Trial Practice and Procedure

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I. INTRODUCTION

This Article surveys the 1996 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. JURISDICTIONAL ISSUES

A. Federal Question Jurisdiction

1. Constitutional Challenges. The Eleventh Circuit held in Boatman v. Town of Oakland\(^1\) that the district court lacked subject matter jurisdiction to consider a property owner's action under 42 U.S.C. § 1983 against a Florida town for denial of a certificate of occupancy. Plaintiffs attempted to construct and occupy a manufactured home in one of the town's residential districts. The town refused to issue a certificate of occupancy because plaintiffs' home was designated a "mobile home" in violation of a zoning-ordinance. Plaintiffs sought an injunction directing the town to issue the certificate, money damages, and attorney fees under section 1983.\(^2\) Their complaint alleged that the ordinance was arbitrary and capricious, violated their due process rights

\(^{1}\) 76 F.3d 341 (11th Cir. 1996).

\(^{2}\) Id. at 343.
under the Fourteenth Amendment, and deprived them of their vested property right.³

The district court found plaintiffs' home did not fit the definition of a mobile home under the ordinance, and awarded compensatory damages.⁴ The Eleventh Circuit reversed, however, finding that subject matter jurisdiction was absent on several grounds.⁵ First, the determination of what constitutes a mobile home under the ordinance was a question of state law.⁶ Second, plaintiffs had no constitutional or statutory authority to support their contention that the ordinance exceeded the town's police power.⁷ The court found the ordinance was fully accepted by the Florida Department of Community Affairs, an agency that governs whether the growth plans of local governments comply with state laws.⁸ Furthermore, the court perceived no substantive due process ground, and any procedural due process claim was meritless because plaintiffs were afforded sufficient due process by the state.⁹ In this regard, the court noted that several options were available for the resolution of plaintiffs' dispute at the county and state levels—options which plaintiffs had disregarded completely.¹⁰

2. Challenges to Congressional Regulations and Legislation Affecting Veterans' Benefits. In Hall v. United States Department of Veterans' Affairs,¹¹ the Eleventh Circuit questioned the vitality of the Supreme Court's decision in Johnson v. Robison,¹² which held that district courts have jurisdiction over facial constitutional challenges to congressional legislation affecting veterans' benefits.¹³ Plaintiff, a state prison inmate, filed a pro se action in district court challenging the constitutional validity of a congressional regulation¹⁴ that reduced his VA disability benefits.¹⁵ The district court sua sponte dismissed the action for lack of subject matter jurisdiction under 38 U.S.C. § 511(a).¹⁶ The Eleventh Circuit affirmed, citing provisions in the Veterans' Judicial

³. Id. at 343-44.
⁴. Id. at 344.
⁵. Id.
⁶. Id. at 345.
⁷. Id.
⁸. Id.
⁹. Id. at 346.
¹⁰. Id. at 345.
¹¹. 85 F.3d 532 (11th Cir. 1996).
¹³. Id. at 366-74.
¹⁵. 85 F.3d at 532-33.
¹⁶. Id. at 533.
Review Act ("VJRA"),\textsuperscript{17} which vests judicial scrutiny of regulations affecting benefits exclusively in the Federal Circuit Court of Appeals.\textsuperscript{18}

In light of congressional intent in the VJRA to place judicial review of regulations at the appellate level, the court reasoned, the validity of the \textit{Johnson} decision is debatable.\textsuperscript{19} The Eleventh Circuit noted a continued split among several circuits with respect to the jurisdiction of district courts to entertain challenges to legislation affecting benefits,\textsuperscript{20} but declined to reach the issue because plaintiff did not specify a challenge to legislation.\textsuperscript{21}

3. \textbf{Disbarment Proceedings.} Federal court jurisdiction over matters of state bar admissions, bar disciplinary actions, and disbarments was the subject of the Eleventh Circuit's decision in \textit{Matter of Calvo}.\textsuperscript{22} Calvo, an attorney, was found to have violated federal securities laws, and a district court enjoined him from further violations. The Florida Bar began disciplinary actions against him that resulted in his disbarment.\textsuperscript{23} In response to an order from the federal court to show cause why he should not be barred from practicing in federal court as well, Calvo filed a pleading that alleged constitutional defects in the state court proceedings.\textsuperscript{24} The district court nevertheless ordered plaintiff's disbarment.\textsuperscript{25}

Before reaching the merits of the district court's disbarment order, the Eleventh Circuit first examined whether federal courts have jurisdiction to hear disbarment proceedings. After noting that it could find no authority in its own precedent or in decisions from the Supreme Court, the Eleventh Circuit expressed a concern over whether a "case or controversy" existed under Article III of the United States Constitution. In finding that federal courts do have jurisdiction, the court reasoned that the "case or controversy" requirement focuses on the "nature and effect" of the ruling, and not its form.\textsuperscript{26} Given the adversarial nature of disbarment proceedings, the Eleventh Circuit ultimately determined

\begin{itemize}
\item \textsuperscript{17} 38 U.S.C. § 7104 (1994).
\item \textsuperscript{18} 85 F.3d at 534.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id. at 534-35.
\item \textsuperscript{21} Id. at 535.
\item \textsuperscript{22} 88 F.3d 962 (11th Cir. 1996) (per curiam).
\item \textsuperscript{23} Id. at 964.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. at 965.
\end{itemize}
that a justiciable case or controversy was presented and affirmed Calvo's disbarment from federal court proceedings.\textsuperscript{27}

\section*{4. Aid to Families with Dependent Children.} The decision in Maynard \textit{v. Williams}\textsuperscript{28} addressed whether a private right of action exists under 42 U.S.C. § 1983 to enforce the childcare provisions of the Family Support Act of 1988.\textsuperscript{29} Plaintiffs filed a section 1983 suit claiming that a freeze by the State of Florida on childcare benefits for families participating in a job training and education project under the Aid to Families with Dependent Children\textsuperscript{30} ("AFDC") program deprived them of their right to education. Plaintiffs alleged that 42 U.S.C. § 602(g) imposes an obligation on states, regardless of financial constraints, to guarantee childcare services to all AFDC recipients involved in the program.\textsuperscript{31}

The district court granted plaintiffs' motion for summary judgment, but the Eleventh Circuit reversed, finding that under the Supreme Court's two-step analysis in Golden State Transit Corp. \textit{v. City of Los Angeles},\textsuperscript{32} section 1983 does not provide a right of action for the enforcement of 42 U.S.C. § 602(g).\textsuperscript{33} Although Congress intended the childcare provisions of 42 U.S.C. § 602(g) to benefit plaintiffs, that statute did not create a "binding obligation" upon states to guarantee childcare as a part of the job and education training program.\textsuperscript{34} Instead, Congress intended for states simply to consider all their resources available for the program, including those for childcare services.\textsuperscript{35}

\section*{B. Diversity of Citizenship Jurisdiction—Amount in Controversy}

The Eleventh Circuit's decision in Tapscott \textit{v. MS Dealer Service Corp.}\textsuperscript{36} involved an interesting issue of removal and the burden of proof for diversity of citizenship jurisdiction. Plaintiff filed a state law class action against defendants alleging common law and statutory fraud and civil conspiracy arising from service contracts on automobiles.\textsuperscript{37} After

\begin{thebibliography}{99}
\bibitem{27} Id, at 964-65.
\bibitem{28} 72 F.3d 848 (11th Cir. 1996).
\bibitem{29} 42 U.S.C. § 602(g) (1994).
\bibitem{31} 72 F.3d at 850.
\bibitem{32} 493 U.S. 103, 106 (1989).
\bibitem{33} 72 F.3d at 855.
\bibitem{34} Id.
\bibitem{35} Id, at 854.
\bibitem{36} 77 F.3d 1353 (11th Cir. 1996).
\bibitem{37} Id, at 1355.
\end{thebibliography}
defendant removed the action to federal court, plaintiffs filed a motion to remand on grounds of subject matter jurisdiction, claiming that each class member's demands for damages failed to meet the requisite amount for diversity jurisdiction under 28 U.S.C. § 1332. The district court denied the motion, and the Eleventh Circuit affirmed. In so ruling, the court of appeals addressed the burden of proof required for diversity jurisdiction in removal when a plaintiff has made an unspecified demand for damages in a state court. With an unspecified amount, a burden of proof lower than a legal certainty is required because there is no measuring stick available to determine appropriate damages for purposes of diversity. A defendant, however, must still prove that the plaintiffs would not recover less than the statutory amount required for diversity. Thus, the court held that a removing defendant must show by a preponderance of the evidence that the amount in controversy more likely than not exceeds the jurisdictional threshold.

Concerning the satisfaction of the amount in controversy requirement, the Eleventh Circuit then decided for the first time that punitive damages could be aggregated. The court of appeals first noted that resolution of the issue did not turn upon whether the action arose from multiple individual transactions or a single act. Instead, the court relied on state law governing punitive damages and found that punitive damages are collective in nature and are awarded for the public good. Because punitive damages reflect defendant's conduct toward all of the class members, it was proper to consider their damages in the aggregate. However, the court of appeals limited its ruling to its facts and cautioned against a bright-line rule that any class claim for damages could be aggregated for diversity purposes.

C. Personal Jurisdiction under Florida's Long-Arm Statute

The issue of personal jurisdiction over a nonresident defendant was the subject of the Eleventh Circuit's decision in Robinson v. Giarmarco

38. Id.
39. Id.
40. Id. at 1356-57.
41. Id. at 1357.
42. Id.
43. Id.
44. Id. at 1357-58.
45. Id. at 1358 n.11.
46. Id. at 1358-59.
47. Id. at 1359.
48. Id.
The litigation arose from estate planning services provided by defendants, which plaintiff alleged were negligent. Defendants moved to dismiss for lack of personal jurisdiction or change of venue, claiming Florida’s long-arm statute did not extend to foreign tortious acts. The district court denied the motion, finding both jurisdiction and venue proper.

On appeal, the Eleventh Circuit first addressed the extent of the long-arm statute, noting its previous finding in Sun Bank, N.A. v. E.F. Hutton & Co. that the reach of the statute outside the state was unclear. Despite an attempt by Florida courts to define the parameters of the statute, according to the court of appeals, the extent of jurisdiction remained cloudy. As a result, the Eleventh Circuit followed its decision in Sun Bank, holding that personal jurisdiction under the statute is not limited to negligent acts within the state, but also extends to foreign acts causing injury within the state. Defendants maintained sufficient contact within the state to justify the exercise of personal jurisdiction by centering their estate planning services for the decedent around Florida law. Jurisdiction further comported with due process because the state had a significant interest in adjudicating a suit involving assets within its borders. The court concluded by stating that the convenience for plaintiff and absence of a great burden on defendants supported plaintiff’s venue selection.

D. Abstention Doctrines

1. Younger Abstention. In Pompey v. Broward County, the Eleventh Circuit applied the Younger abstention doctrine to an interesting issue involving “Daddy Roundups,” a Florida county’s effort to punish deadbeat parents. Plaintiffs were a group of fathers who had been or who were going to be ordered incarcerated for failure to pay

49. 74 F.3d 253 (11th Cir. 1996).
50. Id. at 256.
51. Id.
52. Id.
53. 926 F.2d 1030 (11th Cir. 1991).
54. FLA. STAT. ch. 48.193(1)(b) (1994).
55. 74 F.3d at 257.
56. Id.
57. Id.
58. Id. at 259.
59. Id.
60. Id. at 260.
62. 95 F.3d 1543 (11th Cir. 1996).
child support. They brought suit in federal district court under 42 U.S.C. § 1983 seeking injunctive relief from the county court's allegedly unconstitutional practice of not advising parents of the right to court-appointed counsel, of not appointing counsel for indigent parents, and of not sufficiently inquiring about each parent's ability to pay the support. The district court granted summary judgment in favor of defendants on Younger abstention grounds, and plaintiffs appealed.63 In affirming, the Eleventh Circuit noted other areas to which the abstention doctrine has been applied.64 Although the relief sought by plaintiffs was no less intrusive than other areas of abstention, the court found the difficulty of framing the injunction militated against federal court intervention.65 The court noted that an overriding concern at the heart of the Younger abstention doctrine is comity between state and federal governments, and that the relief sought by plaintiffs would unnecessarily and improperly intrude on the business of the state courts of Florida.66 Accordingly, the dismissal was affirmed.67

2. Rooker-Feldman Abstention. The district court's jurisdiction over a challenge to a state court divorce action in light of the Supreme Court decision in District of Columbia Court of Appeals v. Feldman68 was the issue in Powell v. Powell.69 The litigation arose after a state court awarded part of plaintiff's naval retirement pay to his ex-wife pursuant to the Uniformed Services Former Spouses' Protection Act ("FSPA").70 Plaintiff filed suit in federal district court against his ex-wife and the Secretary of the Navy, alleging the FSPA was unconstitutional and amounted to a taking of his property.71 The district court entered summary judgment in favor of defendants, and held the FSPA was constitutional.72

On appeal, the Eleventh Circuit addressed the Secretary of the Navy's claim that the district court's jurisdiction was barred under the Rooker-Feldman doctrine, which prohibits district court review of final state court judgments.73 The court of appeals found that the doctrine was
not limited to state court decisions based solely on state law, but applies to issues that are "inextricably intertwined" with the state court judgment, regardless of whether the issues were actually raised in state court.\textsuperscript{74} The only significant limitation on the \textit{Rooker-Feldman} doctrine exists when a plaintiff has no reasonable opportunity to raise a federal claim in state court.\textsuperscript{75} Because in \textit{Powell} plaintiff had full opportunity to raise his constitutional challenge to the FSPA in state court but failed to address it, the Eleventh Circuit found the district court lacked jurisdiction under the \textit{Rooker-Feldman} doctrine.\textsuperscript{76}

\textbf{E. Preemption of State Law}

\textbf{1. Financial Institutions Reform, Recovery and Enforcement Act.} The Federal Deposit Insurance Corporation ("FDIC") brought suit against former officers and directors of a savings and loan in \textit{FDIC v. Stahl},\textsuperscript{77} alleging negligence in managing several target loans. After the jury awarded a verdict in favor of the FDIC, the district court set aside the verdict and entered a "take-nothing" judgment for defendants.\textsuperscript{78}

On appeal, the Eleventh Circuit framed the issue as whether the gross negligence standard in section 1821(k) of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") preempted state standard of care laws for purposes of the standard to be applied to actions of directors.\textsuperscript{79} Congressional intent to allow for the application of state law, according to the court, was demonstrated in the "other applicable law" language of the statute.\textsuperscript{80} Although case law in other circuits upholds preemption of federal common law by the gross negligence standard in section 1821(k), the court emphasized the absence of case law supporting preemption of state common law.\textsuperscript{81} The court therefore concluded that section 1821(k) does not preempt state standards of fault that require less of a showing than gross negligence.\textsuperscript{82}

\textsuperscript{74} Id.
\textsuperscript{75} Id. at 467.
\textsuperscript{76} Id. at 467-68.
\textsuperscript{77} 89 F.3d 1510 (11th Cir. 1996).
\textsuperscript{78} Id. at 1512.
\textsuperscript{79} Id. at 1514-15.
\textsuperscript{80} Id. at 1515.
\textsuperscript{81} Id. at 1515-16.
\textsuperscript{82} Id. at 1516.
2. Federal Election Campaign Act. In Teper v. Miller, a member of the Georgia General Assembly sought an injunction prohibiting state officials from enforcing a provision in the Georgia Ethics in Government Act barring members from accepting campaign contributions during a legislative session. Plaintiff was considering a campaign for federal office and claimed the provision would seriously compromise his efforts compared to other federal candidates who are not state officials. The district court, in granting the injunction, found plaintiff had a significant chance of success in claiming the provision was preempted by the Federal Election Campaign Act ("FECA"). The court's ruling was limited solely to enjoining enforcement of the provision as it relates to federal elections.

The Eleventh Circuit agreed and upheld the injunction. In examining the scope of both the FECA and the Georgia provision, the court of appeals held the Georgia provision was preempted to the extent it limited the period in which an Assembly member could accept contributions for a federal campaign. Despite the valid purpose of the state provision in preventing financial improprieties, the court found that the provision must yield to the greater interests of the FECA. Because the preemption provision in the FECA is unambiguous, the court of appeals turned to the Federal Election Commission's ("FEC") interpretation, which prohibits state limits on contributions and expenditures of federal candidates. In deferring to the FEC, the Eleventh Circuit cited the Supreme Court decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., which directed the court to rely on administrative agency interpretations where a federal statute is unclear.

Before reaching its decision, the Eleventh Circuit noted that the Chevron rule is anomalous in that preemption requires unambiguous statutory language, yet Chevron requires deference to agency interpreta-

83. 82 F.3d 989 (11th Cir. 1996).
85. 82 F.3d at 992.
86. Id.
87. Id. at 993.
88. Id. at 999.
89. Id. at 994-95.
90. Id. at 995.
91. Id. at 995-96.
93. Id. at 843-44.
tions if the statute is ambiguous. The Eleventh Circuit ultimately left this issue aside for another day, finding it was not necessary given the clarity of the congressional intent in this particular regard.

3. Admiralty—Nonpecuniary Damages. The recent Supreme Court decision in *Yamaha Motor Corp., U.S.A. v. Calhoun,* concerning the right of personal representatives to recover nonpecuniary damages in an admiralty action, was addressed by the Eleventh Circuit in *American Dredging Co. v. Lambert.* In response to American Dredging’s petition for exoneration from liability, the personal representatives sought pecuniary and nonpecuniary damages for the death of nonseamen in territorial waters. The district court granted summary judgment in favor of the personal representatives.

On appeal, plaintiffs asserted that the uniform federal scheme applied to all deaths in territorial waters and displaced state wrongful death and survival statutes. In rejecting this argument, the Eleventh Circuit relied upon the *Calhoun* decision, in which the Supreme Court held that federal maritime law does not displace state nonpecuniary damages. Given the absence of federal statute or common law precluding personal representatives from recovering nonpecuniary damages, the court of appeals affirmed.

III. PROCEDURAL BARS TO RECOVERY

A. Res Judicata

1. Exclusive versus Concurrent Jurisdiction. In *Aquatherm Industries, Inc. v. Florida Power & Light Co.,* the Eleventh Circuit, in a matter of first impression, addressed the question of whether res judicata bars litigation of a claim that was not brought in a prior state court action due to lack of subject matter jurisdiction in that prior proceeding. Aquatherm, a manufacturer of solar-powered heating systems for swimming pools, filed state antitrust claims in a Florida

94. 82 F.3d at 998.
95. Id.
97. 81 F.3d 127 (11th Cir. 1996).
98. Id. at 129.
99. Id.
100. Id. at 130.
101. Id.
102. Id. at 130-31.
103. 84 F.3d 1388 (11th Cir. 1996).
state court, alleging that statements made by defendant to its customers unfairly advantaged the market for electric pool heaters.\textsuperscript{104} When Aquatherm later amended its complaint to add a federal Lanham Act\textsuperscript{105} claim, defendant removed the action to federal court.\textsuperscript{106} Aquatherm withdrew its federal cause of action, causing the case to be remanded back to the state court system.\textsuperscript{107}

Meanwhile, Aquatherm filed a federal action to allege antitrust violations under the Sherman Act,\textsuperscript{108} and reasserted its claim under the Lanham Act. Aquatherm later amended its claims to add antitrust claims under the Clayton Act.\textsuperscript{109} The district court dismissed the entire federal lawsuit, finding that res judicata barred Aquatherm's antitrust and Lanham Act claims.\textsuperscript{110} The issue on appeal was whether Aquatherm's lawsuit was barred due to the dismissal of its related claims by the Florida court.

In reaching the issue on appeal, the Eleventh Circuit differentiated between the antitrust and the Lanham Act claims: whereas federal courts have exclusive jurisdiction of the former, federal courts have concurrent jurisdiction with the state courts over the latter. Where the federal courts have exclusive jurisdiction, the res judicata analysis first requires a review of the state's preclusion law and allows exceptions thereto only to the extent authorized by the full faith and credit requirements of 28 U.S.C. § 1738.\textsuperscript{111} If the courts would have concurrent jurisdiction, however, the state law on preclusion must be adhered to due to the full faith and credit statute.\textsuperscript{112}

Turning to the facts before it, the Eleventh Circuit then reviewed Florida's law and found that preclusion is not permitted unless the state court had subject matter jurisdiction over the claims in the original action.\textsuperscript{113} Because the state court would not have been able to hear the antitrust claims, Florida law would not apply res judicata. Consequently, Aquatherm could have its federal antitrust claims heard, notwithstanding the dismissal of its state antitrust claims.\textsuperscript{114}

\textsuperscript{104} Id. at 1390.
\textsuperscript{106} 84 F.3d at 1390.
\textsuperscript{107} Id.
\textsuperscript{110} 84 F.3d at 1391.
\textsuperscript{111} Id. at 1392.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1392-93.
\textsuperscript{114} Id. at 1394.
The Eleventh Circuit reached a different conclusion, however, on the Lanham Act claim. Because the Lanham Act claim could have been brought in the prior state court proceeding, but was not, Florida law would bar its litigation.\footnote{Id.} Consequently, the district court's dismissal of the Lanham Act claim was affirmed, but its dismissal of the federal antitrust claims was reversed.\footnote{Id. at 1395.}

2. Stay of Arbitration. The Eleventh Circuit addressed a similar preclusion issue in Sewell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,\footnote{94 F.3d 1514 (11th Cir. 1996).} a case involving claims of fraud and mismanagement against a brokerage firm. Plaintiff, an investor, filed claims for arbitration with the National Association of Securities Dealers ("NASD"). Instead of submitting to arbitration, defendant sought a stay of the arbitration in a New York state court alleging plaintiff's claims did not qualify for arbitration under section 15 of the NASD Code. Plaintiff did not appear in state court because he agreed that the NASD lacked jurisdiction to arbitrate, and the New York court entered a permanent stay of any arbitration.\footnote{Id. at 1516.}

Plaintiff then brought suit in Florida, alleging similar claims of fraud and mismanagement against the same defendant.\footnote{Id. at 1516-17.} Defendant removed to federal district court and moved for a dismissal or summary judgment based on res judicata.\footnote{Id. at 1517.} In agreeing with defendant, the district court gave full preclusive effect to the New York court's default judgment.\footnote{Id.} Although the New York court did not consider the merits of plaintiff's case, the court noted that the effect of the default judgment barred the claims.\footnote{Id. at 1518.}

The Eleventh Circuit reversed the lower court, holding that the New York court did not address the merits of the case for purposes of res judicata but merely stayed arbitration for lack of jurisdiction of NASD.\footnote{Id. at 1518.} Because the New York court stayed those claims on jurisdictional grounds, res judicata did not bar plaintiff from seeking legal recovery in the Florida court.\footnote{Id.}
B. Statute of Limitations for Bivens Actions

In *Kelly v. Serna*, the Eleventh Circuit decided two issues of first impression in this circuit: (1) the applicable statute of limitations for claims of constitutional violations brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*; and (2) the accrual date for those causes of action. Kelly, an attorney whose conviction for illegal drug activity in federal court had been reversed, filed suit for malicious prosecution and violations of the Fourth, Fifth, and Ninth Amendments. The district court dismissed plaintiff's *Bivens* claims based on his failure to comply with section 9-3-33 of the Official Code of Georgia Annotated ("O.C.G.A."), which provides a two-year statute of limitations applicable to a comparable 42 U.S.C. § 1983 claim. Although it had not addressed the issue previously, the Eleventh Circuit had little difficulty following all other circuits that had decided the issue by adopting the same statute of limitations applicable to claims brought under section 1983. Because Georgia's two-year personal injury statute of limitations applies to section 1983 claims, the court determined that the same limitation applied to *Bivens* claims and upheld the lower court's ruling.

Addressing the second issue of first impression, the court of appeals cited the Supreme Court ruling in *Heck v. Humphrey*, which held that a constitutional claim that challenges the validity of one's conviction does not accrue until the conviction has been invalidated. Because *Heck* applies to *Bivens* actions, the two-year statute of limitations in Kelly's case did not accrue until his conviction was reversed. Determining the date of reversal for purposes of this rule proved problematic because Kelly's civil complaint was filed more than two years after the reversal was entered but less than two years after the government allowed the certiorari period to lapse without a filing. The Eleventh Circuit found the date of reversal was the accrual of the

125. 87 F.3d 1235 (11th Cir. 1996).
126. 403 U.S. 388 (1971).
127. 87 F.3d at 1238.
129. 87 F.3d at 1238.
130. Id.
131. Id.
132. Id.
134. Id. at 2374.
135. *Kelly*, 87 F.3d at 1240.
136. Id.
claim—and hence the running of the statute of limitations—but left for another day the decision whether reversal is entry of the judgment on appeal or the mandate in the trial court.\textsuperscript{137}

C. Statute of Repose under Florida’s Products Liability Law

The fluctuating nature of Florida’s twelve-year statute of repose was the subject of the Eleventh Circuit’s decision in Mosher \textit{v.} Speedstar Division of AMCA International, Inc.\textsuperscript{138} Plaintiff brought a products liability suit in federal court after he was injured while using a drill rig in his employment.\textsuperscript{139} A jury verdict in plaintiff’s favor was reversed, and the case was remanded for a new trial due to an error in the jury instructions.\textsuperscript{140} Defendant moved for entry of judgment at the new trial, alleging the action was filed fifteen years after the drill rig was delivered to plaintiff’s employer.\textsuperscript{141} Defendant further claimed that the Florida state court decision in Firestone Tire & Rubber \textit{Co. v. Acosta},\textsuperscript{142} prohibited reliance upon legislative or judicial uncertainty about the statute’s constitutionality.\textsuperscript{143} The district court agreed and entered judgment in defendant’s favor.

On appeal, the Eleventh Circuit certified two questions to the Florida Supreme Court: (1) whether the “reliance exception” operated to preserve claims accrued during the statute’s period of unconstitutionality; and (2) whether plaintiff could have reasonably relied upon Batilla \textit{v. Allis Chalmers Manufacturing Co.},\textsuperscript{144} a decision by the supreme court holding the statute unconstitutional.\textsuperscript{145} Answering both questions in the affirmative, the Florida Supreme Court stated that the reliance exception preserved actions arising within the period of the statute’s unconstitutionality and that the \textit{Acosta} holding only established that the legislative repeal of the statute did not renew previously barred claims.\textsuperscript{146} The supreme court further stated that plaintiff was justified in relying on the court’s decision in \textit{Batilla} even though his action was filed after the supreme court resurrected the statute.\textsuperscript{147} At the time of plaintiff’s injury, the only time constraint was a four-year statute of

\begin{itemize}
\item \textsuperscript{137} Id. at 1240 & n.2.
\item \textsuperscript{138} 93 F.3d 746 (11th Cir. 1996).
\item \textsuperscript{139} Id. at 747.
\item \textsuperscript{140} Id. at 747-48.
\item \textsuperscript{141} Id. at 748.
\item \textsuperscript{142} 612 So. 2d 1361 (Fla. 1992).
\item \textsuperscript{143} Mosher, 93 F.3d at 748.
\item \textsuperscript{144} 392 So. 2d 874 (Fla. 1980).
\item \textsuperscript{145} 93 F.3d at 748.
\item \textsuperscript{146} Id. at 749.
\item \textsuperscript{147} Id.
\end{itemize}
In accordance with the Florida court decision, the Eleventh Circuit reversed the district court judgment. In accordance with the Florida court decision, the Eleventh Circuit reversed the district court judgment.

IV. RIGHT TO TRIAL BY JURY

A. Equitable and Legal Relief Sought in the Same Proceeding

Plaintiffs' right to a jury trial under the Labor Management Relations Act ("LMRA") and the Employee Retirement Income Security Act of 1974 ("ERISA") was a matter of first impression in Stewart v. KHD Deutz of America Corp. A group of retirees filed a class action suit alleging that defendant breached two collective bargaining agreements in failing to provide the proper health benefit coverage during plaintiffs' retirement. In their complaint, plaintiffs requested legal and equitable relief under section 301 of the LMRA and under ERISA. The district court granted defendant's motion to strike the demand for a jury trial; the issue for appeal was whether plaintiffs were entitled to a jury trial for an LMRA claim joined with an ERISA claim that is not triable by a jury.

In resolving this issue, the Eleventh Circuit reversed and held plaintiffs were entitled to a jury trial under the Seventh Amendment for their claim under the LMRA. For purposes of the Seventh Amendment, the joinder of the ERISA claim was irrelevant and did not deprive plaintiffs of their right to a jury trial. In ascertaining the right to a jury trial, the court of appeals likened the breach of the collective bargaining agreements to a breach of a contract that satisfied the common law element of the Seventh Amendment. Because the Eleventh Circuit interprets monetary relief under section 301 of the LMRA as legal, labeling relief under ERISA as equitable was not dispositive of the jury trial right. The court concluded by emphasis-
ing that joinder of the ERISA claim did not create the kind of "imperative circumstance" that militates against a jury trial.160

B. Employment Discrimination Claims

The Eleventh Circuit in Goodgame v. American Cast Iron Pipe Co.161 reversed the district court order setting aside a jury verdict as advisory under rule 39(c) of the Federal Rules of Civil Procedure in a suit brought under 42 U.S.C. § 1981.162 Plaintiffs filed a race discrimination suit against defendant alleging violations of Title VII of the Civil Rights Act of 1964163 and section 1981.164 While the case was pending, Congress passed the Civil Rights Act of 1991,165 thereby expanding the law applicable to plaintiffs' claims by creating a jury right and expanding the scope of relief recoverable to include compensatory and punitive damages.166

Based on these changes in the law, the district court empaneled a jury to hear plaintiffs' claims. After a verdict in plaintiffs' favor, but before entry of final judgment, the Eleventh Circuit ruled in a separate case that the amendments applied prospectively only.167 Accordingly, the district court set aside the jury verdict as "advisory" under Federal Rule Civil Procedure 39 and issued its own findings of fact and conclusions of law.168

The Eleventh Circuit disagreed with the district court's application of Rule 39(c) because plaintiffs' section 1981 claims—separate and apart from their Title VII claims—were triable by a jury as a matter of right.169 The court of appeals emphasized that in these cases a trial court is not authorized to dismiss a jury verdict and impose its own determination of the claim.170 Although the scope of damages recoverable under the Title VII claim was properly limited by the district court, the amounts needed to be determined at a subsequent trial.171

160. Id. at 1528.
161. 75 F.3d 1516, 1517 (11th Cir. 1996).
164. 75 F.3d at 1518.
166. 75 F.3d at 1517.
168. 75 F.3d at 1517.
169. Id. at 1520.
170. Id.
171. Id. at 1521-22.
V. SUFFICIENCY OF A COMPLAINT (RULE 12)

In In re Johannessen, the Eleventh Circuit addressed the sufficiency of a complaint alleging fraud and breach of contract to except an obligation from discharge under Chapter 7 of the Bankruptcy Code. After plaintiffs filed a state court complaint alleging fraud and breach of contract, the parties entered into a settlement agreement, and a judgment was entered. Defendants subsequently filed a voluntary petition for bankruptcy under Chapter 7. Plaintiffs refiled their complaint in the bankruptcy court to determine the dischargeability of the debt. The bankruptcy court ultimately entered an order granting defendant's motion to dismiss with prejudice under Federal Rule of Civil Procedure 12(b)(6), and the district court affirmed.

Plaintiffs appealed, alleging the district court erroneously imposed upon them the burden of proving the facts of their complaint while opposing a motion to dismiss under Rule 12(b)(6). The Eleventh Circuit agreed and held that the district court misinterpreted its precedent concerning the sufficiency of a complaint for an exception under 11 U.S.C. § 523(a)(2)(A). The court of appeals emphasized that the Federal Rules of Civil Procedure do not require litigants to prove the facts of a claim in detail and that district courts must accept the allegations as true. In reviewing the elements of a complaint under 11 U.S.C. § 523, the court of appeals found plaintiffs sufficiently alleged that: (1) defendant made a false statement intended to deceive plaintiffs; (2) plaintiffs relied upon the statement; (3) their reliance was justified; and (4) plaintiffs sustained monetary damages as a result of defendant's falsehood. Accordingly, the claims could proceed. The Eleventh Circuit decision in Johannessen, although a bankruptcy case, applies with full force to Rule 12(b)(6) motions as well.

172. 76 F.3d 347 (11th Cir. 1996).
174. 76 F.3d at 348.
175. Id.
176. Id.
177. Id. at 347.
178. Id. at 349.
179. Id. at 349-50.
180. Id. at 350.
181. Id.
VI. POST-JUDGMENT MOTIONS (RULES 59 AND 60)

A. Rule 59

In In re Southeast Bank Corp., plaintiff, a Chapter 7 trustee, sought to establish that certain ad valorem taxes on artwork were invalid and that the related tax lien was avoidable. The bankruptcy court ruled in favor of the taxing authority and entered final judgment. The trustee successfully moved for rehearing, but the motion was not filed until twelve days had passed from the entry of judgment. On appeal, the district court affirmed.

The taxing authority then appealed to the Eleventh Circuit, which reversed on jurisdictional grounds. Specifically, under Federal Rule of Civil Procedure 59(e), the trustee's rehearing notice was due with ten days of the entry of judgment. Because the motion was filed twelve days after judgment, the bankruptcy court lacked jurisdiction to rehear its decision, and its original ruling had to be reinstated.

B. Rule 60

1. Excusable Neglect. Under Federal Rule of Civil Procedure 60(b), a court may relieve a party from an adverse final judgment for "excusable neglect" by the party's legal representative. Whether counsel's failure to demand a trial de novo within thirty days under a local rule constituted excusable neglect was the subject of the Eleventh Circuit ruling in Cheney v. Anchor Glass Container Corp.

Plaintiff filed an age discrimination suit in a Florida state court, alleging both state and federal claims, and defendant removed to federal court. After the district court recommended arbitration, an arbitration panel determined that plaintiff failed to prove pretext. Plaintiff's attorney failed to file a demand for trial de novo within thirty days as required by Middle District of Florida Local Rule 8.05(b); instead, a demand was filed six days late.
The Eleventh Circuit relied upon the Supreme Court’s analysis in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership* to define “excusable neglect” under Rule 60(b). The Supreme Court in *Pioneer* evaluated the issue in Rule 60(b) in terms of filing deadlines, holding that excusable neglect includes conduct attributable to negligence. The Court found that whether a party’s failure to timely file constitutes excusable neglect is an equitable decision based on an analysis of the following factors: (1) the danger of prejudice to opposing party; (2) the length of the delay and its possible effect on the proceedings; (3) the reason for the delay; and (4) whether the moving party acted in good faith in failing to comply. In reversing the district court, the Eleventh Circuit attached primary significance to the fact that defendant did not suffer prejudice as a result of plaintiff’s filing his demand for a trial de novo a mere six days after the deadline.

2. Review of Rule 60(b)(6) Motions. In *Rice v. Ford Motor Co.*, the Eleventh Circuit addressed the scope of relief and standard of review for Rule 60(b)(6) decisions. After plaintiffs’ proposed class action was dismissed voluntarily before certification, Ford moved for a review of the judgment to determine the effect of the dismissal on absent members of the proposed class under Federal Rule of Civil Procedure 23(e). The district court denied the motion, stating that the approval and notice requirements of Rule 23(e) did not apply to putative class actions before certification of the class. In affirming the district court, the Eleventh Circuit noted that Ford’s motion was filed beyond the ten-day post-judgment period required under Rule 59(e) and therefore construed it as arising under the “catch-all” provision in Rule 60(b)(6). Because Rule 60(b)(6) motions apply to exceptional circumstances only, and are reviewed under an abuse of discretion standard, the court did not reach the legality of the district court’s ruling. Instead, the Eleventh Circuit affirmed because the district court had considered Ford’s arguments, and any “legal mistake” by the district court could...
have been corrected had Ford appealed directly instead of moving under Rule 60(b).\textsuperscript{199}

VII. TAXATION OF COSTS

The Eleventh Circuit in \textit{Morrison v. Reichhold Chemicals, Inc.},\textsuperscript{200} considered for the first time the taxation of costs for videotaped depositions under 28 U.S.C. § 1920(2) and Federal Rule of Civil Procedure 30(b)(2) and (3).\textsuperscript{201} Plaintiffs sought damages in a personal injury action for exposure to fumes resulting from a chemical explosion and fire at defendant's plant.\textsuperscript{202} After a jury verdict in favor of defendant, plaintiffs moved for a judgment notwithstanding the verdict or a new trial.\textsuperscript{203} The district court denied the motion and taxed plaintiffs with the costs for expert witnesses and video depositions in favor of defendant.\textsuperscript{204}

The Eleventh Circuit affirmed the lower court's denial of plaintiffs' motion, but reversed the taxation of costs for expert witnesses because the court exceeded the forty dollar per day limit for nonappointed witness fees under 28 U.S.C. § 1821.\textsuperscript{205} The court acknowledged the extreme disparity between the statutory rate and "economic reality," but found no room for discretion in this regard.\textsuperscript{206} The Eleventh Circuit further reversed the district court, finding that the costs incurred by defendant for equipment rental and fees to the videographer for a playback of the deposition at trial were not taxable to plaintiffs.\textsuperscript{207} Reading 28 U.S.C. § 1920(2) in conjunction with Rule 30(b), the court determined that taxation of videotaped depositions is allowed under 28 U.S.C. § 1920(2) only as long as the deposing party notifies the deposition as being recorded by nonstenographic means or by both stenographic and nonstenographic means.\textsuperscript{208} Because defendant had not done so, the costs could not be awarded.

\textsuperscript{199} Id. at 919-20.
\textsuperscript{200} 97 F.3d 460 (11th Cir. 1996).
\textsuperscript{201} Id. at 461.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 462.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 463.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 465-66.
\textsuperscript{208} Id. at 464-65.
VIII. MISCELLANEOUS

A. Substitution or Addition of Counsel

Robinson v. Boeing Co.\textsuperscript{209} involved the discretion of a trial court to allow the substitution or addition of counsel in the midst of litigation.\textsuperscript{210} The litigation concerned claims of race and sex discrimination brought by several employees against their employer. Defendant sought to associate a third law firm as additional trial counsel fifteen months into the litigation.\textsuperscript{211} Because a nephew of the trial judge was employed with the firm, a different district court heard the motion. The request for substitute counsel was then denied based on a number of factors including the lack of a need for additional counsel, the potential for delay, and because the judge assigned to the case would need to be recused.\textsuperscript{212}

The Eleventh Circuit upheld the ruling as within the full discretion of the trial judge and held that defendant's fundamental right to counsel was not infringed.\textsuperscript{213} The court of appeals was clearly concerned about the possibility that defendant was "judge shopping" by selecting an attorney who would in turn require the recusal of the judge.\textsuperscript{214} Under all the factors, the court concluded that denial of the motion fell properly within the district court's broad discretionary powers.\textsuperscript{215}

B. Bankruptcy—Accrual of Interest on a Trustee's Claim

The issue of first impression in In re Glados, Inc.\textsuperscript{216} was whether Chapter 7 trustees are entitled to an award of interest accruing from the date of the award or from the date of their appointment.\textsuperscript{217} A debtor filed a voluntary petition for Chapter 11 bankruptcy that was converted to Chapter 7. Following the liquidation of the debtor's estate and settlement of all claims, the appointed trustee and his counsel sought compensation for work in two lawsuits involving the debtor. The United States trustee objected to the proposed compensation based on the apportionment of the estate's surplus funds for interest to the trustee

\textsuperscript{209} 79 F.3d 1053 (11th Cir. 1996).
\textsuperscript{210} 79 F.3d at 1053.
\textsuperscript{211} Id. at 1054.
\textsuperscript{212} Id. at 1055.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 1056.
\textsuperscript{216} 83 F.3d 1360 (11th Cir. 1996).
\textsuperscript{217} Id. at 1361.
The bankruptcy court awarded compensation for administrative fees and interest on those fees. The court held that interest for the trustee's fees accrued from the date of appointment under 11 U.S.C. § 726(a)(5). The court further held that interest on the fees of nontrustee professionals accrued from the date of filing fee applications. The district court affirmed the ruling.

The Eleventh Circuit did not agree with the lower courts' analyses of 11 U.S.C. § 726(a)(5), and reversed. The court recognized that 11 U.S.C. § 726(a)(5) references other sections of the Bankruptcy Code, thereby creating a conflict in any literal reading of section 726(a)(5). In determining when interest begins to accrue under the statute, the court followed the Ninth Circuit ruling in In re Riverside-Linden Investment Co. and held that interest is paid from the time of the court's award and not from the time of appointment. In addition to this legal precedent, the Eleventh Circuit found that a policy reason justified adoption of the Ninth Circuit rule: to prevent a trustee from delaying the case by accruing interest earlier. The Eleventh Circuit accordingly reversed the district court's judgment, finding that interest for trustees and other professionals accrued from the date of the fee award.

C. Contribution Claims and Joint Tortfeasors

In Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, the Eleventh Circuit addressed the ability of joint tortfeasors to recover on claims of contribution after the claims by the injured parties have been settled. In that case, a tanker collision resulted in personal injuries (including deaths) and property damage. After settling the claims, Great Lakes pursued contribution claims against Chevron Corporation. Chevron successfully moved for dismissal in the district court on the theory that joint tortfeasors, by definition, cannot recover

218. Id.
219. Id. at 1362.
221. 88 F.3d at 1362.
222. Id.
223. Id. at 1363-64.
224. Id.
225. 945 F.2d 320, 324 (9th Cir. 1991).
226. 83 F.3d at 1367.
227. Id. at 1366-67.
228. Id. at 1367.
229. 92 F.3d 1102 (11th Cir. 1996).
due to the absence of proportionate fault. In so ruling, the district
court relied primarily on the Supreme Court decisions in McDermott,
Inc. v. AmClyde, and Boca Grande Club, Inc. v. Florida Power &
Light Co., both of which were issued during the pendency of the trial
on the contribution claims.

On appeal, the Eleventh Circuit affirmed in part and reversed in
part. The court agreed that Great Lakes, as a joint tortfeasor with
Chevron, could not seek contribution for those claims to which joint
liability applied. But as to other claims, such as "maintenance and
cure," in which the parties are liable to the extent of their "proportionate
share" of fault, Great Lakes' contribution claims could proceed. The
case was therefore remanded for further proceedings consistent with the
Eleventh Circuit's opinion.

D. Georgia's Fair Business Practices Act

Friedlander v. PDK Labs, Inc. involved the answer by the Georgia
Supreme Court to a question certified by the Eleventh Circuit concerning
the unsettled question of standing of nonconsumers to bring suit under
Georgia's Fair Business Practices Act ("FBPA"). The litigation
involved a suit brought by a diet control drug patentee alleging
violations of the FBPA. The district court dismissed the suit,
finding plaintiff could not bring suit under the FBPA in a representative
capacity for the general consuming public without first personally
suffering harm.

On appeal, the Eleventh Circuit framed the issue as whether the
phrase "consumers and legitimate business enterprise" under section 10-
1-39(a) of the O.C.G.A. is limited solely to individual members of the
consuming public. The Georgia Supreme Court answered affirmatively in Friedlander v. PDK Labs, Inc., stating that only a member

230. Id. at 1103.
233. 92 F.3d at 1104.
234. Id. at 1107.
235. Id. at 1106.
236. Id. at 1105-07.
237. Id. at 1107.
238. 89 F.3d 747 (11th Cir. 1996).
241. 59 F.3d at 1132.
242. Id. at 1132-33.
of the consuming public, whether individual or business, is eligible to bring claims under the FBPA. Because nonconsumers have no cause of action under the FBPA, the Eleventh Circuit affirmed the lower court’s dismissal of plaintiff’s suit.

IX. CONCLUSION

In 1996, as in recent years, jurisdictional issues both at the trial and appellate levels were at the forefront of the Eleventh Circuit’s agenda. While dauntless in defining the parameters of federal court jurisdiction, the Eleventh Circuit appears deferential in addressing the interests of state law and state court jurisdiction. The impact of new as well as old Supreme Court decisions helped shape Eleventh Circuit opinions in many substantive areas. There were also several issues of first impression this year. As the cases featured in this Survey demonstrate, the wide range of complexities of practice in the federal arena requires a continued and close scrutiny of the ongoing developments in federal civil procedure.

244. Id. at 180-81, 465 S.E.2d at 671.
245. 89 F.3d at 748-49.