Hairston v. Travelers Cas. & Sur. Co., 232 F.3d 1348, 1352 (11th Cir. 2000)).

260. *Id.* (citing 42 U.S.C. § 405(g)). In Jackson's case, it was undisputed that § 405(g) made federal courts the exclusive forum in which claimants may challenge final decisions of the Commissioner. *Id.*

261. *Id.* at 1357-58 (quoting *Hairston*, 232 F.3d at 1353 (holding that filing a claim under the National Flood Insurance Program, 42 U.S.C. § 4072 (2000), in a state court that lacked competent jurisdiction did not toll the statute of limitations)); Bailey v. Carnival Cruise Lines, Inc., 774 F.2d 1577, 1579-81 (11th Cir. 1985) (holding that filing a claim under the Death on High Seas Act, 46 U.S.C. §§ 761-769(c) (repealed 1986), in a state court lacking competent jurisdiction did not toll the statute of limitations); United States *ex rel.* Harvey Gulf Int'l Marine, Inc. v. Md. Cas. Co., 573 F.2d 245, 247 (5th Cir. 1978) (holding that filing a claim under the Miller Act, 40 U.S.C. § 270(b) (2000), in a state court without competent jurisdiction did not toll the statute of limitations).

262. *Jackson*, 506 F.3d at 1358.

relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.