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Philip W. Savrin

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Trial Practice and Procedure

by Philip W. Savrin∗

I. INTRODUCTION

This Article surveys the 1995 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. PLEADINGS

A. Timeliness of a Jury Demand

Burns v. Lawther1 involves the timeliness of a jury demand in federal court. Burns, a federal inmate, claimed that he had received inadequate medical care at a federal institution, and sued two physician’s assistants for a violation of his Eighth Amendment rights under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.2 Although an Eighth Amendment claim, seeking legal relief, is triable to a jury, Burns did not include a jury demand with his complaint.3

In lieu of an answer, the defendants—at the direction of the magistrate to whom the case was assigned—filed a “special report” consisting of affidavits and documents disputing Burns’ allegations. Nine months after the special reports were filed, Burns amended his complaint to add negligence claims against the existing defendants as well as the United

∗ Associate in the firm of Drew, Eckl & Farnham, Atlanta, Georgia. Clark University (B.A. with high honors, 1981); Boston University (J.D. cum laude, 1985). Law Clerk to the Honorable Harold L. Murphy of the Northern District of Georgia, 1988-1990. Member, American Bar Association, State Bar of Georgia, Atlanta Bar Association, Federal Bar Association. The author acknowledges the assistance of Christian Garnett in bringing this Article to completion.
1. 53 F.3d 1237 (11th Cir. 1995).
2. 403 U.S. 388 (1971).
3. 53 F.3d at 1239.
States of America, pursuant to the Federal Tort Claims Act ("FTCA"). At that point, Burns for the first time demanded a jury trial.

The magistrate decided to treat the special reports as motions for summary judgment and, in passing on the issues, found a trial necessary. The district court adopted the magistrate's recommendation that triable issues existed and proceeded to conduct a non-jury trial of both the \textit{Bivens} and the FTCA claims. The court thereafter entered judgment in favor of all defendants on all claims and expressly found that Burns had not made a timely demand for his case to be heard by a jury.

The Eleventh Circuit found the jury demand issue to be one of first impression. After examining the relevant rules, the appeals court disagreed with the district court, and sent the case back for a jury trial. In reaching its decision, the Eleventh Circuit acknowledged that, under Federal Rule of Civil Procedure 38, a jury trial is waived if not demanded in a timely manner, "not later than 10 days after the service of the last pleading directed to [a jury] issue." The focus of the Eleventh Circuit's opinion is on the definition of "pleading" within the meaning of Rule 38. For assistance, the Eleventh Circuit looked to Federal Rule of Civil Procedure 7, which defines "pleadings" to include the following: a complaint, an answer, a reply to counterclaim, an answer to a cross claim, a third-party complaint, or a third-party answer. Under the doctrine of \textit{inclusio unius, exclusio alterius}, the court of appeals held that the list in Rule 7(a) is specific and exclusive of other documents that might be considered a "pleading."

In the court below, the district judge had construed the special reports, filed at the magistrate's direction in response to the complaint, to be the "last pleading" directed to the jury issue. The Eleventh Circuit found this decision to be flawed because the reports, even though converted to motions for summary judgment, were simply not "pleadings" within the meaning of Rule 38. Consequently, Burns's jury demand, filed along with his amended complaint which added the FTCA claims, was timely as it predated the defendants' answers.

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5. 53 F.3d at 1239-40.
6. \textit{Id.} at 1241.
7. \textit{Id.}
8. \textit{Id.} at 1240.
9. \textit{Id.} at 1241.
10. \textit{Id.}
11. \textit{Id.} at 1240.
12. \textit{Id.} at 1241.
13. \textit{Id.}
After reaching the conclusion that the district court erred in refusing to conduct a jury trial, the Eleventh Circuit applied a “harmless error” analysis, in light of the court's factual findings on the non-jury issue presented under the FTCA. Harmless error had not occurred, however, because, pursuant to the reasoning in Beacon Theatres v. Westover, a non-jury proceeding cannot foreclose jury consideration of legal issues, absent “imperative circumstances” that did not exist in this case. Consequently, the district court's deprivation of Burns's right to a jury trial was reversible error.

B. Resolution Trust Corporation Cases

1. Necessity of a Rule 59 Motion in Removed Actions. In Resolution Trust Corp. v. Bakker, the Eleventh Circuit discussed the proper procedure for appealing district court judgments in cases where the Resolution Trust Corporation has been appointed as a receiver for a savings and loan institution following an award against the savings and loan in state court. In dicta in a previous case, Jackson v. American Savings Mortgage Corp., the Eleventh Circuit had hinted that a Rule 59 motion to modify or vacate the judgment would need to be filed to preserve issues for review. In Bakker, the court converted Jackson's dicta into a holding.

The facts of the case are as follows. First Federal Savings and Loan Association sued the Bakkers in state court for breach of contract, and the Bakkers counterclaimed on various theories. After a trial on the merits where both parties prevailed in part, the state court set aside Bakkers' award. While an appeal was pending, Resolution Trust Corporation (“RTC”) was appointed as receiver of First Federal, filed a notice of substitution with the state court, and removed the case to federal court. Five months later, the Bakkers filed a Rule 59 motion asking the district court to vacate the state court order. Although the district court denied the motion and refused to rule on the merits, it held the motion was timely because it found the ten-day limit on Rule 59 motions to be discretionary and not to begin in any event until the district court has issued an order.

15. 53 F.3d at 1242 (quoting Beacon Theatres, 359 U.S. at 511).
16. 51 F.3d 242 (11th Cir. 1995).
17. Id. at 244.
18. 924 F.2d 195 (11th Cir. 1991).
19. 51 F.3d at 244 (citing Jackson, 924 F.2d at 199).
20. Id. at 243-44.
The Eleventh Circuit affirmed, though it disagreed with the lower court's analysis.\textsuperscript{21} It expressed a concern that federal courts not become a "super appellate" court for state court judgments, but noted at the same time that the RTC has additional defenses it can assert after it has been appointed as a receiver and removed a pending action to federal court.\textsuperscript{22} It also found no support for the district court's conclusion that the ten-day time period for bringing a Rule 59 motion is "discretionary" with the trial judge or that an order directing that such a motion be filed is at all necessary.\textsuperscript{23} It also ruled that there must be some type of procedural vehicle to enable appellate court review of a district court's judgment in cases removed by the RTC in this circumstance.\textsuperscript{24} It therefore established the following procedure: "A party must file a Rule 59 motion within ten days of removal to preserve its right to appeal. If a timely Rule 59 motion is filed, the district court must consider and decide the substance of that motion as it would had the judgment originated in federal court."\textsuperscript{25} On the facts before it, the Eleventh Circuit then found that the Bakkers had waived their right to challenge the state court judgment by not filing a timely Rule 59 motion.\textsuperscript{26} Accordingly, the district court's denial of the motion was affirmed, albeit on different grounds for reasons contrary to those expressed by the district court.\textsuperscript{27} At a minimum, the decision in Bakker clarifies the procedure to be followed whenever the RTC removes a pending action to federal court following entry of judgment by the state court.

2. Time for Removal by Resolution Trust Corporation. In Resolution Trust Corp. v. Fragetti,\textsuperscript{28} Resolution Trust Corporation ("RTC") was appointed receiver of Carteret Savings Bank in six separate mortgage foreclosure suits filed in state court against the defendants.\textsuperscript{29} RTC filed notices of substitution and removal to federal court under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").\textsuperscript{30} The district court remanded the actions to state court, however, finding that the removals were filed more than ninety days

\begin{enumerate}
\item Id. at 246.
\item Id. at 245.
\item Id. at 246.
\item Id. at 245.
\item Id. at 246.
\item Id.
\item Id.
\item 49 F.3d 715 (11th Cir. 1995).
\item Id. at 716.
\end{enumerate}
after the period allowed by FIRREA. In so ruling, the district court construed the ninety day period as commencing on the date the RTC was appointed as receiver.\footnote{31}

The Eleventh Circuit reversed, holding that the 1991 amendment to FIRREA provided a clear and unambiguous definition of substitution, which specifies Congress' intent for the removal period to commence when a document is filed noticing a state court of a party's appointment as receiver and not when the party is actually appointed.\footnote{32} Because RTC filed its notices of removal on the same day that it filed the orders of appointment, the removal was timely in each case.\footnote{33} The court of appeals rejected the defendants' argument that such a definition of substitution would allow a party unfettered control over removal because it can control the timing of substitution.\footnote{34} FIRREA provides that any party may file a notice of receiver with a state court, thereby triggering the running of the ninety-day removal period.\footnote{35} Finally, the Eleventh Circuit acknowledged that its position contradicted that reached in \textit{Carteret Savings Bank v. Diedrick}.\footnote{36} As an unpublished opinion, however, \textit{Diedrick} is non-binding precedent, and the court declined to follow its analysis.\footnote{37}

**III. District Court's Jurisdiction**

**A. Service of Process on a Foreign Defendant**

\textit{Silvious v. Pharaon}\footnote{38} addresses the revised Federal Rule of Civil Procedure 4 regarding service of process on an agent of the defendant. Silvious had been a depositor at the Bank of Credit & Commerce International ("BCCI") and brought suit against Pharaon, as owner and operator of BCCI, for fraud. Pharaon, who was the subject of criminal proceedings as well, had apparently left the United States and was believed to be residing in Saudi Arabia. Silvious made numerous attempts to serve Pharaon by various methods and, after about a year and a half, served an individual in Georgia who was alleged to be Pharaon's agent. After Pharaon failed to answer the complaint following

\footnotesize{
\begin{itemize}
\item[31.] 49 F.3d at 716-17.
\item[32.] Id. at 717.
\item[33.] Id.
\item[34.] Id.
\item[35.] Id. at 717-18.
\item[36.] 8 F.3d 36 (11th Cir. 1993).
\item[37.] 49 F.3d at 718.
\item[38.] 54 F.3d 697 (11th Cir. 1995).
\end{itemize}
}
service on this individual, Silvious moved for entry of default judgment against Pharaon.\textsuperscript{39}

In reviewing Silvious' motion for default judgment, the magistrate addressed the adequacy of service on the agent. The magistrate concluded that Rule 4(e), which allows for service on an agent, did not apply because Pharaon was physically outside the country. The district court adopted the magistrate's recommendation and dismissed the complaint for lack of proper service.\textsuperscript{40}

The Eleventh Circuit reversed and remanded for further proceedings.\textsuperscript{41} Specifically, the appeals court discussed that amended Rule 4(e), which provides for service on an agent, applies by its express terms to individuals within a judicial district of the United States.\textsuperscript{42} The Eleventh Circuit construed this statute to apply to the place where service is effected, not necessarily where the defendant resides.\textsuperscript{43} Significantly, in revising Rule 4, the advisory committee had demonstrated an intent to widen, not restrict, the reach of service.\textsuperscript{44} Because service was made within a judicial district of the United States, the Eleventh Circuit continued, service could be proper if the individual served was, in fact, an agent of Pharaon.\textsuperscript{45} The Eleventh Circuit therefore reversed the district court and remanded for an analysis of service under the provisions of Rule 4(e).\textsuperscript{46}

B. Higher Education Act

In \textit{Bartels v. Alabama Commercial College},\textsuperscript{47} former college students brought suit to rescind student loan contracts and to enjoin the federal agencies to those contracts from pursuing collection efforts, claiming the contracts had been coerced fraudulently. The district court dismissed the action for lack of subject matter jurisdiction because plaintiffs had failed to show federal question jurisdiction.\textsuperscript{48} Plaintiffs moved for reconsideration based on a "sue and be sued" provision contained in the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 698-700.
\item Id. at 699-700.
\item Id. at 702.
\item Id. at 701 n.9.
\item Id. at 701.
\item Id. at 702.
\item Id.
\item Id.
\item Id.
\item Id. at 703-05.
\item 54 F.3d 702 (11th Cir. 1995).
\end{enumerate}
\end{footnotesize}
Higher Education Act ("HEA"). The district court again declined to find jurisdiction.

In vacating the district court’s ruling, the Eleventh Circuit employed the Supreme Court’s statutory interpretation analysis from American National Red Cross v. S.G., in which the Court held that a “sue and be sued” provision can be read to confer federal jurisdiction but only if the clause specifically mentions the federal courts. The court of appeals determined that section 1082(a)(2) of the HEA specifically refers to the federal courts and thus confers jurisdiction over actions involving federal student loan programs. Specifically, the words “sue and be sued” in the provision provide a separate and independent jurisdictional grant irrespective of the jurisdictional overlap in the remainder of the provision. Although the analysis in American National Red Cross involved a “sue and be sued” clause for federally chartered corporations, the Eleventh Circuit held that the analysis was particularly applicable to cases involving federal agencies.

IV. APPELLATE JURISDICTION

A. Final Judgment Rule

In Shannon v. Jack Eckerd Corp., Shannon filed suit against the defendant following a denial for pre-authorization of his benefits under a health plan governed by the Employee Retirement Income Security Act. In his suit, Shannon sought to recover the refused benefits and a declaration of a right to future benefits. Following a bench trial, the district court held that the denial of benefits was arbitrary and capricious and remanded the claim to a Plan Administrator for a new determination. The district court also held that Shannon’s request for a declaration of his right to future benefits was premature.

The defendant appealed, but before briefs were filed on the merits the Eleventh Circuit raised sua sponte the question of its appellate jurisdiction to review the district court’s order, pursuant to 28 U.S.C.

50. 54 F.3d at 706.
52. Id. at 2471.
53. 54 F.3d at 707.
54. Id. at 707-08.
55. Id. at 708.
57. Id. at 562-63.
§ 1291, which limits appeals to final judgments of the district court. The Eleventh Circuit then found it lacked jurisdiction, essentially for three reasons. First, the district court's remand order did not constitute a final judgment because it did not end the litigation on the merits: further action in the nature of a redetermination of benefits was indicated. Second, the remand order did not dispose of all the plaintiff's requests for relief but only considered his request as to future benefits. Finally, the Eleventh Circuit found that it lacked jurisdiction because the collateral order exception to the final judgment rule did not apply. Under this exception, orders that are collateral to the merits are appealable despite the lack of finality. Here, in contrast, the district court's remand order was not completely separate from, but instead was merged with, the merits of Shannon's claim. Accordingly, the Eleventh Circuit dismissed the case for lack of appellate jurisdiction.

B. Collateral Order Doctrine

The collateral order exception to the final judgment rule was rejected as well in Winfrey v. School Board of Dade County. Winfrey, a former school principal, sued the Dade County School Board, the Superintendent and the Acting Superintendent, alleging race and gender discrimination. The district court granted summary judgment on two of six counts as well as to the individual defendants based on qualified immunity. Winfrey appealed the grants of summary judgment on qualified immunity grounds to the individual defendants. The Eleventh Circuit dismissed the appeal, finding it lacked jurisdiction to review the decision. In multiparty and multiclaim cases, the court reasoned, a decision disposing of less than all claims against all defendants is not final absent a certification of finality by the district court pursuant to Federal Rule of Civil Procedure 54(b). The Eleventh Circuit acknowledged that, pursuant to the collateral order doctrine, district court orders denying summary judgment on qualified immunity grounds to the individual defendants.

58. Id. at 563.
59. Id.
60. Id.
61. Id. at 563-64.
62. Id. at 563.
63. Id.
64. Id. at 564.
65. 59 F.3d 155 (11th Cir. 1995).
66. Id. at 157.
67. Id. at 158.
68. Id. at 157.
immunity grounds can be appealed separate from other claims.\(^69\) After noting that it had not ruled on the issue previously, the court then held that grants of summary judgment are not appealable, prior to final judgment, under the collateral order doctrine.\(^70\)

C. Pendent Appellate Jurisdiction

The decision in Haney v. City of Cumming\(^71\) recognized the Supreme Court's recent rejection, in Swint v. Chambers County Commission,\(^72\) of the Eleventh Circuit's exercise of pendent jurisdiction over additional issues when an appeal arises based on an appealable issue.\(^73\)

In Haney, plaintiffs brought a multiclaim action under 42 U.S.C. § 1983 against the multiple defendants based on the suicide of a prisoner in her jail cell. Following the completion of discovery, the district court granted summary judgment as to two defendants and denied it to others based on qualified immunity. Summary judgment on other issues was denied.\(^74\)

On appeal, the parties for whom summary judgment was denied sought exercise by the Eleventh Circuit of discretionary jurisdiction given that the case was properly before the Court on the denial of qualified immunity.\(^75\) The Eleventh Circuit, however, found its review limited to the qualified immunity denials, in light of the Supreme Court's intervening decision in Swint.\(^76\) The Eleventh Circuit reasoned that Swint controlled the issue, as the non-qualified immunity issues were not "inextricably interwoven" with the qualified immunity question.\(^77\) Accordingly, only the denials of qualified immunity could be considered on appeal.\(^78\)

D. Mootness

In Brooks v. Georgia State Board of Elections,\(^79\) the Eleventh Circuit discussed the mootness doctrine in the context of an appeal from a district court's rejection of a settlement agreement. Plaintiffs challenged

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\(^{69}\) Id. at 158.
\(^{70}\) Id.
\(^{71}\) 69 F.3d 1098 (11th Cir. 1995).
\(^{73}\) 69 F.3d at 1101.
\(^{74}\) Id. at 1100.
\(^{75}\) Id. at 1102.
\(^{76}\) Id.
\(^{77}\) Id. at 1102 n.6.
\(^{78}\) Id. at 1102.
\(^{79}\) 59 F.3d 1114 (11th Cir. 1995).
the state of Georgia's system of electing judges for state court, superior court and court of appeals and justices of the supreme court as violative of the Voting Rights Act and the United States Constitution. A three judge panel held that the system had the potential for discriminating against minority voters and enjoined subsequent elections or appointments that were not precleared. The parties later reached a proposal agreement that was approved by the Attorney General of the United States and conditioned upon the approval of the district court. The district court certified a Plaintiff class encompassing all present and future black registered voters in Georgia. Following a fairness hearing, the district court denied the parties' joint motion for approval of the settlement based on constitutional concerns and the plaintiffs appealed.

In denying their appeal, the Eleventh Circuit first determined that the issue before the court was rendered moot due to several intervening events which made it impossible for the court to grant effective relief. The terms of the settlement could no longer be implemented because some of the deadlines contained in the agreement for increasing the number of black judges on the bench had expired. Further, any decision on the merits by the court would be purely advisory, thereby violating the case or controversy requirement of Article III of the United States Constitution.

On appeal, the plaintiffs' counsel suggested that the appeal could escape mootness by the Eleventh Circuit's approval of the settlement "now for then" and modification of the terms by either the court of appeals or the district court. The Eleventh Circuit vigorously rejected this suggestion and reemphasized Article III's case or controversy requirement. The court also noted the lack of authority to support the proposition that federal courts are authorized to alter the terms of voluntary agreements between parties in order to afford effective relief and avoid the mootness doctrine. Appellate courts are not free to modify settlement provisions but rather must simply determine if the lower court abused its discretion in approving or rejecting the settlement. The court of appeals acknowledged some exceptions to the

81. 59 F.3d at 1116-18.
82. Id. at 1119.
83. Id.
84. Id. at 1118-19.
85. Id. at 1119.
86. Id.
87. Id.
88. Id.
mootness doctrine exist, but quickly dismissed them as inapplicable to the present case. Instead, the Eleventh Circuit dismissed the appeal as moot without remanding or vacating the district court's order.

E. Remands to State Court

The Eleventh Circuit in *In re First National Bank of Boston*, made clear that district courts are without the discretionary authority to remand *sua sponte* cases based on procedural defects within the thirty-day period after filing of a removal notice. A loan customer brought suit in state court against First National Bank of Boston (Bank of Boston), claiming damages for failure to correct credit information. After Bank of Boston removed the suit to federal court based on diversity of citizenship jurisdiction, the district court *sua sponte* remanded the case back to state court based on Bank of Boston's failure to allege a state of incorporation for diversity purposes. The district court denied the bank's motion for reconsideration, in which the bank had argued, apparently correctly, that it had no state of incorporation given its status as a national bank. The district court struck the reconsideration motion on the ground that it had no jurisdiction following the remand order.

Bank of Boston appealed the rulings to the Eleventh Circuit, seeking a writ of mandamus to reinstate the case in federal court. The Eleventh Circuit found that the district court had acted erroneously, given that Bank of Boston indeed has no state of incorporation and that federal subject matter jurisdiction did exist over the dispute. In order to reach the merits of the district court's decision, however, the Eleventh Circuit had to first analyze whether the removal statute, specifically 28 U.S.C. § 1447, allowed the district court's order to be reviewed. The difficulty arose because section 1447(d) provides that remands to state court are non-reviewable. Section 1447(c), however, requires procedural errors in the removal procedure to be corrected by way of motion only. Because the bank's failure to allege a state of incorporation would be a procedural error, had it been error at all, the Eleventh

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89. *Id.* at 1120-21.
90. *Id.* at 1122.
91. 70 F.3d 1184 (11th Cir. 1995).
92. *Id.* at 1190.
93. *Id.* at 1186.
94. *Id.*
95. *Id.* at 1188.
96. *Id.* at 1187.
97. *Id.*
98. *Id.*
Circuit reasoned, the district court could not *sua sponte* remand the case.\textsuperscript{99} Instead, procedural errors are to be policed solely by the parties.\textsuperscript{100}

In an interesting dissent, Judge Black accused the majority of making bad law.\textsuperscript{101} She agreed that the district court had erred by finding removal improper, but insisted that the removal statute precluded appellate review of that decision.\textsuperscript{102} She did not approve of the distinction between procedure and jurisdiction drawn by the majority, finding it was an "end run" around the statute.\textsuperscript{103} Given Judge Black’s dissent and the fact that the majority pegged its ruling on the district court’s inability to *sua sponte* raise procedural errors in the removal procedure, it remains to be seen whether a district court’s error in remanding a case would be reviewable upon motion of the plaintiff.

\textbf{F. Bankruptcy Appeals}

A Chapter 13 debtor in *In re Seidler*,\textsuperscript{104} brought a declaratory action against her mortgage holders, the Russos, under the Bankruptcy Code,\textsuperscript{105} challenging the validity of a mortgage lien on her home. The bankruptcy court found that Seidler had satisfied the mortgage and ordered that it be recorded with the city public records office to remove the lien. The court rejected the mortgage holders' claims for relief, and they appealed.\textsuperscript{106} The district court entered a stay of confirmation of Seidler's debt plan, but the Russos failed to post the required bond and the stay never arose. Instead, the district court confirmed the debt plan.\textsuperscript{107}

The Russos then attempted to file an adversary proceeding in the bankruptcy court that was later dismissed without prejudice. The bankruptcy court held that if the Russos were successful on their appeal to the district court, then a new adversary proceeding could be filed that would relate back to the original date of filing. The district court subsequently granted Seidler's motion to dismiss, and the Russos appealed.\textsuperscript{108}

\begin{itemize}
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id. at 1189.
  \item \textsuperscript{101} Id. at 1190 (Black, J., dissenting).
  \item \textsuperscript{102} Id. at 1190-91.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} 44 F.3d 945 (11th Cir. 1995).
  \item \textsuperscript{105} 11 U.S.C. § 1301 (1994).
  \item \textsuperscript{106} 44 F.3d at 946-47.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
\end{itemize}
The Eleventh Circuit reversed, finding that the district court erroneously premised its dismissal on the assumption that section 1327 of the Bankruptcy Code moots a potential creditor's appeal from an adversary proceeding for failure to procure a stay of a plan confirmation. Section 1327 controls the effect of a plan confirmation and is premised on the idea that issues not appropriate for decision are not barred. While section 1327 may have some preclusory effect upon certain issues addressed by the confirmation, the court of appeals pointed to the absence of authority holding that section 1327 is capable of mooting an appeal of issues not considered by the confirmation. The Eleventh Circuit reasoned that allowing confirmation to moot an appeal would undermine the protective nature of adversary proceedings under the Bankruptcy Code. Further, relief was still available to the Russos in the form of an adversary proceeding to revoke the plan and enforce the lien. Consequently, the Russos failure to obtain a stay of proceedings did not moot their appeal of the bankruptcy court's order to remove the lien.

V. ARBITRATION

A. Enforceability of Agreements to Arbitrate

In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, a brokerage firm ("Merrill Lynch") filed suit in state court seeking to enjoin an investors' arbitration claim made before the National Association of Securities Dealers ("NASD"), on the ground that the arbitration was time-barred. After the investors successfully moved for removal, the district court granted their motion to compel arbitration, holding that the issue of the arbitration's timeliness was to be decided by an arbitration panel, not a federal court.

On appeal, the Eleventh Circuit acknowledged the case was one of first impression in the circuit. It cited to the NASD's Code of Arbitration and noted that the courts would not interfere with an agreement to arbitrate—provided the parties' intent to arbitrate is based

109. Id. at 948.
110. Id.
111. Id. at 948-49.
112. Id. at 949.
113. Id.
114. Id.
115. 62 F.3d 381 (11th Cir. 1995).
116. Id. at 382.
117. Id. at 383.
on "clear and unmistakable evidence."\textsuperscript{118} The court considered section 35 Code of Arbitration, which requires an arbitrator to interpret and determine the applicability of the Code.\textsuperscript{119} Although section 15 of the Code addresses timeliness of arbitration claims, the Eleventh Circuit found insufficient evidence of the parties' intent to allow the arbitrator to determine timeliness.\textsuperscript{120} Consequently, the district court's decision was reversed.\textsuperscript{121}

B. Damages Awardable and Standard of Judicial Review

In \textit{Davis v. Prudential Securities, Inc.},\textsuperscript{122} an investor initiated arbitration before the American Arbitration Association against Prudential Securities, Inc. ("PSI"), alleging fraud, breach of fiduciary duty and negligence as well as violations of federal and state laws. Following an arbitration hearing, a panel awarded Davis compensatory and punitive damages and assessed each party their own costs and attorney fees. In state court, the plaintiff sought attorney fees, confirmation of the arbitration award and modification of the award to the extent the arbitrators ruled on the issue of attorney fees. PSI removed to federal district court which granted Davis' motion to confirm and denied the motion for modification of the award for attorney fees.\textsuperscript{123}

Before turning to the merits of the arbitration, the Eleventh Circuit adopted a new standard of review recently established by the Supreme Court in \textit{First Options of Chicago, Inc. v. Kaplan.}\textsuperscript{124} In rejecting the usual "abuse of discretion" standard, the Supreme Court in \textit{Kaplan} held that a district court's confirmation of an arbitration award should be reviewed by examining questions of law de novo and accepting findings of fact that are not clearly erroneous.\textsuperscript{125}

The Eleventh Circuit affirmed the district court's confirmation of the punitive damages award, recognizing the authority of an arbitrator to award any remedy or relief deemed just and equitable and within the scope of the parties' agreement, irrespective of contrary state law.\textsuperscript{126} The court of appeals relied upon the Supreme Court's decision in

\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id. at 384.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id. at 385.}
\textsuperscript{122} 59 F.3d 1186 (11th Cir. 1995).
\textsuperscript{123} \textit{Id. at 1187-88.}
\textsuperscript{125} \textit{Id. at 1926.}
\textsuperscript{126} 59 F.3d at 1188-89.
Mastrobuono v. Shearson Lehman\textsuperscript{127} which held that, under the Federal Arbitration Act ("FAA"), state law can not overcome the terms of an arbitration agreement.\textsuperscript{128}

The Eleventh Circuit further affirmed the lower court in finding that the award of punitive damages did not violate the Due Process Clause of the Fifth Amendment.\textsuperscript{129} Judicial review of an arbitration agreement is limited to only four bases for vacatur by the FAA, which presumes that these agreements will be confirmed unless the "arbitration has been tainted in specified ways."\textsuperscript{130} In rejecting PSI's assertion that due process requires more stringent review, the court of appeals held that only state action is subject to scrutiny under the Due Process Clause.\textsuperscript{131} The state action requirement for due process claims is absent in private arbitration cases and the limited state action involved in confirmation of arbitration awards does not rise to the level of the Due Process Clause.\textsuperscript{132} The court reasoned that the Congressional policy in the FAA of favoring arbitration plus the lack of bias in arbitration ensures that the problem of "runaway punitive damages" in the court systems is less likely to arise in arbitration.\textsuperscript{133} The Eleventh Circuit also emphasized the voluntary nature of arbitration and admonished PSI for requiring its customers to arbitrate and then later complaining about the adequacy of the procedures in the forum of its choice.\textsuperscript{134} In sum, the court of appeals found that the punitive damages award by the district court did not violate due process and to constitutionalize arbitration would dilute its effectiveness and appeal as an alternative forum.\textsuperscript{135}

As for the plaintiff's claim for modification as to the attorney fees, the Eleventh Circuit reversed the district court because the issue was never submitted to arbitrators.\textsuperscript{136} The court of appeals held that the arbitration panel's knowledge of a statute providing for the award of attorney fees did not constitute submission and the arbitrators exceeded their authority in deciding the issue.\textsuperscript{137}

\textsuperscript{127} 115 S. Ct. 1212 (1995).
\textsuperscript{128} Id. at 1216.
\textsuperscript{129} 59 F.3d at 1190.
\textsuperscript{130} Id. (quoting Robbins v. Day, 954 F.3d 679, 683 (11th Cir.), cert. denied, 113 S. Ct. 201 (1992)).
\textsuperscript{131} Id. at 1190-91.
\textsuperscript{132} Id. at 1191-92.
\textsuperscript{133} Id. at 1192-93.
\textsuperscript{134} Id. at 1193.
\textsuperscript{135} Id. at 1193-94.
\textsuperscript{136} Id. at 1194-95.
\textsuperscript{137} Id. at 1195.
VI. MISCELLANEOUS

A. Statute of Limitations in Age Discrimination Cases

In Edwards v. Shalala,138 the Eleventh Circuit decided an issue of first impression in the circuit concerning the applicable statute of limitations for an age discrimination case brought by a federal employee in federal court.139 Edwards, an employee of the United States Department of Health and Human Services ("HHS"), brought such a lawsuit in 1990 under the Age Discrimination in Employment Act ("ADEA"),140 complaining of acts dating back to 1986. HHS asserted that the action was time-barred. In ruling on HHS' limitations defense, the district court found that the statute under which Edwards traveled did not expressly provide a relevant limitations period. The district court granted HHS' motion, finding that the statute of limitation under the age discrimination statute relating to private employers applied.141

On appeal, Edwards argued that the district court erred in applying section 626(e) because section 633a(f) specifically provides that all section 633a claims are independent of all other provisions contained in the ADEA. He claimed, instead, that the appropriate period is the six-year statute of limitations for non-tort civil claims against the United States under 28 U.S.C. § 2401(a).142 While the Eleventh Circuit acknowledged the need to "borrow" an appropriate period of limitations from an analogous statute, it rejected the six-year period espoused by Edwards.143 Based on the Supreme Court's ruling in Stevens v. Department of the Treasury,144 the court of appeals held that the six-year period is too general in its application in light of other statutes which are more similar to the ADEA.145 The court found it inconsistent that Congress would allow a broader six-year period for suits against the government yet provide only a two- or three-year period for private suits.146 The Eleventh Circuit therefore affirmed the district court's decision that Edwards' claim was time-barred.147

138. 64 F.3d 601 (11th Cir. 1995).
139. Id. at 603.
140. 29 U.S.C. § 626.
141. 64 F.3d at 603.
142. Id. at 603-04.
143. Id. at 605.
145. 64 F.3d at 605.
146. Id.
147. Id. at 607.
B. Application of Federal Rules of Evidence in Diversity Cases

In *Wood v. Morbark Industries, Inc.*,148 a widow brought a strict liability suit against Morbark Industries for the death of her husband, alleging that a wood chipper used in the husband’s employment was defective and unreasonably dangerous. The district court granted Morbark’s motion *in limine* to exclude post-accident design change evidence but with the caution against opening the door to later admission of such evidence. Subsequently, the district court allowed Wood’s counsel to elicit testimony as to design changes in the wood chipper because Morbark’s counsel misled the jury. After a jury verdict in favor of Morbark, the district court denied Wood’s motion for a new trial.149

Wood appealed the judgment to the Eleventh Circuit on several grounds. One of the issues addressed in the appeal was whether Florida or federal law governed the admissibility of the post-accident remedial measures taken by Morbark. Wood maintained that Florida law should apply, given that the case was founded on diversity of citizenship jurisdiction such that Florida’s product liability law applied. For support, Wood pointed to a decision by the Tenth Circuit150 holding that state law governs evidentiary rulings in product liability cases in the face of contradictory federal law.151

The Eleventh Circuit disagreed with Wood’s position and expressly declined to follow the Tenth Circuit’s lead.152 Instead, based on Eleventh Circuit precedent, the court found that Federal Rule of Evidence 407, which addresses the use of post-accident remedial measures, is a procedural rule and therefore applicable in a product liability case based on Florida law, regardless of Florida’s evidentiary rules in such cases.153 Accordingly, the admissibility of this type of evidence in Wood’s case was controlled by Rule 407 and not state law.154

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148. 70 F.3d 1201 (11th Cir. 1995).
149. *Id.* at 1203-05.
151. 70 F.3d at 1207.
152. *Id.* at 1207-08.
153. *Id.*
154. *Id.*
C. Costs and Attorney Fees in Civil Rights Cases

The Eleventh Circuit in D'Aguanno v. Gallagher,155 extended the qualified immunity defense to include attorney fees, costs, and litigation expenses in suits brought against public officials in their individual capacities.156 Homeless persons brought a civil rights action under 42 U.S.C. § 1983 against a county sheriff and sheriff deputies in their individual capacities for entering a homeless campsite located on private property and destroying shelters and personal property. Plaintiffs alleged violations of both federal and state constitutional rights and sought declaratory and injunctive relief in addition to money damages. Plaintiffs also sought to recover their attorney fees and litigation costs. The district court granted the defendants' motion for summary judgment based on qualified immunity.157

Qualified immunity shields public officials in civil cases from the burdens of litigation, including liability for money damages, if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known."158 The Eleventh Circuit reversed the district court as to the plaintiffs' state law claims, holding that qualified immunity is a defense only to federal claims.159 The court further held that qualified immunity did not bar the plaintiffs' injunctive and declaratory claims because the defense only applies to monetary claims.160

Having found that the district court incorrectly granted summary judgment on the nonmonetary claims, the court of appeals reviewed the record concerning the plaintiff's federal monetary claims.161 With respect to the plaintiffs' federal constitutional claims, the court found that the district court properly upheld the qualified immunity defense.162 The court then ruled that, for qualified immunity purposes, damages include costs, attorney fees and litigation costs in suits brought against defendants in their individual capacities.163 Allowing these damages would severely undercut the policy behind qualified immunity of protecting public officials from monetary personal liability, especially

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155. 50 F.3d 877 (11th Cir. 1995).
156. Id. at 881.
157. Id. at 878-79.
158. Id. at 879.
159. Id.
160. Id.
161. Id. at 880-81.
162. Id.
163. Id. at 881.
since such damages are often in excess of a plaintiff’s other recovery.\textsuperscript{164} More importantly, the court explained, Congress did not intend for the granting of such damages in civil rights actions and, if a defendant has qualified immunity for damages, he also has good faith immunity for the purposes of attorney fees.\textsuperscript{165} For support, the Eleventh Circuit noted that although 42 U.S.C. § 1988 allows plaintiffs, as prevailing parties, to recover the attorney fees, that statute does not “require” such an award against defendants in their individual capacities. Consistent with the above, the court concluded that qualified immunity protects defendants in their individual capacities from being held liable for fees and costs when the lawsuit is solely for injunctive or declaratory relief.\textsuperscript{166}

VII. CONCLUSION

As in past surveys of the Eleventh Circuit’s cases involving trial practice and procedure, this year’s review adds many new rules to the federal landscape. The court continues to define the limited nature of federal court jurisdiction, both at the trial and the appellate levels, and has issued opinions of far reaching significance in different substantive areas. There were quite a few issues of first impression as well. Given the complexities of federal court practices, the cases highlighted in this article will hopefully provide clarity and guidance to the bench and bar.

\textsuperscript{164} Id.
\textsuperscript{165} Id. at 882.
\textsuperscript{166} Id. at 881-82.