Trial Practice and Procedure

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I. INTRODUCTION

The 2008 survey period yielded several noteworthy decisions in the United States Court of Appeals for the Eleventh Circuit relating to federal trial practice and procedure, several of which involved issues of first impression. This Article analyzes recent developments in the Eleventh Circuit, including significant rulings in the areas of statutory interpretation, civil procedure, arbitration, appellate jurisdiction, and other issues of interest to the civil trial practitioner.

II. REMOVAL

A. Determining Whether, in Multi-Defendant Litigation, the Limitations Period for Removal Expires Thirty Days From Service on the "First-Served" or "Last-Served" Defendant Under 28 U.S.C. § 1446(b)

In *Bailey v. Janssen Pharmaceutica, Inc.*,[1] the Eleventh Circuit held, as a matter of first impression, that in multi-defendant litigation, the limitations period for removal expires thirty days after service on the "last-served" defendant under 28 U.S.C. § 1446(b).[2] Plaintiff-appellant Lori Jo Bailey, as administrator of the estate of decedent Chad Edgar

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1. 536 F.3d 1202 (11th Cir. 2008).
2. *Id.* at 1203; 28 U.S.C. § 1446(b) (2006).

Beal, brought a wrongful death action in Florida state court on behalf of Beal, who died from a lethal dose of a pain narcotic from a transdermal skin patch that was manufactured, distributed, and sold by the defendants Alza Corporation (Alza), Janssen Pharmaceutica, Inc. (Janssen), and Walgreen Company (Walgreen), respectively. Alza and Janssen were subsidiaries of the defendant, Johnson & Johnson, Inc. (J&J). The first defendant served in the state court action was Walgreen, served on May 12, 2006. Alza was served on May 15, 2006, and Janssen was served on May 19, 2006. J&J was served on June 22, 2006. On July 24, 2006, J&J, the last-served defendant, filed a notice of removal of the state court action pursuant to 28 U.S.C. § 1446(b).[3]

After the action was removed to the United States District Court for the Southern District of Florida, Beal sought remand. Beal argued that under § 1446(b), the time for filing a notice of removal ran from the date of service on the first defendant—here, Walgreen on May 12, 2006—and that J&J's notice was not timely filed within thirty days of the May 12 service.[4] The district court denied Beal's motion to remand and adopted the "last-served" defendant rule, which permits *each* defendant to file a timely motion for removal within thirty days of service.[5] Under the "last-served" rule, earlier-served defendants who fail to timely file a notice of removal may consent to a timely motion by a later-served defendant.[6] Because J&J's notice of removal was filed within thirty days of service, the district court found that it was timely.[7] Beal appealed, challenging the district court's denial of the motion to remand.[8]

The Eleventh Circuit affirmed, first looking to the language of 28 U.S.C. § 1446,[9] which provides that: "'[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by

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3. *Bailey*, 536 F.3d at 1203-04. The removal was based on complete diversity of citizenship. *Id.* at 1204.

4. *Id.* at 1204. Under Beal's argument, the time for removal would have expired before J&J even received service of process. *Id.* n.2.

5. *Id.* at 1204.

6. *Id.*

7. *Id.* The district court also found that all the defendants had consented to J&J's notice of removal. *Id.*

8. *Id.* at 1203. The district court denied Beal's motion to remand and granted the defendants' motions to dismiss with prejudice. *Id.* The Eleventh Circuit determined that it had jurisdiction to consider the denial of the motion to remand because the district court had entered a final order dismissing Beal's complaint with prejudice. *Id.* at 1204.

9. 28 U.S.C. § 1446(a) (2006). This section "describes the appropriate removal procedure to invoke federal jurisdiction, and requires the defendant seeking removal to file a timely notice of removal stating the grounds for removal with the appropriate federal district court." *Bailey*, 536 F.3d at 1204 (citing 28 U.S.C. § 1446(a)).

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.'"[10] Noting that § 1446(b) does not expressly address multi-defendant litigation,[11] the court noted that "[i]n applying the statute to multi-defendant litigation, courts ha[d] split over whether each individual defendant ha[d] a right to seek removal within thirty days of receipt of service or whether the appropriate time window for § 1446(b) runs from receipt of service by the first-served defendant only."[12] Beal urged the court to adopt the "first-served" rule and hold that J&J's notice of removal was untimely because it was filed more than thirty days after service on the first defendant.[13] In rejecting Beal's argument, the Eleventh Circuit adopted the last-served rule, interpreting § 1446(b) to permit each defendant thirty days in which to seek removal.[14]

The Eleventh Circuit first observed that "the trend in recent case law favors the last-served defendant rule."[15] Of the four circuit courts that

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10. *Bailey*, 536 F.3d at 1204-05 (alteration in original) (quoting 28 U.S.C. § 1446(b)). Citing the United States Supreme Court's holding in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48, (1999), the Eleventh Circuit noted "that the time window in § 1446(b) 'is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, through service or otherwise, after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.'" *Bailey*, 536 F.3d at 1205 (quoting *Murphy Bros.*, 526 U.S. at 348).

11. *Bailey*, 536 F.3d at 1205. "'[T]he statutory language itself contemplates only one defendant and thus does not answer the question of how to calculate the timing for removal in the event that multiple defendants are served at different times, one or more of them outside the original 30-day period.'" *Id.* (quoting Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 532 (6th Cir. 1999)).

12. *Id.* (". . . in other words, whether the 'first-served' or 'last-served' defendant triggers § 1446(b)'s limitations period"). The court also noted that leading commentators had split on this issue, pointing out that in the United States Court of Appeals for the Sixth Circuit's opinion in *Brierly*, the court observed "that at the time it decided to endorse the last-served . . . rule, the two leading treatises, Wright & Miller and Moore's, came to divergent conclusions on [that] issue." *Id.* at 1205 n.3 (citing *Brierly*, 184 F.3d at 532 n.2)).

13. *Id.* at 1205.

14. *Id.* The court noted that while it was using the familiar "last-served" and "first-served" nomenclature,

> it may be more in keeping with our interpretation of the rule to think of the "last-served" defendant rule as the "each defendant" rule. In other words, the statute should be read to permit each defendant, whether first or last served or somewhere in between, thirty days within which to file a notice of removal upon receipt of service.

Id. at 1205 n.4.

15. *Id.* at 1205 ("'More recently, however, the trend in the case law has been toward the later-served rule. The Sixth and the Eighth Circuits, several district courts in this circuit and a court in this district have followed the later served rule.'" (quoting General

had considered the issue, only the United States Courts of Appeals for the Fifth[16] and the Fourth Circuits[17] had adopted the first-served rule.[18] The Eleventh Circuit noted that the Fourth and Fifth Circuit cases adopting the first-served rule were distinguishable from the case at bar[19] and that the most recent of those decisions was more than fifteen years old.[20] In contrast, the court noted that the two circuit courts that adopted the last-served rule had "done so far more recently: the Eighth Circuit in 2001,[21] and the Sixth Circuit in 1999."[22]

The Eleventh Circuit also observed that "both common sense and considerations of equity favor the last-served defendant rule."[23] Both the Eighth[24] and Sixth Circuits[25] had endorsed the last-served rule for

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Pump & Well, Inc. v. Laibe Supply Corp., No. CV-607-30, 2007 WL 3238721, at *2 (S.D. Ga. Oct. 31, 2007)).

16. *Id.* at 1206 ("'The general rule . . . is that if the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove. . .due to the rule of unanimity among defendants which is required for removal.'" (ellipsis in original) (quoting Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986)). "'In cases involving multiple defendants, the thirty-day period begins to run as soon as the first defendant is served.'" (quoting Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262-63 (5th Cir. 1988))).

17. *Id.* (citing McKinney v. Bd. of Trustees of Md. Comty. Coll., 955 F.2d 924, 926 & n.3 (4th Cir. 1992)). The Eleventh Circuit noted that the Fourth Circuit's decision in *McKinney*

> endorsed the first-served rule, but in dicta. . . . The actual issue in *McKinney*, however, was whether a later-served defendant has thirty days after effective service to join in a timely petition for removal filed within thirty days of the first-served defendant. The petition for removal was filed within thirty days of the first-served defendant in *McKinney*, but a later-served defendant did not join the notice within the original thirty-day window. The [Fourth Circuit] held that each individual defendant has thirty days in which to join a timely filed notice of removal.

Id. at 1206 n.5 (citing *McKinney*, 955 F.2d at 926-28).

18. *Id.* at 1205-06. The courts adopting the first-served rule "held that a notice of removal is only timely if it is filed within thirty days of service of process on the first defendant." *Id.*

19. *Id.* at 1206.

20. *Id.* n.6.

21. *Id.* at 1206 (citing Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753, 755 (8th Cir. 2001)).

22. *Id.* (citing *Brierly*, 184 F.3d at 533).

23. *Id.*

24. *Id.* at 1207.

> "[The Fifth Circuit] did not consider, however, the 'hardships' to a defendant when the first-served defendant for whatever reason does not file a notice of removal within thirty days of service. Later-served defendants would not be afforded the opportunity to attempt to persuade their co-defendants to join a notice of removal if more than thirty days had passed since the first defendant was served."

equitable reasons, and the Eleventh Circuit was persuaded by the Sixth Circuit's holding that the "first-served" rule improperly requires reading the term "first-served defendant" into the statute.[26]

The Eleventh Circuit was

> unpersuaded by the rationale behind the first-served rule [because] [t]hose courts that have endorsed the first-served rule have generally done so for two reasons: (1) it is perceived as more consistent with the unanimity rule for notices of removal; and, (2) courts are to narrowly construe the removal statute and federal jurisdiction.[27]

The Eleventh Circuit reasoned that the last-served rule is consistent with the rule of unanimity[28] because earlier-served defendants could choose to join in a later-served defendant's motion.[29] The court also noted that

> [t]he unanimity rule alone does not command that a first-served defendant's failure to seek removal necessarily waives an unserved defendant's right to seek removal; it only requires that the later-served defendant receive the consent of all then-served defendants at the time he files his notice of removal.[30]

The Eleventh Circuit also rejected the argument that a strict construction of the removal statute required it to endorse the first-served rule.[31] Instead, the court agreed with the Eighth Circuit's prediction that the United States Supreme Court would endorse the last-served rule because it recognizes that individual defendants are not required to take action until they are properly served.[32] The court held as follows:

Id. (alteration in original) (quoting *Marano*, 254 F.3d at 755).

25. *Id.* ("noting that 'as a matter of fairness to later-served defendants' it endorsed the last-served rule" (quoting *Brierly*, 184 F.3d at 533)).

26. *Id.* at 1206-07 ("'[A]s a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert first before defendant into the language of the statute. We are naturally reluctant to read additional words into the statute, however.'" (quoting *Brierly*, 184 F.3d at 533)).

27. *Id.* at 1207.

28. *Id.* ("The unanimity rule requires that all defendants consent to and join a notice of removal in order for it to be effective." (citing Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1050 (11th Cir. 2001))).

29. *Id.* The court noted that this "preserv[ed] the rule that a notice of removal must have the unanimous consent of the defendants." *Id.*

30. *Id.*

31. *Id.* In *Murphy Bros.*, 526 U.S. at 347-48, the Supreme Court "rejected using simple notice or constructive service to start the clock on [the] § 1446(b) time window." *Bailey*, 536 F.3d at 1207 n.7 (citing *Murphy Bros*., 526 U.S. at 347-48).

32. *Bailey*, 536 F.3d at 1207-08. The Eighth Circuit in *Marano* observed that

> [The Supreme Court's holding in] *Murphy Brothers* supports the last-served defendant rule because a defendant has no obligation to participate in any removal procedure prior to his receipt of formal service of judicial process. Contrary to *Murphy Brothers*, the first-served defendant rule would obligate a defendant to seek removal prior to his receipt of formal process bringing him under the court's jurisdiction.[33]

Determing that it would be "contrary to the Supreme Court's holding in *Murphy Brothers*, as well as the interests of equity, to permit a first-served defendant to . . . bind later-served defendants to a state court forum when those defendants could have sought removal had they been more promptly served by the plaintiff," the Eleventh Circuit adopted the last-served rule—which permits each defendant, upon formal service of process, thirty days to file a notice of removal—as the most reasonable interpretation of § 1446(b).[34] The court held this interpretation to be consistent with Supreme Court precedent and the "tide of recent decisions by the courts of appeals, as well as the majority of the district courts in this Circuit [which] recognize that equity favors permitting

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> [t]he [Supreme] Court [in *Murphy Brothers*] held that formal process is required, noting the difference between mere notice to a defendant and official service of process: "An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." Thus, a defendant is "required to take action" as a defendant—that is, bound by the thirty-day limit on removal—"only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend." The Court essentially acknowledged the significance of formal service to the judicial process, most notably the importance of service in the context of the time limits on removal.

Id. at 1208 (second and third alterations in original) (quoting *Marano*, 254 F.3d at 756).

33. *Id.* at 1208.

> As the Eighth Circuit observed, the last-served defendant rule is consistent with *Murphy Brothers*, in which the Supreme Court held that a defendant has no obligation to engage in litigation prior to his receipt of formal service of process. *Murphy Brothers* also signals a slight departure from the weight courts might ordinarily put on strict construction of the removal statute.

Id.

34. *Id.*

each defendant thirty days in which to seek removal under the statute."[35]

III. STATUTORY INTERPRETATION

A. Whether the Federal Arbitration Act Permits Enforcement of a Contract Clause Requiring an Aggrieved Party Before Filing a Lawsuit, to Institute Mediation or Nonbinding Arbitration

The interlocutory appeal in *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*[36] required the Eleventh Circuit to decide whether the Federal Arbitration Act (FAA)[37] permits enforcement of a contractual provision which requires an aggrieved party to institute mediation or nonbinding arbitration before filing a lawsuit.[38] In concluding that it does not, the court affirmed an order from the United States District Court for the Southern District of Florida denying the defendant-appellant's motion to stay pending arbitration pursuant to § 3 of the FAA.[39] Because the court held that FAA remedies, including mandatory stays and motions to compel, may not be invoked to compel mediation, the court limited its holding and "reserve[d] for another day [the question of] whether *non-binding* arbitration is within the scope of the FAA."[40]

Advanced Bodycare International (ABI) and Thione International, Inc. (Thione) were parties to a contract that granted ABI exclusive rights to market and distribute Thione's nutritional supplements and related "testing kits."[41] The contract contained a dispute resolution provision that provided in pertinent part the following:

> If any dispute arises between the parties relating to the interpretation, breach[,] or performance of this Agreement . . . and the parties cannot resolve the dispute within thirty (30) days of a written request by either party to the other party, the parties agree to hold a meeting . . . to attempt in good faith to negotiate a resolution of the dispute prior to pursuing other available remedies. If within sixty (60) days after such written request, the parties have not succeeded in negotiating a

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35. *Id.* at 1208-09. *See, e.g.*, *General Pump & Well, Inc.*, 2007 WL 3238721, at *2 (adopting last-served defendant rule).

36. 524 F.3d 1235 (11th Cir. 2008).

37. 9 U.S.C. §§ 1-307 (2006).

38. *Advanced Bodycare Solutions*, 524 F.3d at 1236.

39. *Id.*; 9 U.S.C. § 3 (2006).

40. *Advanced Bodycare Solutions*, 524 F.3d at 1241 ("We merely hold that the mandatory remedies of the FAA may not be invoked to compel mediation.").

41. *Id.* at 1236. The testing kits purportedly monitored the amount of free radical cells in the body. *Id.*

> resolution of the dispute, such dispute shall be submitted to non-binding arbitration or mediation with a mutually agreed upon, independent arbitrator or mediator. . . . If no resolution acceptable to both parties is reached through arbitration or mediation, either party may resort to instituting legal action against the other in court and all rights and remedies of the party shall be preserved in such action.[42]

Pursuant to the contract, Thione shipped testing kits to ABI, which ABI found to be defective. Thione acknowledged a manufacturing defect and shipped replacement units to ABI, although not enough to replace all of the defective kits. ABI sued Thione in Florida state court, asserting breach of contract and related state law claims based on the defective test kits. ABI did not seek arbitration or mediation prior to filing suit. Thione removed the action to the United States District Court for the Southern District of Florida and moved to stay the case pending arbitration pursuant to section 3 of the FAA. The district court denied Thione's motion to stay and Thione appealed.[43]

ABI urged the Eleventh Circuit to dismiss the appeal for lack of jurisdiction, contending that there was no appealable order because the FAA's interlocutory appeal provision[44] only authorizes appeal of "'an order refusing a stay of any action under section 3 [of the FAA],' and a § 3 stay is available only where suit is brought upon an issue [that is] 'referable to arbitration.'"[45] ABI argued that its lawsuit was not "'referable to arbitration' because mediation and non-binding arbitration [were] not enforceable under the FAA."[46] Thus, ABI claimed that Thione's motion to stay was not proper under section 3 "because the contract does not require 'arbitration' within the meaning of the FAA."[47]

Disagreeing with ABI, the Eleventh Circuit held that it had jurisdiction to consider the appeal because the parties had entered into an agreement which called for nonbinding arbitration.[48] Because the court held that Thione had made a colorable claim that there was an "agreement to arbitrate," a section 3 stay could be proper.[49] The court

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42. *Id.* at 1237 (alteration in original) (internal quotation marks omitted).

43. *Id.*

44. *See* 9 U.S.C. § 16(a)(1)(A) (2006).

45. *Advanced Bodycare Solutions*, 524 F.3d at 1237 (first alteration in original) (quoting 9 U.S.C. § 3).

46. *Id.* at 1237-38.

47. *Id.* at 1238.

48. *Id.*

49. *Id.* The court held that Thione's nonfrivolous claim that the parties had an agreement to arbitrate, coupled with Thione's nonfrivolous motion for a stay pending arbitration (which was denied), was sufficient to confer appellate jurisdiction. *Id.* (citing

then turned to the merits, which required it to "decide if a contract under which disputes 'shall be submitted to non-binding arbitration or mediation' is an agreement 'to settle by arbitration a controversy,' thereby making the dispute 'referable to arbitration'" pursuant to the FAA.[50] The court acknowledged that if the dispute was "referable to arbitration," then entry of a stay would have been mandatory pursuant to section 3 of the FAA and the district court would have erred in denying the stay.[51]

The Eleventh Circuit first observed that the contract required "mediation or non-binding arbitration" and "contain[ed] no conditions requiring that one or the other procedure be invoked in certain circumstances."[52] Having found no precedent on this point, the court concluded that if mediation or nonbinding arbitration was not "arbitration" under the FAA, then the dispute resolution provision was not enforceable under the FAA.[53] The court stated,

> When an aggrieved party has an unconditional right to choose between two or more dispute resolution procedures, and one of them is not FAA arbitration, the contract is not one 'to settle by arbitration a controversy.'[54] This is merely an application of the principle that arbitration is a creature of contract; a party may not be compelled to arbitrate if he did not agree to do so.[55] When an aggrieved party may satisfy his contractual duties under a dispute resolution clause without undertaking arbitration, he has not obligated himself to settle the dispute by arbitration.[56]

Thus, the court held that if mediation or nonbinding arbitration was not "arbitration" under the FAA, it must affirm the order denying the stay.[57]

Omni Tech Corp. v. MPC Solution Sales LLC, 432 F.3d 797, 800 (7th Cir. 2005)). The court also determined this to be consistent with the treatment of jurisdictional allegations in a complaint, noting that "[a] complaint alleging a colorable federal cause of action confers district court jurisdiction even if the complaint is ultimately dismissed for failure to state a claim." *Id.*

50. *Id.* (quoting 9 U.S.C. §§ 2, 3).

51. *Id.* (citing Klay v. Pacificare Health Sys., Inc., 389 F.3d 1191, 1204 (11th Cir. 2004)).

52. *Id.*

53. *Id.*

54. *Id.* (quoting 9 U.S.C. § 2).

55. *Id.* (citing *Klay*, 389 F.3d at 1201).

56. *Id.* (citation omitted).

57. *Id.*

The court then addressed the issue of whether mediation is "arbitration" as contemplated by the FAA.[58] Noting that the FAA does not define "arbitration" and that "courts have had a difficult time defining just what types of procedures are enforceable under the [FAA],"[59] the court acknowledged that it "has not enunciated a test for resolving whether a particular dispute resolution procedure is FAA 'arbitration.'"[60] The court noted that "[o]ne widely-followed opinion asks whether the parties have agreed to submit a dispute to a third party for a decision,"[61] while "[o]ther authorit[ies] consider[ed] how closely the procedure chosen resemble[d] 'classic arbitration' and whether enforcing it serve[d] the [FAA's] purpose."[62] In harmonizing these authorities, the Eleventh Circuit held that

> when there is a dispute about whether any particular dispute resolution method chosen in a contract is FAA arbitration, we will look for the "common incidents" of "classic arbitration," including (i) an independent adjudicator, (ii) who applies substantive legal standards (*i.e.*, the parties' agreement and background contract law), (iii) considers evidence and argument (however formally or informally) from each party, and (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief. The presence or absence of any one of these circumstances will not always be determinative, and parties have great flexibility under the FAA to select pre-packaged dispute resolution procedures, or to craft their own.[63]

Acknowledging "that there are few clear rules in delineating the bounds of FAA arbitration," the court held that the FAA "clearly presumes that arbitration will result in an 'award' declaring the rights and duties of the parties."[64] Thus, "[i]f a dispute resolution procedure does not produce some type of award that can be meaningfully con-

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58. *See id.*

59. *Id.* The court noted that this issue merited "close scrutiny" because "doubts about arbitrability are resolved in favor of arbitration . . . and because a few district courts have decided on that basis that mediation contracts are enforceable under the FAA." *Id.* at 1238-39 (citing Fisher v. GE Med. Sys., 276 F. Supp. 2d 891 (M.D. Tenn. 2003); C.B. Richard Ellis, Inc. v. Am. Envtl. Waste Mgmt., No. 98-CV-4183(JG), 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998)).

60. *Id.* at 1239.

61. *Id.* (citing AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (S.D.N.Y. 1985)).

62. *Id.* (citing Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 689-90 (10th Cir. 2004); Fit Tech, Inc. v. Bally Total Fitness Holding Corp., 374 F.3d 1, 6-7 (1st Cir. 2004)).

63. *Id.* (citation omitted).

64. *Id.*

firmed, modified, or vacated by a court upon proper motion, it is not arbitration within the scope of the FAA."[65] Accordingly, the court concluded that mediation is not within the FAA's scope and issued the following holding:

> Simply stated, mediation does not resolve a dispute, it merely helps the parties do so. In contrast, the FAA presumes that the arbitration process itself will produce a resolution independent of the parties' acquiescence—an award which declares the parties' rights and which may be confirmed with the force of a judgment. That a typical mediation produces no award is highly probative evidence that an agreement to mediate a dispute is not "an agreement to settle by arbitration a controversy."[66] Parties to a mediation contract have not "agreed to submit a dispute for decision by a third party,"[67] because the third party makes no decision.
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> In short, because the mediation process does not purport to adjudicate or resolve a case in any way, it is not "arbitration" within the meaning of the FAA. Accordingly, FAA remedies, including mandatory stays and motions to compel, are not appropriately invoked to compel mediation. Further, a dispute resolution clause that may be satisfied by arbitration *or* mediation, at the aggrieved party's option, is not "an agreement to settle by arbitration a controversy" and thus is not enforceable under the FAA either.[68]

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65. *Id.* The court was careful to note that

> [t]he inverse is not true, however. The presence of an award does not by itself make a procedure "arbitration" if the procedures that produce the award bear no resemblance to classic arbitration. The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA.

Id. at 1239 n.3.

66. *Id.* (quoting 9 U.S.C. § 2).

67. *Id.* at 1240 (quoting *AMF Inc.*, 621 F. Supp. at 460).

68. *Id.* The court emphasized the limited nature of its ruling and reiterated that its holding should not be read as denigrating mediation. *Id.* at 1241. Rather, the court "encourage[d] district courts to liberally employ any authority they have under local rules to order mediation sua sponte when doing so may expedite the resolution of a case." *Id.* The court also emphasized what it had not held, which was that agreements to mediate were per se unenforceable. *Id.* Further, the court also "emphasize[d] that [it does] not hold that stays in aid of mediation are per se impermissible. To the contrary, district courts have inherent, discretionary authority to issue stays in many circumstances, and granting a stay to permit mediation (or to require it) will often be appropriate." *Id.* at 1241 (footnote omitted).

Because the court decided the case on this basis, it limited its holding accordingly and "reserve[d] for another day [the question of] whether *non-binding* arbitration is within the scope of the FAA."[69]

B. Whether Injunctive Relief and Equitable Relief, Such as Restitution or Disgorgement, are Available Remedies to Private Litigants Under the Truth In Lending Act

In *Christ v. Beneficial Corp.*,[70] the Eleventh Circuit held that injunctive relief and other equitable relief, such as restitution or disgorgement, are not available remedies to private litigants under the Truth In Lending Act (TILA).[71] Accordingly, the court vacated a class certification order conditionally certifying an award of injunctive relief, and more than $22 million awarded to the plaintiff class for restitution or disgorgement.[72]

The plaintiff, Kenneth R. Christ, Jr., sued his lender, Beneficial Florida, Inc. (BFI) and several affiliated corporations in the United States District Court for the Middle District of Florida for alleged violations of the TILA. Christ alleged that BFI listed a fee for nonfiling insurance (NFI)[73] in the wrong column of a TILA disclosure form.[74] Christ's complaint sought actual damages, statutory damages, a permanent injunction prohibiting the practice of purchasing NFI and charging NFI premiums, a declaratory judgment, an accounting, and disgorgement. The judicial panel on multi-district litigation (MDL)

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69. *Id.* at 1240-41 ("We merely hold that the mandatory remedies of the FAA may not be invoked to compel mediation.").

70. 547 F.3d 1292 (11th Cir. 2008).

71. *Id.* at 1300; 15 U.S.C. §§ 1601-67 (2006).

72. *Christ*, 547 F.3d at 1294.

73. *Id.* at 1294-95. The court explained,

> Non-filing insurance is sometimes purchased by lenders in lieu of filing a Form UCC-1 Financing Statement. Instead of filing a UCC-1 to perfect its interest in the collateral, the lender purchases NFI to ensure against the risk that another creditor will obtain priority over the lender's interest in the collateral. . . . In either case—whether perfecting or insuring its security in the borrower's collateral—the lender usually passes the cost of filing the UCC-1 or paying an insurance premium on to the borrower.

Id. at 1295 n.1.

74. *Id.* at 1295. Christ

> claimed that the NFI premium should have been disclosed in the "Finance Charge" column of the [TILA] disclosure form rather than the "Amount Charged" column because (1) the NFI premium was not for "insurance," and . . . (2) even if the NFI premium was for insurance, it was not for non-filing insurance.

Id.

transferred the case to the Middle District of Alabama for consolidated pretrial proceedings with similar cases.[75]

After transfer, Christ "moved under Federal Rule of Civil Procedure 23(b)(2)[[76]] for certification of a nationwide class of borrowers who were charged [the] NFI fee by any of [BFI's] consumer lending subsidiaries."[77] Christ also sought a declaration under the Declaratory Judgment Act (DJA)[78] that the defendants violated the TILA disclosure requirements based on the disclosures of the NFI premiums. The MDL court conditionally certified an injunction class under Rule 23(b)(2), naming Christ as the class representative.[79] The MDL court also held that "'[i]njunctive and declaratory relief are available under TILA,' and that 'it is TILA, not state law, that determines what may be charged and disclosed as an amount financed, as opposed to a finance charge.'"[80] The MDL court granted summary judgment to the plaintiff class on the TILA claims and remanded the case to the district court.[81]

Following remand, the district court conducted a bench trial on damages, at which time class counsel withdrew its demand for statutory damages and conceded that class members were not entitled to actual damages because there was no detrimental reliance as required by the TILA.[82] This left only the question of whether the plaintiffs were entitled to restitution or disgorgement damages.[83] The district court, "invoking the [DJA], . . . awarded to the plaintiff class injunctive relief and over $22 million as restitution or disgorgement of the NFI fees."[84] The defendants appealed.[85]

The Eleventh Circuit vacated the orders certifying the class of plaintiffs, awarding injunctive relief, and awarding restitution or disgorgement.[86] First, the Eleventh Circuit noted that the district court

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75. *Id.*

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

77. *Christ*, 547 F.3d at 1295.

78. 28 U.S.C. § 2201 (2006).

79. *Christ*, 547 F.3d at 1295-96. Christ was certified as the representative of a class of "'all persons in the United States who were charged a fee for non-filing insurance by one of [BFI's subsidiaries] at any time from May 19, 1994 to the present.'" *Id.* at 1296 (quoting *In re* Consol. Non-Filing Ins. Fee Litig., 195 F.R.D. 684, 695 (M.D. Ala. 2000)).

80. *Id.* at 1296 (alteration in original) (quoting *In re* Consol. Non-Filing Ins. Fee Litig., 195 F.R.D. at 692, 693).

81. *Id.*

82. *Id. See* Turner v. Beneficial Corp., 242 F.3d 1023, 1024 (11th Cir. 2001) (en banc) (holding that detrimental reliance is an element of a TILA claim for actual damages).

83. *See Christ*, 547 F.3d at 1296.

84. *Id.*

85. *Id.*

86. *Id.*

had certified the "class of plaintiffs under Rule 23(b)(2), which provides for such a class only if the defendant has 'acted . . . on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'"[87] The Eleventh Circuit noted that "TILA does not expressly provide for private injunctive relief, but neither does it expressly preclude it."[88] The district court had "inferred from TILA's silence that TILA provides private injunctive relief."[89] The Eleventh Circuit disagreed, noting that "[t]he parameters of relief available to private litigants . . . include actual damages, statutory damages, and attorney's fees and costs."[90] The court reasoned that "[w]here Congress has provided a comprehensive statutory scheme of remedies, as it did [in TILA], the interpretative canon of *expressio unius est exclusio alterius* applies,"[91] and that "[b]ecause we do not expect Congress to 'expressly preclude' remedies, we do not read TILA to confer upon private litigants an implied right to an injunction or other equitable relief such as restitution or disgorgement."[92] Because the court determined that injunctive relief is not a remedy available under TILA to Christ or the plaintiff class, the court held that the Rule 23(b)(2) class certification under TILA was improper.[93]

The Eleventh Circuit then turned to the district court's order awarding the plaintiff class $22 million under the DJA as "'restitution or

87. *Id.* (ellipsis in original) (quoting FED. R. CIV. P. 23(b)(2)).

88. *Id.*

89. *Id.*

90. *Id.* at 1297 (footnote omitted) (citing 15 U.S.C. § 1640(a) (2006)). The court further noted that "TILA [expressly] permits certain other forms of relief for specific types of loans." *Id.* For instance, TILA provides that "private litigants with loans subject to the Home Ownership and Equity Protection Act may seek the recovery of finance charges, and private litigants with loans secured by real property used as a principal dwelling may seek the remedies of rescission and restitution." *Id.* (citing 15 U.S.C. §§ 1635(a)-(b), 1640(a)(4) (2006)).

91. *Id.* at 1298 ("'The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)); "'It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979))).

92. *Id.* (citing Perrone v. GMAC, 232 F.3d 433, 439 (5th Cir. 2000)).

93. *Id.* The court held that "Christ's claim under the [DJA] does not create a basis for class certification under Rule 23(b)(2) [because] none exists under TILA." *Id.* The court noted that "[t]he relief sought under the [DJA] is essentially a declaration of liability under TILA, and can only 'lay the basis for a damage award rather than injunctive relief.'" *Id.* (quoting 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 at 59-60 (3d ed. 2005)).

disgorgement of the illegal NFI premiums by which [BFI] was unjustly enriched.'"[94] The Eleventh Circuit held that the district court erred by invoking the DJA to award this remedy and disagreed with Christ's argument that "because Congress did not expressly preclude other remedies, the district court was able to invoke the [DJA] and its inherent equitable powers to issue the injunction and award disgorgement and restitution."[95] First noting that "'[t]he operation of the [DJA] is procedural only,'"[96] the court held that "'the [DJA] does not create remedies otherwise unavailable to the plaintiffs,'"[97] and that "further relief beyond a declaratory judgment or decree is permitted only to the extent that it is 'necessary or proper.'"[98] The court vacated the district court's award of injunctive relief and restitution or disgorgement, holding that this "further relief" was awarded to Christ unnecessarily and improperly and that it circumvented the express remedies provided by Congress under TILA: "actual damages (which Christ conceded he could not prove) or statutory damages (which Christ waived)."[99]

IV. JURISDICTION

A. Whether the Denial of a Motion to Dismiss a Chapter 7 Bankruptcy Proceeding for Abuse is a Final Appealable Order

In the bankruptcy appeal of *In re Donovan*,[100] the Eleventh Circuit concluded, as a matter of first impression, that the denial of a motion to dismiss a Chapter 7 bankruptcy proceeding as abusive is not a final appealable order that is subject to direct appeal.[101] The order under review denied the motion of appellant Cindy Barben, an unsecured creditor, who sought to dismiss the Chapter 7 bankruptcy case of her ex-husband, Donald Donovan, as abusive in violation of the 2005 Bankrupt-

94. *Id.* at 1299 (quoting Christ v. Beneficial Corp., No. 2:98-cv-210-JES-SPC, 2006 WL 2385028, at *2 (M.D. Fla. Aug. 17, 2006)).

95. *Id.*

96. *Id.* (quoting Household Bank v. JFS Group, 320 F.3d 1249, 1253 (11th Cir. 2003)). The court also noted that "[w]here federal court jurisdiction is otherwise proper, the [DJA] permits a party to apply to a federal court for a declaration of an underlying right or relation rather than waiting for the adjudication of such rights in a traditional coercive action." *Id.*

97. *Id.* (quoting Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 977 (5th Cir. 2000)).

98. *Id.* (quoting 28 U.S.C. § 2202 (2006)).

99. *Id.* at 1299-1300.

100. 532 F.3d 1134 (11th Cir. 2008).

101. *Id.* at 1137.

cy Abuse Prevention and Consumer Protection Act (BAPCPA).[102] Barben held a judgment against Donovan as the result of a divorce settlement.[103] Donovan filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Florida in February 2004, prior to the passage of the BAPCPA. Donovan's Chapter 13 plan was confirmed, and he made plan payments to the Chapter 13 trustee for nearly one year. However, due to monthly income fluctuations, Donovan converted the case to Chapter 7 on June 14, 2006.[104]

Barben moved to dismiss the Chapter 7 case, arguing "that the conversion to Chapter 7 was presumptively abusive within the meaning of the [BAPCPA] because Donovan had more income than the median for his state."[105] The bankruptcy court denied Barben's motion to dismiss, holding "that the more stringent standards of the [BAPCPA] for conversion to Chapter 7 did not apply" in Donovan's case and that "Barben lacked standing to raise the abuse issue under pre-2005 law."[106] The district court affirmed, and Barben appealed to the Eleventh Circuit.[107]

The question of whether the denial of a motion to dismiss a Chapter 7 proceeding for abuse is a final appealable order was a matter of first impression in the Eleventh Circuit.[108] The court first noted that it had jurisdiction "over only final judgments and orders arising from a bankruptcy proceeding."[109] The court further noted that to be "final" so as to confer appellate jurisdiction, "an order must end the litigation on the merits, leaving nothing to be done but execute the judgment."[110] However, the court acknowledged that "finality" was more flexible in the bankruptcy context "because bankruptcy is an aggregation of controversies and suits."[111] Even so, the court acknowledged that this increased flexibility "does not render appealable an order which does not finally dispose of a claim or adversary proceeding."[112] Rather, the court

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102. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C. (2006)).

103. *In re Donovan*, 532 F.3d at 1135. Barben's judgment was unsecured and was fully dischargeable in bankruptcy. *Id.* at 1135-36.

104. *Id.* at 1136. The bankruptcy court dismissed the Chapter 13 case on June 30, 2006. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* The court distinguished its appellate jurisdiction from that of the district court, which "may review interlocutory judgments and orders as well." *Id.*

110. *Id.* (citing Jove Eng'g v. IRS, 92 F.3d 1539, 1547 (11th Cir. 1996)).

111. *Id.* (citing *Jove Eng'g*, 92 F.3d at 1548).

112. *Id.*

reasoned that "the same concepts of finality apply in bankruptcy as in any other case, but they are applied to the discrete controversies within the administration of the estate; 'the separate dispute being assessed must have been finally resolved and leave nothing more for the bankruptcy court to do.'"[113]

Accordingly, the Eleventh Circuit held that the bankruptcy court's order denying Barben's motion was not a final order because "[b]y denying [the] motion to dismiss, the bankruptcy court permitted the Chapter 7 case to continue."[114] The bankruptcy court "did not conclusively resolve the bankruptcy case as a whole, nor did the court resolve any adversary proceeding or [specific] claim."[115] In support of this holding, the court noted that the "weight of circuit authority ha[d] concluded that orders denying a motion to dismiss for bad faith or abuse are not appealable," and cited three other circuits that had "specifically held that an order denying a motion to dismiss a Chapter 11 bankruptcy case for abusive filing is not a final order."[116]

Barben argued "that the denial of her motion . . . *effectively* disallowed her claim because once Donovan's estate was converted to Chapter 7 . . . it became a practical certainty that her claim would be discharged and she would receive little or no payment."[117] Barben also argued that because judicial disallowance of a claim is immediately appealable, the bankruptcy court's order—which had the practical effect of disallowance—should be immediately appealable.[118] The court was unpersuaded, reasoning that while the conversion may have guaranteed that Barben would not receive a distribution from the estate, that was a result of her unsecured status and the degree of Donovan's insolvency rather than a matter of bankruptcy procedure.[119] The court also reasoned that the conversion to Chapter 7 was "not legally equivalent to disallowing a claim [because] Barben was still a creditor in Donovan's

113. *Id.* at 1137 (quoting *In re* Charter Co., 778 F.2d 617, 621 (11th Cir. 1985)).
114. *Id.*
115. *Id.*
116. *Id.* (citing *In re* Jartran, Inc., 886 F.2d 859, 864 (7th Cir. 1989); *In re* 405 N. Bedford Drive Corp., 778 F.2d 1374, 1379 (9th Cir. 1985); *In re* Comm. of Asbestos-Related Litigants, 749 F.2d 3, 5 (2d Cir. 1984)). Although the court acknowledged that other courts had concluded to the contrary, including "the Third Circuit[, which] ha[d] held that the denial of a motion to dismiss for bad faith is immediately appealable in both Chapter 7 and 11 [cases,]" the court noted that these cases did "not discuss whether a particular adversary proceeding must be final." *Id.* (citing *In re* Brown, 916 F.2d 120, 123-24 (3d Cir. 1990)).
117. *Id.* at 1137 n.2.
118. *Id.* (citing Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002)).
119. *Id.*

Chapter 7 case and would have received a pro rata distribution had there been sufficient assets."[120] Having held that the bankruptcy court's order denying Barben's motion to dismiss was not a final appealable order, the court dismissed the appeal for lack of jurisdiction.[121]

B. Whether the Court Should Exercise Jurisdiction Over an Interlocutory Appeal of a Discovery Order Implicating the Attorney-Client Privilege Under the "Collateral Order" Doctrine

In *Carpenter v. Mohawk Industries, Inc.*, [122] the court held, as a matter of first impression in the Eleventh Circuit, that it would not "extend the 'collateral order' doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*[[123]] . . . to the exercise of . . . [appellate] jurisdiction over an interlocutory appeal of a discovery order implicating the attorney-client privilege."[124] Before the court on appeal were (1) the defendant-appellant Mohawk Industries, Inc.'s (Mohawk) appeal of a district court's order granting plaintiff-appellee Norman Carpenter's motion to compel information and materials that Mohawk contended were protected by the attorney-client privilege; (2) Mohawk's "petition for writ of mandamus, seeking to compel the district court judge to vacate the order as it relate[d] to [the] motion to compel;" and (3) Carpenter's "motion to dismiss the appeal for lack of jurisdiction."[125] The Eleventh Circuit dismissed the appeal for lack of jurisdiction and denied Mohawk's petition for writ of mandamus, concluding that Mohawk had not shown that its "'right to issuance of the writ [was] clear and indisputable.'"[126]

Carpenter sued Mohawk in the United States District Court for the Northern District of Georgia, alleging that his employment was terminated in violation of 42 U.S.C. § 1985(2)[127] and various Georgia laws.[128] Carpenter "filed a motion to compel responses to . . . his interrogatories and document requests, seeking information [Mohawk]

120. *Id*. The court also noted that "this case [did] not fit into one of [its] established exceptions to the finality rule." *Id.* at 1137 (citing *In re* FDR Hickory House, Inc., 60 F.3d 724, 726-27 (11th Cir. 1995)).
121. *Id.*
122. 541 F.3d 1048 (11th Cir. 2008).
123. 337 U.S. 541 (1949).
124. *Carpenter*, 541 F.3d at 1050.
125. *Id.*
126. *Id.* (quoting *In re* Lopez-Lukis, 113 F.3d 1187, 1188 (11th Cir. 1997)).
127. 42 U.S.C. § 1985(2) (2006).
128. *Carpenter*, 541 F.3d at 1050.

contended was protected by the attorney-client privilege."[129] The district court found that the communications at issue were privileged, but concluded that Mohawk had waived the privilege with respect to some of the requested communications. The district court ordered Mohawk to respond to Carpenter's discovery requests, and Mohawk appealed.[130] Mohawk "also filed a petition for writ of mandamus, seeking to compel the district court judge to vacate the order as it relate[d] to [Carpenter's] motion to compel."[131] Carpenter moved to dismiss, arguing that the Eleventh Circuit lacked "jurisdiction to consider the appeal of a nonfinal discovery order."[132]

The Eleventh Circuit first addressed its jurisdiction to review Mohawk's claims by way of interlocutory appeal.[133] The court acknowledged that discovery orders normally are not immediately appealable because they generally are not final orders for purposes of obtaining appellate jurisdiction under 28 U.S.C. § 1291.[134] However, the court noted that the "collateral order" doctrine, established by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*,[135] "provides an exception to the finality requirement."[136] Under *Cohen*, a nonfinal order is immediately "appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment."[137]

Mohawk argued that "the challenged discovery order is an appealable 'collateral order' under *Cohen*, because all three prongs of the *Cohen* test [were] met."[138] The Eleventh Circuit agreed that the first and second prongs of the *Cohen* test were met.[139] First, the Eleventh Circuit reasoned that the district court's order requiring Mohawk to produce the disputed information left "no room for the district court to further consider whether the information at issue is protected."[140] Second, the

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129. *Id.* at 1051.
130. *Id.* at 1051-52.
131. *Id.* at 1052.
132. *Id.*
133. *See id.*
134. *Id.*; 28 U.S.C. § 1291 (2006). The court noted that "[a] final decision is one that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'" *Carpenter*, 541 F.3d at 1052 (quoting McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1338 (11th Cir. 2007)).
135. 337 U.S. 541 (1949).
136. *Carpenter*, 541 F.3d at 1052.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

court noted that "the attorney-client privilege is important," and "the district can resolve the privilege issues (*i.e.*, whether [Mohawk] must produce the disputed documents and communications) without deciding the merits of the case."[141]

As for the third prong, the Eleventh Circuit did not "find that a discovery order that implicates the attorney-client privilege is effectively unreviewable on appeal from a final judgment."[142] The court noted that if it

> were to determine on appeal from a final judgment that privileged information was wrongly [produced] and was used to the detriment of the party asserting the privilege, [it] could reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed information, as well as any documents, witnesses, or other evidence obtained as a consequence of the improperly disclosed information.[143]

The court also acknowledged that while it had previously held that discovery orders were not immediately appealable,[144] it had not "directly addressed the question of whether a discovery order compelling the disclosure of information claimed to be protected by the attorney-client privilege can be appealed before final judgment under *Cohen*."[145] The court noted that several circuits had addressed the issue and there were decisions on both sides of the argument.[146] Concluding that the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (citing *In re* Int'l Horizons Inc., 689 F.2d 996, 1000-01 (11th Cir. 1982); Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp., 680 F.2d 743, 745 (11th Cir. 1982)).

145. *Id.* at 1053.

146. *Id.* (citing *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1087-89 (9th Cir. 2007) (finding jurisdiction under the collateral order doctrine to review the district court's order compelling production of attorney-client communication); United States v. Phillip Morris, Inc., 314 F.3d 612, 617-21 (D.C. Cir. 2003) (same); FDIC v. Ogden Corp., 202 F.3d 454, 458 & n.2 (1st Cir. 2000) ("Discovery orders generally are not thought to come within [the collateral order doctrine]."); *In re* Ford Motor Co., 110 F.3d 954, 964 (3d Cir. 1997) ("[t]he strictures of the collateral order doctrine have been met in this case, and we have jurisdiction over the appeal."); Boughton v. Cotter Corp., 10 F.3d 746, 749-50 (10th Cir. 1993) (declining to accept jurisdiction, stating that "in virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take jurisdiction"); Texaco Inc. v. La. Land & Exploration Co., 995 F.2d 43, 44 (5th Cir. 1993) (noting that an order requiring plaintiff to produce certain documents that it claimed were subject to attorney-client privilege was not appealable under the collateral order doctrine); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 162-63 (2d Cir. 1992) (stating that pretrial discovery orders are not appealable under the collateral order doctrine); Reise v. Bd. of Regents of Univ. of Wis. Sys., 957 F.2d 293, 295 (7th Cir. 1992)

challenged discovery order was not an appealable collateral order under *Cohen*, the court found "no clear distinction between the interlocutory appeal of a discovery order implicating the attorney-client privilege and an interlocutory appeal of a discovery order implicating the accountant-client privilege, [which the] Court ha[d] previously held [to be] not appealable."[147] The court was also unpersuaded by Mohawk's argument that "once the privileged material is turned over, the 'cat is out of the bag' and the damage is done."[148]

The court further noted that it had "never exercised jurisdiction under the collateral order doctrine to review any discovery order involving any privilege."[149] Rather, it held that "'mandamus is often an appropriate method of review[ing] orders compelling discovery.'"[150] The court noted other circuit court opinions that denied collateral order review of discovery orders denying a claim of privilege, holding instead that mandamus review was the appropriate avenue for immediate review.[151] The court reasoned that "the writ of mandamus, which places a higher burden on the challenging party than a direct appeal, [was] the appropriate vehicle to hear challenges to discovery disputes grounded in

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("Orders to produce information over strong objections based on privilege are not appealable."); Quantum Corp. v. Tanden Corp., 940 F.2d 642, 644 (Fed. Cir. 1991) (holding that an order compelling discovery of attorney opinion letters was not immediately appealable under the collateral order doctrine)).

147. *Id.* (citing *In re Int'l Horizons*, 689 F.2d 996).

148. *Id.*

149. *Id.*

150. *Id.* (quoting *In re* Fink, 876 F.2d 84, 84 (11th Cir. 1989)).

151. *Id.* at 1054 (citing *In re* U.S. Dep't of Homeland Sec., 459 F.3d 565, 568 (5th Cir. 2006) (stating that "[m]andamus is appropriate if the district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal"); U.S. *ex rel.* Pouge v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 473 (6th Cir. 2006) (refusing to determine the applicability of the collateral order doctrine to a challenge of a discovery order's finding relating to the attorney-client privilege, in part, because the court had "traditionally viewed mandamus as the sole method by which [an appellate court] might review a discovery order involving a claim of privilege"); Simmons v. City of Racine, PFC, 37 F.3d 325, 327, 328-29 (7th Cir. 1994) (explaining that the court lacked jurisdiction over an appeal of a discovery order compelling the production of documents allegedly protected by privilege, but stating that the appellants could "obtain immediate review of an adverse discovery order by other means," including petitioning the court for a writ of mandamus); *Boughton*, 10 F.3d at 750-51 (holding that an order compelling production of information allegedly protected by the attorney-client privilege was not appealable under the collateral order doctrine and, instead, analyzing whether the order could be vacated under a writ of mandamus); *Chase Manhattan Bank*, 964 F.2d at 163 (rejecting the application of the collateral order doctrine in an appeal from a discovery order that required disclosure of documents allegedly protected by the attorney-client privilege and, instead, overturning the discovery order through a writ of mandamus)).

the attorney-client privilege."[152] Given the potentially large volume of appeals which could arise out of such discovery orders, the court asserted that there are "powerful prudential reasons to avoid commonplace interlocutory appeals."[153] The court held that

> [u]tilizing the writ of mandamus, as opposed to the collateral order doctrine, . . . to seek review of discovery orders involving claims of privilege strikes an appropriate balance between the concerns of furthering the important policies of full and frank communication sought to be furthered by the privilege and the concerns of judicial efficiency.[154]

Mohawk sought "a writ of mandamus directing the district judge to vacate the part of his order finding that Mohawk implicitly waived its attorney-client privilege, and . . . compel[ling] Mohawk to produce the disputed information."[155] The court denied Mohawk's petition for writ of mandamus,[156] holding that even if it were to conclude that the district court erred in finding that Mohawk waived the attorney-client privilege, Mohawk had not met its burden of showing that its right to the issuance of the writ of mandamus was "clear and indisputable."[157] The court noted that it will not issue a writ "'merely because [the petitioner] shows evidence that, on appeal, would warrant reversal of the district court.'"[158] Rather, the court held that "[m]andamus is appropriate only when there has been a clear usurpation of power or abuse of discretion, and Mohawk has not shown that either occurred here."[159]

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152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 1055.
156. *Id.* The court first reiterated that "[m]andamus is an extraordinary remedy, and it is appropriate only when 'no other adequate means are available to remedy a clear usurpation of power or abuse of discretion by the district court.'" *Id.* (quoting *In re* Loudermilch, 158 F.3d 1143, 1145 (11th Cir. 1998)).
157. *Id.* (citing *In re Lopez-Lukis*, 113 F.3d at 1188).
158. *Id.* (alteration in original) (quoting *In re* Bellsouth Corp., 334 F.3d 941, 953 (11th Cir. 2003)).
159. *Id.*

C. Whether, and to What Extent, the Proportionate Liability Scheme of Section 21(D)(f) of the Securities Exchange Act of 1934 Amends Section 20(a) of the Act, Under Which a Person Who Controls a Violator of the Act is Liable Jointly and Severally With and to the Same Extent as the Violator

The interlocutory appeal in *Laperriere v. Vesta Insurance Group, Inc.*,[160] presented an issue of first impression in all circuit courts:

> whether, and to what extent, the proportionate liability scheme of section 21(D)(f) of the Securities Exchange Act of 1934 [(Act)],[161] enacted as part of the Private Securities Litigation Reform Act of 1995 [(PSLRA)],[162] amends section 20(a)[163] of the Act, under which a person who controls a violator of the Act is "liable jointly and severally with and to the same extent" as [the primary] violator.[164]
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> . . . Recognizing that implicit repeals of statutory provisions are disfavored, [the Eleventh Circuit held] that section 21(D)(f) and section 20(a) should be read in harmony to preserve both the PSLRA's proportionate liability scheme and a controlling person's derivative liability under section 20(a).[165]

The appellants, a group of investors in publicly traded securities, filed a securities class action against several defendants, including appellee Torchmark Corporation (Torchmark), in the United States District Court for the Northern District of Alabama.[166] The appellants moved to strike two of Torchmark's affirmative defenses, arguing that they "improperly sought to graft the PSLRA's scheme of 'proportionate liability' onto the joint and several liability existing between a controlling person and a controlled person under section 20(a)."[167] The district court denied "the motion to strike, concluding, as a matter of

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160. 526 F.3d 715 (11th Cir. 2008).

161. 15 U.S.C. § 78u-4(f) (2006).

162. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2006)).

163. 15 U.S.C. § 78t-1 (2006).

164. *Laperriere*, 526 F.3d at 718.

165. *Id.* at 719.

166. *Id.* The court noted that "[a]fter completing discovery, obtaining class certification, and surviving various motions to dismiss by defendants, appellants reached court approved settlements" with the remaining defendants, leaving Torchmark as the only remaining defendant in the action. *Id.*

167. *Id.*

first impression, that the proportionate liability regime set out in section 21(D)(f) . . . 'trumps' section 20(a)."[168]

Disagreeing with the district court, the Eleventh Circuit did "not interpret section 21(D)(f) as 'trumping' a controlling person's derivative liability under section 20(a)."[169] Instead, the Eleventh Circuit held "that section 21(D)(f) and section 20(a) should be read in harmony to preserve both the PSLRA's proportionate liability scheme and a controlling person's derivative liability under section 20(a)."[170]

1. The PSLRA and Proportionate Liability. Prior to the enactment of the PSLRA, "the general rule in most securities law actions was that defendants found to have violated the Act were jointly and severally liable for all of the plaintiff's damages."[171] Congress passed the PSLRA in response to

> "significant evidence of abuse in private securities lawsuits," including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer."[172]
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> . . . In addition to strike suits, the legislative history of the PSLRA suggests Congress was concerned about the many cases in which the application of traditional joint and several liability unfairly resulted in defendants having to pay for damages caused by other defendants.[173]

To alleviate these concerns, "Congress enacted section 21(D)(f) of the PSLRA, which replaced the existing joint and several liability regime with a proportionate liability scheme that restricts joint and several liability to persons who knowingly violate the Act."[174] Notably,

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168. *Id.* The district court also "granted [a]ppellant's motion to file an interlocutory appeal and certified the present issue as one 'involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion.'" *Id.* (quoting 28 U.S.C. § 1292(b) (2006)).

169. *Id.*

170. *Id.*

171. *Id.* (citing Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 292 (1993)).

172. *Id.* (quoting H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep), *reprinted in* 1995 U.S.C.C.A.N. 730, 730). Congress passed the PSLRA "'motivated in large part by a perceived need to deter strike suits by opportunistic private plaintiffs that filed securities fraud claims of dubious merit in order to exact large settlement recoveries.'" *Id.* (quoting Novak v. Kasaks, 216 F.3d 300, 306 (2d Cir. 2000)).

173. *Id.* at 719-20. *See* H.R. REP. NO. 104-369, at 37 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 736 ("Under current law, a single defendant who has been found to be 1% liable may be forced to pay 100% of the damages in the case.").

174. *Laperriere*, 526 F.3d at 720.

"Congress clarified that section 21(D)(f) affects only the allocation of damages between liable defendants."[175] The court observed that, "[u]nder section 21(D)(f), a controlling person is liable jointly and severally for the entirety of plaintiffs' damages only if it [knowingly violates the Act]."[176] Section 21(D)(f) provides as follows:

> (f) Proportionate liability
>
> (1) Applicability
>
> Nothing in this subsection shall be construed to create, affect, or in any manner modify, the standard of liability associated with any action arising under the securities laws.
>
> (2) Liability for Damages
>
> (A) Joint and Several Liability
>
> Any covered person against whom a final judgment is entered in a private action shall be liable for damages jointly and severally only if the trier of fact specifically determines that such covered person knowingly committed a violation of the securities laws.
>
> (B) Proportionate Liability
>
> (i) In general
>
> Except as provided in subparagraph (A), a covered person against whom a final judgment is entered in a private action shall be liable solely for the portion of the judgment that corresponds to the percentage of responsibility of that covered person, as determined [by the fact finder].[177]

The court announced a three-step process to be followed in determining a liable defendant's share of responsibility under section 21(D)(f).[178] First, the fact finder must determine whether the "'covered person [or] other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff' violated the securities laws."[179] Second, the fact finder determines each person's percentage of responsibility "'measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff.'"[180] Third,

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175. *Id*. Congress expressly stated that section 21(D)(f) must not "'be construed to create, affect, or in any manner modify, the standard of liability associated with any action' arising under the Act." *Id.* (quoting 15 U.S.C. § 78u-4(f)(1)).

176. *Id.* at 719.

177. 15 U.S.C. §§ 78u-4(f)(1)-(2)).

178. *See Laperriere*, 526 F.3d at 720.

179. *Id.* (alteration in original) (quoting 15 U.S.C. § 78u-4(f)(3)(A)).

180. *Id.* at 720 n.2 (quoting 15 U.S.C. § 78u-4(f)(3)(A)(ii)).

"the fact finder determines whether such person knowingly committed a violation of the securities laws."[181]

2. Section 20(a) and Derivative Liability. The court observed that "[t]he Act imposes liability not only on the person who actually commits a securities law violation, but also on an entity or individual that controls the violator."[182] Further, "[u]nder section 20(a), a controlling person is liable to the plaintiff jointly and severally with and to the same extent as a controlled person for the controlled person's acts, unless the controlling person can establish the affirmative defense of good faith and non-inducement."[183] According to section 20(a),

> "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."[184]

The court continued, explaining that section 20(a) plainly "imposes derivative liability on persons that control primary violators of the Act."[185] The legislative history of section 20(a) shows that Congress intended to make "'a person who controls a person subject to the act . . .

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181. *Id.* (quoting 15 U.S.C. § 78u-4(f)(3)(A)(ii)). The court explained,

> A person "knowingly commits a violation of the securities laws" and thus is responsible for damages jointly and severally if it (1) "makes an untrue statement of a material fact, with actual knowledge that the representation is false" or (2) "omits to state a fact necessary in order to make the statement made not misleading, with actual knowledge that . . . one of the material representations of the covered person is false" or (3) "engages in . . . conduct with actual knowledge of the facts and circumstances that make the conduct of that covered person a violation of the securities laws."

Id. at 721 (ellipses in original) (quoting 15 U.S.C. § 78u-4(f)(10)).

182. *Id.*

183. *Id.*

184. *Id.* (quoting 15 U.S.C. § 78t(a) (2006)).

185. *Id.* ("The legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws." (citing H.R. REP. NO. 73-152, at 12 (1933) (Conf. Rep.) *reprinted in* 1 FED. SEC. LAW 252, 263 (1983)). *See also* Loftus C. Carson, II, *The Liability of Controlling Persons Under the Federal Securities Acts*, 72 NOTRE DAME L. REV. 263, 266 (1997); William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305 (1934).

liable *to the same extent* as the person controlled unless the controlling person acted in good faith.'"[186]

> [However,] [p]rior to section 20(a), the conduct of a corporation's agents in violation of the securities laws was not attributable to those who were part of the corporate hierarchy, such as shareholders, directors, and officers, because under the common law of agency the principal in the agency relationship was the corporation. Congress intended section 20(a) to expand upon the common law of vicarious liability.[187]

Section 20(a) is a derivative liability statute because it requires a defendant, through an affirmative defense, to "prove that it did not act in bad faith or with a recklessness that equates to inducing the acts constituting a securities law violation."[188]

Because "a controlling person's liability under section 20(a) is derived from the acts of its controlled person," a "plaintiff must show that the controlled person (not the controlling person) violated the federal securities laws. A plaintiff must also show that the controlling person exercised control over the controlled person."[189] Recognizing that it would be difficult to anticipate "the many ways in which actual control may be exercised," Congress "expressly declined to define the term 'control,'" and thus left courts "free to decide issues of control status on a case by case basis."[190]

The Eleventh Circuit also noted that the "derivative nature of section 20(a) liability has caused courts to disagree over the extent and nature" of the plaintiff's burden of proof.[191] Citing its prior holding in *Brown v. Enstar Group, Inc.*,[192] the court stated that a plaintiff alleging controlling person liability under section 20(a) must allege that the

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186. *Laperriere*, 526 F.3d at 721-22 (ellipsis in original) (quoting H.R. REP. NO. 73-1383, at 26 (1934)).

187. *Id.* at 722.

188. *Id.*

189. *Id.* at 722.

190. *Id.* at 722-23. The Eleventh Circuit noted that the Securities and Exchange Commission defined "control" under the Act as "'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.'" *Id.* at 723 (quoting 17 C.F.R. § 230.405 (2008)). The court further noted the findings of other circuit courts which recognized "that the control regulation, like the statute, does not . . . formulate a precise definition of 'control' applicable to all cases, but is intended only to provide some guidance, leaving a determination as to whether control exists dependent on the particular factual circumstances." *Id.*

191. *Id.* at 723 (quoting Sheinkopf v. Stone, 927 F.2d 1259, 1270 (1st Cir. 1991)).

192. 84 F.3d 393 (11th Cir. 1996).

defendant had the power to control both "the general affairs of the primary violator" and "the specific corporate policy that resulted in the primary violation."[193] The court also noted that some of its "sister circuits ha[d] required a plaintiff seeking to hold a controlling person liable under section 20(a) to prove that the controlling person was a 'culpable participant' in the primary violation."[194] However, the court acknowledged

> that courts stopped short of requiring the controlling person to knowingly participate in or independently commit a violation of the Act. Despite the varying standards, courts . . . appear to be in agreement that a controlling person need not commit an intentional violation of the Act to be liable under section 20(a).[195]

Accordingly, the Eleventh Circuit interpreted

> section 20(a) as requiring a controlling person to prove more than a lack of participation in the primary violation. A controlling person is derivatively liable under section 20(a) for the violations of its controlled person if the controlling person "acted recklessly in failing to do what he could have done to prevent the violation."[196]

In so holding, the court noted that section 20(a) is a "derivative liability statute, imputing liability to a controlling person based on its relation-

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193. *Laperriere*, 526 F.3d at 723 (citing *Enstar Group, Inc.*, 84 F.3d at 396).

> The Court in *Enstar Group, Inc.* connoted an important distinction between the test it adopted and the Eighth's Circuit test requiring a plaintiff to prove that a defendant actually exercised power over the entity primarily liable. Because the Court found that the defendant in *Enstar Group, Inc.,* neither possessed nor exercised power over the entity primarily liable at the relevant time, it did not decide whether the power to control the general affairs of the entity primarily liable means "simply abstract power to control, or actual exercise of the power to control."

Id. n.14 (quoting *Enstar Group, Inc.*, 84 F.3d at 397 n.6).

194. *Id.* at 723-24 (citing Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 880 (3d Cir. 1975); Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973)).

195. *Id.* at 724 ("As the former Fifth Circuit observed, '[w]hat would be the purpose of the controlling person provision if intent were required-the provision would hardly make anyone liable who would not be so otherwise.'" (quoting G.A. Thompson & Co. v. Patridge, 636 F.2d 945, 960) (5th Cir. Feb. 1981)).

196. *Id.* at 725 (quoting *G.A. Thompson & Co.*, 636 F.2d at 960). In so holding, the Eleventh Circuit also noted the holding of the former Fifth Circuit in *G.A. Thompson & Co.*, wherein the court held that "a controlling person attempting to invoke the affirmative defense has the burden of establishing that 'he did not act recklessly in inducing, either by his action or his inaction, the act or acts constituting the violation.'" *Id.* at 724-25 (quoting *G.A. Thompson & Co.*, 636 F. 2d at 960).

ship to a primary violator and not based on any independent violation of the securities laws by the controlling person."[197]

3. Discussion. The court then turned to the question of whether, and to what extent, the proportionate liability provisions of section 21(D)(f) amended the joint and several liability provisions of section 20(a).[198] The court first held that the proportionate liability provisions of section 21(D)(f) apply to section 20(a) claims against controlling persons, citing the plain language of the PSLRA which applies to "any covered person," including a controlling person covered under section 20(a).[199] The court reasoned,

> [N]othing in the proportionate liability provisions of the PSLRA displaces in any way the 'standard of liability' created by the [Act], including section 20(a) controlling person liability.
>
> . . .
>
> . . . [S]ection 20(a) provides the standard for holding controlling persons substantively liable for the securities fraud that they do not themselves commit but instead is committed by those they control.[200]

Therefore, the court held that the plain language of the PSLRA "compels the conclusion that if controlling person liability existed before the PSLRA added section 21(D)(f), it still exists afterwards."[201]

The court also found support for its holding in the legislative history of the PSLRA, which provides,

> "[T]he 'fair share' rule of proportionate liability does not create any new cause of action or expand, diminish, or otherwise affect the substantive standard for liability in any action under the 1933 Act or the 1934 Act . . . . [T]he standard of liability in any such action should be determined by the pre-existing, unamended statutory provision that creates

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197. *Id.* at 725. The court further noted the

> consensus in the circuit courts that section 20(a) was intended to supplement, not to supplant the common law theory of *respondeat superior* as a basis for vicarious liability under the Act and thus, section 20(a) does not constitute an exclusive substitute for the vicarious liability of secondary actors that might otherwise exist under common law agency principles.

Id.

198. *See id.*

199. *Id.* at 726.

200. *Id.* at 726-27 ("Section 20(a) states that controlling persons will be . . . jointly and severally liable [under] those circumstances unless they establish the affirmative defense of good faith and lack of inducement." (citing 15 U.S.C. § 78(u)-4(f)(1))).

201. *Id.* at 727.

> the cause of action, without regard to this provision, *which applies solely to the allocation of damages*."[202]

The court interpreted this to mean that the PSLRA did not change the rules for determining who was liable for violating the securities laws, it merely changed the rules for allocating damages once liability has been established.[203]

For instance, the court noted that before the PSLRA was enacted, if a party was found liable as a controlling person under section 20(a), "it would have been responsible jointly and severally for the damages to the same extent as the primary violator."[204] The proportionate liability provisions of section 21(D)(f) provide a new standard for allocating damages, which apply only after liability has been determined.[205] As the court noted, "[u]nder the new statutory regime, a controlling person is liable to the same extent as the controlled person, unless the controlling person affirmatively establishes that it acted in good faith and did not induce the violation by the controlled person."[206] Once liability is established, the proportionate liability provisions of the PSLRA apply to determine whether the controlling person is responsible for the entire amount of damages or only its proportionate share.[207]

> Under these provisions joint and several liability for all the damages exists only if . . . the controlling person knowingly committed the violation. . . . Where a controlling person fails to affirmatively establish good faith and lack of inducement under section 20(a) but the fact finder does not specifically find a knowing violation [of the Act], there is liability for the violation but responsibility for the damages is only proportionate, not joint and several.[208]

In sum, the court concluded

> that section 20(a) controlling person liability survives section 21(D)(f)'s proportionate liability scheme. . . . All that the PSLRA has changed for controlling persons is the standard for deciding whether their responsibility for damages is joint and several or proportionate. Damages are now allocated based on the proportionate liability provisions in the

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202. *Id.* (alterations and ellipsis in original) (quoting H.R. CONF. REP. NO. 104-369 at 38, *reprinted in* 1995 U.S.C.C.A.N. 730, 737).

203. *Id.* In other words, "[i]f a controlling person would have been substantively liable under section 20(a) before the PSLRA, it still [would] be afterwards." *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 727-28.

208. *Id.* (citing 15 U.S.C. § 78u-4(f)(2)(a)(b)(i)).

> PSLRA, including the provision that knowing violators of the securities laws are "liable for damages jointly and severally."[209]

D. When Security Interests Perfected Under the Doctrine of Equitable Subrogation Can Be Set Aside as Preferential Transfers of Interests Under the Bankruptcy Code

In the consolidated appeal of *In re Hedrick*,[210] the Chapter 7 Trustee of the bankruptcy estates of Tracy and Theresa Hedrick and Santosh and Som Sharma appealed the bankruptcy courts' grants of summary judgment to secured creditors NovaStar Mortgage, Inc. (NovaStar) and ABN AMRO Mortgage Group, Inc. (ABN). In both cases, the debtors refinanced debts secured by their homes, paying off prior creditors with loans from the new creditors. The loans from the new creditors were secured by first priority security deeds in the debtors' homes. The cancellations of the prior security deeds were not recorded until after the new security deeds were recorded, which occurred within the ninety-day period preceding the filing of the bankruptcy petitions. In the Hedricks' case, the prior lenders were paid off more than ninety days before the Hedricks filed bankruptcy, whereas the Sharmas' prior lenders were paid off within the ninety-day preference period.[211]

The trustee brought adversary proceedings to avoid the new security deeds under 11 U.S.C. § 547(b),[212] which "permits trustees to avoid certain preferential transfers of interests in a debtor's property that occur within ninety days before the filing of a bankruptcy petition."[213] The effect of avoiding the transfer is to convert a creditor's claim secured by a debtor's real property to an unsecured claim against the estate.[214] The bankruptcy courts concluded that "under Georgia's law of equitable subrogation the transfers of the security deeds were 'made' for section 547(b)(4) purposes on the date[s] the loans closed instead of on the later date[s] when the security deeds were recorded."[215] In the Hedricks' case, that meant that the trustee could not avoid the transfer of the security deed to NovaStar because it occurred before the section 547(b) preference period began.[216] In the Sharmas' case, the trustee could not avoid the security deed because it qualified for the section 547(c)(1)[217]

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209. *Id.* at 729.
210. 524 F.3d 1175 (11th Cir. 2008).
211. *Id.* at 1178-79.
212. 11 U.S.C. § 547(b) (2006).
213. *In re Hedrick*, 524 F.3d at 1179.
214. *Id.*
215. *Id.*
216. *Id.*
217. 11 U.S.C. § 547(c)(1) (2006).

"contemporaneous exchange" exception.[218] The United States District Court for the Northern District of Georgia affirmed the bankruptcy courts' orders, and the trustees appealed to the Eleventh Circuit.[219]

1. The Hedricks' Case. On December 4, 2003, the Hedricks refinanced secured debts held by Astoria Federal Savings (Astoria) and Countrywide Home Loans, Inc. (Countrywide) with a loan from NovaStar. NovaStar's loan was to be secured by a first priority security deed on the Hedricks' home. On December 10, NovaStar delivered checks to Astoria and Countrywide, paying off the Hedricks' debts in full.[220] The same day, NovaStar sent the new security deed to the county clerk, but the clerk did not record the deed until January 7, 2004. The clerk recorded the cancellations of the prior security deeds to Astoria and Countrywide on January 22, 2004. The Hedricks filed their bankruptcy petition on April 5, 2004—seventy-three days after NovaStar's deed was recorded. The trustee sought to avoid NovaStar's security deed under section 547(b)(4)(A),[221] thus requiring the bankruptcy court to determine when the transfer to NovaStar was "made."[222]

The Bankruptcy Code's relation-back provision, section 547(e)(2)-(A),[223] establishes that "a transfer is 'made' at the time of the exchange if the interest received is perfected within ten days."[224] Applying Georgia's doctrine of equitable subrogation, the bankruptcy court found that the transfer of the security deed to NovaStar was made when NovaStar paid off Astoria and Countrywide. Because the payoff occurred within ten days of the exchange at the NovaStar loan closing, the bankruptcy court found that the transfer was "made" at the time of the exchange, which was outside the preference period.[225] Thus, the bankruptcy court held "that the trustee was not entitled to avoid the transfer," and the district court affirmed.[226]

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218. *In re Hedrick*, 524 F.3d at 1179.

219. *Id.* at 1180.

220. *Id.* The three-day federally mandated rescission period on the refinancing loan expired on December 9, 2003. *Id.*

221. 11 U.S.C. § 547(b)(4)(A).

222. *In re Hedrick*, 524 F.3d at 1180.

223. 11 U.S.C. § 547(e)(2)(A) (2006).

224. *In re Hedrick*, 524 F.3d at 1180.

225. *Id.*

226. *Id.* The bankruptcy court further held that the "trustee had failed to introduce sufficient evidence to survive summary judgment on one of the other elements of the avoidance provision: the requirement that the party seeking to avoid the transfer prove that the transferee received more from the transfer than it would have from Chapter 7 proceedings." *Id.*

On appeal, the Eleventh Circuit noted that whether the transfer of interest in the Hedricks' property was "made" outside the ninety-day preference avoidance period under section 547(b)(4)(A) depended on when the NovaStar security interest was perfected.[227] The court stated that

> [i]f the transfer is perfected within ten days of the exchange, it is considered to have been made when [the transfer] occurred.[228] If the transfer is perfected more than ten days after the exchange, it is considered to have been made at the time it is perfected, which [would] be after the transfer occurred.[229]

Finally, the court noted that a transfer "'is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee.'"[230]

The court held that under Georgia law, NovaStar's interest was perfected when a bona fide purchaser could no longer have obtained an interest in the property that was superior to NovaStar's.[231] Under Georgia's recording statutes,[232] "the world was on notice of NovaStar's security deed once it was recorded," and no one who purchased an interest after that "could have been a bona fide purchaser of an interest superior to Novastar's."[233] Thus, the dispute was whether a bona fide purchaser could have acquired a superior interest "between the time NovaStar paid off the earlier creditors, thereby extinguishing their security deeds, and the time NovaStar's own security deed was recorded."[234]

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227. *Id.* (quoting 11 U.S.C. § 547(b)(4)(a) ("conditioning the trustee's ability to avoid the transfer on it having been 'made . . . on or within 90 days before the date of the filing of the petition'") (ellipsis in original)).

228. *Id.* (citing 11 U.S.C. § 547(e)(2)(A) (2006)).

229. *Id.* (citing 11 U.S.C. § 547(e)(2)(B) (2006)).

230. *Id.* at 1180-81 (quoting 11 U.S.C. § 547(e)(1)(A) (2006)). Although the court noted that the bankruptcy code does not define the term "bona fide purchaser," it held that the

> common, ordinary meaning of a "bona fide purchaser" is "[o]ne who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

Id. at 1181 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1271 (8th ed. 1999)).

231. *Id.* at 1181. Because the Hedricks' property was located in Georgia, the court looked to Georgia law to determine when NovaStar's interest was perfected. *Id.*

232. O.C.G.A. § 44-2-3 (1991).

233. *In re Hedrick*, 524 F.3d at 1181.

234. *Id.*

The court held that this

> determination turn[ed] on Georgia's doctrine of equitable subrogation and how it fits into the Bankruptcy Code. Equitable subrogation may benefit a party who "advances money to pay off an [earlier] encumbrance on realty either at the instance of the owner of the property or the holder of the encumbrance . . . [and] the new security is for any reason not a first lien on the property." . . . [I]f the new creditor is "not chargeable with culpable or inexcusable neglect, [it] will be subrogated to the rights of the prior [creditor,] . . . unless the superior or equal equity of others would be prejudiced."[235]

NovaStar argued that "no one could have obtained a superior interest to its security deed because it acquired a first priority interest . . . through equitable subrogation once it paid the earlier creditors."[236] The trustee argued that equitable subrogation did not apply for two reasons: (1) "equitable subrogation cannot perfect an interest under the Bankruptcy Code" because it "operates through the creation of an equitable lien," which is not recognized under the Bankruptcy Code; and (2) "even if equitable subrogation can operate to perfect the transfer of a property interest for Bankruptcy Code purposes, it did not do so here" because a hypothetical buyer could have obtained an interest superior to NovaStar's.[237]

The Eleventh Circuit disagreed, first holding that "equitable subrogation does not create an equitable lien," but rather "is an equitable doctrine which affects the priority of property interests that exist apart from equity."[238] Noting that the "doctrine of equitable subrogation is alive and well in Georgia," the court held that "if the requirements of equitable subrogation are met in this case, NovaStar's security deed enjoy[ed] the same priority as the earlier security deeds that NovaStar paid off."[239] The court also disagreed with the trustee's second argument, holding that no intervening buyer could, under any set of hypothetical facts, have been a bona fide purchaser in this case.[240] The court noted that "[a]ny purchaser who acquired an interest in the Hedricks' property during the period between the time NovaStar paid off the earlier debts and the time it recorded its own security deed could not be a bona fide purchaser under Georgia law" because the prior security

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235. *Id.* at 1181-82 (second, third, and fifth alterations in original; first ellipsis in original) (quoting Banker's Trust Co. v. Hardy, 281 Ga. 561, 563, 640 S.E.2d 18, 20 (2007)).

236. *Id.* at 1182.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1183-84.

deeds remained of record during that period.[241] The court also observed that "Georgia recognizes inquiry notice, which imputes knowledge of an earlier interest to a later purchaser . . . whenever there is '[a]ny circumstance which would place a man of ordinary prudence fully upon his guard, and induce serious inquiry.'"[242] Therefore, a purchaser "has inquiry notice, and thus cannot be a bona fide purchaser, if he acquires his interest before earlier creditor's security deeds are cancelled."[243]

Accordingly, the court held that in the Hedricks' case, "no bona fide purchaser could [have] acquire[d] an interest superior to NovaStar's because the [prior] security deeds were not cancelled until after the NovaStar security deed was recorded."[244] NovaStar's security deed was perfected under Georgia's doctrine of equitable subrogation as soon as the prior lien holders received the checks paying off the Hedricks' debts.[245] NovaStar's checks to the prior creditors were sent on December 10, 2003 and cleared NovaStar's escrow account on December 12, 2003.[246] Therefore, the court noted that "the latest that Novastar perfected its interest under the doctrine of equitable subrogation was December 12, 2003."[247] NovaStar's loan to the Hedricks closed on December 4, 2003.[248] Because the payoff and the closing occurred within ten days of each other, the transfer was "made" at the time of the closing for purposes of section 547(e)(2)(A)'s relation-back provision.[249] Because the avoidance period did not begin until January 6, 2004, the December 4, 2003 transfer was "made" outside the ninety-day avoidance period, preventing the trustee from avoiding the security deed.[250]

2. The Sharmas' Case. Santosh Sharma and Sanjiv Gupta jointly owned a home. Each took out loans and gave liens on his or her share of the property. On May 20, 2003, they refinanced those debts with a loan from ABN. ABN secured the loan with a first priority security deed on the home. Most of the proceeds from the new ABN loan were used

241. *Id.* at 1182-83.
242. *Id.* at 1183 (alteration in original) (quoting Page v. Will McKnight Constr., Inc., 282 Ga. App. 571, 572, 639 S.E.2d 381, 383 (2006)).
243. *Id.*
244. *Id.* at 1183-84. The court noted that anyone who might have acquired an interest in the Hedricks' property would have been on notice of NovaStar's interest and could not have been a bona fide purchaser. *Id.* at 1184.
245. *Id.* at 1184.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*

to pay Union Planters Bank (Union Planters), satisfying Sharma's debt. The remainder of the proceeds were paid to Atlantic States Bank (Atlantic), satisfying Gupta's debt.[251]

The three-day federally mandated rescission period on the refinancing ended on May 23, 2003. Because the next business day (May 27) was the Memorial Day holiday, the parties agreed that the checks could not have arrived until the next business day, May 28. On May 28, ABN sent its security deed to the county clerk to be recorded, but the clerk did not record the deed until June 10, 2003.[252]

On June 18, 2003, Santosh Sharma and her husband, Som Sharma, filed a Chapter 7 bankruptcy petition. The clerk recorded the cancellations of the Union Planters and Atlantic security deeds on the Sharmas' home on June 23 and June 26, 2003, respectively.[253] In the bankruptcy proceedings, "ABN and the trustee both agreed that the transfer of the security deed to ABN was made within the ninety days preceding the filing of the Sharmas' bankruptcy petition."[254] Applying the doctrine of equitable subrogation, the bankruptcy court granted summary judgment to ABN based on the "contemporaneous exchange" exception to the preference avoidance provision.[255] The district court affirmed and the trustee appealed to the Eleventh Circuit.[256]

The Eleventh Circuit held that under equitable subrogation, ABN's security deed had the priority of the prior interests on May 28, 2003, "when the checks from ABN arrived at Union Planters and Atlantic to pay off the Sharmas' debts. . . . At that time, the exchange between ABN and the Sharmas was complete"—ABN had paid the prior lenders to satisfy the Sharmas' debts—"and ABN had received a security deed in the Sharmas' home, which was immediately perfected through equitable subrogation."[257]

The court noted that

> [b]ecause May 28, 2003 [w]as fewer than ninety days before the Sharmas filed for bankruptcy on June 18, 2003, the question [became] whether ABN qualifie[d] for an exception to the § 547(b) preference

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251. *Id.*

252. *Id.*

253. *Id.* at 1184-85.

254. *Id.* at 1185 ("Ninety days before the petition was filed was March 20, 2003, two months before ABN's loan to the Sharmas closed.").

255. *Id.* The contemporaneous exchange exception "exempts from avoidance transfers that are intended to be contemporaneous and are in fact at least substantially contemporaneous." *Id.* (citing 11 U.S.C. § 547(c)(1)).

256. *Id.*

257. *Id.*

> avoidance provision. ABN contend[ed] that the eight days between the time the loan closed and the time it received a perfected interest in the . . . [property was] close enough to be "substantially contemporaneous" for purposes of the § 547(c)(1) exception.[258]

This exception applies when the transfer is: "'(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) [was] in fact a substantially contemporaneous exchange.'"[259] The trustee did not dispute that the security deed was intended to be a contemporaneous exchange for new value given to the debtor, but argued that the exchange was not substantially contemporaneous.[260]

The Eleventh Circuit noted that it had not interpreted the term "substantially contemporaneous" in section 547(c)(1)(B) outside the context of enabling loans.[261] The court also noted that other circuits that had addressed the issue had split over whether to apply the ten-day period specified in the relation-back provision "into 'substantially contemporaneous,' or [to] instead define the term in a way that requires a case-by-case consideration of all the facts in order to decide if a given transfer was substantially contemporaneous."[262] The court was

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258. *Id.*

259. *Id.* (alteration in original) (quoting 11 U.S.C. § 547(c)(1)).

260. *Id.*

261. *Id.* at 1185. The court noted that "[e]nabling loans (i.e. purchase money security interests) have a specific exception to avoidance, which is found in section 547(c)(3). If the enabling loan is perfected in the statutorily defined period a trustee cannot avoid it." *Id.* at 1185 n.4. The court also cited its prior holding in *Gower v. Ford Motor Credit Co.* (*In re Davis*), 734 F.2d 604 (11th Cir. 1984), "a decision limited to enabling loans," wherein it held that "for an exchange that involve[d] the transfer of an enabling loan to be 'substantially contemporaneous' it must occur within the period of time allotted for perfection in § 547(c)(3), the enabling loan exception to avoidance." *In re Hedrick*, 524 F.3d at 1186 n.4 (citing *Gower*, 734 F.2d at 605-07). In *Gower* the Eleventh Circuit "reasoned that Congress's intent in creating a specific provision governing enabling loans and a particular period for perfecting those loans would be circumvented by allowing creditors to perfect their interest outside that period and then use the contemporaneous exchange exception to prevent avoidance of their interest." *Id.* (citing *Gower*, 734 F.2d at 607). Because the case at bar did not involve an enabling loan, and because there was not a specific provision in the Bankruptcy Code that "requires perfection of non-purchase money security deeds within a particular time," the court held that the holding in *Gower* was not controlling and its reasoning was not helpful in the instant case. *Id.*

262. *Id.* at 1185-86 (citing Collins v. Greater Atlanta Mortgage Co. (*In re* Lazarus), 478 F.3d 12, 19 (1st Cir. 2007) (interpreting "substantially contemporaneous" as requiring the exchange to occur within the ten-day relation back period under section 547(e)(2)(a)); Lindquist v. Dorholt, Inc. (*In re* Dorholt, Inc.), 224 F.3d 871, 874 (8th Cir. 2000) (holding that whether an exchange is "substantially contemporaneous" must be determined on a case by case basis); Dye v. Rivera (*In re* Marino), 193 B.R. 907, 915 (B.A.P. 9th Cir. 1996)

unconvinced by the reasons that the First and Sixth Circuits had given for writing the ten-day rule of the relation-back provision into section 547(c)(1)(B)'s "substantially contemporaneous" term, reasoning that those circuits had drawn a bright line rule at the expense of adherence to the statutory language.[263] The Eleventh Circuit observed that "[s]ection 547(c)(1)(B) does not set out a bright line rule," and "does not refer . . . to the ten-day period contained in § 547(e)(2)(A) or to any other provision's time standard."[264] Rather, "Congress chose . . . not to make ten days the time measure for § 547(c)(1)(B)," but "chose instead to make 'substantially contemporaneous' the standard."[265] Accordingly, the Eleventh Circuit held that the plain meaning of the "substantially contemporaneous" term conveys flexibility "and requires a case-by-case approach focused on the facts and circumstances."[266]

The court pointed out that the existence of precise, bright line time periods in other parts of the Bankruptcy Code weighed against courts inserting one into the "substantially contemporaneous" measure of section 547(c)(1)(B).[267] The Eleventh Circuit noted that Congress knew how to write specific deadlines and time periods into the Code, and the "presence of specified time measures elsewhere in the Act makes the absence of one in § 547(c)(1)(B) all the more telling."[268] The court also disagreed "with the premise of the First and Sixth Circuits that a court is authorized to interpret a statute contrary to the plain meaning of its words if doing so would, in the court's view, better further the purpose it thinks Congress had in mind."[269]

In so holding, the Eleventh Circuit reiterated that "[s]ection 547 of the Bankruptcy Code deals with preferences," and that the general rule is that transfers of interest acquired within the ninety days before a debtor

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(same), *aff'd*, 117 F.3d 1425 (9th Cir. 1997); Pine Top Ins. Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 969 F.2d 321, 328 (7th Cir. 1992) (interpreting "substantially contemporaneous" in 11 U.S.C. § 547(c)(1)(B) to require a flexible inquiry in a state insurance law case); Ray v. Sec. Mut. Fin. Corp. (*In re* Arnett), 731 F.2d 358, 363 (6th Cir. 1984)).

263. *Id.* at 1186 (citing *In re Lazarus*, 478 F.3d at 19; *In re Arnett*, 731 F.3d at 363).

264. *Id.*

265. *Id.*

266. *Id.* at 1187 (citing *Pine Top*, 969 F.2d at 328). The court stated, "We have no license to assume that Congress did not mean what it said in § 547(c)(1)(B), but we are instead bound to assume that it meant exactly what it said." *Id.* at 1186.

267. *Id.* at 1187.

268. *Id.* ("'It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Duncan v. Walker, 533 U.S. 167, 173 (2001)).

269. *Id.* at 1187-88 (citing *In re Lazarus*, 478 F.3d at 17-18; *In re Arnett*, 731 F.2d at 363).

files a bankruptcy petition can be avoided by the trustee if the transfers meet certain requirements.[270] One exception to that rule appears in section 547(c)(1), "which provides that a transfer within ninety days may not be avoided by the trustee if two conditions are met:" (1) "the transfer was intended by both the debtor and the creditor to be a contemporaneous exchange for new value given," and (2) "the transfer was in fact a substantially contemporaneous exchange."[271] The exception "depends solely on those two conditions having been met," and does not require that the transfer have been perfected in ten days or any other specified time period.[272]

The Eleventh Circuit agreed with the Eighth and Ninth Circuits that "substantially contemporaneous" does not mean the same thing as "within 10 days," and the Eleventh Circuit joined these circuits in holding that, "unlike the ten-day bright line rule of § 547(e)(2)(A), the 'substantially contemporaneous' rule of § 547(c)(1)(B) requires an examination of all the facts and circumstances."[273] This flexible standard should include "the objective reasonableness of the time taken to perfect the interest, the cause of any delay, and the motivations for it."[274] Although the length of the delay between the transfer and perfection is a factor, the court held that it is not dispositive, and "the nature of the transaction and how long a creditor in that type of transaction usually takes to perfect its interest in the normal course of affairs are relevant."[275] The court noted that the most important fact may be whether the delay in perfecting the interest was the result of negligence or intentional delay by the creditor.[276]

Accordingly, the Eleventh Circuit determined that "[u]nder equitable subrogation, ABN's interest was perfected when Union Planters and Atlantic received their checks from ABN to pay off the Sharmas' debts," which occurred eight days after the closing, on May 28, 2003.[277] The trustee did not contend that ABN was attempting to acquire a secret lien or otherwise acting in bad faith and did not "contend that waiting until after a federal holiday to send a deed to be recorded was outside the

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270. *Id.* at 1188.
271. *Id.* (citing 11 U.S.C. § 547(c)(1)).
272. *Id.*
273. *Id.* at 1190 (citing *In re Dorholt, Inc.*, 224 F.3d at 874; *In re Marino*, 193 B.R. at 915).
274. *Id.*
275. *Id.*
276. *Id.* at 1191.
277. *Id.* ("ABN sent its deed to be recorded on that same date, the first business day after the federally mandated rescission period had ended.").

normal course of affairs for this kind of transaction."[278] Therefore, the Eleventh Circuit concluded that this was a substantially contemporaneous exchange under section 547(c)(1) such that the trustee could not avoid the transfer.[279]

V. CONCLUSION

The 2008 survey period yielded several noteworthy decisions, many of which involved issues of first impression in the Eleventh Circuit. While this Article is not intended to be exhaustive, the Authors have attempted to provide material that will be useful to practitioners by providing relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.

278. *Id.*
279. *Id.*