Mercer Law Review

Volume 51
Number 4 *Eleventh Circuit Survey*

Article 13

7-2000

Trial Practice and Procedure

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by Philip W. Savrin*

I. INTRODUCTION

This Article surveys the 1999 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. REMOVAL JURISDICTION

In *Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*,[1] the court had to decide "whether section 612 of the Cable Communications Policy Act of 1984 completely preempts state-law tort and breach of contract claims involving 'leased access' cable channels such that the claims are removable to federal court."[2] At the time the lawsuit was filed, Blab T.V. was Mobile's only locally owned and operated television station. Comcast was Mobile's cable operator as defined by the Cable Communications Policy Act of 1984. After a contract dispute, Blab T.V. filed a complaint in Alabama state court against Comcast, alleging fraud and breach of contract.[3]

Comcast removed the case to federal district court and argued that Section 612 of the Act provided federal jurisdiction over Blab T.V.'s state

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1. 182 F.3d 851 (11th Cir. 1999).
2. *Id.* at 852.
3. *Id.* at 853.

law claims.[4] Section 612 regulates the manner in which operators like Comcast deal with local and affiliated broadcasters such as Blab T.V.[5] Section 612 also creates a federal right of action in district court for unaffiliated programmers who are injured by a cable operator's failure or refusal to make commercial lease access channels available.[6]

Blab T.V. did not object to the removal of its lawsuit to federal court. However, it did file a motion to remand when Comcast filed a motion to strike Blab T.V.'s demands for a jury trial and punitive damages because Comcast argued neither was permitted under Section 612.[7]

The district court ruled in favor of Comcast, holding that Section 612 comes within the "complete preemption" doctrine and that Blab T.V.'s state law claims arose under Section 612. Upon Blab T.V.'s motion for reconsideration, the district court certified for interlocutory appeal the question of whether Blab T.V.'s state law claims are completely preempted by Section 612 and whether Section 612 confers removal jurisdiction on district courts.[8]

The Eleventh Circuit began its analysis by setting forth the Supreme Court's explanation that "complete preemption occurs when 'the preemptive force of a statute is so "extraordinary" that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'"[9] However, the Supreme Court has never enthusiastically applied the complete preemption doctrine in areas of law other than the Labor Management Relations Act ("LMRA") and the Employee Retirement Income Security Act ("ERISA").[10] Indeed, the Eleventh Circuit had never before applied the complete preemption doctrine in areas of law other than the LMRA or ERISA.[11]

After analyzing other circuits' rulings on whether the complete preemption doctrine applies outside the LMRA or ERISA context,[12] the Eleventh Circuit noted that the inquiry focused on

> "whether Congress not only intended a given federal statute to provide a federal defense to a state cause of action that could be asserted either

4. *Id.*
5. 47 U.S.C. § 532(b)(1)(A) (1994).
6. *Id.* § 532(d).
7. 182 F.3d at 853.
8. *Id.* at 853-54.
9. *Id.* at 854 (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987)).
10. *Id.* at 856.
11. *Id.*
12. *Id.* at 856-57.

> in a state or federal court, but also intended to grant a defendant the ability to remove the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal [one]."[13]

Thus, the Eleventh Circuit concluded that it should resolve the issue by looking at congressional intent behind the Act.[14]

While the Act did not directly address the issue, the court noted that "Section 612(a) contains jurisdictional language that is similar to Section 301 of the LMRA, which according to [the Supreme Court], supports complete preemption."[15] However, the Act's legislative history does not indicate "that Section 612(a)'s jurisdictional language is intended to function in the same manner as Section 301 of the LMRA."[16] Because of the absence of such a statement, the Eleventh Circuit focused on other provisions in the Act and its legislative history.[17] In so doing, the court found that the Act has a "broad policy of preserving state authority except in areas in which the exercise of this authority would be inconsistent with federal law."[18] For example, one of the Act's purposes is "to 'establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems.'"[19] Moreover, the Act provides that "'[n]othing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.'"[20]

The Eleventh Circuit then concluded that these provisions contemplated the application of state law and state court jurisdiction to some degree in the cable services industry.[21] The inclusion of these provisions, the court reasoned, demonstrates that Congress did not intend for the complete preemption doctrine to apply to the Act as it does to the LMRA and ERISA.[22] Accordingly, the court concluded "that Section 612 of the Cable Act does not confer removal jurisdiction over [Blab T.V.'s] state law claims pursuant to the complete preemption doctrine."[23]

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13. *Id.* at 857 (quoting Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1797-98 (1998)) (alteration in original).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* (quoting 47 U.S.C. § 521(3) (1994)).
20. *Id.* (quoting 47 U.S.C. § 556(b) (1994)) (alteration in original).
21. *Id.* at 857-58.
22. *Id.* at 858.
23. *Id.* at 859.

III. ARBITRATION

A. *Equitable Estoppel*

In *MS Dealer Service Corp. v. Franklin*,[24] the Eleventh Circuit had to determine whether a nonsignatory to a contract could be compelled to submit to mandatory arbitration under a mandatory arbitration clause within that contract. Sharon Franklin purchased a vehicle from Jim Burke Motors. The Buyer's Order executed by the parties incorporated by reference a Retail Installment Contract in which Franklin was charged $990 for a service contract through MS Dealer.[25] The Buyer's Order contained an arbitration clause that provided that "[a]ll disputes and controversies of every kind and nature between the parties hereto arising out of or in connection with this contract . . . shall be submitted to binding arbitration."[26] MS Dealer did not sign either the Buyer's Order or the Retail Installment Contract.[27]

After discovering defects in her car, Franklin filed suit in Alabama state court against Jim Burke Motors, MS Dealer, and Chrysler Credit Corporation, alleging that MS Dealer cooperated, conspired, and colluded with Jim Burke Motors and Chrysler Credit Corporation to defraud her in connection with the purchase of the service contract. Relying on the arbitration clause, MS Dealer petitioned the district court to compel Franklin to submit to arbitration. The district court dismissed the petition because MS Dealer did not sign the Buyer's Order and, thus, lacked standing to compel arbitration.[28]

Even though arbitration is a matter of contract, the Eleventh Circuit recognized that there are three exceptions that prevent the lack of a written arbitration agreement from being an impediment to arbitration.[29] The first exception is equitable estoppel.[30] The second exception arises when "'under agency or related principles, the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the

24. 177 F.3d 942 (11th Cir. 1999).
25. *Id.* at 944.
26. *Id.* (alteration in original).
27. *Id.*
28. *Id.* at 945.
29. *Id.* at 947.
30. *Id.*

signatories be avoided.'"[31] Finally, the third exception "'arises when the parties to a contract together agree, upon formation of their agreement, to confer certain benefits thereunder upon a third party, affording that third party rights of action against them under the contract.'"[32]

Although MS Dealer argued that each of the three exceptions applied, the Eleventh Circuit focused only on the equitable estoppel exception and noted that there are two circumstances in which equitable estoppel allows a nonsignatory to compel arbitration.[33] "First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause 'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory."[34] Second, "'application of equitable estoppel is warranted . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'"[35] Thus, the Eleventh Circuit had to determine whether the nature of Franklin's fraud claims against MS Dealer fell within the scope of the arbitration clause contained in the Buyer's Order.[36]

The Eleventh Circuit concluded that both circumstances giving rise to the application of equitable estoppel were present.[37] First, plaintiff's fraud claim against MS Dealer referred to the $990 charge for the service contract, which was contained in the Retail Installment Contract and incorporated by reference into the Buyer's Order.[38] Consequently, each of Franklin's claims relied upon her contractual obligation to pay the $990 charge for the service contract.[39] Additionally, Franklin's claims against Jim Burke Motors and MS Dealer were based on the same facts because she alleged that MS Dealer worked in concert with Jim Burke Motors in the alleged fraudulent plan.[40] This allegation of collusive behavior clearly demonstrated that her claims against MS Dealer were intertwined with the obligations imposed by the Buyer's

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31. *Id.* (quoting Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423, 1432 (M.D. Ala. 1997)).

32. *Id.* (quoting *Boyd*, 981 F. Supp. at 1429).

33. *Id.*

34. *Id.* (quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993)) (alteration in original).

35. *Id.* (quoting *Boyd*, 981 F. Supp. at 1433).

36. *Id.*

37. *Id.*

38. *Id.* at 947-48.

39. *Id.* at 948.

40. *Id.*

Order.[41] For these reasons the Eleventh Circuit concluded that Franklin was equitably estopped from avoiding arbitration with MS Dealer.[42]

B. Appellate Jurisdiction

The Eleventh Circuit was confronted with another issue of first impression in *Randolph v. Green Tree Financial Corp.-Alabama.*[43] In *Randolph* the court had to decide whether a district court's order compelling arbitration is an appealable "final decision" when it dismisses the remaining claims. Plaintiff purchased a mobile home and financed that purchase through Green Tree Financial Corp.–Alabama. The Retail Installment Contract between the parties contained an arbitration clause that required binding arbitration to resolve all disputes.[44]

Plaintiff filed suit in federal court alleging that defendant violated the Truth in Lending Act and the Equal Credit Act. Defendant responded by moving to compel plaintiff to arbitrate her complaint pursuant to the arbitration agreement and by moving to stay the case until arbitration occurred or, alternatively, to dismiss the case.[45]

After concluding that all the issues raised in plaintiff's complaint had to be submitted to arbitration, the district court dismissed plaintiff's claims with prejudice.[46] After plaintiff appealed, defendant moved to dismiss for lack of jurisdiction.[47] Thus, the Eleventh Circuit had to determine whether the district court's order compelling arbitration and dismissing plaintiff's complaint with prejudice could be classified as a "'final decision with respect to an arbitration'" under Section 16(a)(3) of the Federal Arbitration Act.[48]

In analyzing whether it had jurisdiction, the Eleventh Circuit first examined a distinction drawn by other circuits between embedded and independent proceedings.[49] "An 'embedded' proceeding is one in which the arbitration issue arises as part of a broader action dealing with other issues."[50] However, "an 'independent' proceeding [is one in which] the motion to compel arbitration is the *only* issue before the court."[51] Other

41. *Id.*
42. *Id.*
43. 178 F.3d 1149 (11th Cir. 1999).
44. *Id.* at 1151.
45. *Id.* at 1151-52.
46. *Id.* at 1152.
47. *Id.*
48. *Id.* at 1152-53 (quoting 9 U.S.C. § 16(a)(3) (1994)).
49. *Id.* at 1153.
50. *Id.*
51. *Id.*

circuits have found that orders compelling arbitration in embedded proceedings should be treated as interlocutory and nonappealable because the district court still has other issues remaining in the case to resolve, and, thus, it could not be considered a final decision for purposes of Section 16(a)(3).[52]

In *Randolph*, although it was an embedded proceeding because plaintiff alleged substantive violations of federal law, the dismissal of the action left no additional issues for the district court to resolve.[53] Thus, the Eleventh Circuit reasoned that the distinction between embedded and independent proceedings did not resolve the issue.[54] Further, the court noted,

> In most arbitration appeals there will be little difference between the traditional definition of "final decision" and one that relies on the distinction between embedded and independent proceedings. If the district court's order compelling arbitration in a so-called embedded proceeding leaves other issues unresolved, the court will have more left to do than simply execute the judgment, so there will be no final decision. But that is not true in cases such as this one, where the district court dispensed with the remaining issues by dismissing the case.[55]

The court also noted that there was nothing in Section 16 that required it to distinguish between embedded and independent proceedings.[56] Instead, the court focused on the Federal Arbitration Act's legislative history to resolve the issue.[57]

Specifically, the Senate Judiciary Committee stated that

> "under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from . . . a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court."[58]

The court concluded that when a district court orders arbitration and, by dismissing the remaining claims with prejudice, it effectively disposes of all other issues, the Eleventh Circuit has appellate jurisdiction over

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52. *Id.*
53. *Id.* at 1155.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 1156.
58. *Id.* (quoting *Committee on the Judiciary, Section-by-Section Analysis on S1482*, 100th Cong., 2d Sess., 134 CONG. REC. S16284 (1988)).

the case.[59] Consequently, the court proceeded to determine the enforceability of the arbitration clause and concluded that it was unenforceable.[60]

IV. ABSTENTION

In *Posner v. Essex Insurance Co.*,[61] plaintiff sued a Bermuda corporation and a Pennsylvania corporation in federal court under an insurance policy that plaintiff had purchased from the Bermuda corporation. After denying the allegations, the Bermuda corporation filed a declaratory judgment action in Bermuda seeking a ruling on the validity of the insurance policies issued to plaintiff. Meanwhile, the Bermuda corporation argued in the district court that the international abstention doctrine compelled the court to dismiss or stay the action. After dismissing some counts for lack of personal jurisdiction, the district court agreed and dismissed the remaining claims under the international abstention doctrine.[62]

On appeal plaintiff argued that the district court erred by not following *Quackenbush v. Allstate Insurance Co.*,[63] which the United States Supreme Court decided in 1996.[64] The Court held that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."[65] Otherwise, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."[66]

Nevertheless, the Eleventh Circuit found that *Quackenbush*'s applicability to international abstention was an issue of first impression.[67] In holding that *Quackenbush* does not apply to international abstention, the Eleventh Circuit focused on the fact that the issue in *Quackenbush* was "'whether the principles underlying our abstention cases would support the remand or dismissal of a common-law action for damages.'"[68] Thus, the court ruled that the Supreme Court in *Quackenbush* cited "only cases in which federal court actions risk interfering with state proceedings or authority."[69] The court also noted that "the

59. *Id.*
60. *Id.* at 1157-59.
61. 178 F.3d 1209 (11th Cir. 1999) (per curiam).
62. *Id.* at 1213-14.
63. 517 U.S. 706 (1996).
64. 178 F.3d at 1222.
65. 517 U.S. at 731.
66. *Id.* at 716.
67. 178 F.3d at 1222.
68. *Id.* at 1222-23 (quoting *Quackenbush*, 517 U.S. at 719).
69. *Id.* at 1223.

Supreme Court's admonition that courts generally must exercise their nondiscretionary authority in cases over which Congress has granted them jurisdiction" only applies to abstention doctrines that concern federalism issues.[70]

Because the relationship between the federal courts and the states is different from the relationship between the federal courts and foreign nations, the Eleventh Circuit found that *Quackenbush* has no impact on international abstention.[71] Thus, the court turned to precedent established in *Turner Entertainment Co. v. Degeto Film GmbH*[72] that addressed international abstention.[73] Finding *Turner Entertainment* unaffected by *Quackenbush*, the court applied the relevant three-factor test from *Turner Entertainment* to the abstention issue and concluded that abstention was justified, but that the district court should have stayed the counts for which jurisdiction was proper.[74]

V. FINAL JUDGMENT

The issue in *Snapper, Inc. v. Redan*[75] (also of first impression) was "whether . . . a district court's remand order is reviewable when the court issued the order to enforce a contractual forum selection clause."[76] Snapper, a Georgia corporation, had a business relationship with KPM Distributors, a New Jersey corporation, and KPMNY Distributors, a New York corporation. As part of an expansion agreement, three officers of KPM and their spouses assumed personal liability for all of KPM's obligations to Snapper when they executed six identical security agreements.[77]

Approximately four years later, a dispute arose between Snapper and KPM regarding payment for equipment. KPM sued Snapper in the United States District Court for the District of New Jersey, and Snapper filed a counterclaim. Rather than filing a third-party claim in the New Jersey federal action against the six guarantors, Snapper sued in the Superior Court of DeKalb County, Georgia against the guarantors, but not KMP. The guarantors then removed the case to the Northern District of Georgia and moved to transfer the case to the District of New

70. *Id.*
71. *Id.*
72. 25 F.3d 1512 (11th Cir. 1994).
73. 178 F.3d at 1223.
74. *Id.* at 1223-24.
75. 171 F.3d 1249 (11th Cir. 1999).
76. *Id.* at 1250-51.
77. *Id.* at 1251.

Jersey for consolidation with KPM's action. Snapper opposed the guarantors' motion and moved to remand the case to the state court.[78]

The district court found "that the forum selection clause in each the security agreements signed by the guarantors constituted a waiver of their right to remove."[79] In particular, the district court interpreted the terms of the forum selection clause to allow Snapper to choose to litigate either in a Georgia state court or in the Northern District of Georgia.[80] Because "removal premised on diversity jurisdiction was a right based on domicile," the guarantors, by the terms of the security agreements, had waived any rights afforded to them by virtue of their domicile.[81] Thus, the district court ruled that the guarantors could not remove the action.[82] Accordingly, "[t]he district court . . . remanded the action to [Georgia] state court and dismissed the motion to change venue."[83]

In determining whether it had appellate jurisdiction, the Eleventh Circuit examined the language of the statute governing procedure after removal.[84] That statute provides, in relevant part, that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[85] However, "the [United States] Supreme Court has held that § 1447(d) bars appellate review only where the remand order is based upon the grounds specified in § 1447(c)."[86] Because the remand order in *Snapper* was based upon a forum selection clause, the Eleventh Circuit had to determine "whether a remand order based upon a forum selection clause fits within one of the grounds specified in § 1447(c)."[87]

Section 1447(c) indicates that a district court may order a remand if there is either a lack of subject matter jurisdiction or a defect other than

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78. *Id.*
79. *Id.* at 1251-52.
80. *Id.* at 1252.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1252-54.
85. 28 U.S.C. § 1447(d) (1994).
86. 171 F.3d at 1252 (citing Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 346 (1976)).
87. *Id.* That statute provides, in relevant part, that

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

28 U.S.C. § 1447(c) (Supp. III 1997).

a lack of subject matter jurisdiction.[88] Because subject matter jurisdiction was not an issue in *Snapper*, the district court could have ordered a remand only if there was a defect other than lack of subject matter jurisdiction.[89] Thus, the Eleventh Circuit examined the meaning of the word "defect" as that word is used in Section 1447(c).[90]

The Eleventh Circuit concluded that failure to follow the filing and timeliness requirements enunciated in the statute governing removal procedures can render removal defective.[91] However, the court noted that other grounds for remand exist that do not depend on any defect in the removal.[92] For example, the court mentioned that grounds for remand tend to "arise in the contexts of forum selection clauses, abstention, and supplemental jurisdiction."[93] Most importantly, a "remand based on a forum selection clause depends on an adjudication of the meaning of the clause, a determination that is external to the removal process."[94]

Whether a forum selection clause permits removal is determined by the terms of the agreement.[95] Just as "a determination that a federal court should abstain in a particular case or that it should refuse to exercise supplemental jurisdiction over pendent state claims after dismissal of all federal claims does not mean the removal was defective," so too a forum selection clause does not render removal defective.[96] Instead, it is simply a matter of the federal court enforcing an agreement similar to any other contractual adjudication.[97] Thus, the Eleventh Circuit concluded that the "remand order was not based upon a ground specified in § 1447(c), and therefore § 1447(d) does not apply."[98]

VI. PREEMPTION

In *Butero v. Royal Maccabees Life Insurance Co.*,[99] the Eleventh Circuit was faced with the question of whether an employee's state law claims for breach of contract, bad faith refusal to pay, and fraud in the inducement were preempted or superpreempted under ERISA and, thus,

88. 171 F.3d at 1252-53.
89. *Id.* at 1253.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1260.
99. 174 F.3d 1207 (11th Cir. 1999).

were properly removed. A company named Simply Fashion provided its employees with a cafeteria plan that included health, life, and long-term disability insurance. After Simply Fashion's insurance carrier canceled the group policy that Simply Fashion offered to its employees, Royal Maccabees offered to provide a replacement group policy at the same premium. Simply Fashion then issued a memorandum to its employees informing them of the new life insurance coverage that would be provided by a new carrier. Simply Fashion further informed the employees that they would be enrolled automatically.[100]

Royal Maccabees later backed away from its earlier representations and instead offered a cheaper, nonportable policy to Simply Fashion. This new policy was issued to Simply Fashion, not to Simply Fashion's employees. However, Simply Fashion began collecting premiums from its employees and issued two premium checks to Royal Maccabees.[101]

After the policy's effective date, Royal Maccabees required Simply Fashion to provide a "statement from the company that there had been no deaths or disabilities since the effective date" of the policy.[102] Well after a month later, Simply Fashion responded, but stated only that "we have had no death claims."[103] The letter did not mention any disabilities at Simply Fashion during that month when, in fact, one of Simply Fashion's managers, Benedict Butero, had taken leave because of a severe illness. Indeed, Butero died one day after Simply Fashion notified Royal Maccabees that no outstanding death claims existed.[104]

On the day Butero died, Simply Fashion received a letter from Royal Maccabees in which Royal Maccabees declined Simply Fashion's request for coverage and stated that no contract of insurance existed between them. Royal Maccabees enclosed a check reimbursing Simply Fashion for the premiums already paid by Simply Fashion. Annette Butero, Benedict's widow, then claimed benefits through Simply Fashion, but her claim was denied.[105]

Butero, joined by Simply Fashion, sued Royal Maccabees, one of its employees, and an independent insurance agent. Defendants then removed the case to federal court, arguing that the insurance policy was part of a plan governed by ERISA. The court severed and remanded plaintiff's claims against the independent insurance agent, leaving only the claims against Royal Maccabees and its employee in federal court.

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100. *Id.* at 1210.
101. *Id.*
102. *Id.*
103. *Id.* at 1210-11.
104. *Id.* at 1211.
105. *Id.*

These defendants then moved to strike plaintiff's claims against them, arguing that ERISA governed the policy and that all the remaining claims were thus preempted. The district court agreed and dismissed plaintiff's complaint without prejudice, which allowed plaintiff to refile a complaint stating claims under ERISA.[106]

There are two types of preemption that arise under ERISA. The first, complete preemption or superpreemption, "arises from Congress's creation of a comprehensive remedial scheme in 29 U.S.C. § 1132 for loss or denial of employee benefits."[107] The second, defensive preemption, "provides only an affirmative defense to certain state-law claims."[108] Superpreemption requires the satisfaction of four elements: (1) there must be a relevant ERISA plan; (2) the plaintiff must have standing to sue under that plan; (3) the defendant must be an ERISA entity; and (4) the complaint must seek compensatory relief similar to that available under Section 1132(a), which will often be a claim for benefits due under a plan.[109]

Because Simply Fashion was an employer, and Section 1132(a) does not grant employers a cause of action for damages, Simply Fashion had no standing to sue under ERISA; thus, their claims were not superpreempted.[110] However, the court found that Butero's claims were superpreempted because the second, third, and fourth elements were easily present.[111] The only remaining analysis was to determine whether there was a relevant ERISA plan. This was subject to discussion because Royal Maccabees' refusal to issue the policy might have precluded any plan from being established.[112]

The court nevertheless found that a plan had been established.[113] First, a plan is established by the employer's conduct, and in *Butero* the employer had made multiple representations to its employees regarding the prospective plan.[114] Moreover, the employer collected money for the plan through payroll deductions from its employees, paid premiums, and obviously intended for life insurance to take effect.[115] All these actions demonstrated Simply Fashion's intent to establish a plan.[116]

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106. *Id.*
107. *Id.*
108. *Id.* at 1212.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 1214.
113. *Id.* at 1214-15.
114. *Id.*
115. *Id.* at 1215.
116. *Id.*

Thus, the court concluded that there was a relevant ERISA plan and that Butero's claims were superpreempted.[117]

"Defensive preemption defeats claims seeking relief under state-law causes of action that 'relate to' an ERISA plan."[118] Because the court determined that there was an ERISA plan, and because both claims related to that plan, both of plaintiff's claims were defensively preempted.[119] Thus, "[t]he district court properly dismissed both plaintiffs' claims with leave to refile."[120]

VII. JURISDICTION

A. Subject Matter Jurisdiction and the Family and Medical Leave Act

In *Wascura v. Carver*,[121] the Eleventh Circuit had to decide, as a matter of first impression, whether public officials in their individual capacities could be classified as employers under the Family and Medical Leave Act ("FMLA"). Plaintiff was a city clerk for fourteen years. Defendants were the city's mayor, vice-mayor, and city commissioners. Because plaintiff's son was near the end stage of AIDS and unable to care for himself, plaintiff notified defendants of her son's illness and her need to take time off to care for her son. Plaintiff planned first to exhaust her vacation and sick pay and then take any remaining time as unpaid leave. After plaintiff took off just twenty hours, the mayor told her she should resign because of her situation at home. Plaintiff refused, and defendants terminated her at a city commission meeting.[122]

Plaintiff sued defendants in their individual capacities, claiming that they terminated her because she attempted to exercise her rights under the FMLA. Defendants moved to dismiss on the ground that they were not employers under the FMLA and thus could not be held individually liable. Alternatively, defendants argued that they were entitled to qualified immunity. After the district court denied defendants' motion, defendants filed an interlocutory appeal from the denial of qualified immunity.[123]

When analyzing interlocutory appeals regarding denials of qualified immunity, the Eleventh Circuit has the authority to determine the

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117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. 169 F.3d 683 (11th Cir. 1999).
122. *Id.* at 684.
123. *Id.*

threshold question of whether the actions allegedly taken by the defendants violated federal law.[124] The Eleventh Circuit noted, "If a district court lacks subject matter jurisdiction over a claim, that claim cannot provide a basis for imposing liability, and it necessarily follows that the claim states no violation of federal law."[125] Because there is no subject matter jurisdiction over a claim against a defendant who is not an employer under the FMLA, the Eleventh Circuit began its analysis by examining whether defendants met the statutory definition of "employer" under the FMLA.[126]

Prior to *Wascura* the Eleventh Circuit had addressed the meaning of "employer" only under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.[127] The court found that the FMLA's definition of "employer" is much more expansive than these other statutes and that the FMLA includes "'any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.'"[128] Indeed, the FMLA's definition of "employer" is "materially identical" to the definition of "employer" found in the Fair Labor Standards Act ("FLSA").[129]

The Eleventh Circuit held in *Welch v. Laney*[130] that the term "employer," as it is used in the FLSA, does not include a public official in his or her individual capacity. In that case the court held that under the FLSA a sheriff was not an employer in his individual capacity because he did not have "'control over [the plaintiff's] employment and [therefore did] not qualify as [an] employer under the Act.'"[131] Thus, under *Welch* "a public official sued in his individual capacity is not an 'employer' subject to individual liability under the FLSA."[132] Because the definition of "employer" is the same under the FMLA as it is under the FLSA in *Wascura* the court found that "a public official sued in his or her individual capacity is not an 'employer' under the FMLA and, therefore, there is no federal subject matter jurisdiction over such a claim."[133]

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124. *Id.* at 685.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* (quoting 29 U.S.C. § 2611(4)(A)(ii)(I) (1994)).
129. *Id.* at 685-86.
130. 57 F.3d 1004 (11th Cir. 1995).
131. 169 F.3d at 686 (quoting *Welch*, 57 F.3d at 1011) (alterations in original).
132. *Id.*
133. *Id.* at 687.

B. *Subject Matter Jurisdiction and Voluntary Dismissals*

The Eleventh Circuit was confronted with a rather unique situation in *University of South Alabama v. The American Tobacco Co.*[134] In that case the University sued various tobacco companies and manufacturers for damages and restitution for money it spent on unreimbursed medical care for tobacco-related illnesses. After plaintiff filed the case in an Alabama state court, defendants removed it to federal district court on the basis of diversity jurisdiction.[135]

On the following day, one defendant filed its answer. Less than a week later, before any other defendant had answered, Alabama's Attorney General filed a notice of dismissal, arguing "that he was the proper plaintiff in this action because the University is an agency and instrumentality of the state subject to the Attorney General's authority to direct and control litigation."[136] After the University moved to remand, alleging lack of subject matter jurisdiction, the defendant who had filed its answer joined in the Attorney General's request for dismissal.[137]

Following a hearing the district court issued an order dismissing the entire action without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure because the Alabama Attorney General had authority under state law to file a notice of dismissal. Thus, the court dismissed the action as to all defendants without reaching the question of its subject matter jurisdiction. The University then filed its appeal.[138]

The Eleventh Circuit began its analysis by noting that normally voluntary dismissals are effective immediately and "precede any analysis of subject matter jurisdiction because [they are] self-executing and [moot] all pending motions, obviating the need for the district court to exercise its jurisdiction."[139] However, in this case, the district court had "to determine a complex substantive issue of Alabama law," namely, whether the proper plaintiff had filed a notice of dismissal in the proceeding.[140]

> Therefore in order to determine whether the Attorney General's notice satisfied the requirements of Rule 41(a)(1), the district court first had to determine that the University was an agency of the state, that the

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134. 168 F.3d 405 (11th Cir. 1999).
135. *Id.* at 408.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 409.
140. *Id.*

> University was subject to the authority of the Attorney General to control all litigation in the state and, hence, that the Attorney General had the authority to file a Notice of Dismissal.[141]

Clearly, none of these substantive rulings should have been made without the district court first determining whether it had subject matter jurisdiction to hear the case because "removal jurisdiction is no exception to a federal court's obligation to inquire into its own jurisdiction."[142] The Eleventh Circuit later concluded that the district court's failure to inquire into subject matter jurisdiction rendered its ruling in essence an advisory opinion.[143] Accordingly, the Eleventh Circuit remanded the case to the district court with instructions to remand the case to the state court.[144]

VIII. APPELLATE JURISDICTION

The issue in *Druhan v. American Mutual Life*[145]—whether an appeal from a final judgment that resulted from a voluntary dismissal with prejudice is within the Eleventh Circuit's jurisdiction—was one of first impression for the court.[146] In that case plaintiff alleged that she was fraudulently induced to purchase a life insurance policy from defendant. After discovering the fraud, she sued in Alabama state court. Defendant responded by arguing that because plaintiff's policy was purchased in connection with a benefits package provided by her employer, her state law claims were preempted by the Employee Retirement Income Security Act ("ERISA"). Defendant then removed the case to federal court, in essence treating the case as though it had been brought under ERISA.[147]

Despite plaintiff's objections the district court agreed that ERISA preempted her claims. Plaintiff then moved the district court to dismiss her claim with prejudice because she stated that she had no claims under ERISA and that the court's decision to deny her motion to remand effectively left her without a remedy. The court granted plaintiff's request and entered a final judgment dismissing her claims with prejudice. Plaintiff immediately filed her appeal.[148]

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141. *Id.*
142. *Id.* at 410.
143. *Id.* at 411.
144. *Id.* at 412-13.
145. 166 F.3d 1324 (11th Cir. 1999).
146. *Id.* at 1325.
147. *Id.* at 1324-25.
148. *Id.* at 1325.

Before determining whether a plaintiff could appeal from a final judgment that was entered on her own motion for a dismissal with prejudice, the Eleventh Circuit noted that it had no jurisdiction to review the final judgment in the case because there was no case or controversy.[149] Because neither party contended that the district court erred in entering the final judgment—indeed, plaintiff had specifically requested it—there was no adverseness and, thus, no case or controversy.[150]

Ceding to plaintiff's wishes to look beyond the form of the appeal to the substance thereof, the Eleventh Circuit held further that even looking beyond the lack of a case or controversy, plaintiff's approach to get the matter before the court was not statutorily authorized.[151] The court stated, "In substance, this is not an appeal from a final judgment, but an appeal from an interlocutory order denying the plaintiff's motion to remand."[152] Congress clearly set forth the instances in which an appellate court may hear an appeal from an interlocutory order, and denying remand is not on the list.[153] Thus, both in form and in substance, the Eleventh Circuit had no jurisdiction over the appeal and therefore dismissed it.[154]

IX. CONCLUSION

This year's review of Eleventh Circuit cases adds new rules to the federal landscape and contains a significant number of issues of first impression. Hopefully, this Article will assist the bench and bar with the ongoing complexities of federal court practice.

149. *Id.* at 1326.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* (citing 28 U.S.C. § 1292 (1994)).
154. *Id.* at 1327.