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Trial Practice and Procedure

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I. INTRODUCTION

The 2018 - 2019 survey period yielded noteworthy decisions relating to federal trial practice and procedure in the Eleventh Circuit, several of which involved issues of first impression. This article analyzes recent developments in the Eleventh Circuit, including significant rulings in the areas of civil procedure, statutory interpretation, class actions, arbitration and subject matter jurisdiction.

II. CIVIL PROCEDURE

A. *Whether a District Court Has Jurisdiction to Hear A Rule 54(b) Motion to Enter Final Judgment on Claims That Were Resolved Prior to the Plaintiff Filing a Rule 41(a) Voluntary Dismissal of*

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Remaining Claims.

In *Perry v. Schumacher Group of Louisiana*,¹ the Eleventh Circuit addressed an issue of first impression of whether a district court has jurisdiction to hear a plaintiff's Rule 54(b) motion to enter final judgment on her previously-resolved claims when the parties purported to dismiss the remaining claim by filing a Rule 41(a) stipulation.² Ultimately, the Eleventh Circuit concluded that because such a Rule 41(a) stipulation is invalid, a district court *does* have jurisdiction to consider a Rule 54(b) motion regarding previously-resolved claims.³

The lawsuit, filed in the U.S. District Court for the Middle District of Florida, was against five defendants and alleged multiple claims arising out of alleged violations of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.⁴ Once the district court disposed of all but one of Plaintiff's claims,⁵ the parties entered into a "Joint Stipulation for Voluntary Dismissal Without Prejudice of Count III (42 U.S.C. § 1981) of Fourth Amended Complaint" (the "Stipulation") pursuant to Rule 41(a)(1)(A) with the intention of Plaintiff thereafter appealing the disposition of the Resolved Claims.⁶ Based on the Stipulation, the District Court entered judgment in favor of Defendants on the Resolved Claims with prejudice, stating that there was "nothing further remain[ing] to be done."⁷

Thereafter, Plaintiff appealed the dismissal of her Resolved Claims.⁸ However, the Eleventh Circuit ultimately dismissed the appeal for lack of jurisdiction due to the fact that the District Court's order was "non-final" since it dismissed her § 1981 claim without prejudice.⁹ In light of

1. 891 F.3d 954 (11th Cir. 2018).

2. *Id.* at 957.

3. *Id.*

4. *Id.* at 956. Following the original complaint, plaintiff amended her complaint four times. *Id.* The final Fourth Amended Complaint contained eight claims, each against a specific defendant or defendants. *Id.* Because the plaintiff sued one of the defendants in error, she voluntarily dismissed her claim against the fifth defendant, leaving four defendants in this action. *Id.*

5. *Id.* The district court disposed of seven of the eight counts, resolving the claims against three of the four defendants (the "Resolved Claims"). *Id.* Thus, the plaintiff's only remaining claim was her discrimination claim under 42 U.S.C. § 1981 against Naples HMA, LLC ("NHMA"). *Id.*

6. *Id.* at 957. Because the plaintiff did not want to proceed to trial only on her one remaining claim, she and NHMA entered into the Stipulation, which stated that "[t]he parties agree that Count III of the Fourth Amended Complaint as the remaining claim in this action is hereby dismissed without prejudice." *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; see also *Perry v. Schumacher Grp.*, No. 14-15600 (11th Cir. Aug. 28, 2005).

the Eleventh Court's dismissal of her first appeal, Plaintiff moved the District Court to enter final judgment pursuant to Rule 54(b) as to the Resolved Claims and to dismiss her § 1981 claim with prejudice.¹⁰ However, the District Court denied Plaintiff's motions, stating that it lacked jurisdiction to grant the plaintiff's Rule 54(b) motion.¹¹ Plaintiff appealed this decision.¹²

On appeal, the Eleventh Circuit reversed the district court, finding that the Stipulation did not divest the district court of its jurisdiction because the Stipulation, which attempted only to dismiss one claim as opposed to the entire action pursuant to Rule 41(a)(1)(A), was invalid.¹³ The Eleventh Circuit focused on the "plain text" of Rule 41(a)(1)(A) and explained that Rule 41(a)(1)(A) governs the dismissal of entire *actions* rather than a particular *claim*.¹⁴ The Court also noted that because the Federal Rules provide multiple ways for a plaintiff to dismiss a single claim without dismissing an entire action,¹⁵ the existence of these

10. *Perry*, 891 F.3d at 956.

11. *Id.* The district court stated that it "lack[ed] jurisdiction over the substance of the case" in light of Plaintiff's voluntary dismissal of her § 1981 claim. *Id.*

12. *Id.*

13. *Id.* at 957–58.

14. *Id.* Rule 41(a)(1)(A) states in pertinent part as follows:

(A) *Without a Court Order*. . . the plaintiff may dismiss *an action* without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.

Id. at 958 (citing FED. R. CIV. P. 41(a)(1)(A) (emphasis added)). The Eleventh Circuit stressed that "[t]here is no mention in the Rule of the option to stipulate dismissal of a portion of a plaintiff's lawsuit—*e.g.*, a particular *claim*—while leaving a different part of the lawsuit pending before the trial court." *Id.* (citing *Berthold Types Ltd. v. Adobe Sys. Inc.*, 242 F.3d 772, 777 (7th Cir. 2001); 9 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §2362 (3d ed. 2008)).

15. *Id.* First, Rule 15 allows a plaintiff to seek leave to amend the complaint to eliminate any remaining claim and requires the district court to "freely give leave when justice so requires." *Id.* (citing FED. R. CIV. P. 15). The Eleventh Circuit noted that it "cannot foresee how leave to amend could be denied [by the district court] given the circumstances" that the plaintiff "conceded that she was willing to drop her § 1981 claim against NHMA" and "wished to seek immediate appellate review of the District Court's disposition of [the Resolved Claims]." *Id.* Had Plaintiff filed an amended complaint pursuant to Rule 15 to drop her § 1981 claim, "the District Court would have entered final judgment against her and she could have appealed everything at once." *Id.* The Eleventh Circuit concluded that "Rule 15 was designed for situations like this." *Id.* Next, the plaintiff could have invoked Rule 54(b) *before* entering into the Stipulation if she wished to preserve her § 1981 claim against NHMA. *Id.* The Court noted that "Rule 54(b) allows a plaintiff to seek and obtain final judgment on claims already defeated in an action with other claims still pending, as long as 'there is no just reason for delay.'" *Id.* (citing FED. R. CIV. P. 54(b)).

methods confirms that the purpose of Rule 41(a) is to dismiss entire actions rather than particular claims.¹⁶ Therefore, because the Stipulation was invalid, it did not divest the district court of its jurisdiction.¹⁷

B. Dismissal With Prejudice of Complaint on Shotgun Pleading Grounds.

In *Vibe Micro, Inc. v. Shabanets*,¹⁸ the Eleventh Circuit balanced various precedents relating to a district court's obligations prior to dismissing a complaint with prejudice pursuant to Rule 8 on shotgun pleading grounds, holding that "[w]hen a litigant files a shotgun pleading, is represented by counsel, and fails to request leave to amend, a district court must *sua sponte* give him one chance to replead before dismissing his case with prejudice on non-merits shotgun pleading grounds."¹⁹

The lawsuit was filed in the United States District Court for the Southern District of Florida.²⁰ The plaintiff, represented by counsel, filed his six count, 49-page original complaint against the defendants²¹ and shortly thereafter amended the complaint as a matter of right and filed a six count, 56-page amended complaint.²² The district court concluded that the first amended complaint was "a mostly incoherent

16. *Id.*

17. *Id.* The Court noted that if the plaintiff had succeeded in her attempted to dismiss the § 1981 claim, she may have fallen into the "finality trap" which occurs when a district court disposes of some, but not all, claims on the merits, and the plaintiff then voluntarily dismisses the action without prejudice pursuant to Rule 41(a). *Id.* at 959, n. 3. In general, when the dreaded "finality trap" occurs, a district court may lose its jurisdiction to rule on a subsequent motion to enter final judgment for the previously disposed claims and thus, appellate review may be permanently foreclosed because the dismissal of the action without prejudice is not a "final decision" and not appealable under 28 U.S.C. § 1291. *Id.* (citing *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Cir. 1978)). Although the Eleventh Circuit has not ruled on whether the "finality rule" applies in the circumstances presented by this case, the Eleventh Circuit concluded that because the Stipulation was invalid "the case never left the District Court's bosom" and the Court "[has] no occasion to reach that issue here." *Id.*

18. 878 F.3d 1291 (11th Cir. 2018).

19. *Id.* at 1296.

20. *Id.* at 1293.

21. The original complaint also contained 109 pages of exhibits. *Id.*

22. *Id.* The first amended complaint also contained 168 pages of exhibits. *Id.* The Eleventh Circuit noted that its detail in the length of the plaintiff's complaints "should not be construed as an indictment against all long complaints," but rather the detail "serves as one illustration of the shotgun nature of the pleadings in this case." *Id.* at 1293 n. 2.

document containing duplicative, inconsistent, and wholly conclusory allegations," which were "oftentimes not connected to a particular Defendant or set of Defendants, making it impossible to understand who did what," the district court dismissed the first amended complaint without prejudice for violating Rule 8 after several defendants filed motions to dismiss.²³ In its 15-page order, the district court enumerated the numerous deficiencies in the first amended complaint, providing a detailed roadmap for the plaintiff to cure such deficiencies should he wish to proceed with his case and *sua sponte* provided the plaintiff an opportunity to file a second amended complaint within ten days.²⁴ After the plaintiff filed a 70-page²⁵ second amended complaint with similar deficiencies, the district court dismissed the second amended complaint with prejudice under Rule 8.²⁶ Although the plaintiff did not file any motions with the district court or requests for leave to amend, he appealed the order dismissing his second amended complaint.²⁷

On appeal, the plaintiff argued that a district court is only permitted to dismiss a pleading with prejudice on Rule 8 shotgun pleading grounds when it finds evidence of bad faith.²⁸ The Eleventh Circuit, balancing well-established precedent, held that when a plaintiff, represented by counsel, files a shotgun pleading and fails to request leave to amend, "a district court must *sua sponte* give him one chance to replead before dismissing his case with prejudice on non-merits shotgun pleadings grounds."²⁹ The Eleventh Circuit also held that a district

23. *Id.* at 1293 (omitting internal quotations). Despite the motions to dismiss, the plaintiff never requested leave to amend the first amended complaint. *Id.*

24. *Id.*

25. The second amended complaint also contained 160 pages of exhibits. *Id.*

26. *Id.* The district court found that the second amended complaint "remain[ed] duplicative" and "continue[d] to contain labeling and numerical inconsistencies" and "continue[d] to fail to provide even minimal notice to the individual Defendants as to what conduct they are alleged to have participated in." *Id.* (alterations in original) (citing *Vibe Micro, Inc. v. Shabanets*, No. 15-cv-80999, 2016 WL 4256915, at *1–2 (S.D. Fla. July 19, 2016)). After the plaintiff filed the second amended complaint, the defendants again filed motions to dismiss and the plaintiff, still represented by counsel, again failed to request leave to amend his complaint. *Id.* On appeal, the plaintiff argued that his request for "further relief . . . that the [District] Court deems fair, just and equitable" in his response to a motion to dismiss was tantamount to a request for leave to amend." *Id.* at 1294 n.3. The Eleventh Circuit rejected this argument. *Id.*

27. *Id.*

28. *Id.* at 1294. On appeal, the plaintiff admitted that his second amended complaint "had not fixed all of the shot-gun pleading problems that resulted in the dismissal of the [first amended complaint]," but argued that the district court should have provided him with "at least one additional opportunity to fix the pleading problems." *Id.*

29. *Id.* at 1296. The standard of review for a dismissal on Rule 8 shotgun pleadings grounds is abuse of discretion. *Id.* at 1294. Rule 8 requires "a short and plain statement of

court must, as the district court did in this case, "explain how the offending pleading violates the shotgun pleading rules so that the party may properly avoid future shotgun pleadings."³⁰ Because the district court *sua sponte* gave the plaintiff a chance to replead and provided him with a "veritable instruction manual" on how to cure the shotgun deficiencies, the district court did not abuse its discretion in dismissing the second amended complaint with prejudice pursuant to Rule 8 when Plaintiff failed to fix the pleading problems.³¹

C. Whether an Appeal is Barred by Res Judicata Because of Another Court's Treatment of the Judgment as Having a Preclusive Effect.

In *Stardust, 3007 LLC v. City of Brookhaven*,³² the Eleventh Circuit addressed an issue of first impression whether the doctrine of *res*

the claim showing that the pleader is entitled to relief" and, generally, a shotgun pleading fails "to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests" and "waste[s] scarce judicial resources, inexorably broaden[s] the scope of discovery, wreak[s] havoc on appellate court dockets, and undermine[s] the public's respect for the courts." *Id.* at 1294–95 (citing FED. R. CIV. P. 8; *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015); *David v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 979–83 (11th Cir. 2008), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). However, as the district court did in this case, the district court must *sua sponte* allow a plaintiff once chance to remedy the shotgun pleading deficiencies. *Id.* at 1295 (citing *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1280 (11th Cir. 2006)). But, the Eleventh Circuit noted that "a district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Id.* (citing *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc). In reviewing the cases together, the Eleventh Circuit's holding balances the district court's obligation to allow the plaintiff one chance to amend his shotgun pleading *sua sponte* with the district court's ability to dismiss the complaint with prejudice if the plaintiff has still neither filed a compliant pleading nor asked for leave to amend. *Id.* at 1296.

30. *Id.*

31. *Id.* The Eleventh Circuit expressly stated that it "will not adopt a rule requiring district courts to endure endless shotgun pleadings." *Id.* at 1297. Because the second amended complaint contained certain state law claims that were not analyzed on the merits, the Eleventh Circuit remanded the case for the limited purpose of the district court to clarify that it dismissed the state law claims without prejudice to allow the plaintiff an opportunity to refile in state court. *Id.* at 1296–97. The Eleventh Circuit noted that although it is possible for the district court to continue to exercise supplemental jurisdiction over pendant state-law claims, if the district court chooses to dismiss the state law claims with the federal claims, it should do so without prejudice to allow the plaintiff to refile his state law claims in state court. *Id.* at 1296 (citing *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1352 (11th Cir. 1997); *Crosby v. Paulk*, 187 F.3d 1339, 1352 (11th Cir. 1999)).

32. 899 F.3d 1164 (11th Cir. 2018).

judicata barred an appeal from a district court judgment that another court had treated as having a preclusive effect.³³ Ultimately, the court joined several sister circuits in its decision that *res judicata* does not bar direct review of a district court judgment, even when the judgment has been accorded preclusive effect by other courts.³⁴

The plaintiff sued the City of Brookhaven (the "City") in the Superior Court of DeKalb County, Georgia ("Superior Court") to enjoin enforcement of the City's Sexually Oriented Business Code (the "Code") on the basis that it violated provisions of both the United States and Georgia Constitutions (the "State Court Action").³⁵ Several months after filing the State Court Action, the plaintiff sued the City in the U.S. District Court for the Northern District of Georgia.³⁶ After the City counterclaimed, seeking injunctive relief that would require the plaintiff to cease operating a sexual device shop, the plaintiff filed an amended complaint.³⁷ The district court granted the City's motion for summary judgment and the plaintiff appealed.³⁸

While the appeal was pending, the Superior Court entered a permanent injunction against the plaintiff in the State Court Action.³⁹ The Superior Court held that the plaintiff's federal constitutional claims were barred by the doctrine of *res judicata* based on the district court's prior order granting summary judgment to the City.⁴⁰ As for the plaintiff's claims based on violations of the Georgia Constitution, the Superior Court issued alternative rulings.⁴¹ The Superior Court first held that because the Georgia and United States constitutional provisions at issue were identical and because the federal court found no violation of the United States Constitution, the Superior Court was bound to rule in favor of the City based on the principles of *res judicata*.

33. *Id.*

34. *Id.* at 1171.

35. *Id.* at 1168, 1169. Prior to the State Court Action, the City brought a 255-count criminal accusation against the plaintiff in Brookhaven Municipal Court for alleged violations of the Code. *Id.* at 1169. In response, the plaintiff raised constitutional defenses to the various charges and thereafter filed the State Court Action. *Id.*

36. *Id.* The plaintiff alleged that the City's denial of its sign permit application violated its rights under both the United States and Georgia Constitutions. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The injunction ordered the plaintiff to cease operating a sexual device shop in violation of the City's Code. *Id.*

40. *Id.* at 1170.

41. *Id.*

The Superior Court alternatively held that the plaintiff's claims failed on the merits.⁴² The Georgia Supreme Court affirmed.⁴³

On appeal in federal court, the Eleventh Circuit addressed the issue of first impression regarding whether an appeal is precluded on the basis that a superior court decided it was bound to give a district court judgment preclusive effect.⁴⁴ The Court explained that because the Georgia Supreme Court affirmed the Superior Court's order without providing an opinion, there was a possibility that the Georgia Supreme Court affirmed the order on the ground that it was bound by the district court's decision rather than based on the merits.⁴⁵ For this reason, the Eleventh Circuit concluded that it was not bound by the Supreme Court's decision.⁴⁶

The Eleventh Circuit explained, applying *res judicata* principles, "a judgment merely voidable because based upon an erroneous view of the law . . . can be corrected *only by a direct review*" and a direct review is exactly what the plaintiff sought.⁴⁷ Looking to sister circuits, the Eleventh Circuit explained that it would make no sense for an appeal from a district court order or judgment to be precluded based on another court's treatment of the district court judgment or order as having a preclusive effect.⁴⁸ For this reason, the Eleventh Circuit concluded that *res judicata* did not preclude the plaintiff from litigating its claims in the appeal.⁴⁹

42. *Id.*

43. *Id.* The Georgia Supreme Court affirmed without providing an opinion. *Id.*

44. *Id.* at 1171. The Court analyzed the nature of the Superior Court's order, as well as the Georgia Supreme Court's summary affirmance. *Id.* at 1170. The summary affirmance by the Georgia Supreme Court was issued pursuant to Georgia Supreme Court Rule 59, which may be afforded a preclusive effect. *Id.* at 1171. However, without a written opinion by the Georgia Supreme Court, the Eleventh Circuit had no way to know the grounds on which the Georgia Supreme Court affirmed the Superior Court's decision. *Id.*

45. *Id.*

46. *Id.* The Eleventh Circuit explained that the fact that the district court's judgment was pending appeal before the Eleventh Circuit does not mean that it was error for the superior court to apply *res judicata* to the plaintiff's state court claims based on that judgment. *Id.*

47. *Id.* at 1171 (citing *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1136 (9th Cir. 2001)).

48. *Id.* at 1172.

49. *Id.* Thereafter, the Eleventh Circuit turned to the merits of the appeal. *Id.*

D. Whether The Rooker-Feldman Doctrine Bars a Federal Suit Relating to Events Occurring After the State Court Decision.

In *Target Media Partners v. Specialty Mktg. Corp.*,⁵⁰ the Eleventh Circuit considered whether the *Rooker-Feldman* doctrine applies to a complaint brought in a federal district court relating to events occurring after a state court entered its judgment.⁵¹

After litigating a breach-of-contract suit against Specialty Marketing Corporation ("Specialty Marketing") in Alabama state court, Target Media Partners ("Target Media") filed a defamation suit against Specialty Marketing in the United States District Court for the Northern District of Alabama, concerning letters Specialty Marketing mailed to advertising agencies that worked with Target Media.⁵² Ultimately, the district court concluded that the federal suit was "inextricably intertwined" with the state court suit and dismissed the federal claim as being jurisdictionally barred pursuant to the *Rooker-Feldman* doctrine.⁵³

On appeal, the Eleventh Circuit had to determine whether the *Rooker-Feldman* doctrine could bar a federal suit regarding events occurring long after the entry of a state court decision.⁵⁴ The Eleventh Circuit ultimately vacated and remanded the district court's decision, finding that the defamation claim was not barred and the district court, therefore, had jurisdiction to entertain the claim.⁵⁵ To determine the scope of the *Rooker-Feldman* doctrine, the Eleventh Circuit looked to United States Supreme Court precedent,⁵⁶ which applies the doctrine in a way that only bars claims asserted by parties who lost in state court

50. 881 F.3d 1279 (11th Cir. 2018).

51. *Id.* at 1281.

52. *Id.* at 1281, 1283. In the complaint, Target Marketing alleged that these communications were sent to the advertising agencies after the Alabama state court case ended and that these communications discussed, in some detail, the trial and verdict of the case. *Id.* at 1281.

53. *Id.* The Eleventh Circuit explained that the *Rooker-Feldman* doctrine "eliminates federal court jurisdiction over those cases that are essentially an appeal by a state court loser seeking to relitigate a claim that has already been decided in a state court." *Id.* The purpose of the doctrine is "to ensure that the inferior federal courts do not impermissibly review decisions of the state courts—a role reserved to the United States Supreme Court." *Id.* The Eleventh Circuit noted, however, that this jurisdiction bar is a narrow one and, when "invoking the limitation on review of state court decisions, the federal courts must also ensure that litigants whose claims are properly within the cognizance of the courts are not denied a hearing." *Id.*

54. *Id.*

55. *Id.* at 1281, 1289.

56. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 281, 125 S. Ct. 1517, 1520, 161 L. Ed. 2d 454 (2005). See *Target Media Partners*, 881 F.3d at 1285.

and then essentially request that a district court review and reject the judgments of the state court.⁵⁷

The Eleventh Circuit explained that in order to determine whether a claim invites rejection of a state court decision, it applies an inquiry that considers whether the claim was either (1) adjudicated by the state court or (2) is "inextricably intertwined" with the state court judgment.⁵⁸

In addressing these two questions, the Eleventh Circuit first determined that an allegedly tortious act occurring long after a state court renders its judgment cannot be barred by the *Rooker-Feldman* doctrine because the party was not provided an opportunity to complain about the alleged injurious act in the state court proceedings.⁵⁹ Second, the Eleventh Circuit found that the defamation claim was neither the same claim nor "inextricably intertwined" with the state court judgment, because the claims before the Eleventh Circuit were independent from those in the state court case.⁶⁰ Therefore, because there was neither a reasonable opportunity to raise the defamation claim in the state court action and because the claim was not "inextricably intertwined" with the judgment rendered in the state court action, the Eleventh Circuit held that the *Rooker-Feldman* doctrine could not bar the suit and the district court had both the power and obligation to hear the case.⁶¹

57. *Id.* at 1285–86.

58. *Id.* at 1286. A claim is "inextricably intertwined" if it seeks to effectively nullify a state court judgment or succeeds only to the extent that a state court wrongly decided issues. *Id.* The Eleventh Circuit added that the class of federal claims it "found to be 'inextricably intertwined' with state court judgments is limited to those raising a question that was or should have been properly before the state court," citing its decision in *Casale v. Tillman*, 558 F.3d 1258, 1261 (11th Cir. 2009), as an example. *Id.* In *Casale*, the Eleventh Circuit held that though the state and federal claims were different in name, their inquiry was essentially the same and where arguments, even those grounded in federal law, are not offered to or accepted by the state court, they cannot be unloaded or sold again in federal court. *Id.*

59. *Id.* at 1287.

60. *Id.* at 1287, 1289. The Eleventh Circuit explained that "the question posed to the federal court must be intertwined with the state court judgment not only to the extent that it involves the state court proceedings but also to the extent that a *determination* reached by the state court would have to be relitigated in federal court." *Id.* at 1287 (internal quotations omitted). Specifically, the Court explained, "[i]t is not the factual background of a case but the judgment rendered—that is, the legal and factual issues decided in the state court and at issue in federal court—that must be under direct attack for *Rooker-Feldman* to bar our reconsideration." *Id.*

61. *Id.* at 1289.

III. STATUTORY INTERPRETATION

A. State Law Motion-To-Strike Procedure Created by the Georgia Anti-SLAPP Statute Does Not Apply in Federal Court.

In *Carbone v. Cable News Network, Inc.*,⁶² the Eleventh Circuit addressed an issue of first impression regarding whether the motion-to-strike procedure of Georgia's anti-SLAPP⁶³ statute (the "Statute"), O.C.G.A. § 9-11-11.1, applies in federal court.⁶⁴ The Eleventh Circuit held that the Statute does not apply in federal court diversity cases due to its conflict with the Federal Rules of Civil Procedure.⁶⁵

The lawsuit began after Cable News Network ("CNN") published several allegedly defamatory news reports about Davide Carbone ("Carbone") and St. Mary's Medical Center (the "Hospital"), the hospital that Carbone administered.⁶⁶ Carbone filed a complaint against CNN in the U.S. District Court for the Northern District of Georgia, which CNN moved to strike under the Statute or, in the alternative, to dismiss the claim under Rule 12(b)(6).⁶⁷ The district court denied CNN's motion, ruling that the Statute's special-dismissal provision does not apply in federal court because the provision conflicts with Rule 12(b)(6) and that the complaint stated a claim for relief.⁶⁸ CNN challenged both rulings by interlocutory appeal.⁶⁹

On appeal, the Eleventh Circuit addressed the issue of first impression regarding whether the Statute applies to a federal court exercising diversity jurisdiction.⁷⁰ The Eleventh Circuit affirmed the denial of the motion to strike, concluding that the special-dismissal provision of the Statute does not apply to a federal court exercising diversity jurisdiction because the state Statute conflicts with the

62. 910 F.3d 1345 (11th Cir. 2018).

63. "SLAPP" stands for Strategic Lawsuits Against Public Participation.

64. *Id.* at 1347.

65. *Id.* at 1357.

66. *Id.* at 1347. Carbone alleged that while he served as the chief executive officer for the Hospital, CNN published several allegedly false and defamatory articles, news reports, and social media posts which intentionally misrepresented the mortality rate for pediatric open-heart surgery at the Hospital compared to the national average. *Id.* at 1348. This, Carbone alleged, led to the Hospital discontinuing its pediatric cardiology program and Carbone's resignation. *Id.*

67. *Id.* at 1347.

68. *Id.*

69. *Id.*

70. *Id.* at 1350. The Eleventh Circuit dismissed the appeal of the denial of the motion to dismiss, explaining that it could not exercise pendent jurisdiction over the denial of CNN's motion to dismiss. *Id.* at 1357, 1359.

Federal Rules.⁷¹ Specifically, the Eleventh Circuit explained that the issue before the court—whether the complaint stated a claim for relief with sufficient evidentiary support to avoid pretrial dismissal—is answered by Federal Rules 8, 12, and 56, and the answer under the Federal Rules is at odds with the answer under the Statute.⁷²

The Eleventh Circuit was not persuaded by the decisions of several sister circuits, which CNN cited and relied upon to try to show that there was a special purpose for the Statute that was distinct from that of the relevant Federal Rules.⁷³ Moreover, the Eleventh Circuit determined that Rules 8, 12, and 56 are valid under both the Rules Enabling Act and the Constitution.⁷⁴ Based on this determination and because the Federal Rules answer the same question as the Statute, the

71. *Id.* at 1354. The Eleventh Circuit explained that "the Federal Rules and the Georgia anti-SLAPP statute address the same question: whether a complaint states a valid claim supported by sufficient evidence to warrant a trial on the merits." *Id.*

72. *Id.* at 1350. Specifically, the Eleventh Circuit explained that the pleading standard imposed by the Statute implements a probability requirement at the pleading stage while, in contrast "the plausibility standard under Rules 8(a) and 12(b)(6) plainly does not impose a probability requirement at the pleading stage." *Id.* (internal quotations omitted). Further, while Georgia's Statute "contemplates a substantive, evidentiary determination of the plaintiff's probability of prevailing on his claims[.]" to avoid summary judgment under Federal Rule 56, "a nonmovant need only designate specific facts showing that there is a genuine issue for trial." *Id.* at 1350–51 (internal quotations omitted).

73. *Id.* at 1355–56. See *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999); see also *Block v. Tanenhaus*, 815 F.3d 218, 221 (5th Cir. 2016); *Cuba v. Pylant*, 814 F.3d 701, 706 n.6 (5th Cir. 2016); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013); but see *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333–37 (D.C. Cir. 2015). For example, the Ninth Circuit previously held that there was no conflict between California's anti-SLAPP statute and the Federal Rules because that state's anti-SLAPP statute was designed to serve an interest not directly addressed by the Federal Rules—constitutional freedom of speech and petition for redress of grievances. *Id.* at 1356 (citing *U.S. ex rel. Newsham*, 190 F.3d at 973). The Eleventh Circuit found that this argument failed to appreciate a special purpose distinct from that of the relevant Federal Rules and, therefore, was insufficient to eliminate the conflict. *Id.* at 1356.

74. *Id.* at 1357. The Eleventh Circuit explained that due to the conflict between the Statute and the Federal Rules, the only other way the Statute could possibly apply in diversity suits would be if Rules 8, 12, and 56 are "ultra vires" because they fall beyond the scope of either Rules Enabling Act's power or congressional powers over federal courts' operation. *Id.* The Eleventh Circuit explained that a federal rule does not exceed the scope of its power under the Rules Enabling Act if it truly regulates procedure. *Id.* Additionally, the Eleventh Circuit explained that "[a] federal rule falls within Congress's power under the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) if it is rationally capable of classification as procedural." *Id.* at 1357. The Eleventh Circuit found the Federal Rules to be valid under both. *Id.*

Eleventh Circuit determined that the motion-to-strike procedure created by the Statute cannot apply in federal court.⁷⁵

B. The Safe Harbor Provision of the Electronic Fund Transfer Act Does Not Protect a Financial Institution from Challenges to the Substance of Its Opt-In Agreements.

In *Tims v. LGE Community Credit Union*,⁷⁶ the Eleventh Circuit addressed an issue of first impression among the federal appellate courts of whether the Safe Harbor provision of the Electronic Fund Transfer Act (EFTA)⁷⁷ protects a financial institution from challenges to the substance of its overdraft services opt-in agreements.⁷⁸ Ultimately, the Court concluded that the Safe Harbor provision applies to claims about the form, but not the substance, of an institution's opt-in agreements.⁷⁹

Tims arises from a dispute over the method by which a financial institution calculates account balances to determine whether an overdraft occurred for the purposes of imposing an overdraft fee.⁸⁰ The plaintiff, Ms. Tims, filed a consumer class action against her credit union, LGE Community Credit Union, alleging that LGE promised to use one account balance calculation method, but ended up using a different method to calculate whether a transaction resulted in an overdraft on her account.⁸¹ More specifically, Ms. Tims alleged that LGE promised to impose overdraft fees only when her *ledger balance* – the amount of money in her account without considering pending debits – was insufficient to cover a transaction.⁸² LGE instead calculated overdraft fees when Ms. Tim's *available balance* – the money in her account after considering pending debits and deposits – was insufficient to cover a transaction.⁸³ Therefore, Ms. Tims incurred more than one overdraft fee that she claims should not have been imposed.⁸⁴

Ms. Tims filed her case in U.S. District Court for the Northern District of Georgia, asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as a claim

75. *Id.*

76. 935 F.3d 1228 (11th Cir. 2019).

77. 15 U.S.C. § 1693m(d)(2).

78. 935 F. 3d at 1244-45.

79. *Id.* at 1245.

80. *Id.* at 1234-35 (citing 12 C.F.R. §§ 1005.17(b)(1), 1005.17(d)).

81. *Id.* at 1233, 1236.

82. *Id.* at 1233.

83. *Id.* at 1233-34.

84. *Id.* at 1235.

for violation of the EFTA based on LGE's failure to accurately describe its overdraft services.⁸⁵ LGE moved to dismiss Ms. Tims' claims and the District Court granted the motion, finding that LGE's agreements with Ms. Tims unambiguously allowed LGE to impose overdraft fees based on Ms. Tims' available balance, not her ledger balance, and therefore Ms. Tims did not state a claim upon which relief could be granted.⁸⁶ On appeal, the Eleventh Circuit reviewed the *de novo* District Court's order granting LGE's Motion to Dismiss and the decision that the agreements between LGE and Ms. Tims were unambiguous as to which balance calculation method LGE employed to assess overdraft fees.⁸⁷

The Court employed a step-by-step analysis of whether the agreements between Ms. Tims and LGE were indeed unambiguous.⁸⁸ As its first step, the Court considered the language of the agreements themselves.⁸⁹ As between Ms. Tims and LGE there were two agreements, the Opt-In Agreement and the Account Agreement.⁹⁰ The Opt-In Agreement provides that "an overdraft occurs when you do not have enough money in your account to cover a transaction."⁹¹ It did not say which balance calculation method – *ledger* balance or *available* balance – that LGE used.⁹² The Court therefore found the plain language of the Opt-In Agreement to be ambiguous as to which balance calculation method LGE would use to assess overdraft fees.⁹³ Likewise, the Eleventh Circuit determined that the plain language of the Account Agreement did not unambiguously state which balance calculation method LGE would use when determining whether to impose an overdraft fee.⁹⁴

The Court next considered whether Georgia Canons of contract construction resolved the ambiguity in the Opt-In Agreement and Account Agreement.⁹⁵ The Court was not convinced that a reference to "available balance" in another section of the Account Agreement, the Funds Availability Disclosure, was likewise applicable to the Opt-In Agreement or the Account Agreement's treatment of unsettled debit

85. *Id.* at 1236.

86. *Id.* at 1234.

87. *Id.* at 1236-37.

88. *Id.* at 1237-42.

89. *Id.* at 1237.

90. *Id.* at 1235.

91. *Id.*

92. *Id.*

93. *Id.* at 1238.

94. *Id.* at 1238-39.

95. *Id.* at 1240-41.

transactions and overdrafts.⁹⁶ Because the ambiguity of the contract language itself could not be resolved by the Georgia canons of construction, the Court concluded that the meaning of the contract language – including whether it provided for LGE to use the ledger balance or available balance calculation method for imposing overdraft fees – should be left to a jury to decide.⁹⁷

The Eleventh Circuit next turned to an issue unique to Ms. Tims' EFTA claim and the matter of first impression: whether LGA was protected from the EFTA claim by its Safe Harbor provision.⁹⁸ The Court spoke to a central feature of the EFTA, which is the requirement that financial institutions disclose the terms and conditions of electronic funds transfers involving consumer accounts in accordance with the regulations of the Consumer Financial Protection Bureau ("CFPB").⁹⁹ Among those CFPB regulations applicable to financial institutions is Regulation E, which requires the institution to provide notice describing its overdraft service.¹⁰⁰ That notice must be substantially similar to Model Form A-9, provided by the Federal Reserve, and the description of the overdraft service must be "clear and readily understandable."¹⁰¹ Pursuant to the Safe Harbor provision, an institution is protected from EFTA liability for "any failure to make a disclosure in proper form if a financial institution utilized an appropriate model clause issued by the CFPB."¹⁰²

In the case at hand, LGE's opt-in notice provided to Ms. Tims was nearly identical to Model Form A-9.¹⁰³ As such, LGE sought refuge in the Safe Harbor provision.¹⁰⁴ The Court noted, however, that the Model Form A-9 has not dispelled all controversy and confusion surrounding overdraft fees, and that Model Form A-9 does not address which account balance calculation method should be used to determine

96. *Id.* at 1241-42.

97. *Id.* at 1242.

98. *Id.* at 1243.

99. *Id.* (citing 15 U.S.C. § 1693c(a)).

100. *Id.*

101. *Id.* at 1243 (citing 12 C.F.R. §§ 1005.17(d)(1), 1005.4(a)(1); 15 U.S.C. § 1693c).

102. *Id.* at 1244 (quoting 15 U.S.C. § 1693m(d)(2)). "The CFPB interprets the safe harbor to preclude liability 'for failure to make disclosures in proper form' provided the institution 'uses [the model form's] clauses accurately to reflect its services.'" *Id.* (quoting 12 C.F.R. pt. 1005, app. A (Supp. I)).

103. 935 F.3d at 1234-35. LGE is required to use an opt-in notice for its overdraft services that is "substantially similar" to Model Form A-9, and elected to use nearly an exact copy.

104. *Id.* at 1244.

whether a transaction results in overdraft.¹⁰⁵ Indeed, the Court found LGE's Opt-In Agreement to suffer the same flaw, as discussed above.¹⁰⁶ Furthermore, the Court concluded that Ms. Tims' claim was not one over the *form* of LGE's opt-in notice; rather, it was over the *substance* of the notice and, more particularly, its failure to describe the service in a clear and readily understandable way as required.¹⁰⁷ In so concluding, that Court reasoned that making disclosure in proper *form* means "making the disclosure according to proper procedures."¹⁰⁸ Therefore, the Safe Harbor provision insulates an institution from claims based on the means by which the institution communicates its overdraft polity, but not from claims based on an alleged failure to make an adequate disclosure.¹⁰⁹ Because the Safe Harbor provision does not apply to Ms. Tims' claim based on the adequacy of LGE's disclosure about its overdraft services, and because she stated such a claim plausibly in light of the ambiguity of her agreements with LGE, the Court also reversed the District Court's decision to dismiss the EFTA claim.¹¹⁰

C. Whether a "Guarantor" Constitutes an "Applicant" Under the Equal Credit Opportunity Act.

In *Regions Bank v. Legal Outsource PA*,¹¹¹ the Eleventh Circuit addressed a circuit split among sister circuits of whether, under the Equal Credit Opportunity Act (the "Act"),¹¹² a guarantor constitutes an "applicant" and has standing to assert a claim under the Act.¹¹³ Ultimately, the Eleventh Circuit agrees with the Seventh and Eighth Circuits that the ordinary meaning of "applicant" under the Act does not include a "guarantor" and thus a guarantor has no standing to assert a claim under the Act.¹¹⁴

105. *Id.* at 1235.

106. *Id.* at 1238-39.

107. *Id.* at 1245.

108. *Id.* at 1244.

109. *Id.* at 1244-45.

110. *Id.* at 1245.

111. 936 F.3d 1184 (11th Cir. 2019).

112. 15 U.S.C. §§ 1691(a), 1691a(b).

113. 936 F.3d at 1187. Under the Act, it is unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transactions . . . on the basis of . . . marital status." *Id.* at 1189-90 (citing 15 U.S.C. § 1691(a)-(a)(1)).

114. *Id.* at 1193 (citing *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *aff'd by an equally divided court*—U.S. —, 136 S. Ct. 1072, 194 L.Ed.2d 163 (2016) (holding that a "guarantor" unambiguously is not an "applicant" under the Act) and *Morgan Foods, Inc. v. Mid-Atl. Akt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (same)).

The lawsuit giving rise to this appeal was filed in the U.S. District Court for the Middle District of Florida where Plaintiff Regions Bank ("Regions") filed a complaint after the default of two separate loans.¹¹⁵ In response to the complaint filed by Regions, the Defendants¹¹⁶ asserted counterclaims for violation of the Act, alleging that Regions discriminated on the basis of marital status when it required Mr. and Mrs. Phoenix and Legal Outsource to guarantee the Periwinkle Loan.¹¹⁷ Ultimately, the District Court disposed of the counterclaims, holding, among other things, that the guarantor Defendants were not "applicants" under the respective Loans and had no standing to assert claims under the Act.¹¹⁸ After the District Court entered judgment in favor of Regions, the Defendants appealed the judgment.¹¹⁹

On appeal, the Eleventh Circuit focused on whether the District Court erred in granting summary judgment against Ms. Phoenix's counterclaim under the Act.¹²⁰ The Act defines an "applicant" as "any person who *applies* to a creditor directly for . . . credit, or *applies* to a creditor indirectly by use of an existing credit plan for an amount

115. *Id.* at 1187-88. Legal Outsource PA ("Legal Outsource") was the borrower under the Outsource Loan, which was guaranteed by Charles Phoenix ("Mr. Phoenix"). *Id.* at 1187. Periwinkle Partners, LLC ("Periwinkle") was the borrower under the Periwinkle Loan, which was guaranteed by Mr. Phoenix, Lisa Phoenix ("Mrs. Phoenix") and Legal Outsource. *Id.* at 1187-88. Under the Periwinkle Loan, a default by any of the involved parties, including the guarantors, on the Legal Outsource Loan, constituted a default under the Periwinkle Loan. *Id.* at 1188. Regions concluded the Outsource and Periwinkle Loans were in default in 2013 after the applicable parties failed to provide requested financial information and after Periwinkle failed to pay its property taxes. *Id.*

116. Mr. and Mrs. Phoenix, Legal Outsource and Periwinkle are collectively referred to as "Defendants."

117. *Id.* Three of the counterclaims were individually brought by Mr. Phoenix, Mrs. Phoenix and Legal Outsource and the fourth counterclaim was brought jointly by Mrs. Phoenix and Periwinkle Partners. *Id.*

118. *Id.* In response to Regions moving to dismiss the counterclaims, the District Court granted the motion, in part, holding that the guarantors of the Periwinkle Loan lacked statutory standing because they were not "applicants" under the Act. *Id.* However, the District Court denied the motion, in part, holding that the counterclaim asserted jointly by Mrs. Phoenix and Periwinkle Partners sufficiently alleged that they were "applicants" under the Act. *Id.* After Regions moved for summary judgment, the District Court granted the motion, holding, among other things, that not only is Periwinkle as an entity incapable of having a "marital status" but also that Ms. Phoenix failed to provide any evidence that she was an "applicant" for the Periwinkle Loan since she was only a guarantor. *Id.*

119. *Id.* at 1188-89.

120. *Id.* The Eleventh Circuit concludes that the remaining "host of issues" raised by Defendants with respect to the nature of the defaults under the Loans lack any merit. *Id.* Additionally, the Eleventh Circuit concludes that Periwinkle abandoned its claim that it was an "applicant" under the Act for the Periwinkle Loan. *Id.*

exceeding a previously established credit limit."¹²¹ Further, the Federal Reserve Board (the "Board")¹²² defines an "applicant" as "any person who requests or who has received an extension of credit from a creditor" which includes "any person who is or may become contractually liable regarding an extension of credit" and could include "guarantors."¹²³ On appeal, Mrs. Phoenix relies on the definition of "applicant" under the Board regulations to argue that she, as a guarantor, has standing to assert a claim under the Act.¹²⁴

Following a thorough analysis, the Eleventh Circuit concludes that a "guarantor" is not an "applicant" under the Act and affirms the District Court's ruling.¹²⁵ First, the Eleventh Circuit looks to the Act's statutory text and concludes that because an "applicant" is one who requests something "to benefit himself" and a "guarantor" is one who "makes a promise related to the applicant's request," a guarantor does not fit within the Act's definition of "applicant."¹²⁶ Next, the Eleventh Circuit analyzes the entire text of the Act and its usage of the term "applicant" to confirm that the term refers to "a first-party applicant" for credit and does not encompass a guarantor.¹²⁷ Judge Rosenbaum writes a lengthy

121. *Id.* at 1189-90 (citing 15 U.S.C. § 1691a(b)) (emphasis in original).

122. Under the Act, the Board is required to promulgate regulations to enforce the Act. *Id.* (citing 15 U.S.C. § 1691b).

123. *Id.* at 1190 (citing 12 C.F.R. § 202.2(e)).

124. *Id.*

125. *Id.* at 1190-1200.

126. *Id.* at 1191. The Eleventh Circuit applies the "traditional tools of statutory construction" in reviewing the statutory text and "proceed[s] from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Id.* at 1190 (internal citations omitted). When the Act was adopted in 1974, it defined "applicant" as "any person who *applies* to a creditor directly for . . . credit, or *applies* to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." *Id.* (citing 15 U.S.C. § 1691a(b)) (emphasis in original). The Eleventh Circuit also refers to the definition of "apply" from multiple English-language dictionaries both before and after the enactment of the Act to conclude that the term "apply" means "a request for something." *Id.* at 1190-91 (internal citations omitted). Similarly, the dictionaries define "guaranty" to mean "a promise by a guarantor to answer for the payment of some debt if the person liable in the first instance is unable to pay." *Id.* at 1191 (internal citations omitted). Finally, the Court refers to the analysis from other Circuits with respect to the definition of "apply" to mean "a request . . . usually for something of benefit to oneself." *Id.* (citing *Hawkins*, 761 F.3d at 941 and *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014)).

127. *Id.* at 1192. The Eleventh Circuit applies the "whole-text" canon which refers to the principle that a "judicial interpreter should consider the entire text, in view of its structure and of the physical and logical relation of its many parts" and the "consistent-usage" canon which refers to the principle that "a word or phrase is presumed to bear the same meaning throughout a text unless context requires otherwise." *Id.* (internal citations

Dissenting Opinion focusing on a different interpretation of the scope of an "applicant" under the Act.¹²⁸

The Dissenting Opinion in this case argues that the ordinary meaning of the word "applicant" reasonably includes guarantors, in part because if the definition of "apply" means to "make an appeal or request *usually for something of benefit to oneself*" then it must sometimes be "for something of benefit to another."¹²⁹ Next, the Dissenting Opinion contends that the Eleventh Circuit's analysis "fails to reflect the overriding national policy against discrimination that underlies the [Act]."¹³⁰ Finally, the Dissenting Opinion contends that "Congress acquiesced to the [Federal Reserve's] definition of 'applicant' by failing to amend the Act to expressly preclude the [Federal Reserve's] definition."¹³¹ Ultimately, the Eleventh Circuit did not find the Dissenting Opinion's analysis persuasive in its attempt to include a "guarantor" within the Act's definition and use of "applicant."¹³² Ms.

omitted). The Court cites heavily on Judge Colloton's concurring opinion in *Hawkins* which explains that the term "applicant" "is only compatible with a first-party applicant who requests credit to benefit herself." *Id.* at 1192-93 (citing *Hawkins*, 761 F.3d at 943-44).

128. See generally Dissenting Op. The Dissenting Opinion also argues that Mrs. Phoenix and Periwinkle abandoned their counterclaim under the Act by "failing to raise [it] plainly and prominently enough in the [] initial brief." *Id.* at 1197. Although the Eleventh Circuit agrees that the initial brief "is no model of clarity," reading the initial brief in light of the record and other briefs in the appeal make it clear that the counterclaim was never abandoned. *Id.* at 1197-1200

129. *Regions Bank*, 936 F.3d at 1193-94 (citing Dissenting Op. at 1212-13). The Dissenting Opinion also focuses on the Act's use of the word "any" in certain relevant sections to suggest that Congress therefore intended for the Act to "have expansive reach." *Id.* at 1193-94. However, the Eleventh Circuit concludes that "under the usual meaning, an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party." *Id.* at 1194 (citing *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring)).

130. *Id.* at 1193-94 (citing Dissenting Op. at 1219). The Eleventh Circuit wholly rejects the Dissenting Opinion's attempt to apply the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes" as it has consistently been rejected by the Supreme Court and consistently labeled as a "false canon." *Id.* at 1194-95 (internal citations omitted).

131. *Id.* (citing Dissenting Op. at 1220-22). The Eleventh Circuit recognizes that "congressional inaction can, in limited circumstances, support an inference that Congress has acquiesced to an agency or judicial interpretation," it is well-established that "legislative silence is a poor beacon to follow in construing a statute" and "congressional silence alone is ordinarily not enough to infer acquiescence." *Id.* at 1196-97 (internal citations omitted).

132. *Id.*

Phoenix has submitted a Petition for Certiorari, which has been docketed.¹³³

D. Whether the Americans with Disabilities Act Protects Persons "Regarded As Having" the Potential or Possibility to Develop a Disability.

In *E.E.O.C. v. STME, LLC*,¹³⁴ the Eleventh Circuit decided an issue of first impression as to the meaning of the phrase "regarded as having such an impairment" contained in the American's with Disabilities Act of 1990¹³⁵ at 42 U.S.C. § 12102(1)(C).¹³⁶ The Court held that the EEOC's claim that the defendant-employer perceived its employee as having the *potential* to develop a disability when it terminated her was insufficient to state a "regarded as" disabled claim under the ADA.¹³⁷

This case began with a Charge of Discrimination filed by Kimberly Lowe ("Ms. Lowe") against her employer, STME, LLC d/b/a Massage Envy-South Tampa ("Massage Envy").¹³⁸ In 2014, Ms. Lowe requested leave from work to travel to the country of Ghana to visit family.¹³⁹ Massage Envy initially agreed to the leave but days prior to the trip, the owner threatened to terminate Ms. Lowe if she kept her travel plans.¹⁴⁰ This threat was alleged to have been made out of concern that Ms. Lowe would become infected with Ebola during her trip and bring the virus back, infecting others.¹⁴¹ When Ms. Lowe refused to cancel her trip, Massage Envy terminated her employment.¹⁴² When she returned from Ghana, not having contracted Ebola, Ms. Lowe filed her Charge claiming she was discriminated against because Massage Envy perceived her as disabled or as having the potential to become disabled, in violation of the ADA.¹⁴³ The EEOC issued its Letter of Determination, finding reasonable cause to believe that Massage Envy terminated Ms. Lowe because it regarded her as disabled, and subsequently filed its suit in the U.S. District Court for the Middle

133. See *Lisa M. Phoenix v. Regions Bank*, U.S. Supreme Court, 19-815.

134. 938 F.3d 1305 (11th Cir. 2019).

135. 42 U.S.C. § 12101 *et seq.*

136. 938 F.3d at 1314-15.

137. *Id.* at 1318.

138. *Id.* at 1311.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1311-12. There was no dispute that Ms. Lowe did not suffer from an actual disability at the time of her termination.

District of Florida.¹⁴⁴ Massage Envy moved to dismiss the complaint, the district court granted the motion, and this appeal arises from that order.¹⁴⁵

The Eleventh Circuit reviewed the district court's decision *de novo*, and focused its inquiry on the meaning of "regarded as having" a disability as used in the ADA and whether Ms. Lowe was "regarded as having" a disability when fired.¹⁴⁶ Starting with the statutory text itself, the Court referred to 42 U.S.C. § 12102(1), which defines "disability" to include:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).¹⁴⁷

The Court acknowledged that it is well settled that the reference to "impairment" in part (A) of the definition of "disability" is limited to impairments that exist at the time of the adverse employment action and does not include impairments that manifest after the alleged discrimination.¹⁴⁸ With that in mind, the Court reasoned that "impairment" in part (C), the "regarded as" prong of the statute, has the same meaning, particularly where part (C) refers to "such an impairment."¹⁴⁹ Therefore, the Court held that in "regarded as" cases, a plaintiff must show the employer either knew that the employee had an actual impairment, or perceived the employee to have such an impairment, *at the time of the adverse employment action*.¹⁵⁰ Additionally, the Court held that an individual meets the requirement of being regarded as disabled only if she was fired "because of an actual or perceived impairment."¹⁵¹ When an employer does not perceive the

144. *Id.* at 1312.

145. *Id.* at 1313.

146. *Id.* at 1313-18.

147. *Id.* at 1314 (quoting 42 U.S.C. § 12102(1))(emphasis in original).

148. *Id.* at 1315 (citing *Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.ed 1264, 1267-68 (11th Cir. 2014); *E.E.O.C. v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 618 (5th Cir. 2009) *Cash v. Smith*, 231 F.3d 1301, 1306 n.5 (11th Cir. 2000)).

149. *Id.* at 1315-16 (citing *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655-660, 126 L.Ed.2d 615 (1994); *Sullivan v. Strop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 2504, 110 L.Ed.2d 438 (1990)).

150. *Id.* at 1316.

151. *Id.* at 1316 (quoting 42 U.S.C. § 12103(3)(A)).

employee to be impaired at the time of the employment decision, then the employer has not terminated the employer *because of* a perceived impairment.¹⁵²

In the case at hand, the EEOC did not allege that Massage Envy perceived Ms. Lowe as impaired at the time it terminated her, prior to her trip to Ghana.¹⁵³ Rather, the EEOC alleged that Massage Envy perceived Ms. Lowe as having the potential or possibility of becoming disabled in the future.¹⁵⁴ The Eleventh Circuit agreed with several other Circuits by declining to extend the protections of the "regarded as" prong of the statute to claims that an employer believed its employee might develop an impairment in the future.¹⁵⁵ It considered its decision consistent with the EEOC's interpretive guidance,¹⁵⁶ and not inconsistent with the ADA's direction that "disability" should be construed broadly,¹⁵⁷ because the statute nonetheless does not protect anyone who may experience a future disability.¹⁵⁸ Therefore, the Eleventh Circuit agreed with the district court and upheld its dismissal on the grounds that the EEOC did not state a "regarded as" disabled claim against Massage Envy because it did not allege that Massage Envy perceived Ms. Lowe as having an existing impairment at the time it terminated her.¹⁵⁹

152. *Id.*

153. *Id.* at 1318.

154. *Id.* at 1315.

155. *Id.* (citing *EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 923 (9th Cir. 2018); *Adair v. City of Muskogee*, 823 F.3d 1297, 1306 (10th Cir. 2016); *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1113 (8th Cir. 2016)).

156. 29 C.F.R. Pt. 1630, App. § 1630.2(h) (stating that characteristic predisposition to illness or disease does not constitute physical impairment under the ADA). The Eleventh Circuit analogized that if predisposition does not constitute impairment, then Ms. Lowe's heightened risk of contracting disease through her travels is also not an impairment within the meaning of the ADA. 938 F.3d at 1317.

157. 42 U.S.C. § 12101(4)(A).

158. *Id.* at 1316-17.

159. *Id.* at 1318. The Eleventh Circuit also upheld the District Court's decision dismissing the EEOC's claim of association discrimination. *Id.* at 1319-20. That claim was based on the contention that Massage Envy violated the ADA by firing Ms. Lowe based on her association with people in Ghana whom Massage Envy believed to be disabled. *Id.* at 1319. The Court agreed with the District Court that there was no allegation Massage Envy knew Lowe had an association with a specific disabled person in Ghana. *Id.* Further it was far too attenuated to maintain an association discrimination claim based on suspected contacted with certain unknown individuals though to have Ebola, as the ADA requires both a known association and a known disability. *Id.* (citing 42 U.S.C. § 12112(b)). The Court also agreed with the district court that under the circumstances it would be futile for the EEOC to amend its complaint, and therefore upheld the denial of the EEOC's motion for leave to amend. *Id.* at 1320-21. Likewise, the Court agreed with

IV. CLASS ACTIONS

A. To Become a Party to a FLSA Collective Action, Opt-In Plaintiffs Become Parties Upon Their Filing of Consents To Lawsuit, and a Conditional Class Certification Order is not Required.

In *Mickles v. Country Club Inc.*,¹⁶⁰ the Eleventh Circuit decided an issue of first impression whether opt-in plaintiffs become parties to the lawsuit upon filing their opt-in consents with the court, or upon the court's order of conditional class certification in accordance with 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA"). In *Mickles*, the original plaintiff, Mickles, sued Country Club Inc. ("Country Club"), on behalf of herself and all other similarly-situated employees, in a collective action lawsuit under the FLSA, alleging that she and other employees had been improperly classified by Country Club as independent contractors, and they had failed to receive appropriate minimum wage and overtime compensation.¹⁶¹ Country Club answered and filed counterclaims against Mickles and any other plaintiff who joined the lawsuit for money had and received, unjust enrichment, and breach of contract.¹⁶²

After Country Club filed its Answer, other employees opted into the litigation by filing consents to become party plaintiffs.¹⁶³ In total, three additional plaintiffs filed consents, and the case moved into and through discovery over the next approximately six months. After the discovery period expired, Mickles filed a motion for conditional certification of a collective action under 29 U.S.C. § 216(b).¹⁶⁴

The district court denied the motion for conditional certification because Mickles waited until after the discovery period to file the motion when the court's local rules and the case management order required all motions to have been filed within 30 days after the beginning of discovery.¹⁶⁵ The district court found that the motion for conditional certification was untimely because it was filed nearly eight months after the deadline, Mickles did not obtain prior permission of the court to file the motion after the deadline, and Mickles had been

the denial of Ms. Lowe's motion to intervene as a plaintiff in this case, as her own claims suffer from the same flaws as the EEOC's claims. *Id.* at 1322-23.

160. 887 F.3d 1270 (11th Cir. 2018).

161. *Id.* at 1273-74.

162. *Id.*

163. *Id.* at 1274.

164. *Id.* (referencing conditional class certification procedures in *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001)).

165. *Id.* (citing NORTHERN DISTRICT OF GA. LOCAL RULE 7.1(A)(2)).

"well aware that there were other plaintiffs who were similarly situated and wished to opt-in before the deadline for filing the motion for conditional certification."¹⁶⁶ The district court rejected Mickles' argument that granting the motion for conditional certification would serve the interests of judicial economy because "it would allow other potential plaintiffs to join this action, rather than forcing the plaintiffs to file separate actions," instead finding that allowing conditional class certification would require reopening discovery which would force additional costs.¹⁶⁷

Notably, the district court's order made no mention of the three additional plaintiffs who had filed opt-in consents to become party plaintiffs before or shortly after the discovery period had begun.¹⁶⁸ The parties then sought clarification from the district court about whether the three additional plaintiffs remained parties in the action, Country Club believing only Mickles was a party, and Mickles and the opt-ins believing they all remained party plaintiffs. The district court entered a clarification order stating that the three additional plaintiffs who had filed consents to opt-in to the case were never adjudicated to be similarly situated to Mickles, and were therefore never added as party plaintiffs to the collective action.¹⁶⁹ Mickles then settled her claims with Country Club, but the three opt-in plaintiffs appealed to the Eleventh Circuit claiming the district court erred in the class certification order, the clarification order, and by approving Mickles' settlement with Country Club.¹⁷⁰

The Eleventh Circuit had to decide, as a matter of first impression, whether the opt-in plaintiffs were made parties to the litigation by filing their respective consents, or whether the opt-in plaintiffs never became parties as the district court held. The Eleventh Circuit found that no circuit had ever considered this issue, making it an issue of first impression in all circuits.¹⁷¹ The Court analyzed the typical process for conditional certification in FLSA collective actions under *Hipp v. Liberty Nat'l Life Ins. Co.*, and found that the plain language of § 216(b) supports the conclusion that those who opt-in to the lawsuit become party plaintiffs upon the filing of their consents with the district court and that nothing further, such as conditional certification, is required

166. *Id.*

167. *Id.*

168. *Id.* at 1274–75.

169. *Id.* at 1275.

170. *Id.*

171. *Id.* at 1277 n.7 (citing *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 225 (3d Cir. 2016)).

for them to become parties.¹⁷² The Court underscored that the conditional certification process in the FLSA, and the procedures outlined in *Hipp*, require the parties to send court-approved written notice to potential class members who then become party plaintiffs by filing their written consents with the district court.¹⁷³ Although the FLSA also requires an opt-in plaintiff to be similarly situated to the named plaintiff – a finding that was not made prior to the three opt-ins in *Mickles*—the opt-in plaintiffs remain parties to the action until the district court determines that they are not similarly situated and dismisses them.¹⁷⁴ Thus, although there had been no affirmative or express finding by the district court that the three opt-in plaintiffs were similarly-situated to Mickles, their filing of consents to opt-in to the litigation made them parties to the lawsuit until a finding that they were not similarly-situated, which never happened.¹⁷⁵ Thus, the three non-settling opt-in plaintiffs were indeed parties to the litigation and had standing to appeal the orders of the district court.

B. Bank That Moved to Compel Arbitration Years Into Class Action Lawsuit Did Not Waive Arbitration Rights.

In *Gutierrez v. Wells Fargo Bank*,¹⁷⁶ the Eleventh Circuit reversed a district court order that had denied Wells Fargo's motion to compel arbitration filed years into the litigation. The class action lawsuits were filed in 2008 and 2009 for claims alleging improper charging of overdraft fees.¹⁷⁷ Wells Fargo bank accounts were governed by customer agreements with arbitration provisions that required individual, not class, arbitrations.¹⁷⁸ The district court entered an order requiring all "merits and non-merits motions directed to the operative complaints," including motions to compel arbitration, to be filed by December 8, 2009.¹⁷⁹ Wells Fargo joined in other banks' motions to dismiss but did not move to compel arbitration of the named plaintiffs' claims.¹⁸⁰ The district court denied the motions to dismiss and noted that many banks

172. *Id.* at 1278 (citing *Prickett v. DeKalb Cnty.*, 349 F.3d 1294, 1296 (11th Cir. 2003)).

173. *Id.* at 1277 (citing *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013)).

174. *Id.* at 1278.

175. *Id.*

176. 889 F.3d 1230 (11th Cir. 2018).

177. *Gutierrez*, 889 F.3d at 1233–34. The Wells Fargo cases were consolidated by the Judicial Panel on Multidistrict Litigation with numerous other cases against other banks throughout the country. *Id.* at 1234.

178. *Id.*

179. *Id.*

180. *Id.*

did not move to compel arbitration. Thus, the district court ordered the defendants wishing to compel arbitration to file such motions by April 19, 2010.¹⁸¹

Wells Fargo again did not move to compel arbitration and instead, filed a reply to the court's order confirming it would not move to compel arbitration against the named plaintiffs, but reserved its rights against any plaintiffs who may later join the litigation individually or as a putative class member.¹⁸² Wells Fargo then filed its answers in which it stated that absent members of the putative classes are obligated to arbitrate their claims against the bank.¹⁸³ Thereafter, the parties engaged in class-related discovery over the next year.¹⁸⁴ Then, on April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion*,¹⁸⁵ and held that the Federal Arbitration Act, 9 U.S.C. § 2, preempts state law rules that voided consumer arbitration agreements that barred class-wide arbitration procedures.¹⁸⁶ The *Concepcion* decision prompted Wells Fargo to quickly move to compel the named plaintiffs to arbitrate their claims against Wells Fargo.¹⁸⁷

The district court denied the motion to compel arbitration of the named plaintiffs finding that the bank had waived its arbitration rights against the named plaintiffs by not timely filing a motion to compel arbitration before the extensive discovery and litigation proceedings that occurred after the motions to dismiss were denied.¹⁸⁸ Wells Fargo appealed and the Eleventh Circuit affirmed the denial of the motion to compel the named plaintiffs to arbitrate.¹⁸⁹

When the case returned to the district court, Wells Fargo opposed class certification by arguing that the class lacked numerosity because all customers were bound by enforceable arbitration provisions and would have to be excluded from the class. At the same time it filed its opposition to class certification, Wells Fargo filed conditional motions to compel arbitration against the unnamed class members (not against the named plaintiffs) in case the court certified the class.¹⁹⁰ The district court denied the conditional motion to compel arbitration without

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. 563 U.S. 333 (2011).

186. *Gutierrez*, 889 F.3d at 1234.

187. *Id.*

188. *Id.* at 1234–35.

189. *Id.*

190. *Id.* at 1235.

ruling on class cert.¹⁹¹ Wells Fargo appealed and the Eleventh Circuit vacated the ruling because without a certified class, the district court lacked jurisdiction to bind unnamed putative class members and the named plaintiffs lacked standing to argue the rights of unnamed putative class members.¹⁹²

On remand, the district court immediately granted class certification and so Wells Fargo immediately moved to compel arbitration of the unnamed class members.¹⁹³ The district court denied the motion to compel arbitration, holding that Wells Fargo waived the right to compel arbitration because it acted inconsistently with its arbitration rights and significant prejudice would result if Wells Fargo were allowed to compel arbitration.¹⁹⁴

Again on appeal to the Eleventh Circuit, Wells Fargo argued that it did not act inconsistently with its rights to arbitration and did not waive its right to arbitrate claims of the unnamed class members.¹⁹⁵ The Court discussed the two-tier inquiry for determining whether a party has waived its arbitration rights: (1) whether under the totality of the circumstances the party has acted inconsistently with the arbitration right, and (2) if so, whether the party's conduct has in some way prejudiced the other party.¹⁹⁶ The Court found that the "key ingredient" in the waiver analysis is fair notice to the opposing party and the court of a party's arbitration rights and the party's intent to exercise them.¹⁹⁷

Applied to the facts of the Wells Fargo case, the Eleventh Circuit held that the bank had not waived its right to arbitrate against the unnamed class members because it did not act inconsistently with its arbitration rights as to those parties.¹⁹⁸ The Court found that Wells Fargo's conduct with respect to the unnamed class members "differed starkly" from its conduct as to the named plaintiffs.¹⁹⁹ The Court found significant that prior to any discovery being conducted, Wells Fargo had informed the district court and the named plaintiffs that although it would not seek arbitration against the named plaintiffs, the bank

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1237.

196. *Id.* at 1236 (citing *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002); *S&H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990)).

197. *Gutierrez*, 889 F.3d at 1236.

198. *Id.* at 1237.

199. *Id.*

intended to preserve its rights to arbitrate any claims of unnamed plaintiffs when the matter became ripe for the court to consider them.²⁰⁰ Also, the bank cited the parties' arbitration agreements as affirmative defenses in its answers, which had the effect of putting the district court and the plaintiffs on notice of Wells Fargo's arbitration rights and the bank's intent to invoke them.²⁰¹ The Court also addressed the issue of Wells Fargo's failure to meet the district court's deadline to move for arbitration by December 8, 2009 by finding, first, the district court's order was unclear on the issue,²⁰² and second, it would have been impossible for the bank to have filed a motion to compel arbitration of unnamed non-parties because the district court would have lacked jurisdiction to rule on such a motion prior to certification.²⁰³ Finally, the appellate court rejected the district court's statement that the bank could have moved to compel arbitration at the outset as to the named plaintiffs which, if successful, would have extinguished the unnamed class members' claims.²⁰⁴ The Court held that there is no authority that requires a party to file a conditional arbitration motion as to possible future adversaries to avoid waiving such claims – especially at a time when the court lacked jurisdiction to adjudicate such claims.²⁰⁵ Wells Fargo accomplished its requirement of putting the court and named plaintiffs on notice of its intent to compel arbitration of the unnamed putative class members by its conduct including the filed reservation of rights and the statements in its answers.²⁰⁶

200. *Id.*

201. *Id.* The Court distinguished its holding from its opinion in *Garcia v. Wachovia Corp.*, 699 F.3d 1273 (11th Cir. 2012), where the Court found that Wells Fargo acted inconsistently with its arbitration rights as to the *named* plaintiffs because the issue in *Gutierrez* was whether the bank waived its arbitration rights as to the *unnamed* plaintiffs. *Gutierrez*, 889 F.3d at 1237 n. 9.

202. *Id.* at 1237–38. The Court found the district court's order even suggested that motions to compel arbitration as to the unnamed members of the putative class should come later by specifying the motions due were motions "directed to the operative complaints on file." *Id.* at 1238 n.9. Moreover, the order did not mention the unnamed class members.

203. *Gutierrez* at 1238–39 (discussing *In re Checking Account Overdraft Litig. (Spears-Haymond I)*, 780 F.3d 1031, 1034, 1037 (11th Cir. 2015)).

204. *Id.* at 1239.

205. *Id.*

206. *Id.* Because the Court found that Wells Fargo had not acted inconsistently with its arbitration rights, the Court did not address the second tier of the inquiry – prejudice to the non-moving party. *Id.* at 1239 n.10.

V. ARBITRATION

A. *Whether under the Federal Arbitration Act a Non-Party to an International Arbitration Agreement Can Compel a Party to Arbitration Who Did Sign the Agreement.*

In *Outokumpu Stainless USA, LLC v. Convertteam SAS*,²⁰⁷ the Eleventh Circuit addressed two similar issues under the portions of the Federal Arbitration Act ("FAA")²⁰⁸ applicable to international arbitrations using the same factors: (i) how to determine federal subject matter jurisdiction on a motion to remand, and (ii) whether a party can be compelled to arbitration by a non-party to the arbitration agreement.²⁰⁹ Using the factors announced in the Court's 2005 opinion in *Bautista v. Star Cruises*,²¹⁰ the Court found that, using a "very limited inquiry," the district court did have subject matter jurisdiction, but applying a "more rigorous" inquiry of the same factors did not support compelling the dispute to arbitration where the party seeking to compel arbitration was not a signatory to the agreement containing the arbitration clause.²¹¹

Outokumpu operates a steel plant in Alabama, formerly operated by ThyssenKrupp Stainless USA, LLC ("TK").²¹² In 2007, while the plant was under construction, TK entered three contracts to purchase three different sized cold rolling mills used in the plant.²¹³ Each of the contracts were with an entity known as "Fives," and each contained an arbitration clause requiring the parties to arbitrate their disputes.²¹⁴ The parties were defined as Outokumpu and Fives, but when referring to Fives, it would also include its subcontractors.²¹⁵ After the parties entered their contracts, Fives entered subcontracts with GE Energy Conversion France SAS ("GE") which supplied the motors for the cold rolling machines.²¹⁶

When the motors failed, Outokumpu approached Fives and learned that Fives and GE had their own arbitration agreement that purported to allow Fives to join GE in any arbitration that might occur between

207. 902 F.3d 1316 (11th Cir. 2018).

208. 9 U.S.C. §§ 201, *et seq.*

209. 902 F.3d at 1322-23, 1325-26.

210. 396 F.3d 1289 (11th Cir. 2005).

211. 902 F.3d at 1325-27.

212. *Id.* at 1320.

213. *Id.*

214. *Id.* at 1320-21.

215. *Id.* at 1321.

216. *Id.*

Outokumpu and Fives.²¹⁷ Outokumpu sued GE in state court in Alabama and GE removed to federal court, alleging subject matter jurisdiction based on 9 U.S.C. § 205, also known as part of the "New York Convention" codified in the FAA applicable to arbitrations involving a foreign party.²¹⁸ Outokumpu filed a motion to remand to state court and GE filed a motion to dismiss the action and compel arbitration.²¹⁹ The district court found the removal proper and that it had subject matter jurisdiction under the New York Convention and FAA and also granted the motion to compel Outokumpu to arbitrate its claims against GE.²²⁰

On appeal, the Eleventh Circuit described the two issues before it as follows:

This appeal requires us to examine seemingly interrelated – but actually quite separate – questions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"): (1) whether an action between a buyer and a sub-contractor of a seller "relates to" and arbitration agreement signed by the buyer and seller sufficient to establish federal subject matter jurisdiction, and (2) whether a non-signatory sub-contractor may compel arbitration against the buyer under that arbitration agreement.²²¹

The Court, following opinions from the Fifth²²² and Second²²³ Circuits, found that these two questions must be bifurcated and analyzed separately.²²⁴

For the issue of subject matter jurisdiction, the Court stated that on a motion for remand, the district court shall first perform a limited inquiry on the face of the pleadings and removal notice to determine whether the case "relates to" an arbitration agreement falling under the Convention under the factors articulated in *Bautista v. Star Cruises*.²²⁵ Assuming there is subject matter jurisdiction under this limited inquiry, the district court must then decide the motion to compel

217. *Id.* at 1321-22.

218. *Id.* at 1322. Outokumpu had also joined its insurers as plaintiffs and GE alleged fraudulent joinder of the insurers, thereby also providing the court with diversity jurisdiction under 28 U.S.C. § 1332. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 1320.

222. *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002).

223. *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005).

224. 902 F.3d at 1320.

225. *Id.* (citing *Bautista*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005)).

arbitration by engaging in a "more rigorous analysis" of the *Bautista* factors to determine whether the parties entered into an agreement to arbitrate within the meaning of the Convention.²²⁶

The Eleventh Circuit agreed with the district court on the issue of jurisdiction. Engaging only in a limited inquiry based only on the pleadings, the question was whether, as provided in 9 U.S.C. § 205, the subject matter of the action related to an arbitration agreement falling under the Convention.²²⁷ The phrase "falling under the Convention" is defined in 9 U.S.C. § 202,²²⁸ but the statute does not define "relates to an arbitration agreement."²²⁹ The Court adopted the analysis of sister Circuits on the meaning of this phrase and held that "relates to" provides broad removability of cases to federal court.²³⁰ The Court stated that the arbitration agreement need only be sufficiently related to the dispute such that it conceivably affects the outcome of the case, and defined the test as follows:

[A]s long as the argument that the case "relates to" the arbitration agreement is not immaterial, frivolous, or made solely to obtain jurisdiction, the relatedness requirement is met for purposes of federal subject matter jurisdiction.²³¹

The Court further instructed that if the removing party has articulated a non-frivolous basis for meeting the four factors in *Bautista*,²³² and looking only to the pleadings and removal notice, if there is a non-frivolous basis to conclude the agreement sufficiently relates to the case before the court such that the arbitration agreement could conceivably affect the outcome of the case, the district court has jurisdiction under 9 U.S.C. § 205.²³³ The Eleventh Circuit agreed with the district court that in this limited inquiry, the case met the four

226. *Id.*

227. *Id.* at 1323.

228. 9 U.S.C. § 202 essentially says that the Convention covers arbitration agreements or awards that are commercial in nature and excludes agreements arising out of relationships entirely between citizens of the United States (unless it involves property located abroad or contemplates performance or enforcement abroad). *See Outokumpu Stainless*, 902 F.3d at 1323, quoting 9 U.S.C. § 202.

229. *Id.*

230. *Id.* at 1323-24.

231. *Id.* at 1323-24.

232. *E.g.*, there is an agreement in writing, that provides for arbitration in the territory of a signatory to the Convention, arises from a commercial relationship, and a party to the agreement is not an American citizen. *Outokumpu Stainless*, 902 F.3d at 1324, citing *Bautista*, 396 F.3d at 1295-96 n.7 & 9.

233. *Id.* at 1324-25.

Bautista factors and sufficiently related to the Outokumpu arbitration agreement with Fives.²³⁴

For the issue of compelling arbitration, the Court shifted from the "limited inquiry" for jurisdiction to a "rigorous inquiry" of the same factors, but found that although the allegations were sufficient to establish jurisdiction, the evidence was insufficient for GE to compel Outokumpu to arbitration.²³⁵ The Court stated that its inquiry "starts and ends with the first factor" because there was no agreement in writing within the meaning of the Convention.²³⁶ The Court found that the New York Convention, codified in Chapter 2 of the FAA, only allows the enforcement of agreements in writing signed by the parties.²³⁷ Because the Outokumpu and Fives were the parties to the contracts containing the arbitration clauses, there was no agreement in writing signed by the parties – Outokumpu and GE. Although GE was a Fives subcontractor and the Fives-Outokumpu contract provided that references to Fives would apply to its subcontractors, GE was a stranger to the contracts signed by Outokumpu and Fives at the time they entered those agreements.²³⁸ The Court found that at most, GE was a "potential subcontractor" at the time of the Outokumpu contracts and was thus "undeniably not a signatory to the Contracts."²³⁹ Accordingly, to compel arbitration under the Convention, the arbitration agreement must be signed by each of the parties to the litigation or their privies. Since GE was not a signatory or a privy of a signatory, the Court reversed and remanded to the district court.²⁴⁰

On remand, the district court rejected GE's arguments that the case should remain in federal court.²⁴¹ GE insisted that since the Eleventh Circuit had found that denial of the motion to remand was properly denied, the case should not be remanded merely because the appellate court refused to compel arbitration.²⁴² The district court disagreed and remanded to state court, holding that the Eleventh Circuit's finding of fact that there is no agreement in writing within the meaning of the

234. *Id.* at 1324-25.

235. *Id.* at 1327.

236. *Id.* at 1325.

237. *Id.* at 1326.

238. *Id.*

239. *Id.*

240. *Id.* at 1326-27. *See also Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004) and *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).

241. *Outokumpu Stainless USA, LLC v. Convertteam SAS*, No. 16-0378-KD-C, 2019 WL 1748110, at *1 (S.D. Ala. April 18, 2019).

242. *Id.* at *2.

Convention "makes GE Energy's assertion to the contrary, frivolous."²⁴³ Meanwhile, GE petitioned for certiorari in the United States Supreme Court in February 2019, and the high Court granted cert on June 28, 2019.²⁴⁴ After oral arguments in January 2020, the Supreme Court should issue its opinion in this case by summer 2020.

B. Public Policy Does Not Necessarily Require International Arbitral Award to be Vacated by a United States Court.

In *Cvoro v. Carnival Corp.*,²⁴⁵ the Eleventh Circuit had to decide whether, under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"),²⁴⁶ a Serbian plaintiff's arbitral award rendered in Monaco under Panamanian substantive law, must be vacated as against United States public policy.²⁴⁷ In a decision the outcome of which depended more on the parties' choice of law than arbitration principles, the Eleventh Circuit held in a case of first impression that the arbitral decision under Panamanian law did not violate United States public policy despite the plaintiff being unable to recover a statutory remedy under United States law under the Jones Act, 46 U.S.C. § 30104.²⁴⁸

In *Cvoro*, the plaintiff, Ms. Cvoro, was a citizen and resident of Serbia who was employed on the cruise ship "Carnival Dream" as a waitress.²⁴⁹ Carnival was a Panamanian corporation with its principal place of business in Miami, Florida.²⁵⁰ Cvoro and Carnival agreed in an employment agreement that Cvoro and Carnival would resolve all legal disputes in arbitration in one of several locales closest to her home, with the law governing the disputes to be the law of the flag of the ship, Panama.²⁵¹ Cvoro developed carpal tunnel syndrome in her hand and became disabled and unable to work.²⁵² Carnival, to comply with its maintenance and cure obligations under maritime law, selected shore-

243. *Id.*

244. *GE Energy Power Conversion France SAS, Corp., fka Converteam SAS, v. Outokumpu Stainless USA, LLC, et al.*, No. 18-1048 (U.S.S.C.).

245. 941 F.3d 487 (11th Cir. 2019).

246. Codified under United States law at 9 U.S.C. §§ 201 *et seq.*

247. 941 F.3d at 490-91.

248. *Id.* at 503-04.

249. *Id.* at 490-91.

250. *Id.* at 490.

251. *Id.* at 490-91.

252. *Id.* at 491.

side physicians in Serbia to continue treating Cvoró.²⁵³ Ultimately, Cvoró had hand surgery by the Serbian doctors chosen by Carnival, but according to Cvoró, the surgery was negligent and she developed "horrific symptoms due to the negligence of the Serbian doctors" from which she never recovered.²⁵⁴

Cvoró filed an arbitration proceeding against Carnival in Monaco to recover from her injuries, asserting two causes of action under United States law.²⁵⁵ Cvoró brought a claim under the Jones Act, 46 U.S.C. § 30104, asserting that Carnival was vicariously liable for the negligence of the shore-side doctors in Serbia that Carnival selected to treat her injuries.²⁵⁶ Cvoró also asserted a claim for maintenance and cure under maritime law for medical treatment and room and board.²⁵⁷

The arbitrator decided that Panamanian law governed the claims because of the choice of law provision in the arbitration agreement which provided the law of the Carnival Dream's flag would govern.²⁵⁸ The arbitrator rejected Cvoró's arguments that United States law should apply notwithstanding the choice of law agreement because there was not a sufficiently close connection between the dispute and the United States, the only relevance of the United States being that it was Carnival's principal place of business.²⁵⁹ Nevertheless, Cvoró continued to argue for United States law, specifically the Jones Act, to apply, and she conceded that she was not asserting any claims under Panamanian law, which she further conceded would not recognize any claim for vicarious liability like the Jones Act does.²⁶⁰ The arbitrator analyzed Cvoró's claims under Panamanian law and dismissed them because Cvoró had not established Carnival's liability under the law of Panama.²⁶¹

Cvoró sued in the Southern District of Florida seeking to vacate the arbitration award or obtain an order denying its enforceability.²⁶² Meanwhile, Carnival filed an action in Monaco to confirm the

253. *Id.*

254. *Id.*

255. *Id.* at 491-92.

256. *Id.* at 491.

257. *Id.* at 491-92. Cvoró later dropped the maintenance and cure claim because Carnival had in fact paid for all of Cvoró's medical bills and room and board. *Id.* at 492.

258. *Id.* at 492.

259. *Id.*

260. *Id.*

261. *Id.* at 492-93.

262. *Id.* at 493. Cvoró also sought to litigate the merits of her claims under the Jones Act, among other things. *Id.*

arbitration award.²⁶³ The United States district court refused to vacate the arbitration award and the Monaco court confirmed the arbitration award.²⁶⁴ Cvoro appealed the district court ruling, arguing that enforcement of the arbitration award would be contrary to the public policy of the United States, as provided as one of the seven defenses to enforceability of an international arbitration award under the New York Convention.²⁶⁵ The "public policy defense" under Article V(2)(b) of the New York Convention states that enforcement of an arbitral award "may be refused if the competent authority in the country where . . . enforcement is sought finds that . . . recognition or enforcement of the award would be contrary to the public policy of that country."²⁶⁶ The Court found that the public policy defense only applies "when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice."²⁶⁷

Cvoro argued on appeal that the award should not be enforced because it was contrary to the United States' explicit public policy with respect to the protection of seamen as codified in the Jones Act which allows a cause of action for seamen against their employer for vicarious liability for injuries sustained by the negligence of their agents.²⁶⁸ Essentially, Cvoro's position on appeal was that because the arbitration award deprived her of a remedy available under United States law that is not available under Panamanian law, enforcement of the arbitral award would be contrary to the public policy of the United States.²⁶⁹ The Eleventh Circuit noted that the specific issue had never been addressed in this Circuit, but recognized that two Eleventh Circuit opinions provide guidance²⁷⁰ – *Lipcon v. Underwriters at Lloyd's, London*,²⁷¹ and *Lindo v. NCL (Bahamas), Ltd.*²⁷²

In *Lipcon*, the Court refused to invalidate a choice of law provision simply because the remedies available in the contractually chosen

263. *Id.* at 494.

264. *Id.*

265. *Id.* at 495, citing *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998), 9 U.S.C. § 207, and New York Convention, art. III.

266. *Id.*, quoting New York Convention, art. V(2)(b).

267. 941 F.3d at 496, quoting *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1306 (11th Cir. 1998).

268. *Id.* at 496, citing 46 U.S.C. § 30104 and *Hopson v. Texaco, Inc.*, 383 U.S. 262, 264 (1966).

269. *Id.* at 496.

270. *Id.*

271. 148 F.3d 1285 (11th Cir. 1998).

272. 652 F.3d 1257 (11th Cir. 2011).

forum are less favorable than in the United States.²⁷³ Instead, a choice of law clause will be declared unenforceable only when the remedies "in the chosen forum are so inadequate that enforcement would be fundamentally unfair."²⁷⁴ In *Lindo*, the plaintiff, like *Cvoro*, argued that he would lose Jones Act remedies under United States law if his chosen law, Bahamas law applied in an arbitration proceeding located in Nicaragua, applied to his claims.²⁷⁵ The Eleventh Circuit disagreed, holding that *Lindo* had failed to show that application of Bahamian law remedies would be "fundamentally unfair" as compared to what would be available under the Jones Act under United States law.²⁷⁶ In both *Lipcon* and *Lindo*, the Eleventh Circuit compared the remedies available under the contractually-chosen applicable law to U.S. law and found that enforcement of the choice of law would not be "fundamentally unfair."²⁷⁷

Following its reasoning in *Lipcon* and *Lindo*, the Eleventh Circuit found that the remedies available to *Cvoro* under Panamanian law were not "so inadequate that enforcement would be fundamentally unfair."²⁷⁸ Announcing the test for future cases involving enforcement of arbitral awards (as opposed to cases seeking to compel arbitration), the Court stated that "whether a court should refuse to enforce a foreign arbitral award based on public policy is not whether the claimant was provided with all of her statutory rights under U.S. law during arbitration . . . [r]ather, the public-policy defense 'applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice.'"²⁷⁹ Because *Cvoro* had not made such a showing, the Court refused to vacate the district court and vacate the arbitral award.²⁸⁰

VI. CONCLUSION

The 2018-2019 survey period yielded several noteworthy decisions, many of which concerned issues of first impression in the Eleventh

273. 941 F.3d at 497, discussing *Lipcon*, 148 F.3d at 1297.

274. *Id.*, quoting *Lipcon*, 148 F.3d at 1297.

275. *Id.* at 498, discussing *Lindo*, 652 F.3d at 1280-85.

276. *Id.*, discussing *Lindo*, 652 F.3d at 1284-85. As a procedural matter, it is important to note that *Cvoro* and *Lindo* were in post-arbitration and pre-arbitration postures, respectively. In *Cvoro*, the plaintiff was seeking to vacate or prevent enforcement of the arbitration award. In *Lindo*, the plaintiff was

277. *Id.* at 503.

278. *Id.* at 503-04.

279. *Id.*, quoting *Inversiones y Procesadora*, 921 F.3d at 1306 (other cites omitted).

280. 941 F.3d at 504.

Circuit. While this survey is not intended to be exhaustive, the Authors have attempted to provide material that will be useful to practitioners by providing relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.

