Mercer Law Review

Volume 64
Number 4 *Eleventh Circuit Survey*

Article 4

7-2013

Class Actions

Thomas M. Byrne

Stacey McGavin Mohr

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**by Thomas M. Byrne*
and Stacey McGavin Mohr****

This year saw the United States Court of Appeals for the Eleventh Circuit set the ground rules for collateral attacks on class settlements and elaborate on the predominance requirements for class certification.[1] The court also considered the enforceability of a variety of arbitration provisions in light of the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[2] and examined standing issues common in data security breach class actions.

I. COLLATERAL ATTACK ON A LIMITED FUND SETTLEMENT

In *Juris v. Inamed Corp.*,[3] the Eleventh Circuit considered several issues related to the ability of an absent class member to collaterally attack a "limited fund" class settlement. In 1999, the United States District Court for the Northern District of Alabama had approved a mandatory, limited fund class settlement under Federal Rule of Civil Procedure 23(b)(1)(B)[4] resolving thousands of claims arising from injuries allegedly caused by defective silicone breast implants manufac-

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* Partner in the law firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. University of Notre Dame (A.B., cum laude, 1978; J.D., magna cum laude, 1981). Law clerk to the Hon. Robert A. Ainsworth, Jr. of the United States Court of Appeals for the Fifth Circuit and to the Hon. Morey L. Sear of the United States District Court for the Eastern District of Louisiana. Member, State Bar of Georgia.

** Associate in the law firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. Emory University (B.A., 2001); Duke University School of Law (J.D., magna cum laude, 2007). Law clerk to the Hon. Karen Nelson Moore of the United States Court of Appeals for the Sixth Circuit. Member, State Bar of Georgia.

1. For an analysis of Eleventh Circuit class action law during the prior survey period, see Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 63 MERCER L. REV. 1183 (2012).

2. 131 S. Ct. 1740 (2011).

3. 685 F.3d 1294 (11th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3274 (Jan. 14, 2013). The opinion of the court was authored by Judge R. Lanier Anderson III.

4. FED. R. CIV. P. 23(b).

tured by Inamed.[5] The settlement fund was conditioned on the inclusion of an anti-suit injunction that encompassed not only current injury claims but also any claims based on future injuries. In 2006, after discovering she had been injured by the allegedly defective implants, Zuzanna Juris filed an individual action in California state court against Inamed and its successor. The defendants filed a demurrer in the California court on res judicata grounds, to which Juris responded that the application of res judicata would deprive her of due process. The defendants then filed a motion in the Alabama district court requesting that Juris and her attorney show cause why they could not be held in contempt for violating the anti-suit injunction, and the parties jointly requested that the California action be stayed pending a decision from the Alabama district court.[6] Rejecting Juris's many arguments—based on the application of Rule 23(b)(1)(B), due process, and the Anti-Injunction Act[7]—the district court ruled that the class settlement and anti-suit injunction precluded the California action under the doctrine of res judicata and denied Juris's due process challenge.[8]

The Eleventh Circuit affirmed in a lengthy opinion addressing several aspects of the limited fund class action, the res judicata effect of prior settlements, and due process. The court first concluded that Juris could collaterally attack the res judicata effect of the settlement, but that she must show that application of res judicata would be inconsistent with due process.[9] Specifically, she would have to show that the prior proceeding lacked adequate representation or notice or that the absence of opt-out rights amounted to a denial of due process.[10] The court left open the question of whether such collateral review must be limited to preclude Juris from raising arguments already raised and rejected in the class action court, ultimately concluding that, even considering these arguments, Juris could not show a violation of due process.[11]

Before proceeding to the due process arguments, the court addressed Juris's contention that the California state court, rather than the Alabama district court, was the proper forum for her collateral attack.[12] The court ultimately dismissed this argument on the basis that Juris had herself consented to jurisdiction by filing a joint motion staying the

5. *Juris*, 685 F.3d at 1301, 1306.
6. *Id.* at 1308-10.
7. 28 U.S.C. § 2283 (2006).
8. *Juris*, 685 F.3d at 1310-12.
9. *Id.* at 1312-14.
10. *Id.* at 1312-13.
11. *Id.* at 1314 n.16.
12. *Id.* at 1314.

California action and also had abandoned the argument by not raising it below.[13] First, however, the court discussed at some length the implications of a decision from the United States Court of Appeals for the Third Circuit, *In re Real Estate Title & Settlement Services Antitrust Litigation*,[14] which held that if an absent class member has not been given the opportunity to opt out in a class action involving injunctive relief and damages claims, the member could not be "haled across the country" but must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.[15] *Real Estate*, however, did not involve a limited fund settlement, and the Third Circuit had specifically stated that it was not addressing the due process requirements in a limited fund class action.[16] And because Juris had consented to jurisdiction, the Eleventh Circuit did not address the issue left open in *Real Estate*: "[W]hether, in the absence of her express consent to jurisdiction, it would have run afoul of the due process clause to require Juris to litigate her collateral attack on the limited fund settlement in the certifying court."[17]

Turning to the merits of Juris's due process argument, the court considered in sequence her three possible bases: notice, representation, and lack of opt-out rights.[18] As to notice, the court rejected Juris's argument that she was entitled to actual, individual notice of the proposed settlement, focusing instead on whether the notice was sufficient to produce a hearing that was adversarial in nature.[19] Although Rule 23 does not require notice for 23(b)(1) classes, the Eleventh Circuit had previously held in *In re Temple*[20] that due process will require some notice beyond adequate representation in a 23(b)(1)(B) class action, given its mandatory nature.[21] In *Temple*, however, no

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13. *Id.* at 1314-16 & n.19.
14. 869 F.2d 760 (3d Cir. 1989).
15. *Juris*, 685 F.3d at 1314-15.
16. *Id.* at 1315 (quoting *Real Estate*, 869 F.2d at 768).
17. *Id.* at 1316.
18. *Id.* at 1316-33.
19. *Id.* at 1316-21. Noting that it was not fairly raised in Juris's briefs, the court left open the question of whether the United States Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), dictates that notice to exposure-only, future claimants can ever be constitutionally sufficient. The district court had distinguished the current situation because, unlike the claimants in *Amchem*, who may not have known that they had even been exposed to asbestos at the time of the settlement, class members here knew that they had been exposed to the implants, even if no injury was yet apparent. *Juris*, 685 F.3d at 1327 n.21.
20. 851 F.2d 1269 (11th Cir. 1988).
21. *Juris*, 685 F.3d at 1318.

notice had been provided, making it essentially an ex parte proceeding.[22] *Temple* therefore does not require actual, individual notice, just enough notice to prevent the certification proceeding from being essentially non-adversarial: "Where the notice afforded reaches a critical mass of putative class members, such that the facts underlying certification are contested and approached in a sufficiently adversarial manner, the due process pitfall identified in *Temple* can be avoided."[23] Here, the court directed the distribution of individual notices to tens of thousands of claimants, and notices were published in multiple national publications. Moreover, class members who had no manifest injury were at the hearing and represented Juris's interests, making the proceeding "sufficiently adversarial."[24] Indeed, Juris could think of no objection that she would have raised that was not actually raised by objectors at the hearing.[25] The court therefore refused to hold that actual, individual notice is necessary for a 23(b)(1)(B) class.[26]

The court similarly rejected Juris's argument that her interests were not adequately represented during the certification proceedings, again pointing out their adversarial nature.[27] Juris argued that the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*[28] and *Ortiz v. Fibreboard Corp.*,[29] both of which involved plaintiffs claiming asbestos-related injuries, required the creation of two distinct subclasses—one composed of plaintiffs with current injuries and one for plaintiffs with only potential, future injuries—with separate class representatives for each.[30] In *Amchem*, the Court had reversed the grant of class certification based on failure to meet Rule 23(a)(4)'s[31] adequate representation requirement.[32] There, the "'sprawling class' included not only presently injured [plaintiffs], but also those who had only been exposed to asbestos" but had no manifest injury, so that the interests of the currently injured in having immediate payment cut directly against those of the potentially injured in having an ample fund for the future.[33] The Court subsequently held in *Ortiz* that this same principle

22. *Id.* at 1319 (citing *Temple*, 851 F.3d at 1272).
23. *Id.* at 1318.
24. *Id.* at 1319.
25. *Id.*
26. *Id.* at 1321.
27. *Id.* at 1322-29.
28. 521 U.S. 591 (1997).
29. 527 U.S. 815 (1999).
30. *Juris*, 685 F.3d at 1322-23.
31. FED. R. CIV. P. 23(a)(4).
32. *Juris*, 685 F.3d at 1322 (citing *Amchem*, 521 U.S. at 625).
33. *Id.* (quoting *Amchem*, 521 U.S. at 602-03).

of Rule 23(a)(4) was applicable to consideration of the propriety of certification of a limited fund class under Rule 23(b)(1)(B).[34] The Eleventh Circuit clarified, however, that *Amchem* and *Ortiz* simply require that there be structural assurances of adequate representation to protect against conflicting goals: "[P]rotections must ensure that class representatives understand that their role is representing solely members of their respective constituency, not the whole class."[35] But such protections need not necessarily be in the form of formal subclasses. *Amchem* and *Ortiz*, moreover, involved a direct appeal of a Rule 23 certification, not a collateral attack, and the Eleventh Circuit refused to go so far as to hold that due process requires formal subclasses.[36] Again, the procedures in *Juris* adequately protected against antagonistic alignment within the class: the named plaintiffs had a range of injuries, from current to potential, and separate counsel was brought in to represent the future injury plaintiffs.[37]

The court likewise concluded that due process did not require that Juris be given opt-out rights.[38] Juris's argument was based primarily on her lack of contacts with Alabama, which she claimed had deprived the court of personal jurisdiction,[39] giving her a constitutional right to opt out under the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*.[40] *Shutts*, which involved a money damages class, held that the class action court properly exercised personal jurisdiction over absent class members because certain procedural protections, such as opt-out rights, were present.[41] *Shutts*, however, would not apply where an independent basis for personal jurisdiction exists, such as in a limited fund class action, where the presence of the res in the district of the forum court provides such jurisdiction.[42] Here, the limited recovery fund had been deposited in a settlement account in Alabama, giving the Alabama district court jurisdiction.[43] Noting that it was not fairly raised on appeal, the court declined to address the broader argument of whether opt-out rights are required even where personal jurisdiction exists.[44]

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34. *Id.* at 1323 (citing *Ortiz*, 527 U.S. at 856).
35. *Id.*
36. *Id.* at 1323-24.
37. *Id.* at 1324.
38. *Id.* at 1329-33.
39. *Id.* at 1329.
40. 472 U.S. 797 (1985).
41. *Juris*, 685 F.3d at 1329-30.
42. *Id.* at 1330-32.
43. *Id.* at 1332.
44. *Id.* at 1333 n.40.

Having concluded that Juris was not deprived of due process, the court dispensed with her argument that certification of the class had not met the requirements of Rule 23, concluding that the district court properly held such arguments precluded by res judicata.[45] First, however, the court reviewed the minimum requirements for certification of a limited fund class under Rule 23, as described in *Ortiz*, and noted that *Ortiz* left open the questions of what more might be needed and whether a mandatory limited fund can be used to settle tort claims.[46] Again noting that *Ortiz* was a direct appeal of a Rule 23 certification and not a collateral attack in which the issues were limited to whether due process was met, the court declined to reach these questions.[47]

Finally, the court rejected Juris's argument that the Anti-Injunction Act barred the district court from enjoining her California state court action.[48] Citing multiple alternative rationales for its conclusion, including that the Act would not apply because the anti-suit injunction was issued before the California action was even initiated, the court found that both the "necessary in aid of jurisdiction" and the relitigation exceptions applied, allowing an injunction.[49]

In concluding its opinion, the court was careful to emphasize the collateral posture of the case and that the original order certifying the class and approving the settlement was not before the court on direct appeal.[50] Larger questions about the nature of limited fund classes in a post-*Ortiz* world—such as the requirements of a Rule 23(b)(1)(B) class and whether a limited fund class ever should be used to settle aggregated tort claims—remain unanswered. *Juris* instead underscores the long odds facing absent class members attempting to collaterally attack class certification and settlement.

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45. *Id.* at 1334-36.

46. *Id.* at 1334.

47. *Id.* at 1336. The court also declined to reach the issue, raised by the United States Court of Appeals for the Second Circuit in *Findley v. Blinken* (*In re Joint Eastern & Southern District Asbestos Litigation*), 982 F.2d 721 (2d Cir. 1992), of whether the use of a limited fund class in situations where there is a likelihood that an aggregate of tort claims would render a defendant insolvent would improperly circumvent the protections of the Bankruptcy Code. In dismissing this argument, the court noted the Supreme Court's statement in *Ortiz* that "there is no inherent conflict between a limited fund class action under Rule 23(b)(1)(B) and the Bankruptcy Code." *Juris*, 685 F.3d at 1336 n.44 (quoting *Ortiz*, 527 U.S. at 860 n.34).

48. *Juris*, 685 F.3d at 1338-40.

49. *Id.*

50. *Id.* at 1340.

II. CLASS CERTIFICATION

The year also saw the Eleventh Circuit review denials of class certification in two related cases, both focusing on the predominance of individual over class issues. *Coastal Neurology, Inc. v. State Farm Mutual Automobile Insurance Co.*[51] and *DWFII Corp. v. State Farm Mutual Automobile Insurance Co.*[52] both involved claims by health care providers who delivered services to individuals covered under State Farm's no-fault personal injury protection and billed State Farm under an assignment of benefits. The providers claimed that State Farm's use of National Correct Coding Initiative (NCCI) edits to limit the providers' reimbursements violated Florida's no-fault law[53] and sought to certify classes of providers who had had claims reduced or denied by State Farm based on an NCCI edit.[54] Both cases were before the same district judge in the Southern District of Florida, who denied class certification in both cases, based primarily on the failure to meet the typicality prerequisite for class certification under Rule 23(a)[55] and the predominance requirement for a Rule 23(b)(3) class.[56]

The Eleventh Circuit made short work of affirming the denials of class certification. First, in *Coastal Neurology*, the court concluded that the district court did not err in taking into account the individualized defenses that State Farm would have to the proposed class members' claims, as the court had previously held in *Klay v. Humana, Inc.*[57] that the predominance analysis "must take into account the claims, defenses, relevant facts, and applicable substantive law."[58] Citing several of its previous class action opinions, as well as the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,[59] the court reaffirmed that, although the district court may not resolve the merits of claims, "the court may, and sometimes must, inquire into the merits in order to determine whether the requirements of Rule 23 have been satisfied."[60] And the

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51. 458 F. App'x 793 (11th Cir. 2012) (per curiam).

52. 469 F. App'x 762 (11th Cir. 2012) (per curiam).

53. FLA. STAT. § 627.736 (2011).

54. Coastal Neurology, Inc. v. State Farm Mut. Auto. Ins. Co., 271 F.R.D. 538, 542 (S.D. Fla. 2010); DWFII Corp. v. State Farm Mut. Auto. Ins. Co., 271 F.R.D. 676, 681 (S.D. Fla. 2010).

55. *Coastal Neurology, Inc.*, 271 F.R.D. at 547; *DWFII*, 271 F.R.D. at 687-88.

56. *Coastal Neurology, Inc.*, 271 F.R.D. at 544-45; *DWFII*, 271 F.R.D. at 685.

57. 382 F.3d 1241 (11th Cir. 2004).

58. *Coastal Neurology, Inc.*, 458 F. App'x at 794 (quoting *Klay*, 382 F.3d at 1254).

59. 131 S. Ct. 2541 (2011). For a discussion of *Wal-Mart Stores v. Dukes* in last year's survey, see Byrne & Mohr, *supra* note 1, at 1183-86.

60. *Coastal Neurology, Inc.*, 458 F. App'x at 794.

district court's language about "permissible" and "impermissible" edits did not indicate a foray into the merits of the case but instead was used to differentiate the varying defenses that would be available to State Farm in individual cases.[61] The court also rejected the argument that State Farm had waived its right to assert individual defenses by not listing them in an "itemized specification" during the claims review process, as Florida's no-fault law allows insurers to raise such defenses to claims "at any time."[62]

DWFII, decided after *Coastal Neurology*, also affirmed the district court's predominance analysis, citing the same proposition from *Klay*.[63] Although the court first concluded that DWFII had not satisfied the typicality requirement, the typicality analysis overlapped substantially with the predominance analysis: typicality was lacking because, even if the class could show that the NCCI edits were impermissible, "each individual medical service provider in the class must still demonstrate that it is entitled to reimbursement for the disputed charges," meaning that "each claim would require the establishment of different facts and would be subject to different defenses."[64] Again focusing on the predominance of individualized issues, the court rejected the plaintiff's attempt to craft a Rule 23(b)(2) injunctive-relief class, concluding that the monetary relief sought was not incidental to the requested injunctive relief.[65] Specifically, money damages are incidental only when entitlement to damages would be automatic upon a judgment of liability to the class "and awarding them 'should not entail complex individualized determinations.'"[66] Money damages therefore could not be incidental given the necessity of establishing individual facts regarding the services performed and amounts billed and reimbursed to determine the appropriate monetary recovery.

Coastal Neurology and *DWFII*, although not focusing on Rule 23(a) commonality, followed the rationale of *Dukes* in requiring the consideration of individualized claims and defenses and recognizing that such examination may require inquiry into the merits of claims. Next year may see the Eleventh Circuit more closely examine these issues as it sees more cases involving district courts' application of *Dukes*, as well as

61. *Id.* at 795.
62. *Id.*; *see also* FLA. STAT. § 627.736(4)(b).
63. 469 F. App'x at 765.
64. *Id.* at 764-65.
65. *Id.* at 765.
66. *Id.* (quoting Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001)).

the Supreme Court's more recent decision in *Comcast Corp. v. Behrend*.[67]

III. ARBITRATION AND CLASS ACTIONS

The Eleventh Circuit dealt with a series of cases involving application of the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,[68] which held that the Federal Arbitration Act[69] preempts state law rules that prohibit class action waivers in arbitration agreements.[70] Most of those cases arose from the consolidation by the Judicial Panel on Multidistrict Litigation (MDL) in the Southern District of Florida of putative class actions involving challenges to bank overdraft fees. The MDL proceeding was assigned to Judge James L. King.

In one such case, *Garcia v. Wachovia Corp.*,[71] the issue presented was waiver of arbitration. The defendant bank sought to enforce an arbitration provision, but the plaintiffs countered that any right to arbitration had been waived by litigating. The district court in fact had twice invited the bank to move to compel arbitration, first in 2009 and again in 2010, but the bank declined those invitations,[72] likely because of concerns that the motion might be granted and a risky class arbitration, then a distinct possibility, might be the result. The bank instead filed a motion to dismiss, which was denied in most respects. At one point, the bank affirmatively stated that it declined to elect to arbitrate the disputes and would not seek arbitration in the future. There was extensive discovery, including approximately twenty depositions, and other motion practice.[73]

In 2011, two days after the United States Supreme Court decided *Concepcion*, the bank filed a motion to dismiss the five putative class actions filed against it in favor of arbitration or for a stay pending arbitration.[74] After the district court denied this motion on the ground that the bank had waived arbitration by proceeding with the litigation and declining to move to arbitrate sooner, the bank appealed.[75]

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67. 133 S. Ct. 1426 (2013).
68. 131 S. Ct. 1740 (2011).
69. 9 U.S.C. §§ 1-16 (2006).
70. 131 S. Ct. at 1753.
71. 699 F.3d 1273 (11th Cir. 2012). The opinion for the court was authored by Judge William H. Pryor, Jr.
72. *Id.* at 1275-76.
73. *Id.* at 1276.
74. *Id.*
75. *Id.* at 1277.

The Eleventh Circuit explained that it applies a two-part test to decide whether a right to arbitrate has been waived by a litigant.[76] First, the court decides, under the totality of the circumstances, whether the litigant has acted inconsistently with an arbitration right.[77] Second, the court examines whether the other party has been prejudiced by the length of delay in demanding arbitration and the expense incurred in the litigation process.[78] The court concluded that the bank acted inconsistently with its arbitration right by its failure to move for arbitration and its statement that it did not intend to seek arbitration in the future.[79] The court also decided that the plaintiffs would suffer substantial prejudice if arbitration were compelled, given their substantial expenditures of resources in prosecuting the litigation.[80] Finally, the court noted that the bank benefited from conducting discovery of the plaintiffs—a benefit to which, the court assumed, it would not have been entitled during arbitration.[81]

The bank argued that it would have been futile to move for arbitration before *Concepcion*.[82] The court responded that "absent controlling Supreme Court or circuit precedent foreclosing a right to arbitrate, a motion to compel arbitration will almost never be futile."[83] The court rejected the bank's argument that the futility doctrine excuses a failure to move to compel arbitration even if it appears the motion would be unlikely to succeed.[84]

The result in *Garcia* is hardly surprising, given the bank's renunciation of arbitration and the duration and progress of the litigation. *Garcia* can be usefully contrasted, however, with the court's 2011 decision in *Krinsk v. SunTrust Banks, Inc.*,[85] in which the court held that the filing of a substantially amended complaint revived a bank's previously waived arbitration right.[86]

Several of the overdraft fee arbitration MDL cases presented unconscionability challenges to fee-shifting arbitration provisions. In

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76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1278.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1278-79.
85. 654 F.3d 1194 (11th Cir. 2011). This decision is analyzed in the 2011 survey. *See* Byrne & Mohr, *supra* note 1, at 1190-91.
86. *Krinsk*, 654 F.3d at 1203-04.

Green Tree Financial Corp.-Alabama v. Randolph,[87] the Supreme Court acknowledged that an arbitration agreement may not be enforceable where the costs imposed on one party were so severe that its statutory rights could not be vindicated.[88] The burden to demonstrate prohibitive costs is on the party opposing arbitration.[89] This possibility survived *Concepcion*, though the issue is again before the Supreme Court during its 2012 term.[90]

In *Buffington v. SunTrust Banks, Inc.* (*In re Checking Account Overdraft Litigation MDL No. 2036*),[91] the district court had denied SunTrust's motion to compel arbitration on the ground that the arbitration provision in the account agreement was substantively unconscionable under Georgia law because of its class action waiver, but the Eleventh Circuit vacated that ruling and remanded the case for further consideration in light of *Concepcion*.[92] On a renewed motion to compel, after remand, the district court denied the motion on the ground that the arbitration provision was substantively unconscionable because provisions granting SunTrust the right to recover its expenses for arbitration allocated disproportionately to the plaintiffs the risks of error and loss inherent in dispute resolution.[93]

On appeal, the Eleventh Circuit again vacated the district court's opinion.[94] There was no dispute in the district court that the arbitration provision covered the controversy between the plaintiffs and SunTrust. But the plaintiffs argued that the provision was procedurally unconscionable under Georgia law because it was not presented conspicuously and was offered on a take-it-or-leave-it basis.[95] The plaintiffs also argued that the provision was substantively unconscionable because the potential recovery was limited, yet the cost of arbitration, including the possibility of having to reimburse SunTrust for its expenses as a prevailing party, was substantial.[96] The plaintiffs based their arguments concerning substantive unconscionability on a provision that stated that "[t]he prevailing party shall be entitled to an award of

87. 531 U.S. 79 (2000).

88. *Id.* at 90-91.

89. *Id.* at 91-92; *see* Anders v. Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1028 (11th Cir. 2003).

90. Am. Express Co. v. Italian Colors Rest., 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012).

91. 459 F. App'x 855 (11th Cir. 2012).

92. *Id.* at 856-57.

93. *Id.* at 858.

94. *Id.* at 859.

95. *Id.* at 857.

96. *Id.* at 857-58.

the costs and expenses of the arbitration including an award of reasonable attorneys' fees . . . ."[97] The Eleventh Circuit, however, rejected these arguments.[98] The court reversed the district court's holding that the arbitration provision was procedurally unconscionable.[99] The court reasoned that, under Georgia law, for a contract to be procedurally unconscionable, "[it] must be 'so one-sided' that 'no sane man not acting under a delusion would make and that no honest man would' participate in the transaction."[100] The court also pointed out that mere inequality in bargaining power was insufficient under Georgia law to render a contract unenforceable.[101]

The court concluded that there was no merit in the plaintiffs' arguments that the arbitration provision was insufficiently conspicuous, noting that the provision employed bold-faced type in explaining what kinds of disputes were subject to arbitration and that the provision was capitalized in the table of contents in the agreement.[102] The court also pointed out that the Supreme Court had invalidated state law provisions that place arbitration provisions on unequal footing relative to other kinds of contractual provisions, and that the plaintiffs cited no law requiring that arbitration provisions be conspicuous.[103] The court also rejected the plaintiffs' substantive unconscionability arguments.[104]

In *Hough v. Regions Financial Corp. (In re Checking Account Overdraft Litigation MDL No. 2036)*,[105] a decision issued four days after the decision in *Buffington*, the court rejected unconscionability attacks under Georgia law on enforcement of another bank's arbitration provision.[106] Judge King had held that the provision, found in a Regions Bank arbitration agreement, was unconscionable because it included a class action waiver. After *Concepcion* was decided and that order was vacated, Regions renewed its motion to compel, but the district court denied the motion because of Regions's unilateral right to recover its expenses—the same ground the court addressed in *Buffington*. The Regions provision capped the customer's cost for the arbitration proceeding at $125. However, the provision also required the customer

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97. *Id.* at 857 (alteration in original).
98. *Id.* at 858.
99. *Id.* at 858-59.
100. *Id.* at 858 (quoting NEC Techs., Inc. v. Nelson, 267 Ga. 390, 391 & n.2, 478 S.E.2d 769, 771 & n.2 (1996)).
101. *Id.* at 859.
102. *Id.*
103. *Id.*
104. *Id.* at 858.
105. 672 F.3d 1224 (11th Cir. 2012).
106. *Id.* at 1230.

to reimburse Regions if it was the prevailing party for the costs of arbitration. The provision granted Regions a setoff right for any such award as well.[107]

Regions argued in the district court that the arbitration provision delegated all questions of arbitrability to the arbitrator. The plaintiff-customers contended that the delegation of all disputes to the arbitrator was itself substantively unconscionable. Judge King held that Regions had waived its right to arbitrate unconscionability by asking the district court to determine the question.[108]

The Eleventh Circuit agreed that Regions had waived its right to arbitrate unconscionability of its arbitration provision by failing to invoke the delegation clause in response to the customers' arguments about unconscionability.[109] The court cited its decision in *Doe v. Princess Cruise Lines, Ltd.*[110] as presenting the same facts and dictating the same result.[111] The court agreed with Regions, however, that the district court had erred on substantive unconscionability.[112] The court specifically rejected the setoff argument, reasoning that an arbitration provision is not unconscionable under Georgia law because of a lack of mutuality of remedy.[113] The court also rejected the customers' argument that the agreement was procedurally unconscionable on the same basis as the other panel's rejection of the same argument in *Buffington*.[114]

In yet another appeal from the checking overdraft MDL proceeding, *Barras v. Branch Banking & Trust Co. (In re Checking Account Overdraft Litigation MDL No. 2036)*,[115] the court dealt with unconscionability under South Carolina law. Again, the plaintiffs in the district court successfully attacked the fee-and-cost-shifting provision as unconscionable. The bank, Branch Banking & Trust Company (BB&T), appealed Judge King's denial of its motion to compel arbitration. BB&T argued that the fee-and-cost-shifting provision did not apply to arbitration because of the American Arbitration Association (AAA) rules. Specifically, BB&T argued that the AAA rules did not provide for cost-shifting and superseded the provisions of the agreement.[116] But the

107. *Id.* at 1226-28.
108. *Id.* at 1227-28.
109. *Id.* at 1228.
110. 657 F.3d 1204 (11th Cir. 2011).
111. *Hough*, 672 F.3d at 1228.
112. *Id.*
113. *Id.* at 1229.
114. *Id.* at 1229-30.
115. 685 F.3d 1269 (11th Cir. 2012).
116. *Id.* at 1273-75.

court agreed with Judge King's holding that the fee-and-cost-shifting provision was applicable to fees and costs arising from arbitration.[117] Turning to unconscionability, the court noted that "'generally applicable contract defenses' . . . are not preempted by the [Federal Arbitration Act (FAA),]" even under *Concepcion*.[118] The court deemed South Carolina's doctrine of unconscionability arbitration-neutral and thus enforceable, unlike the California law at issue in *Concepcion*.[119] The court reasoned that South Carolina's unconscionability provision was free to operate, notwithstanding the FAA, because it "is concerned with defects in the process of contract formation."[120]

Having determined that South Carolina's unconscionability doctrine was not preempted by the FAA, the court turned to whether the bank's arbitration provision was unconscionable. The court concluded that Barras lacked a meaningful choice in agreeing to the arbitration provision because of the element of surprise.[121] Although the arbitration provision itself was conspicuous, the cost-and-fee-shifting provision was found in an entirely separate part of the account agreement, with no cross-referencing.[122] A reader of the agreement, the court reasoned, would have thought that the arbitration provision was a comprehensive statement of all the rules governing an arbitration proceeding, but the fee-recovery provision was found elsewhere and would not have been discovered even on a thorough reading of the account agreement.[123] The court also determined that the agreement was substantively unconscionable because it would have forced Barras to pay the bank's cost of arbitration regardless of whether the bank actually prevailed in the dispute.[124] The court remarked that this provision "contravenes basic expectations that attorney's fees and costs generally are not recoverable by a non-prevailing party."[125] The Eleventh Circuit also affirmed Judge King's ruling that the bank had waived any right to submit the question of arbitrability to the arbitrator by submitting the same issue to the district court.[126]

The court then turned to the question of remedy. BB&T argued that the cost-and-fee-shifting provision should be severed and the balance of

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117. *Id.* at 1275-76.
118. *Id.* at 1277 (quoting *Concepcion*, 131 S. Ct. at 1746).
119. *Id.* at 1278.
120. *Id.*
121. *Id.* at 1279.
122. *Id.* at 1279-80.
123. *Id.* at 1280.
124. *Id.* at 1281-82.
125. *Id.* at 1281.
126. *Id.* at 1274-75.

the agreement enforced.[127] Barras argued that BB&T waived its right to argue severability by failing to raise that argument in the district court.[128] The Eleventh Circuit declined to consider the waiver question, finding that under South Carolina law, the court was empowered to limit the application of the cost-and-fee-shifting provision.[129] The court reasoned that the arbitration provision was capable of operating independently of the unconscionable cost-and-fee-shifting provision because of the incorporated AAA rules that governed all aspects of the arbitration proceeding, including costs.[130] Accordingly, the court concluded that the cost-and-fee-shifting provision was severable and that the arbitration could proceed.[131] BB&T thus lost most of the arguments—but still won the day.[132]

IV. DATA SECURITY BREACH CLASS ACTION

Data security breach class actions have been brought in many districts and recently have reached the appellate courts, primarily on standing issues.[133] In *Resnick v. AvMed, Inc.*,[134] the Eleventh Circuit considered an appeal of the dismissal of a data breach class action brought in the Southern District of Florida.[135] The complaint, as amended, alleged that AvMed, a health care services business, suffered the theft of two laptop computers stolen from its offices. The complaint alleged that AvMed did not take care to secure the laptops and the information on them was unencrypted. The complaint also alleged that the two named plaintiffs, who had never before suffered identity theft, were victims of identity theft within ten and fourteen months, respectively, after the laptop theft. The complaint provided details of each of the

127. *Id.* at 1283.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. In *Powell-Perry v. Branch Banking & Trust Co.*, 485 F. App'x 403 (11th Cir. 2012), the court considered another BB&T appeal. The court ruled that North Carolina law similarly permitted severance of the cost-and-fee-shifting provision from the arbitration provision. *Id.* at 406-07.
133. *See* Reilly v. Ceridian Corp., 664 F.3d 38 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2395 (2012); Anderson v. Hannaford Bros. Co., 659 F.3d 151 (1st Cir. 2011); Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629 (7th Cir. 2007).
134. 693 F.3d 1317 (11th Cir. 2012).
135. *Id.* at 1321.

identity thefts involved. The district court dismissed the complaint, however, on the grounds that it failed to allege a cognizable injury.[136]

On appeal, the Eleventh Circuit first considered whether the named plaintiffs had Article III standing to bring such an action.[137] In a section of the opinion in which all judges concurred, the court held that the plaintiffs had sufficiently alleged the required injury-in-fact, that the injury was "fairly traceable" to the defendant's conduct, and that it was redressable.[138]

The court then turned to whether a cognizable injury had been sufficiently alleged under Florida law.[139] The court reasoned that six of the seven counts required a plaintiff to show that the defendant's challenged action caused the plaintiff's harm.[140] The court noted that it was not bound to accept the plaintiffs' legal conclusion, set out in the complaint, that the defendant's data breach caused the identity theft.[141] But the court determined that the complaint sufficiently alleged a nexus between the data breach and the identity thefts beyond mere allegations of time and sequence.[142] Citing a Ninth Circuit opinion, the court concluded that the plaintiffs' complaint indicated a logical connection between the two incidents.[143] Specifically, the court pointed out that the complaint alleged the sensitive information on the stolen laptops was the same sensitive information used to steal the plaintiffs' identities.[144] The court consequently vacated the dismissal of all counts, except a count for violation of a Florida statute concerning confidentiality of medical information (which was inapplicable to AvMed) and a count for violation of the implied covenant of good faith and fair dealing (which is not an independent cause of action under Florida law).[145]

In dissent, Judge William H. Pryor Jr. parted company with the majority on the plausibility of the causation allegations.[146] Judge Pryor concluded that "it is equally conceivable, in the light of the facts

136. *Id.* at 1322-23.
137. *Id.* at 1323.
138. *Id.* at 1323-24.
139. *Id.* at 1325.
140. *Id.*
141. *Id.* at 1326.
142. *Id.* at 1327.
143. *Id.* (citing Stollenwerk v. Tri-West Health Care Alliance, 254 F. App'x 664, 667 (9th Cir. 2007)).
144. *Id.*
145. *Id.* at 1328-29.
146. *Id.* at 1330 (Pryor, J., dissenting).

alleged in the complaint, that the unknown identity thieves obtained the information from third parties."[147]

147. *Id.* at 1331.

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