Class Actions

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In its noteworthy 2004 decision in *Klay v. Humana, Inc.*,[1] the United States Court of Appeals for the Eleventh Circuit appeared to veer from its own precedents in affirming certification of a nationwide class asserting a claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[2] During 2009[3] the court returned to RICO class actions in *Williams v. Mohawk Industries, Inc.*,[4] and this time the Eleventh Circuit vacated a district court's refusal to certify a RICO class.[5] The proposed class consisted of Mohawk Industries employees who complained that Mohawk engaged in racketeering activity violating the federal and Georgia RICO[6] statutes by hiring illegal aliens and

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1. 382 F.3d 1241 (11th Cir. 2004).

2. 18 U.S.C. §§ 1961–1968 (2006); *see* Thomas M. Byrne & Suzanne M. Alford, *Class Actions, 2004 Eleventh Circuit Survey*, 56 MERCER L. REV. 1219, 1220–26 (2005) (discussing *Klay* in the context of several prior decisions in which the court reversed class certification on the basis that individual issues predominated).

3. For analysis of Eleventh Circuit class action law during the prior survey period, see Thomas M. Byrne, *Class Actions*, *2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1163 (2009).

4. 568 F.3d 1350 (11th Cir.), *cert. denied*, 130 S. Ct. 500 (2009) (mem.). The opinion for the court was written by Judge William H. Pryor Jr. *Id.* at 1352.

5. *Id.* at 1352, 1360.

6. O.C.G.A. § 16-14-4(a) (2007).

depressing the employees' wages.[7] The employees sought class certification under subsections (b)(2) and (b)(3) of Federal Rule of Civil Procedure 23.[8] The district court concluded that the commonality and typicality requirements of subsections (a)(2) and (a)(3) of Rule 23[9] were not satisfied by the employees.[10] As to commonality, the district court found that Mohawk's operations were extremely decentralized, including its use of temporary employment agencies and its wage-setting practices.[11] The district court deemed the class representatives' claims atypical because they only "worked at . . . a handful of [Mohawk's] facilities."[12] The district court also held that the proposed class did not meet the requirements of subsections (b)(2) or (b)(3) of Rule 23.[13]

On appeal, the Eleventh Circuit identified the district court's first abuse of discretion to be its finding of inadequate commonality.[14] The court reasoned that "[t]he employees presented two overarching questions that are common to all members of the class: (1) whether Mohawk conducted or participated, directly or indirectly, in the conduct of an enterprise's affairs under the federal RICO statute; and (2) whether Mohawk engaged in a pattern of racketeering activity" or a conspiracy to violate the Georgia RICO statute.[15] The court rejected the district court's reliance on employment discrimination precedents under Title VII of the Civil Rights Act of 1964.[16] Citing *Klay*, the court observed that RICO claims, unlike Title VII claims, "are often susceptible to common proof."[17] The court concluded that the "common questions are sufficient to satisfy the low hurdle of Rule 23(a)(2).

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7. *Williams,* 568 F.3d at 1352. The *Mohawk* controversy has a tangled history, including a recent decision by the United States Supreme Court in an interlocutory appeal. Mohawk Indus. v. Carpenter, 130 S. Ct. 599 (2009). The plaintiff in *Carpenter* alleged that he was wrongfully terminated as part of an effort by Mohawk to keep him from testifying in the *Williams* litigation. *Id*. at 603. The district court granted the plaintiff's motion to compel Mohawk's disclosure of information concerning his pre-termination interview with Mohawk's counsel, finding that the attorney–client privilege had been implicitly waived by Mohawk through its representations in the *Williams* litigation. *Id*. at 604. Mohawk sought an interlocutory appeal, but the Supreme Court affirmed the court of appeals in refusing to hear the appeal, *id.* at 603, holding "that the collateral order doctrine does not extend to disclosure orders adverse to the attorney–client privilege." *Id*. at 609.

8. FED. R. CIV. P. 23(b)(2)–(3); *Williams,* 568 F.3d at 1352.

9. FED. R. CIV. P. 23(a)(2)–(3).

10. *Williams*, 568 F.3d at 1352.

11. *Id.* at 1354.

12. *Id.* (second alteration in original) (internal quotation marks omitted).

13. *Id.*

14. *Id.* at 1355.

15. *Id.* (internal quotation marks omitted).

16. 42 U.S.C. §§ 2000e to 2000e-17 (2006); *Williams*, 568 F.3d at 1356.

17. *Williams,* 568 F.3d at 1356.

Whether Mohawk conducted the affairs of an enterprise through a pattern of racketeering activity that depressed the wages of all employees is a question common to each employee's complaint."[18]

The Eleventh Circuit also determined that the district court abused its discretion in not finding that the class representatives' claims were typical of the class.[19] The court deemed the class representatives' claims typical of the claims of other members of the class because they were "based on the same legal theory."[20]

Finally, the Eleventh Circuit concluded that the district court also abused its discretion in not certifying a Rule 23(b)(3) class, but did not order class certification.[21] The court instead remanded the case "for the district court to conduct a pragmatic assessment of whether common issues predominate over individual issues and whether a class action is superior to other forms of relief."[22] Again citing *Klay*, the court observed that "[i]f a district court determines that issues common to all class members predominate over individual issues, then a class action will likely be more manageable than and superior to individual actions."[23] The court determined that the district court's denial of class certification under Rule 23(b)(3) was based on the "erroneous determination about a lack of common issues."[24] On remand, the court instructed the district court to "test and evaluate the employees' argument that their injury is subject to common proof."[25] The court noted that the employees conceded that a Rule 23(b)(2) class was inappropriate because the damages sought were not incidental to the claims for equitable relief.[26] The court nonetheless instructed the district court to determine whether a "hybrid class action" should be certified.[27] The court explained that if a damages class is certified under subsection (b)(3), then the district court must consider whether to certify a class under subsection (b)(2) with respect to equitable relief.[28]

Williams indicates, at the least, that the court remains receptive to RICO class actions. The case may illustrate as well an unwritten rule of class litigation: a court's reaction to the merits of the underlying claim

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18. *Id.*
19. *Id.* at 1357.
20. *Id.*
21. *Id.* at 1359.
22. *Id.*
23. *Id.* at 1358.
24. *Id.*
25. *Id.* at 1359.
26. *Id.*
27. *Id.* at 1360.
28. *Id.*

often influences its technical application of Rule 23. Also notable was the court's relatively lax consideration of Rule 23(a)(3)'s typicality requirement.[29] The court found sufficient typicality because the named plaintiffs and the proposed class relied on the "same legal theory."[30] If this were the extent of the typicality requirement, then it would be fully congruent with Rule 23(a)(2)'s commonality requirement, and thus superfluous. The court undertook a more rigorous typicality analysis in *Vega v. T-Mobile USA, Inc.*,[31] described below.[32]

In *Thomas v. Bank of America Corp.*,[33] the Eleventh Circuit invoked the doctrine established in its 2007 decision in *Lowery v. Alabama Power Co*.[34] to reject a removal predicated on the Class Action Fairness Act of 2005 (CAFA).[35] In *Lowery* the court took a hard stance with respect to CAFA removals, holding that a case is not removable until a document is received by the defendant *from the plaintiff* that unambiguously establishes federal jurisdiction, a position endorsed so far by no other circuit.[36] *Lowery* permits no discovery.[37] The court applied this rule in *Thomas*, a class action against Bank of America and one of its subsidiaries filed in the Superior Court of Clarke County, Georgia.[38] The complaint alleged violations of the Georgia RICO statute and other state laws based on the sale of a bundled insurance product to individuals who were allegedly not eligible to buy it. The product, a credit protection plan, provided different benefits upon the occurrence of various adverse contingencies, such as sickness or unemployment.[39]

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29. *See id*. at 1357.

30. *Id.*

31. 564 F.3d 1256 (11th Cir. 2009).

32. *See infra* notes 84–119 and accompanying text.

33. 570 F.3d 1280 (11th Cir. 2009) (per curiam).

34. 483 F.3d 1184 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2877 (2008) (mem.).

35. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); *Thomas*, 570 F.3d at 1282–83.

36. *Lowery,* 483 F.3d at 1213. The standard in *Lowery* appears to apply equally to non-CAFA removals. *See* Pittman v. Gen. Motors Corp., 613 F. Supp. 2d 1250, 1253 (M.D. Ala. 2009) (stating that "[a]lthough *Lowery* arose in the context of a removal pursuant to the Class Action Fairness Act of 2005 ('CAFA'), it is quite plain from the text of *Lowery* that the holdings of the case are not limited solely to cases removed under CAFA").

37. *Lowery*, 483 F.3d at 1215, 1218. Contrast this standard with that adopted by the United States Court of Appeals for the First Circuit, for example. In *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41 (1st Cir. 2009), the court held that to meet CAFA's amount in controversy requirement the defendant "must show a reasonable probability that more than $5 million is at stake." *Id.* at 50. The court explicitly noted, however, that this "may well require analysis of what *both* parties have shown" and that "a federal court may consider which party has better access to the relevant information." *Id*. at 51.

38. *Thomas,* 570 F.3d at 1281.

39. *Id.*

The plaintiff alleged that the product was contingent on the buyer's being employed for at least thirty hours per week but was sold to individuals, including herself, who worked less than thirty hours per week.[40] Two alternative classes were proposed.[41] The first class, which included all Georgia residents with a credit account with the defendants and who had enrolled and paid premiums for the product, sought certification of an injunctive relief class under Georgia's version of Rule 23(b)(2).[42] The complaint also alleged an alternative class seeking money damages under Georgia's version of Rule 23(b)(3) for persons who bought the product but were ineligible or became ineligible for any of the bundled benefits.[43]

The complaint neither alleged a number of individuals in either of the proposed classes nor demanded a specific amount of recovery. Bank of America removed the action to the United States District Court for the Middle District of Georgia based on CAFA. Bank of America supplemented its notice of removal with a declaration stating that for part of the class period, Bank of America had enrolled 77,787 customers in the program and collected more than $4.8 million in fees from them.[44] Because the complaint also sought treble damages under the Georgia RICO statute and attorney's fees, Bank of America argued that the amount in controversy clearly exceeded $5 million.[45] The plaintiff moved to remand the case, arguing that the amount in controversy was absent.[46] The district court agreed with the plaintiff and found that the $4.8 million figure did not accurately reflect the amount in controversy because the complaint did not allege that all of the customers were entitled to relief for the entire amount of their fees.[47] The district court "concluded that there was 'great uncertainty regarding the amount in controversy and the class size.'"[48] In affirming the district court, the Eleventh Circuit held that because "the complaint provided no information indicating the amount in controversy," CAFA jurisdiction was not established and the case was properly remanded.[49]

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40. *Id.*
41. *See id.* at 1281–82.
42. *Id.*; *see* O.C.G.A. § 9-11-23(b)(2) (2006).
43. *Thomas*, 570 F.3d at 1282; *see* O.C.G.A. § 9-11-23(b)(3) (2006).
44. *Thomas*, 570 F.3d at 1282.
45. *Id.*
46. *Id.*
47. *Id.* at 1282–83.
48. *Id*. at 1283 (quoting Thomas v. Bank of Am. Corp., No. 3:08-CV-68, 2009 WL 88450, at *3 (M.D. Ga. Jan. 12, 2009)).
49. *Id*.

Thomas shows that the Eleventh Circuit intends to apply the *Lowery* doctrine zealously. Bank of America's demonstration of the amount in controversy, however, was not airtight, leaving open for a future case the question of how demanding the Eleventh Circuit will be in the face of an unequivocal showing of the jurisdictional amount that does not originate with the plaintiff. In a footnote in *Lowery*, the court stated that a contractual provision that itself allows the measure of damages to be determined might suffice, even if the contract is not, strictly speaking, generated by the plaintiff.[50] The conspicuous asymmetry in the court's hostility toward evidence supplied by the removing defendant is not convincingly rooted in any statutory language. *Lowery*'s formalistic approach invites multiple removal attempts and disruptive late-stage removals in lieu of a single, reasonably focused inquiry at the outset into whether the jurisdictional amount is satisfied in cases in which there is a genuine question.

While RICO plaintiffs enjoyed some success in the Eleventh Circuit during 2009, plaintiffs in employment cases encountered trouble. *Babineau v. Federal Express Corp.*[51] involved claims for breach of contract and quantum meruit made by Federal Express employees on the theory that the company failed to pay them for "all hours worked."[52] The district court had previously denied certification of a nationwide class of FedEx employees asserting similar claims. The case before the Eleventh Circuit was a second action that confined the class to Florida employees.[53] The specific claims were that FedEx breached their contracts by failing to pay employees for "(1) the interval between an employee's manual punch in time and his scheduled start time; (2) the interval between an employee's scheduled end time and his manual punch out time; and (3) the time worked during unpaid breaks."[54] The plaintiffs' theory was that their employment relationship with the company was governed by an express contract that required FedEx to pay for "all time worked."[55] The district court denied class certification.[56]

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50. *Lowery,* 483 F.3d at 1214 n.66.

51. 576 F.3d 1183 (11th Cir. 2009). The opinion for the court was written by District Judge B. Avant Edenfield, sitting by designation. *Id.* at 1185 & n.*.

52. *Id*. at 1185 (internal quotation marks omitted). The complaint based federal jurisdiction on the CAFA diversity provision, 28 U.S.C. § 1332(d) (2006). *See* Complaint ¶ 6, Babineau v. Fed. Express Corp., No. 08-21428 (S.D. Fla. May 19, 2008).

53. *Babineau,* 576 F.3d at 1185.

54. *Id*. at 1186.

55. *Id*.

56. *Id.* at 1185. Because federal jurisdiction was based solely on CAFA, the district court sua sponte dismissed the case without prejudice upon denial of class certification.

On review, the Eleventh Circuit began by delineating the boundaries of the task. "While we avoid merits determinations to the extent practicable, this case does require the Court to look beyond the pleadings and examine the parties' claims, defenses, and evidence to ensure that class certification would comport with Rule 23's standards."[57] The district court had rejected certification of a Rule 23(b)(3) class on the ground that there was no predominance of common issues over individual issues.[58] The district court reasoned that any adjudication of common issues "would be swamped by individual factual inquiries into the activities of each employee during the gap periods or during breaks."[59] The Eleventh Circuit concluded that the district court's concern "that individualized proof would be required to determine whether employees were actually working during the pre- and post-shift gap periods"[60] was not an abuse of discretion.[61] The court agreed that the district court had reasonably determined "that punch clock records do not provide common proof of any uncompensated work during gap periods."[62] The court pointed to "employee testimony regarding the various non-work-related activities that took place during the gap periods and the various personal reasons that the employees listed for coming in early and staying late."[63] The court observed that the district court's refusal to simply presume a material fact that the plaintiffs were required to prove—that the employees were working for a period of time for which they were not compensated—"was certainly not an abuse of discretion."[64] The court also noted that FedEx could mount an individualized defense that an employee knew of FedEx's

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See Babineau v. Fed. Express Corp., No. 08-21428, 2008 U.S. Dist. LEXIS 109500, at *19–37 (S.D. Fla. Oct. 2, 2008). This dismissal appears to be in conflict with language in the Eleventh Circuit's opinion in *Vega*, discussed below, indicating that denial of class certification does not divest a court of CAFA jurisdiction. *See* 564 F.3d at 1268 n.12 (noting that the failure to establish a class of one hundred or more plaintiffs, as required by CAFA, would not divest the court of jurisdiction, as this "limitation applies only to [the] 'proposed' . . . class[]" and "jurisdictional facts are assessed at the time of removal; and post-removal events (including non-certification, de-certification, or severance) do not deprive federal courts of subject matter jurisdiction"); *see also* Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805, 806 (7th Cir. 2010) (holding "that federal jurisdiction under the Class Action Fairness Act does not depend on certification").

57. *See Babineau*, 576 F.3d at 1190.
58. *Id.* at 1191.
59. *Id*. (internal quotation marks omitted).
60. *Id.*
61. *Id.* at 1191–94.
62. *Id.* at 1192.
63. *Id.*
64. *Id*. at 1192 n.7.

policy prohibiting off-the-clock work and chose to engage in it anyhow—in breach of the contract.[65] The court affirmed the district court's refusal to agree that FedEx's policies and procedure manuals incorporated the regulations adopted under the Fair Labor Standards Act of 1938 (FLSA).[66] The court reasoned that even if the FLSA regulations were applicable, it would still appear that the district court would "have to conduct individualized inquiries into whether each employee voluntarily arrived early or stayed late and whether he engaged in any work."[67] The court determined that it was reasonable for the district court to find that the existence of an overall policy requiring or encouraging employees to arrive early or stay late would not mean that individualized issues still would not predominate.[68]

As to unpaid break periods, the court agreed that the threat that individualized issues could take over the litigation was even more apparent.[69] The court pointed out that there was no way to determine from tracker data or some other source of common proof how long an employee worked during a break.[70] The court also noted there were concerns about the accuracy of the data that was available and that FedEx would raise an individualized defense of breach of contract for working during breaks.[71]

The court held that the district court did not abuse its discretion in refusing to certify the plaintiffs' quantum meruit claims,[72] finding such claims to be "highly individualized," requiring "an inquiry into whether each employee expected compensation for non-work-related tasks or for activities performed while he was supposed to be on break."[73] This would entail an inquiry into the "employee's familiarity with FedEx's policy that employees were to be paid based upon the times entered into [its tracking equipment], not manual punch times."[74] The Eleventh Circuit agreed with the district court that these individualized inquiries were not suitable for class-wide adjudication.[75]

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65. *Id.* at 1192.
66. 29 U.S.C. §§ 201–219 (2006); *Babineau*, 576 F.3d at 1193–94.
67. *Babineau,* 576 F.3d at 1193.
68. *Id.*
69. *Id*. at 1194.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1195.
74. *Id.*
75. *Id.*

The plaintiffs also sought class certification under Federal Rule of Civil Procedure 23(b)(1)(A).[76] But the court reiterated its view that only an action seeking declaratory or injunctive relief can be certified under Rule 23(b)(1)(A).[77] Since the plaintiffs sought only limited injunctive relief and the primary remedy sought in the case was monetary relief, a Rule 23(b)(1)(A) class would be improper.[78]

Babineau underscores the importance of defendants presenting concrete evidence to support claims that individualized factual issues exist. FedEx presented evidence to the district court showing actual, on-the-ground practices among its employees that posed individualized issues under applicable law rather than relying on hypothetical scenarios.[79]

In another employment case, *Vega v. T-Mobile USA, Inc.*,[80] the Eleventh Circuit reversed certification of a statewide class of T-Mobile employees who claimed to be due additional compensation.[81] Specifically, the putative class representative asserted that T-Mobile improperly charged back commissions that sales employees earned on the sale of prepaid cellular telephone plans. The plaintiff claimed that T-Mobile had breached its contract with the employees and was unjustly enriched. The district court refused to certify a nationwide class but, on the eve of a scheduled trial, did certify a Florida-only class of employees.[82] The Eleventh Circuit agreed to review the case under Federal Rule of Civil

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76. FED. R. CIV. P. 23(b)(1)(A); *Babineau*, 576 F.3d at 1195. Rule 23(b)(1)(A) provides for class certification when Rule 23(a)'s requirements are met and "if . . . prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." FED. R. CIV. P. 23(b)(1)(A).

77. *Babineau*, 576 F.3d at 1195.

78. *Id.* (citing Cohen v. Office Depot, Inc., 204 F.3d 1069, 1078 & n.7 (11th Cir. 2000)).

79. *Cf.* Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1326–27 (11th Cir. 2008) (reversing the district court's denial of class certification when the defendant offered no factual support for the claim that the possible existence of individualized defenses would preclude class certification); Moreno-Espinosa v. J & J Ag Prods., 247 F.R.D. 686, 688–90 (S.D. Fla. 2007) (rejecting the defendant's arguments that individual issues prevented employees' claims from involving common issues of law or fact when the defendant's allegations contradicted those of the plaintiff and the alleged individual issues were not relevant under the applicable law).

80. 564 F.3d 1256 (11th Cir. 2009). The court's opinion was authored by Judge Gerald B. Tjoflat. *Id.* at 1260.

81. *Id.* at 1260.

82. *Id.* at 1262–64.

Procedure 23(f),[83] usually a sign of trouble ahead for a class certification order.

On appeal, the court fleshed out the meaning of abuse-of-discretion review of class certification decisions:

> A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous. A district court may also abuse its discretion by applying the law in an unreasonable or incorrect manner. Finally, an abuse of discretion occurs if the district court imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large. In making these assessments, we review the district court's factual determinations for clear error, and its purely legal determinations *de novo*.[84]

The court first examined Rule 23(a)'s numerosity requirement.[85] The court noted that the record did not disclose any evidence of the number of T-Mobile retail sales associates employed in Florida during the class period.[86] Even though numerosity was a "generally low hurdle," the court deemed the district court's inference of numerosity to be "an exercise in sheer speculation" and thus an abuse of discretion.[87]

As to the commonality requirement, the Eleventh Circuit concluded that the district court had botched the analysis from the outset by appearing to merge it with Rule 23(b)(3)'s predominance requirement.[88] The court noted that the district court "never actually identified a single specific common question of law or fact," and that "Rule 23 demands significantly greater analytical rigor and precision; backing into the requisite findings, and relying on a reviewing court to connect the dots, is not enough."[89] The court found an abuse of discretion in the district court's blended consideration of the distinct commonality and predomi-

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83. FED. R. CIV. P. 23(f); *Vega*, 564 F.3d at 1264. Rule 23(f) provides that
> [a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23(f).

84. *Vega*, 564 F.3d at 1264–65 (quoting *Klay,* 382 F.3d at 1251).

85. *Id.* at 1266.

86. *Id.* at 1267.

87. *Id*. at 1267–68.

88. *Id.* at 1269.

89. *Id*.

nance requirements for class certification.[90] Further, the court held that the substance of the district court's analysis of the commonality and predominance issues was also "unreasonable enough to constitute an abuse of discretion."[91] Quoting extensively from its decision in *Klay* on the issue of predominance, the court determined that the plaintiff's own pleading precluded him from relying on a breach of contract theory to support his claim for unpaid wages.[92]

The court noted that the district court had denied the plaintiff's motion to amend his complaint to add a breach of contract claim yet still treated the controversy as including the breach of contract claim.[93] This drew the Eleventh Circuit's ire: "We strongly disapprove of this exercise in judicial rewriting of the plaintiff's pleading."[94] In any event, the court held that commonality would not be present under a breach of contract theory because the plaintiff had not alleged the existence of a common contract that governed employment of all class members.[95] Therefore, identical evidence would not be available to prove the elements of a breach of contract for each class member and would depend on individual facts and circumstances concerning each employee's hiring and employment terms.[96] The absence of a common contract meant that the commonality requirement could not be satisfied, much less the predominance requirement.[97] The court noted that "T-Mobile presented evidence in the form of affidavits from several sales employees who attested to their understanding of the incentive compensation and charge back procedures" that were in dispute.[98] The court concluded that this testimony illustrated "the existence of significant individualized issues with respect to breach, materiality, and damages."[99]

The Eleventh Circuit also held that the plaintiff's unjust enrichment claim lacked commonality and predominance.[100] For an unjust enrichment claim, the court reasoned that "court[s] must examine the particular circumstances of an individual case and assure . . . that, without a remedy, inequity would result or persist."[101] The court noted

90. *Id.* at 1269–70.
91. *Id*. at 1270.
92. *Id.* at 1271.
93. *Id.*
94. *Id*.
95. *Id.* at 1272.
96. *Id.*
97. *Id.*
98. *Id.* at 1273–74.
99. *Id.* at 1274.
100. *Id.*
101. *Id*.

that it had previously held that unjust enrichment claims were inappropriate for class action treatment.[102]

Turning to Rule 23(a)(3)'s typicality requirement, the court pounced on the district court's "utter failure to interrogate Vega's claimed typicality with respect to the certified class."[103] Had the proper typicality analysis been conducted, the court opined, "the district court would have discovered that Vega's claims are not typical of the class he seeks to represent."[104] First, the court reasoned that the plaintiff's pleading provided no basis for a class limited to a particular year's compensation program; second, the claims asserted on behalf of the class depended on the terms, conditions, and mutual understandings regarding compensation that would be particularized to each class member.[105] The court held that the district court's conclusion that typicality was present was an abuse of discretion and another reason why class certification was inappropriate.[106]

Finally, the court concluded that the district court's "extremely cursory" Rule 23(b)(3) analysis was "grossly insufficient and easily rises to the level of an abuse of discretion."[107] The Eleventh Circuit pointed out that "the district court did not engage in any meaningful superiority analysis."[108] Noting again the presence of central individualized issues that precluded findings of commonality, typicality, and predominance, the court observed that the plaintiff "ha[d] done nothing to acknowledge these issues or propose a trial plan that would feasibly address them."[109] The court reproached the district court for failing "to force a reckoning with these issues prior to the very precipice of trial."[110] The court remanded the case with a blunt direction that the plaintiff's claims proceed individually.[111]

Vega is notable for its unusually harsh dissection of the district court's handling of class certification both from a procedural standpoint and in its consideration of Rule 23's substantive requirements. In its stern exegesis of the shortcomings in the district court's approach, the court

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102. *Id.*
103. *Id.* at 1276.
104. *Id*.
105. *Id.*
106. *Id.* at 1277.
107. *Id*. at 1277–78.
108. *Id.* at 1278.
109. *Id.*
110. *Id.* at 1279.
111. *Id.* at 1280.

provides a road map of sorts for district judges in applying Rule 23 and a stark reminder that the journey may be fraught with challenges.[112]

Class action practitioners should also take note of an unpublished Eleventh Circuit decision,[113] *Hamm v. TBC Corp.*,[114] in which the court affirmed the imposition of sanctions against would-be class counsel for impermissibly soliciting clients.[115] *Hamm* was a FLSA action brought by six employees of Tire Kingdom as a proposed collective action.[116] Several months after the plaintiffs filed the case, the defendant sought sanctions against the plaintiffs' law firm for direct solicitation of putative class members in violation of Florida Rule of Professional Conduct 4-7.4(a)[117] and Southern District of Florida Local Rule 11.1.C.[118] The defendant alleged that the law firm had improperly solicited at least three current employees to convince them to join in the lawsuit and have the plaintiffs' firm represent them. The law firm conceded that an administrative assistant had contacted two of the employees but denied soliciting them as clients. Instead, the law firm maintained that the two employees had been contacted to conduct a due diligence investigation before having its client join in the action. The magistrate judge to whom the matter was referred for an evidentiary hearing issued a report and recommendation finding that the law firm solicited the three employees to join the action and that the motive was pecuniary gain. The magistrate also found that the law firm failed to train one of its employees regarding solicitation of clients, and the magistrate recommended sanctions.[119] The sanctions included barring the law firm from representing any individual who did not work with any of the named plaintiffs; requiring that the law firm implement a formal written policy on solicitation; and awarding the defendants all fees and costs incurred in bringing the sanctions motion.[120] The

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112. *See id*. at 1256. In an unpublished decision, the Eleventh Circuit affirmed the denial of class certification in another employment controversy involving migrant and seasonal workers. Luna v. Del Monte Fresh Produce (Southeast), Inc., No. 09-12464, 2009 WL 4366953, at *1–2 (11th Cir. Dec. 3, 2009) (per curiam). In *Luna* the court concluded that "[t]he district court did not err in finding that liability would hinge upon evaluation of proof as to each individual's earnings and time worked," which meant that "common questions did not predominate." *Id.* at *2.

113. Although the court does not consider unpublished opinions as binding precedent, "they may be cited as persuasive authority." 11TH CIR. R. 36-2.

114. 345 F. App'x 406 (11th Cir. 2009) (per curiam).

115. *Id.* at 408, 411–12.

116. *Id.* at 408.

117. FLA. RULES OF PROF'L CONDUCT R. 4-7.4(a) (2009).

118. S.D. FLA. L.R. 11.1.C; *Hamm*, 345 F. App'x at 408.

119. *Hamm*, 345 F. App'x at 408–09.

120. *Id.* at 409.

recommendation did not include barring the lawyers from representing their clients in the action.[121] The district court adopted the recommendation and the law firm appealed.[122]

On appeal, the Eleventh Circuit began by pointing out that a federal district court has the power to discipline attorneys who appear before it.[123] The court approved the enforcement of the Florida bar rule prohibiting a lawyer from soliciting "professional employment from a prospective client with whom the lawyer has no family or prior professional relationship" when a significant motive for the lawyer's doing so is pecuniary gain.[124] The court first rejected the plaintiffs' claim that the sanction was overbroad and would apply in other lawsuits.[125] The court held that the sanctions recommended by the magistrate were narrowly tailored.[126] Finally, the court rejected the law firm's First Amendment[127] argument that was based on the Supreme Court's decision in *Gulf Oil Co. v. Bernard*.[128] The complete ban on all communications concerning the class action between parties and their counsel involved in *Bernard* was completely unsupported by the record in that case.[129] Here, the court pointed out that an evidentiary hearing was held with detailed factual findings that supported the sanctions award.[130]

In *Harris v. Mexican Specialty Foods, Inc.*,[131] a case that has both nothing and everything to do with class actions, the court considered a challenge to the constitutionality of the statutory damages provision of the Fair Credit Reporting Act (FCRA)[132] as applied to amendments enacted by the Fair and Accurate Credit Transactions Act of 2003

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121. *See id.*

122. *Id.*

123. *Id.* at 410 (internal quotation marks omitted) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)).

124. *Id.* (internal quotation marks omitted) (quoting FLA. RULES OF PROF'L CONDUCT R. 4-7.4(a)).

125. *Id.*

126. *Id.*

127. U.S. CONST. amend. I.

128. 452 U.S. 89 (1981); *Hamm*, 345 F. App'x at 411. In *Bernard* the Court concluded that the district court exceeded its authority under the Federal Rules of Civil Procedure by prohibiting named plaintiffs and their counsel from communicating with prospective class members without court approval. 452 U.S. at 99, 101, 104.

129. *Hamm,* 345 F. App'x at 411.

130. *Id.*

131. 564 F.3d 1301 (11th Cir. 2009). The opinion for the court was authored by Judge Phyllis A. Kravitch. *Id.* at 1306.

132. 15 U.S.C. §§ 1681–1681x (2006).

(FACTA).[133] The court's ruling in *Harris* has implications for certification of consumer class actions under FACTA, which has been denied by several courts on the basis that the statutory damages provision precludes the class action from being the superior method for fair adjudication of FACTA actions under Rule 23(b)(3).

FACTA establishes requirements for merchants regarding what information may be printed on credit card receipts at the point of sale.[134] The FCRA's damages provision states that a plaintiff may receive either actual damages or statutory damages between $100 and $1000, plus attorney fees, for willful violations of the statute.[135] The plaintiffs in *Harris* were individuals who brought separate claims against two merchants alleging failure to comply with FACTA's requirements regarding truncation of credit card numbers on receipts.[136] The plaintiffs also sought certification of a class consisting of all customers who had been given a receipt by the defendants that included more than the last five digits of the customer's credit card number, its expiration date, or both.[137] The defendants moved for summary judgment, challenging the constitutionality of FACTA's statutory damages provision.[138] The district court granted the defendants' motion, finding that the statutory-damages provision was unconstitutionally vague on its face and unconstitutionally excessive both on its face and as applied.[139] The district court dismissed the claims with prejudice.[140]

On appeal, the Eleventh Circuit vacated the district court's order.[141] The court concluded that the as-applied excessiveness challenge was not ripe for adjudication, that the statute was not unconstitutionally vague on its face, and that the statute was not unconstitutionally excessive on its face.[142] In concluding that the as-applied excessiveness challenge was not ripe, the court noted that the district court was forced to

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133. Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. § 1681c(g)); *Harris*, 564 F.3d at 1306–07.

134. 15 U.S.C. § 1681c(g)(1). Specifically, this section provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." *Id*.

135. 15 U.S.C. §§ 1681n(a)(1)(A), (a)(3).

136. *Harris,* 564 F.3d at 1307.

137. *Id*.

138. *Id*.

139. *Id.*

140. *Id*.

141. *Id.* at 1308.

142. *Id*. at 1307–08.

"employ[] a series of assumptions and [find] that, based on these assumptions, any verdict awarded by the jury would necessarily be unconstitutionally excessive."[143] Namely, the district court assumed that the defendants would not oppose class certification, that the class would be certified and include all proposed individuals, that none of the plaintiffs suffered actual harm, and that the plaintiffs would prove that the FACTA violations were willful, entitling each plaintiff to at least $100 in statutory damages.[144] Assuming these facts, the district court "found that upon proving liability, the plaintiffs would be entitled to monetary awards that would be grossly disproportionate to the harm caused, and that the award would likely bankrupt the defendants."[145] The Eleventh Circuit explicitly rejected each of these assumptions, concluding that the factual record was not adequately developed to allow for an adjudication on the merits.[146] Notably, the court rejected the assumption that the defendants would not oppose class certification and pointed out that the defendants had already filed a motion arguing that the class action device did not satisfy the superiority requirement.[147]

After addressing the ripeness issue, the court ruled on the merits of the facial vagueness and excessiveness challenges.[148] The court rejected the district court's reasoning that the statute was vague in that it would be impossible to instruct a jury on where an award should fall within the $100 to $1000 range for statutory damages.[149] Regarding the excessiveness claim, the court first concluded that FACTA statutory damages are not necessarily punitive in nature "[b]ecause the FCRA already contains a punitive damages provision and specifies that statutory damages may only be awarded in lieu of actual damages."[150] Moreover, even if the provision were punitive, the court concluded, it is not the case that the provision would always yield unconstitutionally excessive damages awards:

> Even if none of the plaintiffs in the instant case were actually harmed, it is conceivable that in the future a party with actual harm that is difficult to compute will bring a case seeking statutory damages. In

143. *Id*. at 1309.
144. *Id*.
145. *Id*.
146. *Id*. at 1309–10, 1313.
147. *Id*. at 1309.
148. *See id.* at 1310–13.
149. *Id*. at 1310, 1312.
150. *Id*. at 1313.

> such a case, the actual harm might be very close to the statutory damages.[151]

The court's treatment of the FACTA damages provision is noteworthy given the treatment of this provision by other courts when considering certification of FACTA classes. The potentially annihilating effect of statutory damages in consumer class actions as a consideration in the superiority analysis stems from the 1972 decision in *Ratner v. Chemical Bank New York Trust Co.*,[152] which denied class certification of claims brought under the Truth in Lending Act (TILA).[153] The Eleventh Circuit has cited *Ratner* favorably in two class certification decisions, *Klay v. Humana, Inc.*[154] and *London v. Wal-Mart Stores, Inc.*,[155] indicating that the potential for disproportionately large damages is a proper consideration in the superiority analysis.

With the enactment of FACTA's truncation requirements, several courts accordingly have denied certification of FACTA classes on the basis that a class action is not a superior method of adjudication because (1) the amount of damages is potentially annihilating to defendants compared to the actual harm and (2) the availability of statutory damages and attorney fees provides adequate incentive for consumers to bring individual claims.[156] In *Leysoto v. Mama Mia I., Inc.*,[157] the United States District Court for the Southern District of Florida relied

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151. *Id*.

152. 54 F.R.D. 412 (S.D.N.Y. 1972).

153. 15 U.S.C. §§ 1601–1667f (2006); *Ratner*, 54 F.R.D. at 413. Subsequent amendments to TILA set a limit on the amount of statutory damages available in a class action. *See* 15 U.S.C. § 1640(a)(2)(B).

154. 382 F.3d 1241, 1271 (11th Cir. 2004) (stating that when "defendants are being sued for statutory damages for unintentional acts under a strict liability standard, . . . courts [should] take a harder look at whether a defendant deserves to be subject to potentially immense liability" (citing *Ratner*, 54 F.R.D. at 416)).

155. 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (stating that economic harm may be an element of the superiority requirement, particularly when "the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff" (citing *Ratner*, 54 F.R.D. at 416)).

156. *See* Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647, 657 (C.D. Cal. 2008) (holding that the "[d]efendant's statutory liability [was] enormous and completely out of proportion to any harm suffered by [the] [p]laintiff"); Saunders v. Louise's Trattoria, No. CV 07-1060, 2007 WL 4812287, at *1 n.3 (C.D. Cal. Oct. 23, 2007) (stating that "[b]ecause FACTA rewards successful plaintiffs with attorney fees, [certain] cases . . . are not 'negative value suits,' where the potential recovery is outweighed by the costs of litigation"). *But see* Murray v. Mortgage Corp., 434 F.3d 948, 954 (7th Cir. 2006) (concluding that although an unconstitutionally excessive award may be reduced, these due process considerations should be left for after class certification).

157. 255 F.R.D. 693 (S.D. Fla. 2009).

on *London* in denying class certification on this basis.[158] And the United States District Court for the Northern District of Georgia, in *Campos v. Choicepoint, Inc.*,[159] relied on *Klay* and *London* in concluding that a class action was not a superior method for adjudicating certain claims under other provisions of the FCRA.[160]

In denying class certification, these courts have made the same determinations about the consequences of FACTA's statutory damages provision that were rejected by the Eleventh Circuit in *Harris*. Although the Eleventh Circuit has cited the potential for damages hugely disproportionate to the actual harm as a proper consideration for class certification, *Harris* emphasizes that defendants must establish an adequate factual record to show the potential statutory damages and the actual harm to plaintiffs.[161]

158. *Id.* at 696–97 (noting that "the issue of FACTA certification is a matter of first impression within this Circuit").

159. 237 F.R.D. 478 (N.D. Ga. 2006).

160. *Id.* at 490.

161. *See* 564 F.3d at 1309–10.