

# Trial Practice and Procedure

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## I. INTRODUCTION

The 2009 survey period yielded several noteworthy decisions relating to federal trial practice and procedure in the United States Court of Appeals for the Eleventh Circuit, several of which involved issues of first impression. This Article analyzes several recent developments in the Eleventh Circuit, including significant rulings in the areas of civil procedure, subject matter jurisdiction, arbitration, and statutory interpretation.<sup>1</sup>

## II. CIVIL PROCEDURE

### A. *Whether a District Court Can Sua Sponte Remand an Action Based on a Purely Procedural Defect in a Notice of Removal*

In *Corporate Management Advisors, Inc. v. Artjen Complexus, Inc.*,<sup>2</sup> the Eleventh Circuit addressed the issue of “whether the failure to allege facts sufficient to establish subject matter jurisdiction in a notice of

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1. For analysis of Eleventh Circuit trial practice and procedure for the prior survey period, see John O'Shea Sullivan & Ashby L. Kent, *Trial Practice and Procedure, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1313 (2009).

2. 561 F.3d 1294 (11th Cir. 2009).

removal is a defect in the removal procedure.”<sup>3</sup> The court concluded that the failure to establish subject matter jurisdiction in a notice of removal is a procedural defect in the removal process, and the court further held that a “district court cannot sua sponte remand a case to state court” based on such a procedural defect.<sup>4</sup>

In *Corporate Management Advisors*, the defendants sought to remove a lawsuit to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1332<sup>5</sup> on the basis of diversity jurisdiction.<sup>6</sup> “[I]n their notice of removal, the [defendants] alleged only the residency of one of the parties, rather than his citizenship.”<sup>7</sup> “Since residency is not the equivalent of citizenship for diversity purposes, the district court concluded that it lacked subject matter jurisdiction” pursuant to 28 U.S.C. § 1447(c)<sup>8</sup> and remanded the case sua sponte to state court.<sup>9</sup> The defendants subsequently “filed an amended notice of removal in which [] they contend[ed] they alleged sufficient facts to establish complete diversity of citizenship,” but the district court remanded the case again.<sup>10</sup> Pursuant to 28 U.S.C. § 1447(d),<sup>11</sup> “[t]he district court concluded that . . . it lacked jurisdiction to review a remand order ‘on appeal or otherwise.’”<sup>12</sup> The defendants “appeal[ed] the district court’s refusal to allow them to amend their notice of removal [] pursuant to 28 U.S.C. § 1447(d)’s prohibition on review of a remand order ‘on appeal or otherwise.’”<sup>13</sup>

On appeal, the Eleventh Circuit held that “the district court based its *sua sponte* remand order on a perceived lack of subject matter jurisdiction”—the absence of complete diversity—under § 1447(c).<sup>14</sup> Accordingly, the Eleventh Circuit reviewed de novo the district court’s interpretation of 28 U.S.C. § 1447.<sup>15</sup> The court first noted that a “district court

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3. *Id.* at 1295. The court noted that although it had previously addressed this question in *In re First National Bank of Boston*, 70 F.3d 1184 (11th Cir. 1995), *vacated*, 102 F.3d 1577 (11th Cir. 1996) (per curiam), that opinion had been vacated. *Corp. Mgmt. Advisors*, 561 F.3d at 1295 n.1. Thus, the court noted that it had “no binding precedent to guide [it]” on this issue. *Id.*

4. *Corp. Mgmt. Advisors*, 561 F.3d at 1295.

5. 28 U.S.C. § 1332 (2006).

6. *Corp. Mgmt. Advisors*, 561 F.3d at 1295.

7. *Id.*

8. 28 U.S.C. § 1447(c) (2006).

9. *Corp. Mgmt. Advisors*, 561 F.3d at 1295–96.

10. *Id.* at 1296.

11. 28 U.S.C. § 1447(d) (2006).

12. *Corp. Mgmt. Advisors*, 561 F.3d at 1296 (quoting 28 U.S.C. § 1447(d)).

13. *Id.* at 1297–98 (quoting 28 U.S.C. § 1447(d)).

14. *Id.* at 1296.

15. 28 U.S.C. § 1447 (2006); *Corp. Mgmt. Advisors*, 561 F.3d at 1296.

may remand a case *sua sponte* for lack of subject matter jurisdiction at any time<sup>16</sup> and that “a remand order based on subject matter jurisdiction is not reviewable” on appeal.<sup>17</sup> However, the court held that it did have “jurisdiction to review whether the ‘district court exceeded its authority under § 1447(c) by remanding th[e] case because of a perceived procedural defect in the removal process without waiting for a party’s motion” to remand.<sup>18</sup> Citing its prior holding in *Whole Health Chiropractic & Wellness, Inc. v. Humana Medical Plan, Inc.*,<sup>19</sup> the court noted that

[t]he language of § 1447(c), especially Congress’s use of the language “a motion to remand . . . must be made,” in connection with a remand based on a procedural defect in the removal process, and the lack of that phrase with respect to removal for lack of subject matter jurisdiction, indicates that the district court must wait for a party’s motion before remanding a case based on procedural defect.<sup>20</sup>

The Eleventh Circuit further “conclude[d] that the failure to establish a party’s citizenship at the time of filing the removal notice [constituted] a ‘procedural, rather than [a] jurisdictional, defect.’”<sup>21</sup> In so holding, the court relied on the United States Court of Appeals for the Fifth Circuit’s opinion in *In re Allstate Insurance Co.*,<sup>22</sup> a procedurally analogous case in which the district court remanded a case to state court because the defendant failed to adequately allege a party’s citizenship in its notice of removal.<sup>23</sup> “On appeal, the Fifth Circuit reasoned that ‘a “procedural defect” within the meaning of § 1447(c) refers to any defect that does not go to the question of whether the case originally could have been brought in [a] federal district court.’”<sup>24</sup> The Fifth

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16. *Corp. Mgmt. Advisors*, 561 F.3d at 1296 (citing 28 U.S.C. § 1447(c)).

17. *Id.* (citing 28 U.S.C. § 1447(d)). The court noted that 28 U.S.C. § 1447(d) is tightly circumscribed to cover only remand orders within the scope of 28 U.S.C. § 1447(c), based on (1) a district court’s lack of subject matter jurisdiction or (2) a defect in removal other than lack of subject matter jurisdiction that was raised by the motion of a party within 30 days after the notice of removal was filed.

*Corp. Mgmt. Advisors*, 561 F.3d at 1296 (internal quotation marks omitted) (quoting *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008)).

18. 561 F.3d at 1296 (quoting *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317, 1321 (11th Cir. 2001)).

19. 254 F.3d 1317 (11th Cir. 2001).

20. *Corp. Mgmt. Advisors*, 561 F.3d at 1296 (quoting *Whole Health Chiropractic*, 254 F.3d at 1320–21).

21. *Id.* (quoting *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993)).

22. 8 F.3d 219 (5th Cir. 1993).

23. *Corp. Mgmt. Advisors*, 561 F.3d at 1296–97 (citing *In re Allstate*, 8 F.3d at 220).

24. *Id.* at 1297 (quoting *In re Allstate*, 8 F.3d at 221).

Circuit concluded that the failure to allege the plaintiff's citizenship in the notice of removal was "a procedural, rather than [a] jurisdictional, defect."<sup>25</sup> Accordingly, the Fifth Circuit held that the district court lacked the discretion to remand the action sua sponte because the failure to allege citizenship for purposes of diversity jurisdiction was a purely procedural defect in the removal process.<sup>26</sup>

The Eleventh Circuit "agree[d] with the Fifth Circuit's interpretation of § 1447(c) and [its] construction of a party's failure to establish citizenship in its notice of removal as a procedural defect," as opposed to a jurisdictional defect.<sup>27</sup> The Eleventh Circuit held this interpretation to be consistent with the fact that pursuant to 28 U.S.C. § 1653,<sup>28</sup> procedural shortcomings such as defective allegations of jurisdiction could be cured.<sup>29</sup> The court held that "[i]f a party fails to specifically allege citizenship in [its] notice of removal, the district court should allow that party 'to cure the omission,' as authorized by § 1653."<sup>30</sup> Accordingly, upon holding "that the district court erred by remanding th[e] case on jurisdictional grounds when faced solely with a procedural defect in the removal process," the Eleventh Circuit reversed the district court's remand order and directed the district court to allow the defendants leave to amend their notice of removal pursuant to 28 U.S.C. § 1653.<sup>31</sup>

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25. *Id.* (quoting *In re Allstate*, 8 F.3d at 221).

26. *Id.* (citing *Harmon v. OKI Sys.*, 115 F.3d 477, 479 (7th Cir. 1997)).

27. *Id.*

28. 28 U.S.C. § 1653 (2006).

29. *Corp. Mgmt. Advisors*, 561 F.3d at 1297 (citing 28 U.S.C. § 1653). "Section 1653 provides that '[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.'" *Id.* (quoting 28 U.S.C. § 1653). "[W]here subject matter jurisdiction exists and any procedural shortcomings may be cured by resort to § 1653, we can surmise no valid reason for the court to decline the exercise of jurisdiction.'" *Id.* (quoting *In re Allstate*, 8 F.3d at 223).

30. *Id.* (quoting *D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 146-47 (5th Cir. 1979)).

31. *Id.* at 1298. The court explained that its holding was consistent with its prior opinion in *Armada Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566 (11th Cir. 1984), in which the defendant "imperfectly pled" diversity jurisdiction as the ground for its removal to federal court. *Corp. Mgmt. Advisors*, 561 F.3d at 1297 (quoting *Armada Coal*, 726 F.2d at 1568). In *Armada Coal*, the Eleventh Circuit "remanded the case to district court with instructions to grant the party leave to amend its notice of removal to 'unequivocally' establish diversity of citizenship." *Id.* (citing *Armada Coal*, 726 F.2d at 1568-69).

*B. Whether the Failure of the United States Marshal to Effectuate Service on Behalf of an In Forma Pauperis Plaintiff Constitutes “Good Cause” for the Plaintiff’s Failure to Effect Timely Service Within the Meaning of Federal Rule of Civil Procedure 4(m)*

In *Rance v. Rocksolid Granit USA, Inc.*,<sup>32</sup> the Eleventh Circuit held as a matter of first impression that the failure of the United States Marshal to effectuate service on behalf of a plaintiff proceeding in forma pauperis, through no fault of that plaintiff, constitutes “good cause” within the meaning of Federal Rule of Civil Procedure 4(m)<sup>33</sup> for the plaintiff’s failure to effect timely service.<sup>34</sup> In *Rance* the pro se plaintiff filed a lawsuit against his former employer in the United States District Court for the Southern District of Florida alleging that his employment was terminated in violation of the Fair Labor Standards Act of 1938<sup>35</sup> and the Americans with Disabilities Act of 1990.<sup>36</sup> In its order granting the plaintiff’s motion to proceed in forma pauperis, the district court stated as follows: “[T]he Clerk of Court is instructed to prepare the summons and copies of the complaint and same shall be served by the U.S. Marshal. The U.S. Marshal shall file a return of service once service is completed.”<sup>37</sup>

“[O]ne-hundred and eighty-six days after [the plaintiff] filed his complaint, the district court *sua sponte* issued an ‘Order to Show Cause,’ ordering [the plaintiff] to show cause [as to] why his case should not be dismissed for failure to” perfect service of process.<sup>38</sup> The plaintiff did not respond to the show cause order, and the district court dismissed the plaintiff’s case without prejudice.<sup>39</sup> The plaintiff appealed,

[r]elying on decisions from other circuits [and] argu[ing] that the complaint should not have been dismissed for failure to serve [process] because the court clerk and the U.S. Marshal failed to prepare the

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32. 583 F.3d 1284 (11th Cir. 2009).

33. FED. R. CIV. P. 4(m).

34. *Rance*, 583 F.3d at 1288.

35. 29 U.S.C. §§ 201–219 (2006).

36. 42 U.S.C. §§ 12111–12117 (2006); *Rance*, 583 F.3d at 1285.

37. *Rance*, 583 F.3d at 1285 (internal quotation marks omitted).

38. *Id.*

39. *Id.* The plaintiff contended

that he did not respond to the . . . show cause order because (1) he was . . . in the hospital with . . . kidney failure during the period in which the district court requested a response, and (2) he did not receive [a copy] of the show cause order until after he was discharged from the hospital.

*Id.*

summons and complaint and serve [the defendant] as expressly directed by the district court and required by law.<sup>40</sup>

On appeal, the Eleventh Circuit first noted that it had not yet explained the proper standard of review for a sua sponte dismissal pursuant to Rule 4(m).<sup>41</sup> The court held that an abuse of discretion was the proper standard of review because the court applies this standard to “a [district] court’s decision to grant an extension of time under Rule 4(m)” and a district “court’s dismissal without prejudice of a plaintiff’s complaint for failure to timely serve a defendant under Rule 4(m).”<sup>42</sup>

In reviewing the district court’s dismissal for abuse of discretion, the Eleventh Circuit first looked to the plain language of Rule 4(m), which provides as follows:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.<sup>43</sup>

The court noted that “good cause” for failure to make timely service “exists ‘when some outside factor, such as reliance on faulty advice, rather than inadvertence or negligence, prevented service.’”<sup>44</sup> The court further noted that “[e]ven if a district court finds that a plaintiff failed to show good cause, ‘the district court must still consider whether any other circumstances warrant[ed] an extension of time’” to perfect service before dismissing the case.<sup>45</sup> The court explained that “[o]nly after considering whether any such factors exist may the district court exercise its discretion and either dismiss the case without prejudice or direct that service be effected within a specified time.”<sup>46</sup>

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40. *Id.*

41. *Id.* at 1286.

42. *Id.* (internal quotation marks omitted) (quoting *Lepone-Dempsey v. Carroll County Comm’rs*, 476 F.3d 1277, 1280 (11th Cir. 2007)). The court noted the abuse of discretion standard of review required it to “affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard.” *Id.* (internal quotation marks omitted) (citing *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004)).

43. *Id.* (internal quotation marks omitted) (quoting FED. R. CIV. P. 4(m)).

44. *Id.* (quoting *Lepone-Dempsey*, 476 F.3d at 1281).

45. *Id.* (quoting *Lepone-Dempsey*, 476 F.3d at 1282).

46. *Id.* (internal quotation marks omitted) (quoting *Lepone-Dempsey*, 476 F.3d at 1282). The court further noted that “Rule 4(m) grants discretion to the district court to extend the time for service of process, even in the absence of a showing of good cause.” *Id.* (internal

The court then turned to the language of 28 U.S.C. § 1915,<sup>47</sup> which provides that “[t]he officers of the court *shall* issue and serve all process, and perform all duties” when a litigant proceeds in forma pauperis.<sup>48</sup> The court compared this language with the language of Federal Rule of Civil Procedure 4(c),<sup>49</sup> which provides that “[t]he court must so order [service to be made by a United States Marshal or deputy marshal] if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C § 1915.”<sup>50</sup> Accordingly, the court reasoned that

[t]ogether, Rule 4(c)(2) and 28 U.S.C. § 1915(c) stand for the proposition that when a plaintiff is proceeding in forma pauperis the court is obligated to issue plaintiff’s process to a United States Marshal who must in turn effectuate service upon the defendants, thereby relieving a plaintiff of the burden to serve process once reasonable steps have been taken to identify for the court the defendants named in the complaint.<sup>51</sup>

Noting that it had not yet addressed the application of Rule 4(m) in this “unique factual context,” the Eleventh Circuit acknowledged that its “sister circuits have held that a plaintiff has shown ‘good cause’ for purposes of a dismissal pursuant to Rule 4(m) when a United States Marshal has failed to properly serve process through no fault of the plaintiff.”<sup>52</sup> The court also looked to its prior opinion in *Fowler v. Jones*,<sup>53</sup> in which the court addressed “the role of the clerk of the court and the U.S. Marshal Service in serving complaints of parties proceeding *in forma pauperis*’ [in] the [context] of a district court’s denial of a motion for continuance.”<sup>54</sup> In *Fowler* the district court allowed a pro se plaintiff to proceed in forma pauperis in an action filed under 42 U.S.C.

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quotation marks omitted) (quoting *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005)).

47. 28 U.S.C. § 1915 (2006).

48. *Rance*, 583 F.3d at 1286 (alteration in original) (quoting 28 U.S.C. § 1915(d)).

49. FED. R. CIV. P. 4(c).

50. *Rance*, 583 F.3d at 1286 (alterations in original) (quoting FED. R. CIV. P. 4(c)(3)).

51. *Id.* (internal quotation marks omitted) (quoting *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1996)).

52. *Id.* at 1287 (citing *Moore v. Jackson*, 123 F.3d 1082, 1085–86 (8th Cir. 1997) (per curiam); *Byrd*, 94 F.3d at 220; *Dumaguin v. Sec’y of Health & Human Servs.*, 28 F.3d 1218, 1221 (D.C. Cir. 1994); *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990); *Sellers v. United States*, 902 F.2d 598, 602 (7th Cir. 1990); *Rochon v. Dawson*, 828 F.2d 1107, 1110 (5th Cir. 1987); *Romandette v. Weetabix Co.*, 807 F.2d 309, 311 (2d Cir. 1986)).

53. 899 F.2d 1088 (11th Cir. 1990).

54. *Rance*, 583 F.3d at 1287 (quoting *Fowler*, 899 F.2d at 1094).

§ 1983.<sup>55</sup> The plaintiff had named four defendants in his complaint, and he objected at the trial “when the district court indicated that there was only one defendant.”<sup>56</sup> The defense counsel explained that only one defendant had been served, and the plaintiff “requested a continuance in order to serve the other defendants.”<sup>57</sup> The district court denied the plaintiff’s request, and the plaintiff appealed.<sup>58</sup> The Eleventh Circuit “reversed, finding that the district court abused its discretion in denying the continuance.”<sup>59</sup> Relying on decisions from other circuits, in *Fowler* the Eleventh Circuit “held that ‘*in forma pauperis* litigants should be entitled to rely on the court officers and United States Marshals to effect proper service, and should not be penalized for failure to effect service where such failure is not due to fault on the litigant’s part.’”<sup>60</sup>

Relying on *Fowler* and opinions from its sister circuits cited therein, in *Rance* the Eleventh Circuit held “that the failure of the United States Marshal to effectuate service on behalf of an *in forma pauperis* plaintiff through no fault of that plaintiff constitutes ‘good cause’ for the plaintiff’s failure to effect timely service within the meaning of Rule 4(m).”<sup>61</sup> Applying that holding to the facts at issue in *Rance*, the court held that because the district court had allowed the plaintiff to proceed in forma pauperis, the plaintiff was allowed to rely on the United States Marshal to effect timely and proper service on the defendant.<sup>62</sup> The Eleventh Circuit further noted that the district court had “specifically instructed the United States Marshal to make service” in its order granting the plaintiff’s motion to proceed in forma pauperis.<sup>63</sup> Because nothing in the record indicated that the plaintiff shared the United States Marshal’s fault in failing to effectuate proper or timely service, the Eleventh Circuit held that “the district court abused its discretion by dismissing [the plaintiff’s] complaint without prejudice under Federal Rule of Civil Procedure 4(m).”<sup>64</sup>

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55. 42 U.S.C. § 1983 (2006); *Rance*, 583 F.3d at 1287–88 (citing *Fowler*, 899 F.2d at 1090–91).

56. *Rance*, 583 F.3d at 1288 (citing *Fowler*, 899 F.2d at 1090–91).

57. *Id.* (citing *Fowler*, 899 F.2d at 1092).

58. *Id.* (citing *Fowler*, 899 F.2d at 1092).

59. *Id.* (citing *Fowler*, 899 F.2d at 1096).

60. *Id.* (quoting *Fowler*, 899 F.2d at 1095).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

## III. FEDERAL CONSUMER PROTECTION ACT CASES

A. *Whether Claims Brought Pursuant to the Credit Repair Organizations Act Are Subject to Arbitration*

In *Picard v. Credit Solutions, Inc.*,<sup>65</sup> the Eleventh Circuit addressed as a matter of first impression whether claims brought under the Credit Repair Organizations Act (CROA)<sup>66</sup> are subject to arbitration.<sup>67</sup> The United States District Court for the Northern District of Alabama held that claims brought pursuant to the CROA are not subject to arbitration.<sup>68</sup> The Eleventh Circuit disagreed and vacated the judgment of the district court.<sup>69</sup>

In *Picard* the plaintiff, Elizabeth Picard, contacted the defendant, Credit Solutions of America, Inc. (CSA), a debt settlement company, to discuss a possible plan to manage her debt.<sup>70</sup> During their telephone conversations, a CSA representative told “Picard that if she entered into an agreement for a debt management plan with CSA, CSA would negotiate settlements and reductions of her outstanding debts with her creditors.”<sup>71</sup> “Picard entered into a contract with CSA [over] the Internet during her [telephone] conversation with” the CSA representative.<sup>72</sup> The contract included a “customer enrollment package,” which contained the following arbitration provision:

If there is any dispute between the parties arising out of this agreement, the parties agree to submit the dispute to binding arbitration under the auspices of the American Arbitration Association (AAA). If such arbitration is held under the auspices of any other organization, the arbitration will be held in accord with AAA rules to the extent possible. Binding arbitration means that both parties give up their right to a trial by jury and to appeal except for a narrow range of

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65. 564 F.3d 1249 (11th Cir. 2009).

66. 15 U.S.C. §§ 1679–1679j (2006).

67. *Picard*, 564 F.3d at 1251, 1254.

68. *Id.* at 1251.

69. *Id.* at 1251, 1256.

70. *Id.* at 1251. A debt settlement company is a company “that negotiates with unsecured creditors on behalf of its customers to lower the customers’ debt loads and monthly payments.” *Id.*

71. *Id.* Specifically, the CSA representative “proposed a structure whereby CSA would make direct withdrawals from Picard’s bank account” and then pay her creditors. *Id.* “Picard would pay [CSA] for th[is] service [by] direct withdrawals from her bank account.” *Id.*

72. *Id.*

issues that may be appealed under Texas law. Discovery may be limited by the arbitrator.<sup>73</sup>

Shortly after she entered into the debt management plan with CSA, “Picard began receiving telephone calls and letters from [her] creditors telling her that she was in default on her accounts.”<sup>74</sup> Picard maintained that her defaults were due to CSA’s failure to perform under the debt management agreement.<sup>75</sup> Picard filed suit against CSA, “alleging violations of CROA, breach of an oral contract and fraudulent inducement.”<sup>76</sup> “CSA moved to dismiss, or, in the alternative, to compel arbitration based on [the] arbitration clause in the customer enrollment package.”<sup>77</sup> Picard opposed CSA’s motion, arguing “that the arbitration clause did not apply because she did not sign an agreement with CSA.”<sup>78</sup>

Following an evidentiary hearing on CSA’s motion, the district court found that CSA was a “credit repair organization” subject to the CROA. The district court further found that although Picard had entered into an agreement with CSA that contained an arbitration provision, the arbitration provision was unenforceable because the CROA’s disclosure and non-waiver provisions precluded arbitration. CSA appealed, arguing that the CROA does not preclude arbitration and that the district court’s finding that CSA was a credit repair organization subject to the CROA was premature.<sup>79</sup>

On appeal the Eleventh Circuit reversed the district court and held that the CROA does not preclude arbitration and does not create a non-waivable right to a judicial forum.<sup>80</sup> In so holding, the court acknowledged that the Federal Arbitration Act (FAA)<sup>81</sup> creates a strong federal policy in favor of arbitration and that “[s]tatutorily-created causes of action are no exception to the rule that arbitration agreements should

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73. *Id.* at 1252 (internal quotation marks omitted).

74. *Id.* at 1251–52.

75. *Id.* at 1252.

76. *Id.*

77. *Id.*

78. *Id.* At the evidentiary hearing on CSA’s motion, the district court received into evidence the audio recording of Picard’s conversation with the CSA representative. *Id.* After the hearing, Picard changed her argument to contend “that the arbitration clause was not applicable (1) because the CROA voids the arbitration clause, and (2) because the agreement as a whole [was] void” because it was induced by fraud. *Id.*

79. *Id.* Picard brought a contingent cross-appeal, arguing that her fraud claim should be heard in a judicial forum in the event that the Eleventh Circuit reversed the district court’s holding that the CROA precludes arbitration. *Id.*

80. *Id.* at 1255–56.

81. 9 U.S.C. §§ 1–16 (2006).

be enforced according to their terms.”<sup>82</sup> Accordingly, the court held that when “parties agree to arbitrate disputes brought pursuant to federal statute, the statutory claims are subject to arbitration ‘unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.’”<sup>83</sup>

The court then turned to the text of the CROA’s disclosure and non-waiver provisions to determine whether Congress intended to preclude arbitration of claims brought pursuant to the CROA.<sup>84</sup> The disclosure provision of the CROA provides that “[a]ny credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed.”<sup>85</sup>

The disclosure provision then

lists the items that must be included in the written statement, which include, *inter alia*, notice of the right to a copy of one’s credit report, notice of the right to dispute inaccurate information in a credit report, and notice of the right to cancel a contract with a credit repair organization for any reason within three business days from the date of execution.<sup>86</sup>

For purposes of the case at bar, the Eleventh Circuit reasoned that the key element required in the written disclosure was the following: “You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.”<sup>87</sup>

The court then looked to the CROA’s non-waiver provision, which provides that “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.”<sup>88</sup> Noting that the issue of whether the CROA prohibits arbitration was an issue of first impression in the Eleventh Circuit,<sup>89</sup> the court turned to the only circuit court decision

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82. *Picard*, 564 F.3d at 1253 (quoting *Cunningham v. Fleetwood Homes*, 253 F.3d 611, 617 (11th Cir. 2001)).

83. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

84. *Id.*

85. *Id.* (quoting 15 U.S.C. § 1679c(a)).

86. *Id.* at 1254 (citing 15 U.S.C. § 1679c(a)).

87. *Id.* (internal quotation marks omitted) (quoting 15 U.S.C. § 1679c(a)).

88. *Id.* (internal quotation marks omitted) (quoting 15 U.S.C. § 1679f(a)).

89. *Id.*

on this issue, *Gay v. CreditInform*,<sup>90</sup> in which the United States Court of Appeals for the Third Circuit held that CROA claims are arbitrable.<sup>91</sup> In *Gay* the Third Circuit “noted the absence of legislative history indicating an intent to preclude arbitration.”<sup>92</sup> The Third Circuit also found that the plaintiff had failed to demonstrate any conflict between arbitration and the enforcement of the CROA; rather, the rights afforded by the CROA would remain intact in an arbitration proceeding.<sup>93</sup>

The Third Circuit in *Gay* also relied on the fact “that [the] CROA does not contain language creating a right to a judicial forum.”<sup>94</sup> The Third Circuit likened the CROA’s non-waiver provision, entitled “Noncompliance with this subchapter,” to the “compliance” language found in the non-waiver provisions of the Securities Act of 1933<sup>95</sup> and the Securities Exchange Act of 1934.<sup>96</sup> The court in *Picard* noted that “[t]he Exchange Act’s non-waiver provision provides that ‘[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act] . . . shall be void.’”<sup>97</sup> Citing the United States Supreme Court’s opinion in *Shearson/American Express, Inc. v. McMahon*,<sup>98</sup> the Eleventh Circuit noted that because the Exchange Act’s “non-waiver provision only disallowed waivers of ‘compliance’ with the Exchange Act, the Exchange Act only precluded waiver of its substantive requirements.”<sup>99</sup> Accordingly, “[a]n agreement to arbitrate was permissible under the [Exchange Act] because it would not waive

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90. 511 F.3d 369 (3d Cir. 2007). The Eleventh Circuit noted that the plaintiff in *Gay* had made many of the same arguments as *Picard*, all of which the Third Circuit had rejected. *Picard*, 564 F.3d at 1254.

91. *Picard*, 564 F.3d at 1254. The court also noted that numerous district courts had agreed with the Third Circuit’s holding in *Gay* that CROA claims are subject to arbitration. *Id.* (citing *Vegter v. Forecast Fin. Corp.*, No. 1:07-CV-279, 2007 WL 4178947 (W.D. Mich. Nov. 20, 2007); *Schreiner v. Credit Advisors Inc.*, No. 8:07-CV-78, 2007 WL 2904098 (D. Neb. Oct. 2, 2007); *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788 (W.D. Mich. 2007)).

92. *Id.* (citing *Gay*, 511 F.3d at 382).

93. *Id.*

94. *Id.* (citing *Gay*, 511 F.3d at 381–82).

95. 15 U.S.C. §§ 77a–77aa (2006).

96. 15 U.S.C. §§ 78a–78oo (2006); *Picard*, 564 F.3d at 1254. The Eleventh Circuit reasoned that the court in *Gay* “construe[d] . . . [the] CROA’s [non]-waiver provision as only extending to rights premised on the imposition of statutory duties, absent contrary language in the statute.” *Picard*, 564 F.3d at 1254 (internal quotation marks omitted) (quoting *Gay*, 511 F.3d at 385).

97. *Picard*, 564 F.3d at 1254 (second, third, and fourth alterations in original) (quoting 15 U.S.C. § 78cc(a) (2006)).

98. 482 U.S. 220 (1987).

99. *Picard*, 564 F.3d at 1254–55 (citing *McMahon*, 482 U.S. at 228).

compliance with any substantive provision of” that law.<sup>100</sup> The court further noted that two years later “the Supreme Court held that the non-waiver language in the Securities Act also permitted arbitration” because it likewise “extended [only] to ‘compliance with any provision’ of the Securities Act.”<sup>101</sup> Accordingly, “waiver of the jurisdictional provision did not constitute waiving ‘compliance’ with the Act.”<sup>102</sup>

Although the Eleventh Circuit noted that the CROA’s non-waiver provision was “phrased in broader terms than the non-waiver provisions in the Securities Act and Exchange Act,” the court agreed with the Third Circuit’s decision that the “CROA simply does not create a right to sue [exclusively] in a judicial forum.”<sup>103</sup> The Eleventh Circuit also agreed that the text of the CROA makes no mention of arbitration,<sup>104</sup> and “[t]he substantive rights created [by the] CROA are entirely preserved in an arbitral forum.”<sup>105</sup>

The Eleventh Circuit further explained that the only right created in the CROA’s disclosure provision is the right to a statement concerning certain disclosures.<sup>106</sup> The court noted that “[t]he ‘right to sue’ referenced in the required disclosure is set forth separately in the civil liability section, . . . which does not mention the word ‘right,’ the expression ‘right to sue,’ or place any limitation on arbitration.”<sup>107</sup> “Although [the] CROA requires credit repair organizations to inform consumers of their right to a private cause of action,” the court held that a statute’s provision for a private cause of action alone does not exclude arbitration.<sup>108</sup> Accordingly, the court held that “the appropriate forum for resolving this dispute is an arbitral forum” and that “any other issues, such as whether [the] CROA applies to CSA, are for the arbitrator” and should be addressed in arbitration.<sup>109</sup>

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100. *Id.* at 1255 (citing *McMahon*, 482 U.S. at 228).

101. *Id.* (citing 15 U.S.C. § 77n; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482–83 (1989)).

102. *Id.* (citing *Rodriguez de Quijas*, 490 U.S. at 481–83).

103. *Id.*

104. *Id.*

105. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

106. *Id.*

107. *Id.* (citing 15 U.S.C. § 1679g(a)).

108. *Id.* “A statute’s provision for a private right of action alone is inadequate to show that Congress intended to prohibit arbitration.” *Id.* (quoting *Davis v. S. Energy Homes Inc.*, 305 F.3d 1268, 1274 (11th Cir. 2002)).

109. *Id.* at 1256.

*B. Whether a Debt Collector Is Entitled to the “Bona Fide Error” Defense Under the Fair Debt Collection Practices Act When the Collector Intentionally Violates One Provision of the Act to Avoid Violating Another Provision*

In *Edwards v. Niagara Credit Solutions, Inc.*,<sup>110</sup> the Eleventh Circuit held that a debt collection agency subject to the provisions of the Fair Debt Collection Practices Act (FDCPA)<sup>111</sup> could not avail itself of the FDCPA’s “bona fide error” defense when the debt collector intentionally violated one provision of the FDCPA to avoid the risk of violating another provision of the FDCPA.<sup>112</sup> In *Edwards* the defendant debt collection agency left numerous prerecorded voice messages on the plaintiff’s answering machine but intentionally failed to disclose in any of the messages that it was a debt collector or that the purpose of the calls was to collect a debt from the plaintiff.<sup>113</sup> Although the FDCPA “specifically requires . . . debt collector[s] to disclose in all communications with [the] debtor that the message is from a debt collector,”<sup>114</sup> the defendant “deliberately chose not to comply with that requirement because it feared that doing so would risk violating another provision of the [FDCPA], which . . . forbids an agency from communicating about the debt with a third party.”<sup>115</sup> Specifically, the debt collector “was concerned that [the] answering machine messages might be played by or within the hearing of [the debtor’s] family member or roommate, who would then know that a collection agency was calling the debtor” about the debt.<sup>116</sup>

The plaintiff debtor sued the debt collector in the United States District Court for the Northern District of Georgia, alleging that the defendant’s messages violated § 1692e(11)<sup>117</sup> and § 1692d(6)<sup>118</sup> of the

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110. 584 F.3d 1350 (11th Cir. 2009).

111. 15 U.S.C. §§ 1692–1692p (2006).

112. *Edwards*, 584 F.3d at 1353–54.

113. *Id.* at 1351. At the time of the phone calls, the debt collector “had a well-defined policy about messages that it left on debtors’ answering machines.” *Id.* The “policy was to: leave a message asking the debtor to call back about an important matter; provide [the debt collector’s] phone number; supply the real first name of the person calling on behalf of [the debt collector]; and give any reference number assigned to the account.” *Id.*

114. *Id.* (citing 15 U.S.C. § 1692e(11)).

115. *Id.* (citing 15 U.S.C. § 1692c(b)).

116. *Id.* at 1351–52.

117. Section 1692e(11) of the FDCPA specifically requires that a debt collector disclose in all communications with a debtor that the message is from a debt collector. *Edwards*, 584 F.3d at 1353.

118. Section 1692d(6) “requir[es] meaningful disclosure of the caller’s identity.” *Edwards*, 584 F.3d at 1352.

FDCPA.<sup>119</sup> The debt collector asserted numerous defenses, including, pursuant to § 1692k(c) of the FDCPA, the bona fide error defense.<sup>120</sup> The FDCPA's bona fide error defense "insulates [debt collectors] from liability even when they have failed to comply with the [FDCPA's] requirements."<sup>121</sup> The bona fide error defense under the FDCPA provides as follows:

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.<sup>122</sup>

The failure to meet any one of these requirements is fatal to the debt collector's bona fide error defense under the FDCPA.<sup>123</sup>

The district court granted summary judgment in favor of the plaintiff, concluding that the messages left on the plaintiff's answering machine violated the FDCPA and that the bona fide error defense did not apply.<sup>124</sup> On appeal, the defendant conceded that the messages violated the FDCPA but "challeng[ed] the district court's conclusion that it [was] not protected by the bona fide error defense."<sup>125</sup> Accordingly, the issue before the court of appeals was whether a debt collector is entitled to the bona fide error defense when the debt collector intentionally violates one provision of the FDCPA to avoid violating another provision of the FDCPA.<sup>126</sup>

In affirming the district court's ruling, the Eleventh Circuit held that the defendant had failed to meet the required showing to establish that the defendant was entitled to the bona fide error defense.<sup>127</sup> First, the court noted that by its own admission, the defendant decided not to disclose that the caller was a debt collector.<sup>128</sup> Because the defendant had intentionally failed to disclose its identity as a debt collector, the court held that the defendant failed to meet the first prong of the bona fide error defense—that the violation was not intentional.<sup>129</sup>

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119. *Edwards*, 584 F.3d at 1352.

120. *Id.*

121. *Id.* (citing *Johnson v. Riddle*, 443 F.3d 723, 727 (10th Cir. 2006)).

122. *Id.* (internal quotation marks omitted) (quoting 15 U.S.C. § 1692k(c)).

123. *Id.* at 1353.

124. *Id.* at 1352.

125. *Id.*

126. *Id.*

127. *Id.* at 1353.

128. *Id.*

129. *Id.*

The court also held that the defendant “failed to meet the second requirement of the bona fide error defense, which is that the violation actually be a ‘bona fide’ error.”<sup>130</sup> The defendant admitted that “it was concerned that disclosing that the call was from a debt collector could result in a violation of 15 U.S.C. § 1692c(b), which prohibits a debt collector from communicating with third parties about the consumer’s debt.”<sup>131</sup> The court noted that the term *bona fide* under the FDCPA “means that the error resulting in a violation was ‘made in good faith; a genuine mistake, as opposed to a contrived mistake.’”<sup>132</sup> In holding that the defendant’s alleged error was not bona fide, the court noted that it was not objectively reasonable for the defendant to violate one provision “of the [FDCPA] with every message [that] it left in order to avoid the possibility that some of those messages might lead to a violation of” another provision.<sup>133</sup> Because the court determined that the defendant “ha[d] failed to meet either of the first two requirements of the bona fide error defense of § 1692k(c),” the court affirmed the district court’s decision and explained that it need not decide whether the defendant also had failed to meet the third requirement, which mandates the maintenance of procedures reasonably designed to avoid violation of the FDCPA.<sup>134</sup>

*C. Whether a Consumer Reporting Agency Willfully Violated the Fair Credit Reporting Act When the Agency Sold a Consumer Report to a Creditor After the Consumer Had Closed His Account with that Creditor*

In *Levine v. World Financial Network National Bank*,<sup>135</sup> the Eleventh Circuit ruled in favor of a consumer reporting agency on the issue of whether the agency had willfully violated the Fair Credit Reporting

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130. *Id.*

131. *Id.*

132. *Id.* (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 538 (7th Cir. 2005)).

133. *Id.* at 1353–54.

134. *Id.* at 1354. The defendant complained that if it was not allowed to omit from its answering machine messages the disclosures required by § 1692e(11), it would not be able to leave messages on answering machines at all. *Id.* This complaint was based on the defendant’s assumption that “an answering machine message that includes the disclosure required by § 1692e(11), if heard by a third party, would violate § 1692c(b).” *Id.* The court noted that it had not decided the issue, and even if the defendant was correct, the answer was that the FDCPA did “not guarantee a debt collector the right to leave answering machine messages.” *Id.*

135. 554 F.3d 1314 (11th Cir. 2009).

Act (FCRA)<sup>136</sup> when the agency sold a consumer's credit report to a creditor for "account review" after the consumer closed his account with the creditor.<sup>137</sup> Reasoning that it was not objectively unreasonable for the agency to interpret the FCRA to permit the sale of consumer reports for consumers with closed accounts, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the agency.<sup>138</sup>

In *Levine* one of the defendants, Experian Information Systems, Inc., sold Stephen Levine's consumer report to a credit card issuer, Alliance Data Systems, for what Alliance represented to be a semiannual account review of "current customers."<sup>139</sup> At the time that Experian sold Levine's consumer report to Alliance, Levine had closed his account and was no longer a current customer of Alliance.<sup>140</sup> Levine filed a complaint against Experian in the United States District for the Northern District Court of Georgia, alleging "that the [FCRA] did not permit the sale of reports for consumers with closed accounts and that Experian willfully had violated the [FCRA]" by selling Levine's account to Alliance.<sup>141</sup> Specifically,

Levine alleged that, because his account [with Alliance] was closed, there was not an account for Alliance to review, and Alliance must have sought the report for a purpose other than those permitted by the [FCRA]. Levine [further] alleged that Experian failed to maintain reasonable procedures to ensure that it furnished reports only for permissible purposes.<sup>142</sup>

Experian initially "moved to dismiss Levine's complaint for failure to state a claim, and the district court granted [the] motion[]." <sup>143</sup> Levine appealed,<sup>144</sup> and the Eleventh Circuit reversed and remanded the district court's order because "the pleadings did not resolve whether

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136. 15 U.S.C. §§ 1681–1681x (2006).

137. *Levine*, 554 F.3d at 1316.

138. *Id.*

139. *Id.* "Levine held a credit card [account] with a men's clothing retailer, Structure." *Id.* The credit card was issued by a subsidiary of Alliance, World Financial National Bank. *Id.*

140. *Id.* Levine's consumer report reflected that the account had been paid in full and closed. *Id.*

141. *Id.*

142. *Id.* "Levine alleged that both the sale[] of his report for an impermissible purpose and the failure to maintain reasonable safeguards against [that] sale[] were willful violations of the [FCRA]." *Id.*

143. *Id.*

144. *Id.* Levine's claims against Structure and the bank were settled while Levine's appeal was pending. *Id.* (citing *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1120 (11th Cir. 2006)).

Experian had reasonable grounds to believe that the consumer report would be used for an impermissible purpose [or] whether Experian made reasonable efforts to verify the validity of the request for the report.”<sup>145</sup> For purposes of that initial appeal, the court acknowledged that “[t]here is a difference in opinion on whether the ambiguous language in [the FCRA] contains an absolute prohibition against the sale of credit reports to former creditors whose accounts are closed and paid in full.”<sup>146</sup> The court reserved judgment on the ambiguity, because it did not need to decide that issue in resolving the initial appeal from the grant of the motion to dismiss.<sup>147</sup>

“After discovery, Experian moved for summary judgment . . . argu[ing] that Levine could not prove a willful violation because the [FCRA] was unclear about sales of reports for consumers with closed accounts, and an interpretation that [such] sales were permitted was reasonable.”<sup>148</sup> Experian relied on an intervening decision by the United States Supreme Court in *Safeco Insurance Co. of America v. Burr*<sup>149</sup> “to support its argument that a company does not willfully violate the [FCRA] by interpreting it erroneously [as] long as [the] interpretation is not ‘objectionably unreasonable.’”<sup>150</sup> Further,

Experian argued that the [FCRA] did not clearly prohibit the sale of a consumer report for a closed account, and Experian cited [the Eleventh Circuit’s] acknowledgment that the [FCRA] provided “ambiguous” guidance on the issue. Experian also argued that it was entitled to summary judgment because [it] obtained an express certification from Alliance that the consumer reports would be used only for permissible purposes.<sup>151</sup>

Levine opposed Experian’s motion for summary judgment, arguing “that his account was closed when Experian sold his consumer report and . . . that Experian must have known that Alliance planned to use the report[] for an impermissible purpose.”<sup>152</sup>

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145. *Id.* (citing *Levine*, 437 F.3d at 1122).

146. *Id.* at 1316–17 (internal quotation marks omitted) (quoting *Levine*, 437 F.3d at 1122). The court noted that this “difference of opinion [was] reflected by a decision of [the Fifth Circuit] and an advisory letter from the Federal Trade Commission.” *Id.* at 1317 (citing *Levine*, 437 F.3d at 1122).

147. *Id.* at 1317.

148. *Id.*

149. 551 U.S. 47 (2007).

150. *Levine*, 554 F.3d at 1317.

151. *Id.*

152. *Id.*

The district court granted Experian's motion for summary judgment, finding that the release of a customer credit report to the holder of a closed account was permissible based on an objectively reasonable interpretation of the statute.<sup>153</sup> "The district court also concluded that Levine had failed to prove that Experian did not maintain reasonable procedures to ensure that the consumer reports [that] it sold were used for permissible purposes."<sup>154</sup> Levine appealed.<sup>155</sup>

In affirming the district court, the Eleventh Circuit acknowledged that the FCRA "provides that consumer reporting agencies may furnish consumer reports [only] for limited purposes"<sup>156</sup> and that the "agencies must maintain reasonable procedures to ensure compliance with the [FCRA]."<sup>157</sup> The court further noted that under the Supreme Court's decision in *Safeco*, "[t]o prove a willful violation [of the FCRA], a consumer must prove that [the] consumer reporting agency either knowingly or recklessly violated the requirements of the [FCRA]."<sup>158</sup> To prove a reckless violation, the court noted that "a consumer must establish that the action of the agency 'is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.'"<sup>159</sup> The court further held that under *Safeco*, "[a]n interpretation [of the FCRA] that favors the agency must be 'objectively unreasonable' under either the text of the [FCRA] or 'guidance from the courts of appeals or the Federal Trade Commission that might have warned [the agency] away from the view it took."<sup>160</sup>

Applying the reasoning in *Safeco* to Levine's case, the Eleventh Circuit held that it was not objectively unreasonable for Experian to interpret the FCRA to permit the sale of the consumer report to a creditor after the consumer had closed his account with that creditor.<sup>161</sup> Levine had identified two provisions of the FCRA that permitted the sale of reports for "account review," and he argued that Experian's sale of his report did not satisfy either provision because his account was closed at the time of the sale.<sup>162</sup> The first provision that Levine identified "allows a

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153. *Id.*

154. *Id.*

155. *Id.* at 1316.

156. *Id.* at 1317 (citing 15 U.S.C. § 1681b).

157. *Id.* at 1317–18 (citing 15 U.S.C. § 1681e).

158. *Id.* at 1318 (citing *Safeco*, 551 U.S. at 56–57).

159. *Id.* (quoting *Safeco*, 551 U.S. at 69).

160. *Id.* (fourth alteration in original) (quoting *Safeco*, 551 U.S. at 69–70).

161. *Id.* at 1319.

162. *Id.* at 1318.

creditor to examine a consumer report to ensure that a consumer 'continues to meet the terms of the account.'<sup>163</sup> "[T]he second provision . . . allows the sale of [the] consumer report when the seller 'has reason to believe [that the buyer] intends to use the information in connection with a credit transaction involving the consumer . . . and involving the . . . review or collection of an account.'<sup>164</sup> "Levine argue[d] that neither of these provisions could apply to closed accounts" and "that Experian actually knew that the [FCRA] did not permit sales of reports for consumers whose accounts were closed because language in letters from Experian to Alliance restricted the sales [of reports] to 'current customers.'<sup>165</sup> Levine further argued that the district court's findings could not be reconciled with the purpose of the FCRA "of restricting access to consumers' confidential financial information."<sup>166</sup>

Disagreeing with Levine, the Eleventh Circuit determined that the provisions Levine relied on did not clearly distinguish between open and closed accounts, and the court could not determine that the term *account* necessarily meant *an open account*.<sup>167</sup> The court also noted that caselaw has not determined that the FCRA "forbids the sale of reports for consumers whose accounts are closed."<sup>168</sup> Citing its prior analysis of the FCRA in Levine's first appeal, the court noted that the language of the FCRA did not clearly or expressly prohibit the sale of reports for consumers whose accounts were closed, and the court reiterated that "[t]here is a difference in opinion on whether the ambiguous language in [the FCRA] contains an absolute prohibition against the sale of credit reports to former creditors whose accounts are closed and paid in full."<sup>169</sup>

Levine also claimed that Experian recklessly violated the FCRA, stating that Experian's records indicated that Experian read the FCRA "to prohibit the sale of reports on consumers whose accounts were closed."<sup>170</sup> Again disagreeing with Levine, the Eleventh Circuit cited the Supreme Court's holding in *Safeco* "that evidence of subjective bad

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163. *Id.* (quoting 15 U.S.C. § 1681b(a)(3)(F)(ii)).

164. *Id.* (quoting 15 U.S.C. § 1681b(a)(3)(A)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* (quoting *Levine*, 437 F.3d at 1122). "Although Levine offer[ed] two staff opinion letters from the Federal Trade Commission as evidence of a regulatory instruction that reports [from] closed accounts may not be sold, [the Eleventh Circuit noted that] the Supreme Court [in *Safeco*] has expressly declined to describe such letters as 'authoritative guidance.'" *Id.* at 1319 (quoting *Safeco*, 551 U.S. at 70 & n.19).

170. *Id.* at 1319.

faith cannot support ‘a willfulness finding . . . when the company’s reading of the statute is objectively reasonable.’<sup>171</sup> Because the Eleventh Circuit determined Experian’s interpretation of the FCRA—that agencies may sell reports of closed accounts—to be objectively reasonable, the court held that pursuant to the Supreme Court’s instructions in *Safeco*, Experian’s subjective intent should not be considered.<sup>172</sup>

The Eleventh Circuit also disagreed with Levine’s argument “that interpreting the [FCRA] to allow sales of reports for closed accounts ‘cannot be reconciled with the . . . purpose [of the FCRA] of restricting access to consumers’ confidential financial information.’<sup>173</sup> Instead, the court noted that “under *Safeco* there is no underlying purpose criterion to determine whether an interpretation of the FCRA is objectively reasonable.”<sup>174</sup> Rather, the text of the FCRA and the authoritative interpretations of the FCRA are what matter under *Safeco*.<sup>175</sup> Accordingly, the court held that “[a] consumer reporting agency does not recklessly violate the [FCRA] when it acts in accord[ance] with an objectively reasonable interpretation of the [FCRA].”<sup>176</sup>

Finally, the Eleventh Circuit held that Experian did not willfully violate the FCRA by neglecting to maintain reasonable procedures to ensure that the consumer reports it provided were used only for permissible purposes.<sup>177</sup> Specifically, the court held that it did not need to evaluate Experian’s procedures because Experian’s interpretation of the FCRA as allowing the sale of consumer reports for a closed account was not objectively unreasonable.<sup>178</sup> Accordingly, the court held that “no investigation or procedure would have alerted Experian to the possibility of an impermissible use,” and that “[a]ny dearth of reasonable compliance procedures cannot give rise to a willful violation of the [FCRA].”<sup>179</sup>

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171. *Id.* (alteration in original) (quoting *Safeco*, 551 U.S. at 70 n.20).

172. *Id.*

173. *Id.* (second alteration in original) (quoting Brief of Appellant at 24, *Levine v. World Fin. Network Nat’l Bank*, 554 F.3d 1314 (11th Cir. 2009)).

174. *Id.*

175. *Id.* (citing *Safeco*, 551 U.S. at 69–70).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

*D. Whether the Statutory Damages Provision in Section 1681n(a)-(1)(A) of the Fair Credit Reporting Act is Unconstitutionally Vague and Excessive*

In *Harris v. Mexican Specialty Foods, Inc.*,<sup>180</sup> the Eleventh Circuit considered whether FCRA's the statutory damages provision, found at 15 U.S.C. § 1681n(a)(1)(A), is unconstitutionally vague and excessive.<sup>181</sup> In *Harris* credit card customers brought putative class actions against the defendant merchants for alleged violations of the Fair and Accurate Credit Transactions Act of 2003 (FACTA).<sup>182</sup> FACTA is a 2003 amendment to the FCRA that aims to protect consumers from identity theft.<sup>183</sup> FACTA states that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last [five] digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."<sup>184</sup>

In *Harris* the putative "classes include[d] every customer who engaged in a credit or debit card transaction with one of the defendants after the date FACTA became effective and whose electronically-generated receipt included more than the last five digits of the customer's credit card number and/or its expiration date."<sup>185</sup> The plaintiffs filed suits in the United States District Court for the Northern District of Alabama, alleging that the merchant defendants willfully violated FACTA and sought punitive damages, statutory damages, litigation expenses, and attorney fees pursuant to the FCRA.<sup>186</sup> The defendants moved for summary judgment, claiming that the FCRA's statutory damages provision was unconstitutional.<sup>187</sup> The district court issued an order dismissing the plaintiffs' claims with prejudice and declaring that the FCRA's statutory damages provision was unconstitutionally vague and excessive both on its face and as applied to the defendants.<sup>188</sup> On

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180. 564 F.3d 1301 (11th Cir. 2009).

181. *Id.* at 1306.

182. 15 U.S.C. §§ 1681–1681v (2006); *Harris*, 564 F.3d at 1307.

183. *Harris*, 564 F.3d at 1306.

184. *Id.* (quoting 15 U.S.C. § 1681c(g)(1)). "This provision applies to electronically-generated customer receipts, not those made by handwriting or imprinting a copy of the card." *Id.* at 1306 n.1 (citing 15 U.S.C. § 1681c(g)(2)).

185. *Id.* at 1307.

186. *Id.*

187. *Id.* Pursuant to 28 U.S.C. § 2403(a) (2006), the United States intervened as a plaintiff to defend the statute's constitutionality. *Harris*, 564 F.3d at 1307.

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

appeal, the Eleventh Circuit reversed, holding that the statute was not unconstitutionally vague or excessive on its face.<sup>189</sup>

### 1. *The FCRA's Statutory Damages Provision*

In determining the constitutionality of the FCRA's statutory damages provision, the court examined the statutory language and evolution of the FCRA and FACTA.<sup>190</sup> The court first noted that the FCRA permits consumers to bring private actions for willful violations.<sup>191</sup> "Originally, the FCRA provided actual and punitive damages for willful violations."<sup>192</sup> The FCRA was amended in 1996 to add "that victims of willful violations could receive 'any actual damages sustained by the consumer as a result of the failure *or* [statutory] damages of not less than \$100 and not more than \$1,000."<sup>193</sup> "[T]he FCRA still allows victims of willful violations to receive punitive damages."<sup>194</sup>

The FCRA was amended further by the Credit and Debit Card Receipt Clarification Act of 2007,<sup>195</sup> which had been signed into law just a few days after the district court's decision in *Harris*.<sup>196</sup> The Eleventh Circuit explained,

The Clarification Act applies to transactions that took place between December 4, 2004, and June 3, 2008, exempting merchants from liability for willful violations of the FCRA in cases where the merchant printed credit card expiration dates on customer receipts, but 'otherwise complied' with FACTA. The Clarification Act applies retroactively to all cases pending as of the time of its enactment. This means that

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189. *Id.* at 1307–08. The court also vacated the district court's finding that the statute was unconstitutionally excessive as applied to the defendants. *Id.* The Eleventh Circuit explained that the district court had engaged in "impermissible speculation" because it had "employed a series of assumptions," many of which involved disputed issues of fact, in reaching its finding that "any verdict awarded by the jury would necessarily be unconstitutionally excessive." *Id.* at 1309–10. The court held that "[o]nce the district court's assumptions are removed, the as-applied excessiveness challenge is not ripe" for adjudication. *Id.* at 1310. Accordingly, the court held that "[t]he district court therefore lacked jurisdiction to consider whether the FCRA's statutory-damages provision is punitive and will yield an unconstitutionally excessive verdict as applied to these defendants." *Id.*

190. *Id.* at 1306.

191. *Id.*

192. *Id.*

193. *Id.* (alteration in original) (quoting Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2412, 110 Stat. 3009-446 (1996) (codified as amended at 15 U.S.C. § 1681n(a)(1)(A))).

194. *Id.* (citing 15 U.S.C. § 1681n(a)(2)).

195. Pub. L. 110-241, 122 Stat. 1565 (2008) (codified as amended at 15 U.S.C. § 1681n(d)).

196. 564 F.3d at 1306–07.

to recover for willful FACTA violations that occurred prior to the enactment of the Clarification Act, a customer must prove that the merchant printed more than the last five digits of the customer's card number on an electronically-generated receipt.<sup>197</sup>

Proving only that the expiration date was printed on the receipt will no longer support liability under FACTA.<sup>198</sup>

## 2. *Facial Challenges to the FCRA's Statutory Damages Provision*

The Eleventh Circuit reasoned that “the defendants’ facial challenges to the FCRA [were] sufficiently ripe for adjudication . . . because they [did] not require a detailed examination of the facts of the instant case.”<sup>199</sup> The district court held that the statutory damages provision was unconstitutional because it did not provide guidance for juries when they are determining whether to award damages closer to the \$100 or \$1000 damages numbers.<sup>200</sup> As such, the district court found that the statute always left damages “to the whim of the jury” and allowed inconsistent, “willy nilly” verdicts, thereby rendering 15 U.S.C. § 1681n(a)(1)(A) unconstitutionally vague.<sup>201</sup> The district court further concluded that since § 1681n(a)(1)(A)'s “statutory-damages provision is ‘expressly not compensatory in nature,’ its verdicts [would] always be unconstitutionally excessive.”<sup>202</sup>

**(a) Facial Vagueness.** The Eleventh Circuit first examined the district court's reasoning

that the absence of criteria for assessing the appropriate amount of damages within § [1681n(a)(1)(A)'s] statutory-damages range renders the section unconstitutionally vague. The [district] court reasoned that without statutory criteria, it [would be] impossible for a judge to adequately charge a jury on where an award should fall within the \$100 to \$1,000 range.<sup>203</sup>

The district court found “that this [absence] renders the FCRA's statutory-damages provision unconstitutionally vague, in violation of due process.”<sup>204</sup>

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197. *Id.* (citations omitted).

198. *Id.*

199. *Id.* at 1308–09.

200. *Id.* at 1308.

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

202. *Id.* at 1308–09 (quoting *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 552 F. Supp. 2d 1302, 1308 (N.D. Ala. 2008), *rev'd sub nom. Harris*, 564 F.2d 1301)).

203. *Id.* at 1310.

204. *Id.*

The Eleventh Circuit recognized that

the void-for-vagueness doctrine reflects the principle that a “statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”<sup>205</sup>

The court further acknowledged that “[v]agueness within statutes is impermissible because such statutes fail to put potential violators on notice that certain conduct is prohibited, inform them of the potential penalties that accompany noncompliance, and provide explicit standards for those who apply the law.”<sup>206</sup> However, the court also noted the Supreme Court’s warning against applying the vagueness doctrine mechanically; the Supreme Court “emphasiz[ed] that an ‘economic regulation is subject to a less strict vagueness test’ and there should be ‘greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.’”<sup>207</sup>

In applying a void-for-vagueness analysis to the FCRA’s statutory damages provision, the court noted that ranges of statutory damages are not unique to the FCRA.<sup>208</sup> The court also noted that the FCRA’s statutory damages scheme, as compared to other statutes with statutory damage provisions, contained a smaller, more limited range of potential damages, “starting at \$100 per violation, with liability for a single violation capped at \$1,000.”<sup>209</sup> The defendants in *Harris* had

not argue[d] that statutory-damages ranges are categorically impermissible, but rather that the absence of criteria to aid juries in determin-

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205. *Id.* (alteration in original) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984)).

206. *Id.* at 1311 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. *Id.* (internal quotation marks omitted) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966)).

207. *Id.* at 1310 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982)).

208. *Id.* at 1311.

209. *Id.* By way of comparison, the court cited the statutory damages ranges in the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.), and the Communications Act of 1934, 47 U.S.C. §§ 151–615b (2006), both of which contain larger statutory damages ranges than does the FCRA. *Harris*, 564 F.3d at 1311.

ing the appropriate amount of statutory damages within the \$100 to \$1,000 range render[ed] the FCRA unconstitutionally vague because it: (1) deprives potential defendants of notice of the consequences of violating the FCRA; and (2) results in arbitrarily assessed damages awards.<sup>210</sup>

Disagreeing with the defendants, the court held that the FCRA does provide potential defendants with notice of the consequences of noncompliance because the FCRA clearly defines prohibited conduct and the potential range of fines.<sup>211</sup> Specifically, “the [FCRA] gives potential defendants notice that if they violate FACTA, they will be subject to penalties of \$100 to \$1,000 per violation.”<sup>212</sup> The court “therefore conclude[d] that the [FCRA] satisfies due process by giving sufficient notice to potential violators” of the consequences of noncompliance.<sup>213</sup>

The court further found that the FCRA does not provide juries with “unfettered discretion” so as to render their verdicts “arbitrary.”<sup>214</sup> Rather, the FCRA “clearly limits juries’ discretion by mandating that statutory damages . . . reside between \$100 and \$1,000.”<sup>215</sup> Because “valuation of harm [conducted by juries] is limited to a narrow, statutorily-established range,” the court held that juries were “not impermissibly asked to perform a legislative function” and that “[t]he mere potential for disuniform verdicts is not enough to create a constitutional infirmity.”<sup>216</sup> Accordingly, the court “conclude[d] that § 1681n(a)(1)(A) is not unconstitutionally vague on its face.”<sup>217</sup>

**(b) Facial Excessiveness.** Next, the Eleventh Circuit turned to the issue of whether the FCRA’s statutory damages provision is unconstitutionally excessive on its face.<sup>218</sup> The district court had held § 1681n(a)(1)(A) to be unconstitutionally excessive upon determining that it is “expressly not compensatory in nature,”<sup>219</sup> and thus “punitive in nature.”<sup>220</sup> The district court found that “because only litigants that have not suffered any actual harm will avail themselves of statutory damages under [§ 1681n(a)(1)(A)], these damages will always be

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210. *Harris*, 564 F.3d at 1311.

211. *Id.* at 1311–12.

212. *Id.* at 1312.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* (quoting *Grimes*, 552 F. Supp. 2d at 1308).

220. *Id.* (citing *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919)).

unconstitutionally excessive when compared to the actual harm caused by the violator's actions."<sup>221</sup>

The Eleventh Circuit disagreed with the district court's finding that the FCRA's statutory-damages provision was punitive in nature.<sup>222</sup> The court noted that "[p]rior to the 1996 amendment to FCRA, the statute permitted victims of willful violations to obtain actual and punitive damages."<sup>223</sup> "The current version of [the] FCRA provides that plaintiffs may elect to receive actual damages *or* statutory damages, but not both, and [also] maintains the punitive damages provision."<sup>224</sup> "Because the FCRA already contains a punitive damages provision, and specifies that statutory damages may only be awarded in lieu of actual damages," the Eleventh Circuit held that "the district court erred in concluding that the statutory damages provision is tantamount to a punitive damages provision."<sup>225</sup>

The court further held that "even if the statutory damages provision could be construed as punitive, the district court still erred in ruling that [§ 1681n(a)(1)(A)] always yields unconstitutionally excessive verdicts."<sup>226</sup> In so holding, the Eleventh Circuit noted that "the FCRA does not forbid individuals who suffered actual harm from seeking statutory damages."<sup>227</sup> Thus, it would be "conceivable that . . . a party with actual harm that is difficult to compute [would] bring a case seeking statutory damages."<sup>228</sup> "In such a case," the court explained that "the actual harm might be very close to the statutory damages"<sup>229</sup> and that the "mere possibility of a constitutional application is enough to defeat a facial challenge to the statute."<sup>230</sup> Accordingly, the court held that § 1681n(a)(1)(A) is not unconstitutionally excessive on its face and vacated and remanded the district court's decision.<sup>231</sup>

#### IV. CONCLUSION

The 2009 survey period yielded several noteworthy decisions, many of which concerned issues of first impression in the Eleventh Circuit. While this Article is not intended to be exhaustive, the Authors have

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221. *Id.* at 1312–13.

222. *Id.* at 1313.

223. *Id.*

224. *Id.* (citing 15 U.S.C. § 1681n(a)).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* (citing *High Oil Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982)).

231. *Id.*

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.