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Trial Practice and Procedure

by John O'Shea Sullivan*
Ashby L. Kent**
and Amanda E. Wilson***

The 2011 survey period yielded several noteworthy decisions relating to federal trial practice and procedure in the United States Court of Appeals for the Eleventh Circuit, some of which addressed issues of first impression.1 This Article analyzes recent developments in the Eleventh Circuit, including significant rulings regarding arbitration, removal, subject matter jurisdiction, and civil procedure.

I. ARBITRATION

A. Whether Filing an Amended Complaint Can Revive a Defendant's Right to Compel Arbitration, Notwithstanding Its Previous Waiver of that Right

In Krinsk v. SunTrust Banks, Inc.,2 the Eleventh Circuit held, as a matter of first impression, that filing an amended complaint could revive a defendant's right to compel arbitration, notwithstanding the defen-
The dispute in Krinsk arose out of a home-equity line of credit (HELOC) that the plaintiff/appellee Sara Krinsk obtained from the defendant/appellant SunTrust Bank in December 2006. Krinsk's HELOC contained an arbitration clause which required the parties to resolve all disputes via binding arbitration. The arbitration clause provided that a party's notice of election to arbitrate "may be given after a lawsuit has been filed and/or in papers filed in the lawsuit," and precluded resolution of claims by class action.

In October 2008, SunTrust suspended Krinsk's access to her HELOC, alleging concern over her ability to fulfill her payment obligations due to a change in her financial circumstances. Krinsk alleged that SunTrust's concern was pretextual and that SunTrust had suspended her HELOC access, and that of other Florida homeowners, as part of a scheme to restore its capital reserves. Krinsk, who was ninety-two years old, alleged that elderly HELOC borrowers were the most vulnerable targets of SunTrust's scheme because SunTrust did not anticipate much resistance.

On May 15, 2009, Krinsk filed a class action complaint against SunTrust in the United States District Court for the Middle District of Florida. The complaint defined the proposed class as follows:

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3. Id. at 1196.
4. Id. at 1197.
5. Id. (internal quotation marks omitted). The arbitration clause in Krinsk's HELOC agreement provided in pertinent part as follows:
   5. NO CLASS ACTIONS, ETC.... if you or we elect to arbitrate a claim, neither you nor we will have the right: (a) to participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; or (b) to join or consolidate [claims with claims of any person other than you. No arbitrator shall have authority to conduct any arbitration in violation of this provision.
   Id. at 1197 n.1.
6. Id. at 1197. Prior to suspending her HELOC access, SunTrust had mailed Krinsk a letter requesting updated financial information from her. SunTrust contended that Krinsk's HELOC access was suspended due to the information that Krinsk provided in response to that request. Id.
7. Id.
   According to Krinsk, HELOCs like hers—those sold to Florida residents between the late 1990s and early 2008 and secured by Florida real property—were among the highest-rated risk elements in SunTrust's debt portfolio, and SunTrust, recognizing that it had a significant concentration of credit risk arising from these loans, aimed to systematically liquidate the loans' available credit balances.
   Id.
8. Id.
9. Id. at 1197-98. In her original complaint, Krinsk sought declaratory relief regarding her right to access her HELOC and asserted claims for financial elder abuse under
All Florida permanent or part-time residents that entered into an agreement with SunTrust entitled “Access 3 Equity Line Account Agreement and Disclosure” and who, after attaining the age of sixty-five (65), received a letter from SunTrust between July 1, 2008 and October 16, 2008, requesting updated financial information . . . and who were subsequently informed their collateralized credit line had been suspended or reduced during the draw period for purportedly failing to provide the information requested by SunTrust. ¹⁰

Krisnk estimated in her motion for class certification that this class would “consist[] of hundreds of members located throughout Florida.”¹¹

SunTrust filed a motion to dismiss, but did not seek to compel arbitration or otherwise mention the HELOC’s arbitration clause. The litigation proceeded while SunTrust’s motion was pending, during which time the parties filed a case management report wherein they submitted a proposed discovery and pretrial plan, and SunTrust stated that it opposed arbitrating Krinsk’s claims. SunTrust also defended against Krinsk’s motion for class certification and class discovery. SunTrust never asserted its right to compel arbitration and never otherwise indicated its intent to do so.¹²

On January 8, 2010, the district court granted SunTrust’s motion in part but allowed Krinsk leave to amend the complaint.¹³ On January 28, Krinsk filed an amended complaint which offered a new definition of the proposed class as follows:

All Florida residents who entered into one or more agreements for a . . . [HELOC] with SunTrust Bank pursuant to its “Access 3 Equity Line Account Agreement and Disclosure” that was collateralized by real estate located in Florida, and who had the available balance of their HELOC suspended or reduced anytime between January 1, 2007 to the date of class certification (the “Class Period”).¹⁴

The amended complaint and definition encompassed all Florida residents, regardless of age, who had their HELOCs suspended for any

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¹⁰ Florida’s Adult Protective Services Act, breach of contract, deceit, negligent misrepresentation, breach of fiduciary duty, violation of the Truth in Lending Act and its corresponding Regulation Z, and breach of the implied covenant of good faith and fair dealing. Krinsk also named SunTrust’s corporate parent and President/CEO as defendants, although her claims against these defendants were later dismissed. Id. at 1198-99.
¹¹ Id. at 1198.
¹² Id. (alteration in original) (footnote and internal quotation marks omitted).
¹³ Id.
¹⁴ Id. at 1198-99. The district court had not yet ruled on Krinsk’s motion for class certification at the time she filed her amended complaint. Id.
reason during a three-year period, which had the potential to greatly enlarge the size of the putative class. Krinsk estimated in her amended motion for class certification that the number of class members would be in the thousands, if not the tens of thousands.\(^{15}\)

In its answer to the amended complaint, and for the first time since litigation began, SunTrust raised its right to arbitrate. SunTrust also filed a motion to compel arbitration, a motion to stay the action pending arbitration, and a motion to prohibit maintenance of a class action pursuant to the HELOC's arbitration clause. Krinsk opposed SunTrust's motions, claiming that SunTrust had waived its right to compel arbitration.\(^{16}\)

The district court denied SunTrust's motion to compel arbitration, finding that Krinsk had met both prongs of a two-part test designed to determine whether SunTrust had waived its contractual right to arbitrate.\(^{17}\) First, the court found that SunTrust had acted inconsistently with its right to arbitrate by permitting nearly nine months to pass and participating in the litigation up until the filing of the amended complaint.\(^{18}\) Second, the court concluded that "Krinsk would suffer prejudice were SunTrust permitted to assert its arbitration rights in such an untimely manner," because she had been induced to spend time and money on class-related motion practice and discovery—"the type of litigation expense[s] that arbitration was designed to alleviate"—due to her belief that SunTrust would not pursue arbitration under the contract.\(^{19}\) SunTrust appealed, arguing that even if its right to

\(^{15}\) Id.

\(^{16}\) Id. at 1199-1200.

\(^{17}\) Id. at 1200.

To determine whether a party has waived its contractual right to arbitrate, courts apply a two-part test: "First, [they] decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right, and, second, [they] look to see whether, by doing so, that party has in some way prejudiced the other party." Id. (quoting Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315 (11th Cir. 2002)).

\(^{18}\) Id. at 1201. Specifically, "the district court concluded that SunTrust had, for nine months prior to filing its answer and motion to compel arbitration, 'invoked the judicial process in litigating this case without any indication that it was contemplating arbitration.'" Id. The district court also focused on SunTrust's express opposition to arbitration in its case management report, in addition to the significant motions practice that SunTrust had employed in opposition to Krinsk's request for class certification and class discovery following the filing of the original complaint. Id. The district court determined that "[t]hese actions . . . displayed SunTrust's consent to the case's proceeding in court" rather than arbitration. Id.

\(^{19}\) Id. (alteration in original) (internal quotation marks omitted). The district court further found that Krinsk's filing of the amended complaint was "'immaterial' to its assessment, since the claims she raised in both complaints were 'based on the same
arbitrate was waived from previous defense through the judicial process, filing the amended complaint "'rejuvenated' or revived its right to compel arbitration."^20

Noting that this was an issue of first impression for the court, the Eleventh Circuit looked to the decisions of other federal courts that had considered this issue and found that, "in limited circumstances, fairness dictates that a waiver of arbitration be nullified by the filing of an amended complaint."^21 Specifically, the Eleventh Circuit held that a defendant's prior waiver of its right to compel arbitration should not be nullified because the right to arbitrate cannot be effectively revived if the amended complaint does not unexpectedly expand the scope of the litigation. The Eleventh Circuit noted that courts refused to revive the right to compel arbitration where the amended complaint made only minor factual changes which did not alter the underlying scope or theory of substantive claims. ^22

Unlike those cases, the Eleventh Circuit determined that in the case at bar, the amended complaint greatly broadened the potential scope of the litigation by amending the class definition to potentially include thousands of new class plaintiffs who were not contemplated in the original class definition. The court held that "[t]his vast augmentation of the putative class so altered the shape of litigation that, despite its prior invocations of the judicial process, SunTrust should have been allowed to rescind its waiver of its right to arbitration."^25 The court further held that

SunTrust's acts in furtherance of the litigation all occurred prior to the filing of the amended complaint and thus concerned the class contemplated in the original complaint. SunTrust proceeded in court on the expectation that, if the class action were certified, it would defend itself against only the relatively small plaintiff class defined in the original complaint. SunTrust could not have foreseen that Krinsk would expand the putative class in such a broad way nine months into the litigation. Given this unforeseen alteration in the shape of the case, SunTrust, in plain fairness, should have been

^20. Id. at 1202.
21. Id.
22. Id. at 1203.
23. Id.
24. Id. Specifically, the court noted that "the old definition's limits on the class plaintiffs' age and on the bases for their HELOC suspensions" had been discarded, and that the class period had been expanded from over three months to over three years. Id.
25. Id. at 1204.
allowed to rescind its earlier waiver through its prompt motion to compel arbitration.26

Upon holding that SunTrust's right to compel arbitration, even if waived with respect to the claims in the original complaint, was revived by Krinsk's filing of the amended complaint, the Eleventh Circuit vacated the district court's order denying SunTrust's motion to compel arbitration.27

B. Whether Arbitrators Exceeded Their Authority, Thereby Justifying Vacatur of Their Award, By Purportedly Failing to Provide a "Reasoned Award" as Agreed to by the Parties

In Cat Charter, LLC v. Schurtenberger,28 the Eleventh Circuit addressed the question of whether arbitrators exceeded the scope of their authority, thereby justifying vacatur of their award under 9 U.S.C. § 10(a)(4) of the Federal Arbitration Act (FAA),29 when the arbitrators allegedly failed to provide a "reasoned award" as agreed to in an arbitration agreement.30 The dispute in Cat Charter began after plaintiffs paid the defendants to construct a yacht, but defendants never delivered the vessel. Pursuant to an arbitration clause in their construction contract, plaintiffs initiated an arbitration proceeding with the American Arbitration Association (AAA).31 The defendants filed an answer denying all of the plaintiffs' allegations, and both parties requested an award of reasonable attorney fees.32

The arbitration proceeded under the AAA's Commercial Arbitration Rules before a panel of three arbitrators.33 In its preliminary schedul-

26. Id. The court further noted the following:
   [t]he only action that SunTrust took after the Amended Complaint was filed was to submit its answer and its motion to compel arbitration thirteen days later. Thus, in no way did SunTrust act in a manner inconsistent with its right to elect arbitration following the filing of the Amended Complaint.

27. Id. at 1204 n.22.

28. 646 F.3d 836 (11th Cir. 2011).


30. Cat Charter, 646 F.3d at 839.

31. Id. The plaintiffs asserted claims against the defendants for deceptive and unfair trade practices under Florida law, rescission, breach of contract, fraud or alternative misrepresentation, breach of fiduciary duty, and civil remedies for criminal practices under Florida law. Id.

32. Id. at 839-40.

33. Id. at 840. The court noted that
   [p]arties may contract for more than the default "standard award" in arbitration. Under Arbitration Rule R 42(b), "[t]he arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appoint-
ing order, the panel stated that the form of the award “will be determined by agreement of the parties.” Following discovery, a hearing, and post-trial briefing, the panel issued a unanimous arbitration award, finding that the plaintiffs had proven some of their claims “by the greater weight of the evidence;” that all other claims and counterclaims were denied; and finding as follows on the claims for attorney fees:

4. On the claim of the [plaintiffs] for entitlement to attorney[’]s fees in this arbitration proceeding and entitlement to an award of arbitration expenses and costs, inclusive of the arbitrators’ fees and costs, we find that [plaintiffs] are the substantially prevailing parties in this arbitration and are entitled to an award of such fees and costs against [defendants] . . .

5. On the claim of the [defendants] for entitlement to attorney[’]s fees and costs in this arbitration, we find that [defendants] are not the substantially prevailing parties in this arbitration, and said claim is denied;

6. On the claim by [plaintiffs] for civil theft which the [a]rbitrators have denied, the [a]rbitrators find that [plaintiffs] raised a claim that had substantial fact and legal support pursuant to [Florida law] . . . justifying denial of any attorney[’]s fees for [defendants].

The plaintiffs filed a motion to confirm the award in the United States District Court for the Southern District of Florida. The defendants moved to vacate the award, alleging the panel exceeded its authority by failing to issue a “reasoned award” as required by the parties’ agreement. The defendants argued that “the [p]anel’s statements that the

ment of the arbitrator, or unless the arbitrator determines that a reasoned award is appropriate.”

Id. at 840 n.6 (second alteration in original).

34. Id. at 840 (internal quotation marks omitted). The defendants’ counsel sent a fax to the AAA case manager to inform her that “the parties have agreed that the panel shall provide a reasoned award and that the panel shall determine who the prevailing party or parties are on the various claims between the parties.” Id. (internal quotation marks omitted). Similarly, in their post-trial brief, the plaintiffs stated that “[t]he parties have agreed to ask the panel to issue a ‘reasoned award’ and determine which party is the ‘prevailing party’ on all claims.” Id.

35. Id. at 841. The arbitration panel then ordered the defendants to pay the plaintiffs more than $2 million in damages, fees, costs, and interest and also granted the plaintiffs a first priority lien interest on the yacht. Id.

36. Id. In their motion to confirm the award, the plaintiffs did not note the parties’ agreement that required the arbitration panel to provide a reasoned award, nor did they present an argument about the sufficiency of the reasons provided in the award. Id.

37. Id. The Eleventh Circuit noted that the defendants “never complained to the [panel regarding the form of the [a]ward or requested a modification of the [a]ward after it was delivered; they first raised their concern over the lack of reasons provided by the
plaintiffs proved their claims 'by the greater weight of the evidence' add[ed] no explanatory value to the [al]ward and 'work[ed] no transform-
ative alchemy on what [was] most certainly a 'bare' or 'standard'
award.' The district court agreed with defendants and vacated the
arbitration award, finding that the panel had exceeded its powers within
the meaning of § 10(a)(4) of the FAA because it failed to issue a
satisfactorily reasoned award. The plaintiffs appealed.

The Eleventh Circuit noted that § 10(a) of the FAA provides for
vacatur of an arbitration award if, by not providing a reasoned award,
"the arbitrators exceeded their powers, or so imperfectly executed them
that a mutual, final, and definite award upon the subject matter
submitted was not made." Noting that "arbitration is a creature of
contract," the court recognized that arbitrators "may exceed their power
within the meaning of § 10(a)(4) if they fail to comply with mutually
agreed-upon contractual provisions in an agreement to arbitrate." The
court further noted that "[a]n arbitrator may also exceed her
authority by failing to provide an award in the form required by an arbitration agreement. Thus, the court held the following:

[To determine whether the [panel in this case exceeded its powers, then, we must first decipher what constitutes a "reasoned award," a somewhat ambiguous term left undefined by the FAA, the Arbitration Rules, and the parties' contract. As a result, we must rely on common sense and scarce precedent to illuminate this critical term.]

The court first noted that arbitrations without requested awards may warrant a "standard award" that simply announces the result of arbitration. The court then held that, alternatively, parties may request that "findings of fact and conclusions of law" be made under standards complying with that of federal courts. Accordingly, the court acknowledged that "a reasoned award is something short of findings and conclusions but more than a simple result.

In looking for additional guidance to define this term, the court cited Webster's Dictionary, which defines "reasoned" as "based on or marked by reasoning." Thus, the court held that a "reasoned" award is an award that is provided with or marked by the detailed listing or mention of expressions or statements offered as a justification of an act-the 'act' here being, of course, the decision of the [panel.]

With these definitions in mind, the court in Cat Charter held that the arbitration award was appropriate under § 10(a)(4). In support thereof, the court reasoned that the award was primarily based upon credibility of the parties as determined by the arbitration panel, and the terms of the award made clear that the plaintiffs' witnesses were found more credible. Although the court noted that the panel could have provided more explanation of its findings, the court determined that the panel provided more than a standard award and "had the parties wished for a greater explanation, they could have requested that the [panel

43. Cat Charter, 646 F.3d at 843. The court briefly discussed, as an illustration, Western Employers Insurance v. Jefferies & Co., 958 F.2d 258, 260 (9th Cir. 1992), when the court vacated an arbitration award that failed to provide findings of fact and conclusions of law as required by the arbitration agreement. Cat Charter, 646 F.3d at 843.
44. Cat Charter, 646 F.3d at 843.
45. Id. at 844.
46. Id. (internal quotation marks omitted).
47. Id. (quoting Sarofim v. Trust Co. of the W., 440 F.3d 213, 215 n.1 (5th Cir. 2006)) (internal quotation marks omitted).
49. Cat Charter, 645 F.3d at 844.
50. Id.
51. Id. at 844-45.
provide findings of fact and conclusions of law . . . . \textsuperscript{52} The court stated that the panel provided sufficient explanation for the only two findings that required explanation—determination of prevailing party and award of attorney fees.\textsuperscript{53} In sum, the court held that "the [a]ward was a reasoned one" and that its holding "comports with the sparse precedent that specifically addresses this issue,"\textsuperscript{54} and "holds consistent with the general review principles embodied in the FAA."\textsuperscript{55} Therefore, the Eleventh Circuit reversed the district court's order and remanded for reinstatement of the arbitration award.\textsuperscript{56}

C. Whether a Contractual Class Action Waiver Within an Arbitration Agreement is Enforceable, and Whether the Federal Arbitration Act Preempts a State Law Which Purports to Invalidate Such a Waiver as Contrary to Public Policy

In \textit{Cruz v. Cingular Wireless, LLC},\textsuperscript{57} the Eleventh Circuit addressed whether a contractual class action waiver in an arbitration agreement was unenforceable on the ground that it allegedly violated Florida public policy.\textsuperscript{58} The plaintiffs in \textit{Cruz} were customers of AT&T Mobility, LLC (ATTM), a cellular phone company. The plaintiffs each signed a contract with ATTM, wherein each customer plaintiff agreed that any disputes arising out of the cellular service would be resolved through binding

\textsuperscript{52} Id. at 845.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 845 & n.16. \textit{Compare} Green v. Ameritech Corp., 200 F.3d 967, 970, 974-76 (6th Cir. 2000) (reversing a district court's vacatur order and confirming an arbitration award challenged on the ground that it failed to provide reasons when the arbitration agreement required an explanation with respect to each theory advanced), \textit{with} Vold v. Boin & Assocs. Inc., 699 N.W.2d 482, 484-85 (S.D. 2005) (affirming a lower court's vacatur order where an arbitrator provided "no reason for each award and no reason for rejecting [a party's] claims" and "did not mention any of the relevant contract provisions at issue, cite any law, or discuss any of the evidence" despite being required to provide a reasoned award).
\textsuperscript{55} \textit{Cat Charter}, 646 F.3d at 845. The court noted that the Supreme Court has interpreted §§ 9-11 of the FAA:
as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process. \textit{Cat Charter}, 646 F.3d at 845 (quoting Hall Street Assoc., LLC \textit{v.} Mattel Inc., 552 U.S. 576, 588 (2008)).
\textsuperscript{56} \textit{Cat Charter}, 646 F.3d at 846.
\textsuperscript{57} 648 F.3d 1205 (11th Cir. 2011).
\textsuperscript{58} Id. at 1206.
individual arbitration, rather than a class-wide resolution basis.\textsuperscript{59} Notwithstanding this mandatory arbitration provision, the plaintiffs filed a class action against ATTM in the United States District Court for the Middle District of Florida,\textsuperscript{60} alleging that ATTM violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)\textsuperscript{61} by charging them a fee of $2.99 a month for a Roadside Assistance Plan (RAP) that the plaintiffs never agreed to or ordered.\textsuperscript{62} ATTM then moved to dismiss the complaint and, pursuant to the arbitration agreement, compel arbitration. The plaintiffs argued the arbitration provision could not stand because a waiver of class actions would effectively immunize ATTM from potential liability for unlawful business practices, thereby hindering the remedial purposes of the FDUTPA and violating Florida public policy.\textsuperscript{63}

The district court granted ATTM's motion to dismiss and compel arbitration, finding that "an arbitration agreement is unenforceable for public policy reasons if it defeats the remedial purpose of the statute upon which the action is based, or deprives the plaintiff of the ability to obtain meaningful relief."\textsuperscript{64} The district court further found that "although FDUTPA claims are susceptible to class action litigation, FDUTPA [did] not confer a blanket, non-waivable right to class representation."\textsuperscript{65} The district court then addressed the arbitration

\textsuperscript{59} Id.
\textsuperscript{60} Id. The complaint requested damages and injunctive relief, and sought certification of a putative class consisting of "[a]ll persons and entities who (1) enrolled in a[n ATTM] account in the state of Florida; and (2) were subjected to a monthly charge for the Roadside Assistance Plan without ever requesting or enrolling in said plan." Id. at 1208.
\textsuperscript{62} Cruz, 648 F.3d at 1207. The RAP purported to "provide customers with towing services, dead-battery jump starts, flat-tire assistance, fuel delivery, lockout assistance, and key replacement services. Although ATTM called the RAP 'optional,' the Plaintiffs alleged that ATTM automatically enrolled customers for the service without the customers' knowledge or consent." Id. at 1208.
\textsuperscript{63} Id. at 1208.
\textsuperscript{64} Id. (quoting Cruz v. Cingular Wireless, LLC, No. 2:07-CV-714-FTM-29DNF, 2008 WL 4279690, at *2 (M.D. Fla. Sept. 15, 2008)).
\textsuperscript{65} Id. In support of its holding, the district court noted that: Florida's intermediate appellate courts [had] invalidated ... arbitration agreements that purported to limit the substantive remedies available under [the] FDUTPA [as against public policy] ... [but], by contrast, ... [had] enforced an arbitration agreement containing a class action waiver where the agreement provided that the consumer retained all substantive rights and remedies granted under FDUTPA, and did not eliminate the consumer's right to recover full attorney's fees.
agreement at issue in this case, concluding that it was valid and enforceable because:

(1) there is no question that the arbitration agreement provides all the same remedies available to plaintiffs under FDUTPA, as it states in relevant part that "[a]rbitrators can award the same damages and relief that a court can award,"[;] (2) the agreement allows a consumer who prevails in arbitration to recover attorney[']s fees and costs from ATTM without limitation, and even allows an award of double attorney[']s fees in certain instances[;] (3) there was no confidentiality rule preventing the Plaintiffs from disseminating information about their claims to other potential claimants[;] and (4) ATTM agreed to bear all costs of arbitration regardless of which party prevailed. 66

Based on these features, the district court concluded that the arbitration agreement was valid and did not defeat the remedial purposes of the FDUTPA. 67

The plaintiffs appealed, "[a]rguing that the district court failed to appreciate the functionally exculpatory effect of the class action waiver." 68 On appeal, the Eleventh Circuit held that it "must affirm the district court's order compelling individual arbitration if either the class action waiver is enforceable under Florida law or the FAA preempts Florida law to the extent it would invalidate the waiver." 69

In its analysis, the court relied heavily on the United States Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 70 which involved a putative class action about the same arbitration clause at issue in Cruz. 71 In Concepcion, the Supreme Court held that a California "state law which classified most collective-arbitration waivers in consumer contracts as unconscionable, and thus unenforceable, was preempted by the [FAA]." 72

In Concepcion, the plaintiffs argued that the class action waiver in the arbitration agreement was unconscionable and unenforceable under

66. Id. at 1209 (citations omitted).
67. Id. at 1210.
68. Id.
69. Id.
70. 131 S. Ct. 1740 (2011).
71. Cruz, 648 F.3d at 1210-11 (citing Concepcion, 131 S. Ct. at 1744).
72. Id. at 1207, 1211 (quoting Concepcion, 131 S. Ct. at 1746, 1753). The Supreme Court rendered its decision in Concepcion after the Eleventh Circuit had heard oral argument in Cruz. Thus, the Eleventh Circuit requested supplemental briefing from the parties regarding the effect of Concepcion on the case at bar prior to rendering its decision on appeal. Id. at 1207.
California law because it operated to “exempt[] ... [ATTM] from responsibility for its own fraud.” The plaintiffs in Concepcion argued that the “saving clause” found at § 2 of the FAA allowed for revocation of their arbitration agreements, especially since unconscionability is grounds for revocation, whether at law or in equity. In Concepcion, the Court did not dispute that the law, as held by the California Supreme Court in Discover Bank v. Superior Court, would invalidate the class action waiver as unconscionable based on a three-part test used in Discover Bank:

(1) “the waiver is found in a consumer contract of adhesion” drafted by a party that has superior bargaining power; (2) “disputes between the contracting parties predictably involve small amounts of damages”; and (3) “it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”

However, in Concepcion, the Court concluded that the triggering conditions of the Discover Bank rule imposed “no effective limit on its application” and thus “set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere ex post demand by any consumer.” Therefore, the Court in Concepcion held that such a “state-imposed policy preference ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’” Accordingly, the Supreme Court held the following:

because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ...” a state policy that allows any party to a consumer contract to demand classwide procedures ex post, in spite of her agreement to submit all disputes to

73.  id. at 1211 (citing Concepcion, 131 S. Ct. at 1746).
75.  Cruz, 648 F.3d at 1211 (quoting Concepcion, 131 S. Ct. at 1746). The court noted that “[u]nder the so-called saving clause of FAA § 2, an arbitration agreement may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” Cruz, 648 F.3d at 1210 (quoting Concepcion, 131 S. Ct. at 1746).
76.  133 P.3d 1100 (Cal. 2005).
77.  Cruz, 648 F.3d at 1211 (quoting Concepcion, 131 S. Ct. at 1746).
78.  id. at 1211 (citing Concepcion, 131 S. Ct. at 1750).
79.  id. (quoting Concepcion, 131 S. Ct. at 1748). The Supreme Court further explained that “conditioning the enforceability of arbitration agreements on the availability of classwide arbitration procedures [was] inconsistent with the FAA” and that class arbitration “eliminates the ‘principal advantage of arbitration’—its informality—and instead makes the process slower, more costly, more ensnared in procedural formality, and more risky to defendants.” Id. at 1212.
bilateral arbitration, is preempted by the FAA, even if it may be "desirable for [other] reasons." According to the Supreme Court, the FAA preempted California's Discover Bank rule. In Cruz, as in Concepcion, the plaintiffs argued that ATTM's class action waiver was unenforceable because ATTM would be insulated from liability under Florida law, thus defeating the remedial purpose of FDUTPA and violating public policy. The Eleventh Circuit disagreed, finding that the Supreme Court in Concepcion had specifically rejected that public policy argument and found that states "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Accordingly, based on the Supreme Court's holding in Concepcion, the Eleventh Circuit held the following:

[to the extent that Florida law would be sympathetic to the [plaintiffs'] arguments here, and would invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted.]

Accordingly, the Eleventh Circuit affirmed the district court's order dismissing the plaintiffs' complaint and compelling arbitration of the plaintiffs' claims.

D. Whether a District Court has Jurisdiction Over a Petition to Compel Arbitration under § 4 of the FAA

In Community State Bank v. Strong (Strong II), the Eleventh Circuit reexamined its prior opinion in the same case, Community State Bank v. Strong (Strong I), in light of the United States Supreme Court's opinion in Vaden v. Discover Bank. The Eleventh Circuit held that to determine whether a court has federal jurisdiction over a petition to compel arbitration under § 4 of the Federal Arbitration Act (FAA), the court must "look through" the arbitration petition to the underlying

80. Id. at 1212 (quoting Concepcion, 131 S. Ct. at 1750, 1753) (citations omitted).
81. Id.
82. Id.
83. Id. (quoting Concepcion, 131 S. Ct. at 1753).
84. Id. at 1212-13.
85. Id. at 1216.
86. 651 F.3d 1241 (11th Cir. 2011).
87. 485 F.3d 597 (11th Cir. 2007).
controversy and ask whether the underlying dispute between the parties would have arisen under federal law. This case arose when James E. Strong obtained a "payday loan" from a store called Cash America Pawn of Atlanta #15. Under the terms of Strong's loan, Community State Bank was Strong's lender. Strong sued various defendants in Georgia state court alleging that his "payday loan" was illegal and usurious under Georgia law. Strong did not sue Community State Bank in the state court action.

The defendants in the state court action removed the case to the United States District Court for the Northern District of Georgia. On the same day, the state court defendants and the bank filed a petition to compel arbitration under § 4 of the FAA, which commenced an independent action. Strong moved to dismiss the petition to compel arbitration, and the district court granted the motion, rejecting the petitioners' arguments that federal law completely preempted Strong's usury claims under Georgia law.

The petitioners appealed the dismissal of the petition to compel arbitration, and on April 27, 2007, the Eleventh Circuit issued its Strong I opinion reversing the dismissal and holding that, "looking through the § 4 arbitration petition to the underlying controversy, it was apparent that Strong could have filed a coercive action arising under federal law, and therefore the district court had federal jurisdiction over the petition

89. Strong II, 651 F.3d at 1254-55 (quoting Vaden, 556 U.S. at 65).
90. Id. at 1248. "Payday loans are generally small-dollar, short-term, high interest loans secured by a check given to the payday lender in the amount of the cash advance plus interest." Id. (quoting Dale v. Comcast Corp., 498 F.3d 1216, 1221 n.9 (11th Cir. 2007)).
91. Id.
92. Id.
93. Strong sued Georgia Cash America, Inc., Cash America International, Inc., and Daniel Feehan (Cash America defendants), the CEO of both companies who ran the Cash America Pawn store that provided the payday loan to Strong. Id. at 1249.
94. Id.
95. Id. at 1250. In the state court action, Strong expressly stated that he (1) was "not asserting any claims under the laws of the United States"; (2) "did not assert any claim against a state or nationally chartered bank"; and (3) "did not seek recovery . . . in excess of $75,000." Id. (internal quotation marks omitted). The Eleventh Circuit recognized Strong's failure to name the bank as a defendant in the state court action as "an obvious effort to avoid federal jurisdiction." Id.
96. Id. Strong moved to remand the removed action for lack of subject matter jurisdiction, and the district court granted the motion, remanding the action to state court. Id. at 1250-51.
97. Id. at 1250-51. Specifically, the petitioners argued that Strong's claims were preempted by § 27(a) of the Federal Deposit Insurance Act (FDIA). Strong II, 651 F.3d at 1250-51; FDIA, 12 U.S.C. § 1831d(a) (2006).
to compel arbitration." After Strong petitioned for a rehearing en banc, the Eleventh Circuit stayed the appeal pending the United States Supreme Court's decision in Vaden.99 Once the Supreme Court ruled in Vaden, the Eleventh Circuit remanded the case to the panel,100 which then issued its opinion in Strong II.101

The Eleventh Circuit began its analysis in Strong II by recognizing that the FAA is non-jurisdictional.102 Accordingly, the court reasoned that "the parties must identify an independent basis for federal jurisdiction over a petition to compel arbitration."103 The court then summarized its opinion in Strong I, in which it held that despite Strong's express disavowal of any federal claims, "Strong's potential, non-asserted federal claims created federal question jurisdiction over the FAA petition[,]" and that the district court had jurisdiction over the entire action.104

Next, the Eleventh Circuit discussed Vaden in detail, recognizing that it "raised substantially the same jurisdictional question" the court faced in Strong I.105 The district court in Vaden ordered the parties to arbitrate their claims, and the United States Court of Appeals for the Fourth Circuit affirmed the order, adopting the "look through' approach" to determining jurisdiction over FAA § 4 petitions.106 The Fourth Circuit held that federal law107 completely preempted Vaden's counter-claims and that the "now-federalized counterclaims" provided sufficient grounds for federal question jurisdiction.108

The United States Supreme Court unanimously affirmed the Fourth Circuit's "look through" approach, but a majority of five Justices reversed the Fourth Circuit's application of the "look through" analysis, conclud-

98. Strong II, 651 F.3d at 1251 (citing Strong I, 485 F.3d at 612).
99. Id.
101. 651 F.3d at 1251.
102. Id. at 1252.
103. Id.
104. Id. at 1252-54. In Vaden, a Discover Bank affiliate (Discover) sued a credit card holder (Vaden) in state court to recover past-due charges. Id. at 1252-53. Vaden asserted affirmative defenses and counterclaims, alleging that Discover's finance charges violated state usury laws. Id. at 1253. Discover then commenced a separate § 4 petition in federal district court, seeking to compel arbitration of the counterclaims. Id. Significantly, this was the first time either party in Vaden had invoked the arbitration clause in the credit card agreement. Id.
105. Id. at 1252-54.
106. Id.
107. The Fourth Circuit found that § 27(a) of the FDIA preempted the counterclaims asserted in Vaden. Id.
108. Id.
ing that when the "parties' controversy had already been 'embodied' in pending litigation, . . . federal jurisdiction over the subsequent FAA petition must be assessed from the face of the preexisting complaint." 109 In Strong II, the Eleventh Circuit recognized that in Vaden, the Supreme Court "did not, however, answer the question of how to define the parties' controversy for purposes of determining jurisdiction when no litigation between the parties precedes the filing of the FAA petition." 110

After reviewing Vaden, the Eleventh Circuit held that the "essential holding" of Strong I survived, especially regarding the bank, because "no preexisting litigation had yet defined the contours of the controversy between Strong and the [bank,]" and the [bank's] FAA petition was "freestanding." 111 In light of Vaden, the court held that "where the parties' controversy has not yet been embodied in preexisting litigation, [a] district court entertaining a § 4 petition must decide for itself what 'a suit' arising out of the allegedly arbitrable controversy would look like." 112 Thus, the district court "must examine the dimensions of the 'full-bodied controversy'] between the parties, and determine whether any hypothetical claims arising out of that controversy would support federal jurisdiction." 113

Reasoning that the court must still "look through" the petition to "something" when no preexisting litigation exists, the Eleventh Circuit considered the substantive dispute between the parties. 114 The court examined the bank's FAA petition, including the claims and exhibits thereto, to determine the "full flavor" of the dispute. 115 Once the court had "probed the factual basis of the underlying controversy between the parties," it then explored "the potential lawsuits that could arise

109. Id. The four justices who dissented in Vaden disagreed with the majority about the application of the "look through" test. Id. at 1253-54. Instead of focusing on looking through to existing litigation, the dissent would have held that the district court should focus "on the concrete dispute to be arbitrated and determine for itself whether a hypothetical suit—whether pending or not—arising out of that controversy would arise under federal law." Id. at 1254.

110. Id. at 1253.

111. Id. at 1254.

112. Id. at 1255 (punctuation and internal quotation marks omitted).

113. Id. (citation and internal quotation marks omitted). Specifically, district courts should only look to "potential claims between the parties that could be stated on the face of a well-pleaded complaint," not "lurking' federal questions that could only arise by way of an actual or anticipated defense[.]" Id. at 1256.

114. Id. at 1255. "The [Supreme] Court was very clear that jurisdiction should be predicated on the substantive dispute between the parties, not the arbitrability issue actually to be decided by the district court." Id.

115. Id. at 1257.
between the parties from" the underlying controversy. In doing so, the court recognized that it could only consider "well-pled, non-frivolous potential suits" and that "[a]nticipated federal defenses are irrelevant." The Eleventh Circuit recognized at least one potential basis for federal jurisdiction—a potential Federal Racketeer Influenced and Corrupt Organizations (RICO) claim against the bank. Because in looking through the bank's FAA petition, the Eleventh Circuit identified a potential coercive claim between Strong and the bank, which would state a federal issue on its face, the court held that the district court had federal question jurisdiction over the bank's FAA petition, and improperly dismissed the petition.

II. JURISDICTION

A. Whether the District Court Misapplied the Rule 12(b)(6) Standard for Dismissal in the Court's Consideration of a Motion for Remand When Analyzing Whether a Defendant Was Fraudulently Joined

In Stillwell v. Allstate Insurance Co., the Eleventh Circuit held that the United States District Court for the Northern District of Georgia misapplied the Rule 12(b)(6) standard for dismissal in considering and denying a motion for remand on the ground of fraudulent joinder. This action arose out of an insurance dispute. The plaintiff, R. Michael Stillwell, a Georgia resident, filed a lawsuit in Georgia state court against Allstate Insurance Company, an Illinois corporation, and Anthony Edwards Insurance Agency, Inc. (Edwards), a

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116. Id. at 1258.
117. Id. Well-pled, non-frivolous claims may still provide grounds for jurisdiction "even if not in the end meritorious." Id. at 1259.
118. Id. at 1259.
119. Id. at 1261. Because the Cash America petitioners were named as defendants in Strong's state-court lawsuit, the Eleventh Circuit found itself constrained by Vaden to "look through" exclusively to Strong's state court complaint to determine whether federal jurisdiction existed over Cash America's FAA petition. Id. The court did not pursue this inquiry because a final judgment in the state-court action had preclusive effect and required that Cash America's petition must be dismissed. Id.
120. 663 F.3d 1329 (11th Cir. 2011).
121. FED. R. CIV. P. 12(b)(6).
122. Stillwell, 663 F.3d at 1334-35.
123. Id. at 1331. The plaintiff, R. Michael Stillwell, purchased an Allstate Insurance Company insurance policy from defendant Anthony Edwards Insurance Agency, Inc. (Edwards) for property Stillwell owned in East Point, Georgia. In 2007, Stillwell's property suffered fire damage and Stillwell filed a claim for the damage with Allstate, which Allstate denied. Id. Allstate denied coverage under the insurance policy because it claimed that the property did not qualify as a "dwelling." Id. (internal quotation marks omitted).
Georgia corporation, claiming that Allstate breached its insurance contract with Stillwell and acted in bad faith in denying Stillwell's claim and that Edwards breached its fiduciary duty to Stillwell in failing to procure appropriate insurance coverage for Stillwell. Allstate removed the case to federal court on grounds of diversity jurisdiction.

Stillwell filed a motion to remand, claiming the district court lacked jurisdiction over the case because the parties were not diverse as Stillwell and Edwards were both Georgia residents. The district court denied Stillwell's motion after concluding that Stillwell fraudulently joined Edwards to defeat diversity and dismissed Edwards from the action. In reaching this conclusion, the district court found that Stillwell could not make a case against Edwards. Stillwell appealed, challenging the district court's denial of his motion to remand.

Stillwell argued, and the Eleventh Circuit agreed, that the district court erred in applying an "unduly demanding" pleading standard when determining whether Stillwell fraudulently joined Edwards. The court noted that the appropriate standard to apply in a fraudulent joinder analysis is a "lax one"—district courts cannot weigh the merits of a plaintiff's claims "beyond determining whether it is an arguable one under state law." Thus, "if there is even a

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124. Id. at 1331-32. Stillwell had filed a previous suit in Georgia state court against Allstate relating to Allstate's denial of coverage for water damage to Stillwell's property. Id. at 1331.
125. Id. at 1332.
126. Id. After the district court dismissed Edwards, the district court consolidated the two removed cases involving Stillwell and Allstate. Id. Allstate moved for summary judgment, and the district court granted Allstate's motion. Id. Stillwell's appeal, in addition to challenging the district court's denial of the motion to remand, also challenged the district court's award of summary judgment in both cases. Id. The Eleventh Circuit affirmed the summary judgment grant for Allstate in the water damage case, but vacated the summary judgment order in the fire damage case. Id. at 1336. The court remanded the fire damage case to district court with instructions to send it back to Georgia state court for the reasons discussed herein. Id.
127. Id. at 1332.
128. Id. (quoting Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)).
129. Id. at 1332-33.
130. Id. at 1333 (quoting Crowe, 113 F.3d at 1538).
possibility that a state court would find that the complaint states a
cause of action against any one of the resident defendants, the [district]
court must find that the joinder was proper and remand the
case. . . ." The Eleventh Circuit distinguished this standard from
the Rule 12(b)(6) motion to dismiss standard, recognizing that under the
former, "all that is required to defeat a fraudulent joinder claim is 'a
possibility of stating a valid cause of action.'" In denying Stillwell's
motion to remand, the district court found
Stillwell's allegations against Edwards were "conclusory and lacking in
factual specificity." However, the Eleventh Circuit noted that
"disregarding allegations as conclusory and requiring them to contain a
certain amount of factual matter sounds a lot like the [Rule] 12(b)(6)
standard, not the fraudulent joinder standard." The Eleventh
Circuit then examined the pleading standard applicable in Georgia state
courts to determine whether a Georgia state court could find that
Stillwell stated a claim against Edwards.

The Eleventh Circuit recognized that the "true test" under Georgia's
pleading standard "is whether the pleading gives fair notice and states
the elements of the claim plainly and succinctly, and not whether as an
abstract matter it states conclusions or facts." The court then held
that the district court erred in concluding that Edwards was fraudulent-
ly joined and decided that the case must be remanded to state court
because "the allegations against Edwards state the elements of
[plaintiff's claims] and give Edwards fair notice that it is being sued for
failing to procure adequate insurance coverage for Stillwell," and "it is,
at the very least, possible that a Georgia state court would conclude that
Stillwell's allegations against Edwards satisfied" the Georgia pleading
standard.

131. Id. (emphasis added) (quoting Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41
(11th Cir. 1983)).
132. Id. (quoting Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir.
1998)). Under the Rule 12(b)(6) motion to dismiss standard, "a complaint must contain
sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its
face.'" Stillwell, 663 F.3d at 1333 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009)).
133. Stillwell, 663 F.3d at 1334.
134. Id.
135. Id.
136. Id. (quoting Carley v. Lewis, 221 Ga. App. 540, 542, 472 S.E.2d 109, 110-11
(1996)).
137. Id. at 1334-35.
B. Whether a District Court Has Jurisdiction to Reconsider a Remand Order After the Case Has Been Remanded

In *Bender v. Mazda Motor Corp.*, 138 the Eleventh Circuit held that a district court cannot reconsider a remand order after the case has been remanded because the district court no longer has jurisdiction over the action.139 Plaintiff Peggy Bender brought an action on behalf of a decedent in Alabama state court against Mazda Motor Corporation, Mazda Motor of America, Inc. (together, Mazda), Ford Motor Company, Inc. (Ford), Jimmy Pugh, and J&G Auto Sales (J&G), arising out of injuries caused by a defective airbag in Bender’s Mazda Miata.140 Ford and Mazda removed the lawsuit to the United States District Court for the Southern District of Alabama based on diversity jurisdiction.141 Bender moved to remand the action, arguing the evidence was insufficient to establish that the amount-in-controversy exceeded $75,000,142 under the rule set forth by the Eleventh Circuit in *Lowery v. Alabama Power Co.*143

In response to Bender’s motion to remand, Ford and Mazda argued the evidence established that the amount-in-controversy was greater than $75,000 based on the factual similarities between *Bender* and *Roe v. Michelin North America, Inc.*,144 a case in which the district court found that the evidence satisfied the amount-in-controversy and diversity jurisdiction existed.145 Ford and Mazda asked the district court to deny Bender’s motion to remand, or alternatively, to stay its ruling on the motion until the Eleventh Circuit issued an opinion in the

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138. 657 F.3d 1200 (11th Cir. 2011).
139. Id. at 1204.
140. Id. at 1201.
141. Id. Specifically Ford and Mazda argued that J&G and Pugh were not proper defendants, and that the amount-in-controversy exceeded $75,000. Id.
142. Id.
145. *Bender*, 657 F.3d at 1201. In *Roe*, the estate of a passenger killed in a car accident sued the tire manufacturer in state court, seeking an unspecified amount of damages under Alabama’s wrongful death act. 637 F. Supp. 2d at 997. The defendant removed the case based on diversity jurisdiction, and the plaintiff moved to remand, arguing that the defendant failed to show that the $75,000 amount-in-controversy requirement was satisfied. Id. The district court denied the motion to remand, finding that the facts clearly established that the amount-in-controversy requirement was met. Id. at 998. In *Bender*, the plaintiff filed a motion to remand, and at the time Ford and Honda asked the court to deny Bender’s motion, the *Roe* appeal remained pending. *Bender*, 657 F.3d at 1201.
Roe appeal. The district court denied the motion to stay and remanded the case to state court, and six months later, the Eleventh Circuit affirmed the decision in Roe.

Ford and Mazda then filed a Rule 60(b)(6) motion to reconsider in light of new precedent. The district court denied the motion to reconsider because the remand had divested the district court of jurisdiction over the case. Ford and Mazda appealed the denial, relying on Ritter v. Smith, a case that interprets the appropriate application of Rule 60(b)(6) when the law is mistakenly applied. On
appeal, Bender argued that, pursuant to the Eleventh Circuit's decision in *Harris v. Blue Cross/Blue Shield of Alabama, Inc.*, the provisions of 28 U.S.C. § 1447(d), providing "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise[,]" trump the provisions of Rule 60(b)(6).

In *Harris*, the plaintiff asserted several state law claims and one claim pursuant to a federal act in its complaint filed in state court. The defendants timely removed the case to federal court under federal question jurisdiction. The plaintiff moved to remand the case, and the district court, in determining whether the federal claim was substantial enough to support pendant jurisdiction, found that the federal claim was barred and dismissed the claim, remanding the remaining state law claims to state court pursuant to 28 U.S.C. § 1447(c). The defendants filed a motion to reconsider the remand order, and the district court granted the motion, setting aside its remand order and reasserting jurisdiction over the case. On appeal, the Eleventh Circuit held that the district court was incorrect in reasserting jurisdiction over the action once it had been remanded to state court, reasoning that neither the court of appeals nor the district court had jurisdiction to revisit the district court's initial order remanding the case pursuant to 28 U.S.C. § 1447(d).

153. 951 F.2d 325 (11th Cir. 1992).
155. *Bender*, 657 F.3d at 1203 (internal quotation marks omitted); see also 28 U.S.C. § 1447(d). Bender also argued that regardless of the *Ritter* test, the district court properly denied the Rule 60(b)(6) motion because Ford and Mazda failed to prove fraudulent joinder over J&G and Pugh and because Ford and Mazda's removal was not timely. *Id.* at 1202. Because the Eleventh Circuit affirmed the district court's decision based on Bender's first argument, the court did not address her alternative theories. *Bender*, 657 F.3d at 1203.
156. 951 F.2d at 327. In *Harris*, the plaintiff asserted a claim under the Consolidated Omnibus Budget Reconciliation Act of 1985. *Id.* at 326.
157. *Id.* at 326.
159. *Harris*, 951 F.2d at 326. In *Harris*, the defendants moved for summary judgment, and the district court granted their motion. *Id.* The plaintiff appealed the grant of summary judgment. *Id.*
160. *Id.* at 330. In discussing its analysis of the *Harris* decision, the Eleventh Circuit, in *Bender*, explained as follows:

In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Supreme Court clarified that § 1447(d) applies only to remand orders issued pursuant to § 1447(c), which deals with remands based on the district court's lack of subject matter jurisdiction over the removed case. 423 U.S. at 346. Expanding on that doctrine, the court in *Harris* adopted the position accepted by an overwhelming majority of our sister circuits that, "Unquestionably, § 1447(d) not only forecloses appellate review, but also bars reconsideration by the district court of its own
Ford and Mazda argued that *Harris* was inapplicable to *Bender* for three reasons. First, they argued that the motion to reconsider in *Harris* was not a Rule 60 motion. The Eleventh Circuit discounted this argument on two grounds: (1) while the legal basis for the *Harris* motion is not clear, "Rule 60(b)(6) contains a general catch-all provision for any other reason that justifies relief," and (2) the court in *Harris* "was unconcerned with the nature of the motion to reconsider, but instead focused on the direct language of § 1447(d) . . . ." Next, Ford and Mazda argued that their pending request for a stay in light of the *Roe* appeal distinguished their case from *Harris* and "circumvent[ed] the finality of the 'by appeal or otherwise' language." However, the Eleventh Circuit held that the "finality of § 1447(d) does not allow any sort of loophole for any pending motions." Lastly, Ford and Mazda argued that the remand order in the present case was legally erroneous, unlike *Harris*. In response, the Eleventh Circuit stated that this was "irrelevant" and noted that "even if the district court erroneously remanded the case to state court, § 1447(d) prohibits the district court from reconsidering its remand order because the district court no longer had jurisdiction over the case." Thus, the Eleventh Circuit affirmed the district court's denial of Ford and Mazda's Rule 60(b)(6) motion for reconsideration, holding that *Harris* applied and the district court lacked jurisdiction to reconsider its remand order.

C. Whether Federal Courts Have Jurisdiction Over A Suit Between an Alien Corporation and an Individual Who Is a Dual Citizen

In *Molinos Valle Del Cibao v. Lama*, the Eleventh Circuit held, as a matter of first impression, that aliens may sue individuals who are dual United States citizens under alienage jurisdiction—dual citizenship will not destroy diversity. This case arises from a foreign currency exchange agreement entered into between the plaintiff, Molinos Valle Del Cibao (Molinos), a Dominican Republic corporation, and the defendants, Oscar R. Lama (Oscar Sr.), Carlos Lama Seliman (Carlos),...
and Oscar Lama Seliman (Oscar Jr.), who reside in Florida. Oscar Sr. is a dual citizen of the United States and the Dominican Republic; whereas, Carlos and Oscar Jr. are Dominican citizens working in the United States on non-immigrant worker visas.\footnote{170}

Molinos brought suit in the United States District Court for the Southern District of Florida for violations of the foreign currency exchange agreement.\footnote{171} Molinos asserted that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a).\footnote{172} On the eve of trial, the defendants challenged jurisdiction for the first time, filing a motion to dismiss and arguing that the district court lacked subject matter jurisdiction because all parties were aliens. The district court denied the motion to dismiss, and the defendants appealed.\footnote{173}

The defendants put forth three arguments against the district court's exercise of alienage jurisdiction. First, the defendants argued that Oscar Sr. was an improper party under 28 U.S.C. § 1332(a)(2) because he was a dual citizen, or alternatively, because he was domiciled abroad. Next, the defendants argued that the district court never had subject matter jurisdiction over a suit between a Dominican corporation and a dual citizen of the United States and the Dominican Republic.\footnote{174}

\footnote{170. \textit{Id.} at 1335.}
\footnote{171. \textit{Id.} at 1338. Under the foreign currency exchange agreement, Molinos agreed to buy United States dollars in exchange for Dominican pesos from the defendants. \textit{Id.} at 1336.}
\footnote{172. \textit{Id.} at 1338, 1340 n.10; see also 28 U.S.C. § 1332(a) (2006). Section 1332(a) provides the following:}

\footnote{\textit{Id.} at 1339-40. Their Dominican citizenship destroyed full diversity under alienage jurisdiction because Molinos was also a Dominican citizen. \textit{Id.} at 1340. The Eleventh Circuit vacated judgment as it pertained to Carlos and Oscar Jr., and the court was faced with the remaining issue of whether it and the district court had subject matter jurisdiction over a suit between a Dominican corporation and a dual citizen of the United States and the Dominican Republic. \textit{Id.}}
jurisdiction over the action because Carlos and Oscar Jr., as Dominican Republic citizens, destroyed alienage jurisdiction from the initiation of the case. Finally, the defendants argue that the court should impute Dominican citizenship to Oscar Sr. because the "real actors" in the case, although not parties to the action, were citizens of the Dominican Republic. The Eleventh Circuit addressed each argument in turn.

In its analysis of the defendants' first argument, the Eleventh Circuit summarized alienage jurisdiction, and then addressed, as a matter of first impression, "whether aliens may sue individuals who are dual United States citizens under alienage jurisdiction." Recognizing that the courts of appeals in deciding this issue "have uniformly held that, for diversity purposes, courts should consider only the United States citizenship of individuals who are dual citizens"; the Eleventh Circuit was "persuaded by the reasoning of these courts and therefore [held] that an individual who is a dual citizen of the United States and another nation is only a citizen of the United States for the purposes of diversity jurisdiction under § 1332(a)." This holding meant that Oscar Sr.'s dual citizenship posed no bar to the court's jurisdiction over him.

The court next turned to the "more difficult question," of whether it was required to "dismiss the entire case and vacate the judgment for lack of subject matter jurisdiction because neither Carlos nor Oscar Jr. were proper parties." Appellate courts have the power "to rescue an
otherwise valid judgment by dismissing non-diverse parties, but "only if no party will be prejudiced by the dismissal." To determine if the dismissal of Oscar Jr. and Carlos would prejudice another party, the court relied on the two factors established under the *Newman Green, Inc. v. Larrain*, framework: (1) "whether the non-diverse party is indispensable under Rule 19[,]" and (2) "whether the presence of the non-diverse party provided the other side with a tactical advantage in the litigation." Under the first Newman-Green factor, the court assumed Carlos and Oscar Jr. were required parties, but held that Oscar Sr. had not shown that they were indispensable under Rule 19(b). The court also found that the second Newman-Green factor favored dismissal. Thus, the Eleventh Circuit held that Oscar Sr. would not face prejudice as the sole defendant in the action and dismissed Carlos and Oscar Jr. pursuant to Rule 21.

Next, the court examined Oscar Sr.'s final argument against jurisdiction—that the court should impute Dominican citizenship to Oscar Sr. because the real actors in the case, although not parties to the action,

182. *Id.*; see also *Fed. R. Civ. P. 21*. Rule 21 of the Federal Rules of Civil Procedure provides that "[a]lisjoiner of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against any party."

183. *Molinos*, 633 F.3d at 1343. The Supreme Court has cautioned appellate courts to use Rule 21 sparingly. However, the Eleventh Circuit also recognized the somewhat contradictory policy laid out by the United States Supreme Court regarding Fed. R. Civ. P. 21—the Supreme Court has stated that "[i]nce a diversity case has been tried in federal court, . . . considerations of finality, efficiency, and economy become overwhelming." *Molinos*, 633 F.3d at 1343. In light of this, the Eleventh Circuit noted that it was "[k]eeping in mind that this case has already been to a jury trial" when conducting its analysis under Rule 21. *Id.*

184. 490 U.S. 826 (1989). In *Newman Green*, the United States Supreme Court set forth the framework for establishing that a party will be prejudiced by dismissing non-diverse parties. *Id.* at 828.


186. *Molinos*, 633 F.3d at 1343-44.

187. *Id.* at 1344. In its analysis, the court noted that Rule 19 is a two-step inquiry: (1) whether the parties are "required" parties, and (2) if the parties are required, but cannot be joined, whether in equity and good conscience, the action should proceed among the existing parties or should be dismissed. *Id.; see also Fed. R. Civ. P. 19.* The Eleventh Circuit looked at all the factors under Rule 19, but found they weighed against dismissal. *Molinos*, 633 F.3d at 1344.

188. *Molinos*, 633 F.3d at 1344-45. "Tactical advantages include access to otherwise unavailable discovery materials only because of the presence of the improper party." *Id.* at 1345. The court found that no such "otherwise unavailable discovery" was at issue in *Lamas* and also recognized that "even if Oscar Sr. did suffer a tactical disadvantage, he had the power to remedy that issue" by challenging jurisdiction earlier in the action. *Id.*

189. *Id.* at 1345.
were citizens of the Dominican Republic. However, the court determined that this argument also failed, concluding that the district court had alienage jurisdiction over Oscar Sr. and that the Eleventh Circuit could properly hear arguments on the merits of Oscar Sr.'s remaining claims of error on appeal.

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190. Id. at 1345-46. Oscar Sr. alternatively argued that the real actors are indispensable parties under Rule 19. Id. However, the court rejected this argument as well because Oscar Sr. failed to put forth any reason why he or the absent parties would be prejudiced if the real actors were not parties to the case. Id. at 1346-47.

191. Id. at 1347. Oscar Sr. supported his imputation argument by comparing the facts at issue to a case involving corporate law, Freeman v. Northwest Acceptance Corp., 754 F.2d 553 (5th Cir. 1985), wherein the United States Court of Appeals for the Fifth Circuit imputed a subsidiary's citizenship to the parent corporation and, in doing so, destroyed complete diversity. Molinos, 633 F.3d at 1346. The Eleventh Circuit held that Freeman's logic is "inapposite when applied to individuals," recognizing numerous distinctions between corporations and individuals relating to citizenship and rejecting Oscar Sr.'s imputation argument. Id. at 1346-47. The court reasoned that corporations are "citizens" in a diversity analysis wherever they are incorporated and where they have their principal place of business, and thus corporations may be citizens of multiple states. Id. at 1346. Additionally, corporations can merge and re-form themselves "wherever and in as many states as they please," but individuals are only citizens of the states in which they are domiciled and have only one domicile—individuals "cannot choose to split their identities and 'incorporate' in a second state." Id.

192. Molinos, 633 F.3d at 1347.