Trial Practice and Procedure

John O'Shea Sullivan
Ashby Kent Fox
Amanda E. Wilson

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol64/iss4/10

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Trial Practice and Procedure

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

The 2012 survey period yielded several noteworthy decisions relating to federal trial practice and procedure in the United States Court of Appeals for the Eleventh Circuit, several of which involved issues of first impression. This Article analyzes recent developments in the Eleventh Circuit, including significant rulings in the areas of arbitration, statutory interpretation, subject matter jurisdiction, and civil procedure.¹

I. SUBJECT MATTER JURISDICTION—WHETHER A DISSOLVED CORPORATION HAS A PRINCIPAL PLACE OF BUSINESS FOR PURPOSES OF DIVERSITY JURISDICTION

In Holston Investments, Inc. B.V.I. v. LanLogistics Corp.,² the Eleventh Circuit addressed, as a matter of first impression, whether a dissolved or inactive corporation has a principal place of business for purposes of diversity jurisdiction.³ Holston Investments (Holston) sued LanLogistics Corporation (LanLogistics) for breach of contract in the

---

² 677 F.3d 1068 (11th Cir. 2012).
³ Id. at 1070.
United States District Court for the Southern District of Florida, alleging diversity jurisdiction. Holston was a citizen of Florida. LanLogistics was a Delaware corporation headquartered in Florida. When Holston filed suit, LanLogistics had dissolved and forfeited its authority to conduct business in Florida. 4 LanLogistics challenged the district court's subject matter jurisdiction and moved to vacate the final judgment. 5 LanLogistics argued that the court lacked subject matter jurisdiction because the corporation was a citizen of Florida, like Holston, and thus, pursuant to 28 U.S.C. § 1332, 6 the parties were not diverse. 7 The district court found that diversity jurisdiction existed, and LanLogistics appealed. 8

On appeal, the Eleventh Circuit noted that “[d]iversity jurisdiction is determined at the time the complaint was filed,” 9 and a corporation shall be deemed to be a citizen of both the state in which it was incorporated and the state where it has its principal place of business. 10 The court acknowledged that the purpose of diversity jurisdiction is to “provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries.” 11 Discussing whether complete diversity existed between Holston and LanLogistics, the court stated that “[t]he issue here is whether a dissolved or inactive corporation has a principal place of business.” 12 The court noted that it was a case of first impression for the Eleventh Circuit, and the others circuits are not in agreement. 13

The court first cited the United States Court of Appeals for the Second Circuit's finding that “a corporation's principal place of business must be identified regardless of whether the corporation is defunct.” 14 This approach recognized that a dissolved corporation may “still have a local

4. Id. at 1069-70.
5. Id. at 1070.
7. Holston, 677 F.3d at 1070. This statute provides that “[f]ederal courts have subject-matter jurisdiction over civil actions in which: (1) 'the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs'; and (2) the action is between 'citizens of different States.'” Id.; see also 28 U.S.C. § 1332(a)(1) (2006).
8. Holston, 677 F.3d at 1069.
9. Id. at 1070 (citing Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957) for the proposition that “[j]urisdiction, once attached, is not impaired by a party's later change of domicile.”).
12. Id.
13. Id.
14. Id. (citing W.M. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 141 (2d Cir. 1991)).
presence that would alleviate concerns about local bias." The Second Circuit found that if a dissolved corporation is deemed to be a citizen of the state where it last conducted business, that "ensures federal jurisdiction will not be extended to corporations to which Congress had no intention of providing the benefit." The United States Court of Appeals for the Third Circuit rejected finding a principal place if one does not exist. Thus, the court held that a "dissolved . . . corporation is a citizen only of the state in which it was incorporated."

By contrast, the United States Courts of Appeals for the Fourth and Fifth Circuits utilize the "facts and circumstances test," and held that "the extent of a corporation's local character drives the determination as to whether a principal place of business exists for purposes of federal jurisdiction." These circuits found that a state where a corporation had been inactive for a substantial period of time should not be deemed the corporation's principal place of business.

The Eleventh Circuit also looked to the United States Supreme Court's decision in *Hertz Corp. v. Friend,* which held that "simple jurisdictional tests are preferable even if application of the rule occasionally cuts against the basic rationale of [28 U.S.C.] § 1332." In *Hertz,* the Supreme Court reasoned that courts should require "straightforward rules under which they can readily assure themselves of their power to hear a case." Accordingly, the Supreme Court in *Hertz* held that a "corporation's principal place of business is determined [by] where the corporation's 'nerve center' is located."

---

15. Id.
16. Id. at 1070-71 (citing *Passalacqua Builders,* 933 F.2d at 141).
17. Id. at 1071 (citing *Midlantic Nat'l Bank v. Hansen,* 48 F.3d 693, 698 (3d Cir. 1995)).
18. Id. (citing *Midlantic Nat'l Bank,* 48 F.3d at 696).
19. Id. (citing *Harris v. Black Clawson Co.,* 961 F.2d 547, 551 (5th Cir. 1992)); see also *Athena Auto, Inc. v. DiGregorio,* 166 F.3d 288, 291 (4th Cir. 1999).
20. *Holston,* 677 F.3d at 1071 (citing *Harris,* 961 F.2d at 551).
21. Id.
22. 130 S. Ct. 1181 (2010).
23. *Holston,* 677 F.3d at 1071 (citing *Hertz,* 130 S. Ct. at 1193-94).
24. Id. (quoting *Hertz,* 130 S. Ct. at 1193). In *Hertz,* the Supreme Court held that complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.
25. Id. (quoting *Hertz,* 130 S. Ct. at 1193 (internal citations omitted)).
The Eleventh Circuit adopted the Third Circuit’s rule that a dissolved corporation lacks a principal place of business. The court held that this rule aligned closely with the Supreme Court’s analysis in *Hertz*, whereas the Second Circuit’s rule focused not on a corporation’s nerve center approach, but rather on where its business was last conducted. The Eleventh Circuit rejected the Second Circuit’s approach because, “under that rule a corporation could be considered a citizen of a state in which it was not a citizen before dissolution.”

Applying this analysis to the instant case, the Eleventh Circuit held that because LanLogistics had dissolved and lost its ability to conduct business in Florida at the time Holston filed suit, LanLogistics was not a citizen of Florida, but rather was only a citizen of Delaware, the state where it was incorporated. Thus, complete diversity of citizenship existed, and the district court had subject matter jurisdiction.

II. STATUTORY INTERPRETATION—WHETHER THE HOME AFFORDABLE MODIFICATION PROGRAM PROVIDES AN IMPLIED PRIVATE RIGHT OF ACTION TO BORROWERS

In *Miller v. Chase Home Finance, LLC*, the Eleventh Circuit addressed, for the first time in a published opinion, whether the Home Affordable Modification Program (HAMP) provides an implied private right of action to borrowers against loan servicers. In *Miller*, borrower Jason Miller (Miller) sued his mortgage lender, Chase Home Finance, LLC (Chase), alleging that Chase violated HAMP by declining to modify Miller’s loan. The United States District Court for the Northern District of Georgia dismissed Miller’s complaint, finding in pertinent part that HAMP did not provide a private right of action. Miller appealed and the Eleventh Circuit affirmed, holding that HAMP did not

26. *Id.* The court noted that “this bright-line rule may open federal courts to an occasional corporation with a lingering local presence, but undeserved access to a fair forum is a small price to pay for the clarity and predictability that a bright-line rule provides.” *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. 677 F.3d 1113 (11th Cir. 2012).
32. *Id.* at 1116.
33. *Id.* at 1115. The plaintiff alleged that Chase’s failure to give him a permanent loan modification gave “rise to claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) promissory estoppel.” *Id.*
provide borrowers with an express or implied private right of action to sue their loan servicers. The court noted that HAMP was promulgated by the Department of the Treasury, as part of the Emergency Economic Stabilization Act of 2008 (EESA). HAMP was designed to "prevent avoidable home foreclosures by incentivizing loan servicers to reduce the required monthly mortgage payments for certain struggling homeowners." Although loan servicers must abide by HAMP's guidelines when determining whether a borrower is eligible for a loan modification, the Treasury Secretary designated Freddie Mac to conduct compliance assessments of HAMP participants. Because "[n]either HAMP nor EESA expressly creates a private right of action for borrowers against loan servicers," the issue before the court was whether an implied private right of action exists under HAMP.

The court looked to the following factors in its analysis:

1. Is the plaintiff one of the class for whose especial benefit the statute was enacted?
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
3. Is it consistent with the underlying purposes of the legislative scheme to imply a remedy for the plaintiff?
4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Applying these factors to HAMP and EESA, the court held that it is "clear that no implied right of action exists."

First, the court noted that EESA and HAMP were designed to help restore stability to the nation's economy and were not passed for the "especial benefit" of homeowners, even though the homeowners may benefit from HAMP's incentives to loan servicers. Second, the court discerned no "legislative intent to create a private right of action" for borrowers under HAMP; rather, Congress gave the Treasury Secretary the right to bring a cause of action under the Administrative Procedure

34. Id. at 1115-17.
35. 12 U.S.C. §§ 5201-5261 (Supp. III 2009); Miller, 677 F.3d at 1115-16.
36. Miller, 677 F.3d at 1116.
37. Id. (citing U.S. Dep't of Treasury, Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages 27 (2011)).
38. Id. (emphasis added).
39. Id. (quoting Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1362 n.14 (11th Cir. 2008)).
40. Id.
41. Id.; see also 12 U.S.C. § 5201(1).
Third, the court held that a private right of action against mortgage servicers would contravene HAMP's purpose of encouraging servicers to modify loans, because a private right of action would likely discourage servicer participation based on fear of exposure to litigation. Finally, the court found that it should not infer a cause of action under HAMP because state law generally governs the law of contracts and real property.

The Eleventh Circuit concluded that because none of the relevant factors favored finding an implied private right of action under HAMP, the right does not exist. Thus, the Eleventh Circuit affirmed the District Court's finding that Miller lacked standing to pursue his claims against Chase insofar as they were premised on an alleged breach of HAMP obligations.

III. FAIR DEBT COLLECTION PRACTICES ACT

A. Whether a Defendant's Settlement Proposal Which Offers To Pay the Full Amount of Statutory Damages Requested, But Does Not Contain an Offer of Judgment Against Defendant, Moots a Plaintiff's Claims Under the Fair Debt Collection Practices Act

In Zinni v. ER Solutions, Inc., the Eleventh Circuit addressed whether a defendant's settlement proposal, which offered to pay the full amount of statutory damages requested under the Fair Debt Collection Practices Act (FDCPA) but did not contain an offer of judgment against the defendant, moots a plaintiff's claims under the FDCPA. In Zinni, the plaintiffs appealed the United States District Court for the Southern District of Florida's dismissal of their complaints against various debt-collector defendants for lack of subject matter jurisdiction. In each case, the plaintiffs sought to recover statutory damages and attorney fees and costs under the FDCPA, plus a judgment in their favor against the defendants. The defendants offered to settle the plaintiffs' claims.

42. Miller, 677 F.3d at 1116; see also 12 U.S.C. § 5229(a)(1).
43. Miller, 677 F.3d at 1116.
44. Id. (quoting Fidelity Fed. S & L Ass'n v. de la Cuesta, 458 U.S. 141, 174 (1982) (Rehnquist, J., dissenting)).
45. Id. (citing Thompson v. Thompson, 484 U.S. 174, 179 (1988) ("The intent of Congress remains the ultimate issue, however, and unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.").
46. Id. at 1117.
47. 692 F.3d 1162 (11th Cir. 2012).
49. 692 F.3d at 1163, 1166.
FDCPA claims for $1,001. This amount exceeded the maximum statutory damages available for an individual plaintiff under the FDCPA by one dollar.\(^5\) The defendants also offered to pay the plaintiffs' attorney fees and costs but did not specify the amount to be paid.\(^5\) The defendants did not offer to have judgment entered against them as part of the settlement.\(^5\)

The plaintiffs did not accept the settlement offers, and the defendants filed motions to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).\(^5\) The district court granted the motions, finding the settlement offers mooted the plaintiffs' claims and left the plaintiffs with "no remaining stake" in the litigation.\(^5\)

The plaintiffs appealed and the Eleventh Circuit reversed, holding that the settlement offers did not render the plaintiffs' claims moot or divest the district court of subject matter jurisdiction.\(^5\) In so holding, the Eleventh Circuit acknowledged that the issue of "whether [defendants'] settlement offers for the full amount of statutory damages requested under the FDCPA rendered [plaintiffs'] claims moot, requiring their dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)" was an issue of first impression in the Eleventh Circuit.\(^5\)

Analyzing the question of mootness, the court noted that "[a]n issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief"\(^5\) and noted that "[o]ffers for the full relief requested have been found to moot a claim." The plaintiffs argued that the offers to settle did not equal full relief because the defendants did not agree to an entry of judgment against them. Conversely, the defendants argued that the lack of an offer of judgment did not preclude a mootness finding.\(^6\)

---

50. Id. at 1163-66. "A debt collector can be held liable for an individual plaintiff's actual damages, statutory damages up to $1,000, costs, and reasonable attorney's fees." Id. at 1164 n.3 (quoting Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350, 1352 (11th Cir. 2009)); see also 15 U.S.C. § 1692k(a)(1)-(3).
51. Zinni, 692 F.3d at 1164.
52. Id. at 1164-65.
53. Id. at 1164; see also Fed. R. Civ. P. 12.
54. Zinni, 692 F.3d at 1164.
55. Id.
56. Id. at 1166 & n.7.
57. Id. at 1166 (quoting Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1218 (11th Cir. 2009)).
58. Id.
59. Id.
60. Id.
The Eleventh Circuit held that the defendants' failure to offer judgment as part of the settlement was critical to the mootness analysis because it demonstrated that the defendants had never offered the full relief requested by plaintiffs. The court held that a judgment was important to the plaintiffs because the district court could not enforce the settlement otherwise. Without an offer of judgment accompanying the settlement offers, the plaintiffs were left with a promise to pay, and if the defendants did not pay, the plaintiffs faced the prospect of having to file a new lawsuit to compel compliance.

In support of its holding, the Eleventh Circuit relied on the United States Court of Appeals for the Fourth Circuit's decision in Simmons v. United Mortgage & Loan Investment, LLC, where the Fourth Circuit held the defendants' failure to offer the full relief requested, including an offer of judgment, "prevented the mooting" of the plaintiffs' claims under the Fair Labor Standards Act. In Simmons, the court explained that a judgment:

"is far preferable to a contractual promise" to pay the same amount "because district courts have inherent power to compel defendants to satisfy judgments against them ... but lack the power to enforce the terms of a settlement agreement absent jurisdiction over a breach of contract action for failure to comply with the settlement agreement."

Following the court's reasoning in Simmons, the Eleventh Circuit in Zinni held that because the defendants did not offer judgment against them as part of their settlement offers, the defendants had not offered the full relief requested by plaintiffs; thus, the plaintiffs' claims were not

61. Id. at 1166-67 & n.8.
62. Id. at 1168.
63. Id.
64. 634 F.3d 754 (4th Cir. 2001).
65. Zinni, 692 F.3d at 1167 (citing Simmons, 634 F.3d at 766).
66. Id. (quoting Simmons, 634 F.3d at 765).

The [Fourth Circuit] cited language from Federal Trial Practice and Procedure to further illustrate the importance of a judgment: "Settlements often do not involve the entry of a judgment against the defendant, as compared to a judgment of dismissal, so that from the plaintiff's perspective the willingness of the defendant to allow judgment to be entered has substantial importance since judgments are enforceable under the power of the court. Indeed, should a settlement not embodied in a judgment come unraveled, the court may be without jurisdiction to proceed in the case, which often becomes a breach of contract action for failure to comply with the settlement agreement. Even if the court retains jurisdiction, [the] plaintiff is left to litigate a breach of contract action or, perhaps, to continue litigating the claims sought to be settled."

Id. (quoting Simmons, 634 F.3d at 765).
Accordingly, the Eleventh Circuit reversed the district court's dismissal of the plaintiffs' FDCPA claims for lack of subject matter jurisdiction.68

B. Whether a Law Firm May Be Deemed a "Debt Collector" Engaging in "Debt Collection" Activity Pursuant to the FDCPA

In Reese v. Ellis, Painter, Ratterree & Adams, LLP, 69 the Eleventh Circuit examined whether a borrower could state viable claims against a law firm for alleged violations of the Fair Debt Collection Practices Act (FDCPA).70 The dispute in Reese arose when the plaintiffs, borrowers Izell and Raven Reese (the Reeses), defaulted on their residential mortgage loan. The law firm representing the Reeses' mortgage lender sent the Reeses a letter and other documents (the Notices) demanding payment of the underlying debt and threatening to foreclose on the property.71 The Notices expressly referenced the Reeses' promissory note, and advised them that "[t]he Note has been and is declared to be in default for non-payment and Lender hereby demands full and immediate payment of all amounts due and owing thereunder."72 Certain Notices expressly referenced the FDCPA and stated in pertinent part that "THIS LAW FIRM IS ACTING AS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT."73

The Reeses filed a putative class action lawsuit against the law firm in the United States District Court for the Northern District of Georgia, alleging that: (1) the law firm was a "debt collector," (2) it "sought to collect debts" from the Reeses, and (3) the Notices contained "false, deceptive or misleading representations" in violation of § 1692e of the FDCPA.74 The law firm moved to dismiss the complaint, arguing that it was not subject to the requirements of § 1692e because: (1) it was not a debt collector as defined by § 1692a(6) of the FDCPA, and (2) the

---

67. Id. at 1168.
68. Id. Because the court concluded that the defendants' settlement offers did not moot the plaintiffs' FDCPA claims, the court "did[ ] not address [plaintiffs'] alternate argument that the claims were not moot because the offers did not provide for a sum certain of attorneys' fees and costs." Id. at 1168 n.10.
69. 678 F.3d 1211 (11th Cir. 2012).
70. Id. at 1214; see also 15 U.S.C. § 1692(e).
71. Reese, 678 F.3d at 1214.
72. Id.
73. Id. at 1215.
74. Id. The Reeses "sought statutory damages on behalf of a proposed class consisting of 'more than five hundred' people who received similar [notices] from the Ellis law firm." Id.; see also 15 U.S.C. § 1692k(a)(2) (for a violation of the FDCPA, a plaintiff may recover statutory damages).
Notices did not amount to debt collection activity, but instead were an attempt to enforce a security interest in the Reeses' real property.\textsuperscript{75} The district court granted the defendant's motion, the Reeses appealed, and the Eleventh Circuit reversed the district court's judgment.\textsuperscript{76}

The Eleventh Circuit, noting that § 1692e of the FDCPA prohibits a debt collector from using a "false, deceptive, or misleading representation or means in connection with the collection of any debt,"\textsuperscript{77} held that in order to state a plausible FDCPA claim under § 1692e, the Reeses must allege, among other things, that: (1) the law firm is a debt collector, and (2) the Notices are related to debt collection.\textsuperscript{78}

First, the court held that the law firm's Notices were an attempt to "collect a 'debt'" under the FDCPA.\textsuperscript{79} According to the court, the FDCPA's broad definition of the word debt "clearly encompass[ed] the Reeses' payment obligations under the promissory note."\textsuperscript{80} The Notices expressly referenced the promissory note and demanded full and immediate payment of all amounts owed.\textsuperscript{81} The court also relied on the statements in the Notices that the law firm "IS ATTEMPTING TO COLLECT A DEBT," and "THIS LAW FIRM IS ACTING AS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT."\textsuperscript{82} Thus, the court held that the Reeses' complaint sufficiently alleged that the Notices were communications relating to the collection of a debt within the meaning of § 1692e of the FDCPA.\textsuperscript{83}

The court rejected the law firm's argument that the Notices were not debt collection activity because the "purpose was simply to inform the Reeses that [the lender] intended to enforce its security [interest] through the process of non-judicial foreclosure."\textsuperscript{84} Again, the court

\textsuperscript{75} Reese, 678 F.3d at 1215.
\textsuperscript{76} Id. at 1214, 1218-19.
\textsuperscript{77} Id. at 1216; see also 15 U.S.C. § 1692e.
\textsuperscript{78} Reese, 678 F.3d at 1216.
\textsuperscript{79} Id. at 1216-17.
\textsuperscript{80} Id. at 1216; see also 15 U.S.C. § 1692a(5) ("The term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment"). Specifically, the court held that the Reeses's promissory note was a "debt" within the plain language of the FDCPA because the Reeses are consumers who must pay money to their lender, and their obligation to do so arose from a transaction involving property that is primarily for personal, family, or household purposes. Reese, 678 F.3d at 1216-17.
\textsuperscript{81} Reese, 678 F.3d at 1217.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
noted that the Notices demanded payment of the Reeses' debt in addition to threatening foreclosure of the property. The court held that the law firm's argument failed to account for dual purposes of a communication, and even if the law firm intended the Notices to notify the Reeses of foreclosure, the Notices also demanded payment of the note, even though it is not necessary under Georgia law. Thus, the court held that the Notices relating to the "enforcement of a security interest [did] not prevent them from also relating to the collection of a debt within the meaning of § 1692e."

The court further held that the law firm's argument essentially requested an exemption from the provisions of § 1692e "any communication that attempt[ed] to enforce a security interest, regardless of whether it also attempt[ed] to collect the underlying debt." The court cautioned that this would cause a FDCPA loophole because in cases involving a secured debt, the party demanding payment on the debt could avoid the mandates of § 1692e by giving notice of the foreclosure of a security interest. Declining to adopt this reasoning, the court held that "[a] communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest." Notably, because the court held that the demand for payment of the debt in the Notices was debt collection activity under the FDCPA, it did not address situations where a party seeks to enforce a security interest but does not demand payment of the underlying debt.

The court then analyzed whether the law firm is a debt collector within the meaning of the FDCPA. The court first looked to the statute that defines a debt collector as: "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly

85. Id. at 1216-17. The court noted that "a promissory note is a contract evidencing a debt and specifying terms under which one party will pay money to another," whereas "a security interest is not a promise to pay a debt; it is an interest in collateral that a lender can take if a debtor does not fulfill a payment obligation." Id. at 1216.
86. Id. at 1217; see also O.C.G.A. § 44-14-162.2 (2002)) (identifying what must be included in a notice of foreclosure).
87. Reese, 678 F.3d at 1217.
88. Id.
89. Id. at 1217-18. The court held that "[t]he practical result would be that the [FDCPA] would apply only to efforts to collect unsecured debts," and that "[a]s long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA." Id. at 1218.
90. Id.
91. Id. at 1218 n.3.
92. Id. at 1218.
collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” In the complaint, the Reeses alleged that the law firm was “engaged in the business of collecting debts owed to others incurred for personal, family or household purposes,” and that the law firm had sent similar “dunning notices” to more than 500 people. Thus, the court held that the Reeses’ complaint alleged enough facts to show that the law firm was a debt collector because it regularly attempts to collect debts. In sum, because the Eleventh Circuit held the Reeses’ allegations were sufficient to state that the law firm was a debt collector and that the Notices were sent “in connection with the collection of a debt” within the meaning of § 1692e, it reversed the district court’s judgment dismissing the Reeses’ complaint for failure to state a claim under the FDCPA.

IV. CIVIL PROCEDURE—WHETHER AND WHEN A STIPULATION OF DISMISSAL FILED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(A)(1)(A)(II) IS SELF-EXECUTING

In Anago Franchising, Inc. v. Shaz, LLC, the Eleventh Circuit addressed, as a matter of first impression, whether and when a stipulation of dismissal filed pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) is self-executing and dismisses a case upon filing, so as to divest a district court of jurisdiction. The issues in Anago Franchising arose out of an alleged breach of a settlement agreement. After the parties signed the settlement agreement, the United States District Court for the Southern District of Florida administratively closed the case, asked the parties to file a “Stipulation for Final Order of Dismissal,” and stated that after the stipulation was filed, the court would enter an order dismissing the case with prejudice. In response, the parties filed a “Stipulation for Dismissal with Prejudice” which referenced rules 41(a)(1)(A)(ii) and 41(a)(2), stated that all parties agreed to dismiss the case with prejudice, and stated “that the Court shall reserve jurisdiction to enforce the settlement between the parties pursuant to the terms

93. Id.; see also 15 U.S.C. § 1692a(6) (“So a party can qualify as a ‘debt collector’ either by using an ‘instrumentality of interstate commerce or the mails’ in operating a business that has the principal purpose of collecting debts or by ‘regularly’ attempting to collect debts”).
94. Reese, 678 F.3d at 1218.
95. Id.
96. Id. at 1218-19.
97. 677 F.3d 1272 (11th Cir. 2012).
98. Id. at 1277; see also Fed. R. Civ. P. 41(a)(1)(A)(ii).
100. Id. at 1274.
The parties also filed a joint motion for entry of final judgment. The district court signed the final judgment but never entered an order dismissing the case. The final judgment did not mention the stipulation of dismissal and did not expressly dismiss the case.

After judgment was entered, the defendants filed a motion in the district court seeking to compel the plaintiff's compliance with the settlement agreement. The assigned magistrate judge found that the district court retained "jurisdiction to consider the motion [to compel] because the district court had never dismissed the case—it had only administratively closed it." The magistrate judge's order did not discuss the parties' stipulation of dismissal other than to note "that it was filed and that the parties agreed that the district court would retain jurisdiction to enforce the Settlement Agreement." The magistrate judge recommended that the defendants' motion to compel be denied, and the district court adopted those findings and denied the motion on the merits. The defendants appealed.

On appeal, the Eleventh Circuit had to determine whether (and when) dismissal occurred and whether the lower court "retained jurisdiction to enforce the Settlement Agreement after that dismissal." This required the court to clarify two legal issues: (1) whether a stipulation of dismissal filed under Fed. R. Civ. P. 41(a)(1)(A)(ii) dismisses a case automatically, and (2) whether under [the United States Supreme Court's holdings in] Kokkonen v. Guardian Life Insurance of America, a district court may enter an order retaining jurisdiction over a settlement agreement after a stipulation of dismissal is effectuated. Noting that "voluntary dismissal of a case strips the court of jurisdiction and leaves it without power to make legal determinations on the merits," the court first analyzed the legal effect of the filing of the parties' stipulation of dismissal.

101. Id.
102. Id. at 1274-75.
103. Id. at 1275.
104. Id. "The magistrate judge's jurisdictional analysis focused on the text of the final judgment. Because the final judgment did not order the clerk to dismiss the case, the magistrate judge concluded that the case had not been dismissed." Id.
105. Id.
106. Id.
107. Id.
109. Anago Franchising, Inc., 677 F.3d at 1275 (citations omitted).
110. Id.
Looking to Rule 41(a), which allows plaintiffs to voluntarily dismiss an action, the Eleventh Circuit noted that the parties' stipulation of dismissal improperly referenced both Rule 41(a)(1), which allows for dismissal without a court order, and Rule 41(a)(2), which requires the court to order the case dismissed. In determining which rule the parties used to dismiss the case, the court noted that the parties titled the document a "stipulation," which is expressly required in Rule 41(a)(1)(A)(ii) but is not mentioned in Rule 41(a)(2). The stipulation also states that the parties "agree to dismissal with prejudice," which is consistent with the requirements of Rule 41(a)(1) that provide "that dismissals under Rule 41(a)(1) must explicitly state if prejudice is to attach." Finally, the stipulation did not contemplate that a court order was necessary to make it effective. Therefore, the court held that the stipulation of dismissal was filed pursuant to Rule 41(a)(1)(A)-(ii).

111. Id. at 1276.
   A plaintiff may dismiss an action voluntarily without a court order in two circumstances: by filing a notice of dismissal before the opposing party serves an answer or motion for summary judgment, Fed. R. Civ. P. 41(a)(1)(A)(i), or at any time during the litigation by filing a stipulation of dismissal signed by all parties who have appeared, Fed. R. Civ. P. 41(a)(1)(A)(ii).

112. Id. “Under Rule 41(a)(2), the court has discretion to dismiss the case through an order and to specify the terms of that dismissal.” Id.

113. Id. Noting that it “ha[d] never specifically addressed the standard [used] when reviewing a district court's construction of a Rule 41(a) filing,” the Eleventh Circuit applied a de novo review to the district court’s determination of whether the stipulation of dismissal was filed pursuant to Rule 41(a)(1) or Rule 41(a)(2) because that “is a legal conclusion that can be made on the face of the filing and does not depend on facts the district court should find in the first instance.” Id. at 1276 (citing De Leon v. Marcos, 659 F.3d 1276, 1282-83 (10th Cir. 2011); Cunningham v. Whitener, 182 F. App’x 966, 968-69 (11th Cir. 2006)). The court then found that a de novo review required it “to determine the parties' intent when they filed [the stipulation of dismissal], and the best indication of that intent [was] the document itself.” Id. at 1276 (citing De Leon, 659 F.3d at 1283-84 (interpreting a filing de novo, analyzing its contents, and comparing them to the requirements found in Rule 41(a)(1)(A)(ii) and Rule 41(a)(2) to determine which controls)).

114. Id. at 1276.

115. Id. In contrast, Rule 41(a)(2) leaves the final dismissal terms to the district court’s discretion. Id.; see also Fed. R. Civ. P. 41(a)(2) (“Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice”).

116. Reese, 677 F.3d at 1276 (“There is no signature line for the district court, and the statement retaining jurisdiction is not a request made to the district court but a declaration of retained jurisdiction.”).

117. Id. at 1276-77. The court held that the stipulation’s reference to Rule 41(a)(2) was an apparent drafting error. Id. at 1277.
The court then examined when a stipulation can dismiss a case under Rule 41(a)(1)(A)(ii). Although it previously held that a notice of dismissal under Rule 41(a)(1)(A)(i) becomes effective upon the filing, the court had “never directly addressed whether a stipulation filed pursuant to Rule 41(a)(1)(A)(ii) is similarly self-executing.”

Acknowledging that “[m]ost of our sister circuits have directly or implicitly found, in published and unpublished opinions, that a stipulation filed under Rule 41(a)(1)(A)(ii) is self-executing and dismisses the case upon filing,” the court held that “[w]e have found that notices of dismissals allowed for under Rule 41(a)(1)(A)(i) are effective upon filing, and we find no reason to require judicial approval of stipulations of dismissal filed under Rule 41(a)(1)(A)(ii).” Therefore, the court held that “the plain language of Rule 41(a)(1)(A)(ii) requires that a stipulation filed pursuant to that subsection is self-executing and dismisses the case upon its becoming effective.” The court further held that the stipulation is effective when filed, unless a subsequent occurrence is specified as a condition. Accordingly, the Eleventh Circuit held that an effective stipulation strips the district court of jurisdiction and prevents them from taking action.

The court then analyzed whether the stipulation of dismissal in the case at bar was “effective upon filing and if so, whether the district court properly retained jurisdiction to enforce the Settlement Agreement” after the stipulation was filed. Noting that it has not addressed the effect of a district court order entered after a Rule 41(a)(1)(A)(ii) stipulation

118. Id.
119. Id. (quoting Matthews v. Gaither, 902 F.2d 877, 880 (11th Cir. 1990)). “The distinctions Rule 41(a)(1) draws between stipulations and notices are based on the stage of litigation during which they may be filed. The Rules make no distinction regarding their effect on litigation.” Id. at 1278.
120. Id. at 1277.
121. Id.; see Kabbaj v. Am. Sch. of Tangier, 445 F. App'x 541, 544 (3d Cir. 2011) (per curiam); SmallBizPros, Inc. v. McDonald, 618 F.3d 458, 463 (5th Cir. 2010) (per curiam); Gambale v. Deutsche Bank AG, 377 F.3d 133, 139 (2d Cir. 2004); Green v. Nevers, 111 F.3d 1295, 1301 (6th Cir. 1997); In re Wolf, 842 F.2d 464, 466 (D.C. Cir. 1988) (per curiam); Gardiner v. AH Robins Co., 747 F.2d 1180, 1189 (8th Cir. 1984); De Leon, 659 F.3d at 1284; see also Marino v. Pioneer Edsel Sales, Inc., 349 F.3d 746, 752 n.1 (4th Cir. 2003); Commercial Space Mgmt. Co. v. Boeing Co., 193 F.3d 1074, 1077 (9th Cir. 1999).
122. Anago Franchising, Inc., 677 F.3d at 1278 (citing In re Wolf, 842 F.2d at 466 (noting cases interpreting Rule 41(a)(1)(A)(i) to determine the effect of a Rule 41(a)(1)(A)(ii) filing)).
123. Id.
124. Id.
125. Id. (citing SmallBizPros, 618 F.3d at 464).
126. Id.
filing.\textsuperscript{127} The Eleventh Circuit looked to the Supreme Court's decision in \textit{Kokkonen}, wherein the Supreme Court held that a district court could retain jurisdiction to enforce a settlement agreement if the parties agreed and if the district court had issued an order requiring compliance with the settlement agreement.\textsuperscript{128} "In that case, non-compliance would be a violation of a court order[,] and the district court could use its ancillary jurisdiction to enforce its orders and (by extension enforce the settlement agreement)."\textsuperscript{129} The Eleventh Circuit found that \textit{Kokkonen} was based on the "well-established proposition" that, in order "[t]o retain jurisdiction to enforce a settlement agreement, the court itself must act; agreement by the parties is not enough."\textsuperscript{130}

However, the Eleventh Circuit noted the tension created by the language in \textit{Kokkonen} which stated that, "in the context of a 'Rule 41(a)(1)(A)(ii) [dismissal], . . . the [district] court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree."\textsuperscript{131} The Eleventh Circuit held that "[t]his language creates a tension between the self-executing nature of a stipulation of dismissal which strips the district court of jurisdiction to issue orders and the Supreme Court's allowance of a postdismissal order to have the effect of retaining jurisdiction."\textsuperscript{132} The court noted that the Fifth Circuit had resolved this tension "by focusing on the mechanics of Rule 41 and allowing the parties to make the effectiveness of their stipulation contingent on action by the district court."\textsuperscript{133} Specifically, the Fifth Circuit held that a "district court can retain jurisdiction if '[(1)] all the requirements for retaining jurisdiction [are] met at the time of filing, or

\begin{footnotesize}
\begin{enumerate}
\item 127. \textit{Id.} at 1279.
\item 128. \textit{Id.} at 1278 (citing \textit{Kokkonen}, 511 U.S. at 381).
\item 129. \textit{Id.} (citing \textit{Kokkonen}, 511 U.S. at 381). "The Supreme Court [in \textit{Kokkonen}] stated that a district court could require compliance by either making the settlement agreement part of the court order by a separate provision 'retaining jurisdiction' or by incorporating the terms of the agreement into the order itself." \textit{Id.} (quoting \textit{Kokkonen}, 511 U.S. at 381).
\item 130. \textit{Id.} at 1279 (citing \textit{SmallBizPros}, 618 F.3d at 464 n.4 (contemplating a situation that "might arise in which a district court may lack jurisdiction to enforce a settlement agreement" despite "the parties expressly providing for ancillary jurisdiction in their stipulation for dismissal").
\item 131. \textit{Id.} (quoting \textit{Kokkonen}, 511 U.S. at 381-82).
\item 132. \textit{Id.}
\item 133. \textit{Id.} (citing \textit{SmallBizPros}, 618 F.3d at 463). The Eleventh Circuit also noted that the Seventh Circuit had "resolved this tension by finding that \textit{Kokkonen} allows the district court to 'take certain postdismissal action in furtherance of its ancillary jurisdiction' despite the fact that generally a Rule 41(a)(1)(A)(ii) stipulation divests the court of jurisdiction." \textit{Id.} (quoting Bond v. Utreras, 585 F.3d 1061, 1078 (7th Cir. 2009)).
\end{enumerate}
\end{footnotesize}
the filing's effectiveness [is] contingent upon a future act (such as the district court issuing an order retaining jurisdiction).\(^{134}\)

Agreeing with the Fifth Circuit, the Eleventh Circuit held that "a district court cannot retain jurisdiction by issuing a postdismissal order to that effect" because "[a] district court loses all power over determinations of the merits of a case when it is voluntarily dismissed."\(^{135}\) The Eleventh Circuit read the holding in *Kokkonen* "in light of the plain language of Rule 41(a)(1)(A)(ii) and [held] that it allows the district court to retain jurisdiction through an order, even if the parties dismissed the case through use of Rule 41(a)(1)(A)(ii), [if] the parties agree to the retention of jurisdiction."\(^{136}\) However, to retain jurisdiction, an order must be entered prior to the Rule 41(a)(1)(A)(ii) stipulation becoming effective.\(^{137}\) Therefore, in order

for a district court to retain jurisdiction over a settlement agreement where the parties dismiss the case by filing a stipulation of dismissal pursuant to Rule 41(a)(1)(A)(ii), either (1) the district court must issue the order retaining jurisdiction under *Kokkonen* prior to the filing of the stipulation, or (2) the parties must condition the effectiveness of the stipulation on the district court's entry of an order retaining jurisdiction.\(^{138}\)

Applying these findings to the case at bar, the Eleventh Circuit held that the underlying lawsuit was dismissed when the parties filed the stipulation of dismissal with prejudice pursuant to Rule 41(a)(1)(A)(ii).\(^{139}\) According to the court, "[t]he Stipulation did not condition its effectiveness on the issuance of an order by the district court retaining jurisdiction, and the court did not issue such an order prior to the dismissal of the case."\(^{140}\) Because the case was dismissed by the filing of the stipulation of dismissal with prejudice and jurisdiction was not retained, the district court did not have jurisdiction to consider the

---

134. *Id.* (quoting *SmallBizPros*, 618 F.3d at 463).
135. *Id.*
136. *Id.* at 1280.
137. *Id.*
138. *Id.*

As the Fifth Circuit noted, this does not transform a Rule 41(a)(1)(A)(ii) stipulation into a Rule 41(a)(2) dismissal (requiring a court order) because the parties themselves are agreeing to the conditional effectiveness of the stipulation, and the court would not be empowered to impose new conditions on the parties. If the district court does not issue an order retaining jurisdiction, the stipulation would simply not become effective and the case would not be dismissed.

*Id.* at 1280 n.4 (internal citation omitted).
139. *Id.* at 1281.
140. *Id.*
defendants' motion to compel compliance with the settlement agreement. Accordingly, the Eleventh Circuit "vacate[d] the district court's ruling on the [defendants'] motion to compel compliance with the settlement agreement, and "remand[ed] the case with instructions to dismiss for lack of jurisdiction."

V. ARBITRATION

A. Authority to Decide Challenges to Arbitration Agreements

1. Whether the district court or an arbitrator has authority to decide the formation challenges, when a contract containing an arbitration agreement is part of a broader, comprehensive agreement, and a party challenges both the formation of the contract and the formation of the comprehensive agreement. In Solymar Investments, LTD. v. Banco Santander S.A., the Eleventh Circuit addressed the novel question of whether a court, having found a valid contract containing an arbitration clause was formed, also has the authority to consider formation challenges to a broader, comprehensive agreement encompassing that contract. The dispute in Solymar arose out of settlement negotiations between various investment holding corporations (the plaintiffs) and a related group of banking corporations operating under the umbrella of Banco Santander, as well as certain officers and employees of Santander (Santander).

The plaintiffs invested money with Santander, who in turn invested the money in a fund that was part of the Madoff Ponzi scheme. The plaintiffs sustained losses, which they sought to recover from Santander. The plaintiffs and Santander agreed to a multi-part settlement that included an Exchange Agreement. The agreement included an arbitration clause. Although the parties signed the Exchange Agreement, they never finalized or signed the other documents comprising the comprehensive settlement agreement.

---

141. Id. While the court noted that "Rule 41(a)(1)(A) [was] a useful tool in settling cases because it allows parties to dismiss an action without a court order," it cautioned that "ancillary jurisdiction does not allow a court to enforce a filed stipulation in the same way it allows a court to enforce its orders." Id. (citing Kokkonen, 511 U.S. at 380-81).
142. Id.
143. 672 F.3d 981 (11th Cir. 2012).
144. Id. at 985.
145. Id. at 985-86.
146. Id. at 986-88. The Exchange Agreement "involved an exchange of 'worthless' [shares from the Ponzi scheme investment] for shares of Santander's own perpetual, non-cumulative 2% shares." Id. at 986.
The plaintiffs filed suit in the United States District Court for Southern District of Florida, asserting claims against Santander arising out of the investment losses and the subsequent settlement negotiations. Santander asked the district court to dismiss the case pursuant to the arbitration clause in the Exchange Agreement. Although the comprehensive settlement agreement was never finalized, Santander argued that the Exchange Agreement was an independent, binding contract and that the arbitration clause therein should be enforced. The plaintiffs challenged the binding nature of the Exchange Agreement itself, not the arbitration clause, arguing that it was the district court's role to decide whether the Exchange Agreement was but one part of an unexecuted (and thus unenforceable) "comprehensive agreement between the parties." The district court found that the Exchange Agreement was a binding contract, and under Prima Paint Corp. v. Flood & Conklin Manufacturing Co. and Granite Rock Co. v. International Brotherhood of Teamsters, the plaintiffs' challenges should be resolved in arbitration pursuant to the Exchange Agreement's arbitration clause. The plaintiffs appealed, and the Eleventh Circuit affirmed.

In its analysis, the court first discussed "who shall decide what in the context of formation challenges to contracts containing arbitration clauses." In the seminal arbitration case of Prima Paint, the United States Supreme Court announced that "courts are the proper forum to evaluate a challenge to the validity of an arbitration clause, but where the entire agreement of which an arbitration clause is but a part is challenged, such evaluation is properly left to the arbitrator." In subsequent cases decided after Prima Paint, the "Supreme Court declined to clarify whether a court or an arbitrator is required to decide any and all disputes over the formation of an agreement containing an

147. Id. at 988.
148. Id. at 988-89.
149. 388 U.S. 395 (1967).
150. 130 S. Ct. 2847 (2010).
151. Solymar, 672 F.3d at 988.
152. Id. at 988, 999.
153. Id. at 989.
154. Id. Under Prima Paint, the relevant inquiry hinges on "whether the challenge raised is to the arbitration clause specifically" (to be resolved by the court), "or to the contract in which the arbitration clause is found generally" (to be resolved in arbitration). Id. at 998. The Eleventh Circuit found that because the plaintiffs did not differentiate between the formation of the arbitration clause specifically and instead challenged the formation of the entire Exchange Agreement, under Prima Paint the plaintiffs' challenges must be determined by the arbitrator. Id. at 998-99.
arbitration clause," but it did recognize "a distinction between challenges to the validity of an agreement containing an arbitration clause, which were reserved for an arbitrator; and challenges to the formation of an agreement containing an arbitration clause."\textsuperscript{155}

For example, in Granite Rock the Supreme Court provided some clarification and held that issues regarding formation of contracts are usually left to the courts.\textsuperscript{156} Accordingly, in Solymar, the Eleventh Circuit reasoned that this "determination is the threshold question in any dispute involving arbitration."\textsuperscript{157} Thus, "arbitration of a dispute should only be ordered where the court is satisfied that neither the formation of the parties' arbitration agreement nor... its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement."\textsuperscript{158}

Applying the Supreme Court's legal concepts to the facts in Solymar, the Eleventh Circuit first addressed the district court's resolution of the formation challenges.\textsuperscript{159} The plaintiffs argued that: "(a) [the Exchange Agreement] was procured by Santander's fraud in the factum; (b) there was no meeting of the minds; and (c) the conditions precedent were never fulfilled."\textsuperscript{160} According to the court, "[u]nderlying all three of those challenges [was the plaintiffs'] contention that, since the Exchange Agreement was but a part of the parties' intended settlement, the district court was required to resolve the [plaintiffs'] challenges in relation to the comprehensive agreement."\textsuperscript{161}

In addressing the plaintiffs' argument "that their challenges go not just to the formation of the Exchange Agreement, but also to the formation of a broader agreement,"\textsuperscript{162} the Eleventh Circuit reasoned as follows:

In the context of the FAA, ... challenges to the role of a written agreement are not questions of formation but rather of validity. ... With the district court having satisfied itself that the Exchange Agreement was a binding contract, asking the district court to assess the validity of the Exchange Agreement relative to a broader,
unexecuted agreement would be an invasion of the responsibility that
the Supreme Court has reserved for the arbitrator.163

The plaintiffs argued that, in light of the Supreme Court’s holding in
Granite Rock, the district court erred in not considering all formation
challenges.164 The Eleventh Circuit rejected this broad interpretation
of Granite Rock, reasoning that to do so “would constitute broader
inquiry than contemplated by the Granite Rock or Prima Paint Courts;
and, just as importantly, it would be contrary to the explicit terms of the
Exchange Agreement.”165

The Eleventh Circuit agreed with the district court that the Exchange
Agreement was a binding and enforceable contract under Florida
law.166 Thus, the Eleventh Circuit affirmed the district court’s order
dismissing the plaintiffs’ complaint in favor of arbitration, finding that
the plaintiffs’ challenges were properly reserved for the arbitrator.167

2. Whether challenges to the scope of the arbitration agree-
ment, and whether specific claims that fall within the same,
should be decided by the Court or the arbitrator. In Given v.
M&T Bank Corp.,168 the Eleventh Circuit held that the decision of
whether certain claims fell within the scope of the arbitration agreement
was a decision for an arbitrator, not a district court.169 The controver-
sy in Given arose when bank customer Maxine Given (Given) filed a
putative class action against Manufacturers and Traders Trust Company
(M&T Bank), alleging that M&T Bank improperly charged overdraft fees
to its checking account customers. Given filed suit in a Maryland
federal district court. When M&T Bank filed a motion to compel
arbitration, the case was transferred to the United States District Court
for the Southern District of Florida and consolidated with related
cases.170

“The district court denied M&T Bank’s motion to compel arbitration,
finding that the arbitration agreement [was] unconscionable under

163. Id. at 992-93 (emphasis added).
164. See id. at 993.
165. Id. at 984.
166. Id. at 985-96.
167. Id. at 999.
168. 674 F.3d 1252 (11th Cir. 2012).
169. Id. at 1256-57.
170. Id. at 1254. The Judicial Panel on Multidistrict Litigation consolidated in the
Southern District of Florida numerous putative class actions involving similar claims
relating to overdraft fees on checking accounts against approximately thirty banks, and the
consolidated litigation was the subject of several appeals to the Eleventh Circuit in 2012.
Garcia v. Wachovia, N.A., 699 F.3d 1273, 1276 (11th Cir. 2012).
Maryland law, and M&T Bank appealed." After the Eleventh Circuit heard oral arguments, the Supreme Court decided AT&T Mobility LLC v. Concepcion, a case which involved the FAA's preemption of state unconscionability laws. Accordingly, the Eleventh Circuit "vacated the district court's order denying the motion to compel arbitration and remanded the case for reconsideration in light of the Concepcion decision." M&T Bank renewed its motion to compel arbitration, and the district court again denied the motion, this time finding that because Given sought injunctive relief, her claims were not within the scope of the arbitration agreement.

M&T Bank appealed again, arguing that "the district court erred by deciding whether Given's claims [were] within the scope of the arbitration agreement, [and] that an arbitrator should have decided that question." The Eleventh Circuit analyzed the arbitration agreement and found that it contained a "delegation provision," wherein the parties agreed to arbitrate the "gateway" question of whether the arbitration agreement applies to and covers a particular claim or issue. The court recognized that delegation provisions are valid and should be enforced "as long as there is 'clear and unmistakable' evidence that the parties manifested their intent to arbitrate a gateway question." Analyzing the terms of the delegation provision at issue in Given, the Eleventh Circuit found "clear and unmistakable evidence that M&T Bank and Given manifested their intent to arbitrate whether Given's claims [fell] within the scope of the arbitration agreement."

Given argued that the delegation provision was ambiguous, and thus the gateway question should not be arbitrated. The court rejected her argument, finding that the language "any issue" in the arbitration clause was not ambiguous and should not be limited. Thus, the court concluded that the arbitrator was the proper decision-maker.

---

171. Given, 674 F.3d at 1254-55.
173. See id. at 1747.
174. Given, 674 F.3d at 1255.
175. Id. The district court did not reach the issue of whether the arbitration agreement was unconscionable under Maryland law. Id.
176. Id.
177. Id.
178. Id.
179. Id.
180. Id. at 1256. Given also argued that the arbitration agreement was procedurally unconscionable. The court declined to address this challenge because she had not specifically challenged the unconscionability of the delegation provision before the district court. Id.
181. Id.
regarding whether the arbitration agreement encompassed Given's claims.\footnote{182}

Both Given and Solymar provide guidance to what authority a district
court has in deciding certain issues regarding arbitration agreements
and when these issues must be decided by the arbitrator.

B. Application of Concepcion and State Law Unconscionability Rules

As discussed briefly above, on April 27, 2011, the United States
Supreme Court issued an opinion in AT&T Mobility LLC v. Concepcion,\footnote{183} holding that the Federal Arbitration Act, 9 U.S.C. § 1 (FAA)
preempted California's "Discover Bank" rule,\footnote{184} which provided that
class-action waivers in consumer contracts of adhesion were unconscionable.\footnote{185} In Concepcion, the Court found that because the overarching
purpose of the FAA was to ensure enforcement of arbitration agreements
according to the agreements' terms, state law requiring the availability
of class arbitration was inconsistent with the FAA.\footnote{186} In 2012, the
Eleventh Circuit issued numerous opinions addressing Concepcion's
impact on claims for arbitration in this circuit.

1. Whether a party may waive its right to arbitrate the
conscionability of an arbitration clause. In Hough v. Regions
Financial Corp.,\footnote{187} the Eleventh Circuit held that a party will waive
its right to arbitrate the conscionability of an arbitration clause if it asks
the district court to rule on the conscionability challenge.\footnote{188} In Hough,
plaintiffs Lawrence and Pamela Hough sued Regions Financial
Corporation and Regions Bank (Regions) in the United States District
Court for the Southern District of Florida for allegedly violating federal
and state law by collecting overdraft charges from bank customers
pursuant to their deposit agreements.\footnote{189}

Regions moved to compel arbitration based on an arbitration clause in
the Houghs' deposit agreement.\footnote{190} The district court denied the
motion, finding "that the arbitration clause was substantively unconscio-

\footnotesize

182. \textit{Id.} at 1256-57.
184. \textit{Concepcion}, 131 S. Ct. at 1746.
185. \textit{Id.} at 1753.
186. \textit{Id.}
187. 672 F.3d 1224 (11th Cir. 2012). \textit{Hough} also arose as part of the MDL Action
pending in the Southern District of Florida. \textit{See id.} at 1226-28; Garcia, 699 F.3d at 1276.
188. \textit{Hough}, 672 F.3d at 1228.
189. \textit{Id.} at 1226.
190. \textit{Id.}
nable because it contained a class action waiver." In light of Concepcion, the Eleventh Circuit vacated the district court's ruling and remanded for further consideration. On remand, Regions renewed its motion to compel, but the district court again denied the motion, finding that "the arbitration clause was substantially unconscionable under Georgia law because a provision granting Regions the unilateral right to recover its expenses for arbitration allocated disproportionately to the Houghs the risks of error and loss inherent in dispute resolution."

Regions again appealed, arguing that "[(1)] the district court should have submitted the issue of conscionability to the arbitrator, [(2)] the arbitration clause was conscionable and, [(3)] even if unconscionable, the clause was severable." In addressing the first issue, the Eleventh Circuit held that although the arbitration "clause contained 'sweeping language concerning the scope of the questions committed to arbitration' and 'clearly and unmistakably provid[ed]' that an arbitrator should resolve 'any claim of unconscionability,'" Regions waived the right to arbitrate whether the arbitration clause was unconscionable.

The court focused on the fact Regions had not argued the issue should be decided by the arbitrator in response to the Houghs' arguments that the clause was unconscionable, but instead asked the district court to rule on (and deny) the conscionability challenge. Because Regions asked the district court to decide the issue, it waived its right to arbitrate whether the arbitration clause was unconscionable.

Next, the Eleventh Circuit analyzed whether the district court erred in finding that the arbitration agreement was substantively unconscionable. "The arbitration agreement permitted Regions, if it was 'the prevailing party,' to obtain 'reimburse[ment] for [its] costs and expenses (including reasonable attorney's fees) . . . [in] arbitration' and to collect

191. Id.
192. Id.
193. Id.
194. Id.
195. Id. at 1226, 1228. Because the Eleventh Circuit found that the arbitration clause was conscionable, it did not address whether the clause was severable. Id. at 1228.
196. Id. at 1228 (quoting Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453 (2003); Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83 (2002)).
197. Id. at 1227. The delegation provision in the arbitration agreement provided as follows: "Any dispute regarding whether a particular controversy is subject to arbitration, including any claim of unconscionability and any dispute over the scope or validity of this agreement to arbitrate disputes or of this entire Agreement, shall be decided by the arbitrator(s)." Id.
198. Id. at 1227-28.
199. Id. at 1229.
TRIAL PRACTICE & PROCEDURE

that amount by 'charg[ing] [the Houghs'] account.'\textsuperscript{200} The district court found that the arbitration agreement was substantively unconscionable "because Regions had an exclusive right of setoff."\textsuperscript{201} The Eleventh Circuit disagreed, noting that under Georgia law "an arbitration provision is not unconscionable [simply] because it lacks mutuality of remedy."\textsuperscript{202} The district court also found that the arbitration clause was procedurally unconscionable,\textsuperscript{203} but the Eleventh Circuit again disagreed, finding that "to be unconscionable under Georgia law, a contract 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."\textsuperscript{204} The court reasoned that the arbitration clause at issue in Hough did not meet this standard.\textsuperscript{205} Thus, the court reversed the district court's order and remanded the case with instructions to compel arbitration.\textsuperscript{206}

2. Whether a party waived its right to compel arbitration because it did not argue that the FAA preempted a state unconscionability law prior to Concepcion. In Garcia v. Wachovia Corp.,\textsuperscript{207} the Eleventh Circuit held that a party who did not argue that the FAA preempted state laws purporting to make class-wide arbitration provisions unenforceable before the Supreme Court decided Concepcion, but instead participated in litigation and only demanded arbitration after Concepcion was decided, waived its right to arbitrate.\textsuperscript{208} This case involved five separate putative class actions, wherein the plaintiffs alleged that Wells Fargo Bank, N.A. and Wachovia Bank, N.A. (Wells Fargo) improperly charged overdraft fees to their checking account

\textsuperscript{200} Id. (alterations in original) (internal punctuation omitted).
\textsuperscript{201} Id.
\textsuperscript{202} Id. (quoting Crawford v. Great Am. Cash Advance, Inc., 284 Ga. App. 690, 693, 644 S.E.2d 522, 525 (2007)).
\textsuperscript{203} Id. The district court found it troubling "that the clause was presented to the Houghs 'on a take-it-or-leave-it basis with no opt-out provision.'" Id. The Eleventh Circuit noted that "under Georgia law, an adhesion contract is not per se unconscionable." Id. "The district court [had] also criticized the clause as 'not conspicuous.'" Id. However, the Eleventh Circuit found that "the district court overlooked other aspects of the document that made apparent the agreement to arbitrate," including bold, capitalized text on the first several pages that referenced the binding arbitration provisions within. Id.
\textsuperscript{204} Id. (quoting NEC Techs., Inc. v. Nelson, 267 Ga. 390, 391, 391 n.2, 478 S.E.2d 769, 771 (1996)).
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 230.
\textsuperscript{207} 699 F.3d 1273 (11th Cir. 2012). Garcia was consolidated with the MDL Action pending in the Southern District of Florida in June 2009. Id. at 1276.
\textsuperscript{208} Id. at 1276.
customers. The checking accounts were governed by agreements that contained an arbitration clause, and the arbitration clause provided for arbitration of disputes on an individual basis. 209

During the litigation, the district court "twice invited Wells Fargo to move to compel arbitration," but Wells Fargo declined to do so. 210 Instead, the parties engaged in extensive discovery, 211 litigated several motions before the district court, and prepared their cases for trial. However, just days after the Supreme Court issued Concepcion, Wells Fargo moved to compel arbitration. The district court denied the motion, finding that Wells Fargo had waived its right to arbitrate. 212

On appeal, "Wells Fargo argue[d] that it did not waive its right to compel arbitration because it would have been futile to move to compel arbitration before the Supreme Court decided Concepcion." 213 Specifically, Wells Fargo argued that "the state laws governing the customer agreements foreclosed Wells Fargo from enforcing the agreements to arbitrate on an individual rather than class-wide basis," 214 and thus, moving to compel before Concepcion would have been futile. 215 The Eleventh Circuit first examined whether Wells Fargo had waived its right to compel arbitration. 216 The Court then examined whether it would have been futile for Wells Fargo to move to compel arbitration before the Supreme Court decided Concepcion. 217

First, the Eleventh Circuit recognized that a party's conduct may waive its arbitration rights. 218 To determine if a party has waived its

209. Id. at 1275.
210. Id. Specifically, on November 6, 2009, the district court ordered Wells Fargo to file "all merits and non-merits motions . . . ," including any motions to compel arbitration, by December 8, 2009. Id. at 1276. Wells Fargo filed a motion to dismiss, but it did not move to compel arbitration. Id. "On April 14, 2010, the district court [again] offered Wells Fargo a second opportunity to move to compel arbitration by April 19, 2010." Id. Wells Fargo did not so move and instead declined to elect to arbitrate the disputes. Id. Wells Fargo even went so far as to inform the court that it "did not move for an order compelling arbitration . . . nor does it intend to seek arbitration of [its customers'] claims in the future." Id.
211. The parties "served and answered interrogatories, produced approximately 900,000 pages of discovery documents, and took approximately 20 depositions." Id.
212. Id. at 1276-77.
213. Id. at 1275.
214. Id. at 1276. The customer agreements at issue were governed by the laws of California, Florida, Georgia, New Jersey, New Mexico, Oregon, Texas, Virginia, and Washington. Id. at 1276-77.
215. Id. at 1277.
216. Id.
217. Id. at 1278.
218. Id. at 1277 (quoting S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990)).
right to arbitration, courts apply a two-part test: (1) has the party, "under the totality of the circumstances, . . . acted inconsistently with the arbitration right," and (2) "by [acting inconsistently with the arbitration right], [has] that party . . . in some way prejudiced the other party." The Eleventh Circuit found that Wells Fargo's conduct was inconsistent with its right to arbitration in two ways: by failing to move to compel arbitration despite repeated invitations to do so from the district court, and by utilizing "the litigation machinery" before demanding arbitration. The court reasoned that compelling arbitration would substantially harm the plaintiffs for two reasons. The plaintiffs spent significant amounts of money to litigate, and these sums were exactly the types of expenses that arbitration was designed to alleviate. Also, Wells Fargo gained advantages from discovery that would not have been available during arbitration; thus, Wells Fargo's delay in moving to compel arbitration prejudiced the plaintiff's legal position. Accordingly, the court concluded that Wells Fargo had waived its right to arbitrate.

Next, the Eleventh Circuit turned to Wells Fargo's futility argument and recognized that "because [t]his circuit does not require a litigant to engage in futile gestures," a party will not waive its right to arbitrate by failing to act whenever 'any motion to compel would almost certainly have been futile." However, the court then noted that "absent controlling Supreme Court or circuit precedent foreclosing a right to arbitrate, a motion to compel arbitration will almost never be futile." Wells Fargo argued the low chance of success excused its decision to not file a motion to compel arbitration. The Eleventh Circuit held this

219. Id. (quoting Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir. 2002)). "To determine whether the other party has been prejudiced, '[a court] may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process.'" Id. (quoting S&H Contractors, 906 F.2d at 1514).
220. Id.
221. Id. (quoting S&H Contractors, 906 F.2d at 1514).
222. Id. at 1278.
223. Id.
224. Id.
225. Id. at 1277.
226. Id. at 1278 (quoting Miller v. Drexel Burnham Lambert, Inc., 791 F.2d 850, 854 (11th Cir. 1986)).
227. Id. The court adopted the Eighth Circuit's explanation that "a party must move to compel arbitration whenever 'it should have been clear to [the party] that the arbitration agreement was at least arguably enforceable.'" Id. (quoting Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, L.L.C., 588 F.3d 963, 967 (8th Cir. 2009)).
228. Id.
was the wrong standard for the futility doctrine under its precedent.\textsuperscript{229} Specifically, the court reasoned that to avoid waiving the arbitration right under the futility doctrine, it must be "almost certain"—not merely "unlikely"—that a motion to compel would have been denied.\textsuperscript{230} The court reasoned that Wells Fargo's more lenient standard would "only 'encourage litigants to delay moving to compel arbitration until they could ascertain how the case was going in federal district court,' and would undermine one 'of the basic purposes of arbitration: a fast, inexpensive resolution of claims."\textsuperscript{231} In applying the futility standard to the facts in Garcia, the Eleventh Circuit held that a motion to compel arbitration filed before Concepcion would not have been almost certainly denied because "Wells Fargo could have argued exactly what the Supreme Court held in Concepcion: that the Act preempts state contract laws that condition the enforceability of consumer arbitration agreements on the availability of classwide arbitration procedures."\textsuperscript{232} Finding that "[n]either Supreme Court nor [its own] precedents foreclosed that argument," the court held that "[i]t should have been clear to [Wells Fargo] that the arbitration agreement was at least arguably enforceable."\textsuperscript{233} Thus, the court held that "[b]y failing to make this argument, Wells Fargo waived its right to compel arbitration."\textsuperscript{234}

\textbf{3. Whether state laws prohibiting arbitration as unconscionable are preempted by the FAA post-Concepcion.} In 2012, the Eleventh Circuit issued two opinions discussing the impact of Concepcion on state law unconscionability challenges to arbitration agreements.

In Barras v. Branch Banking & Trust Co.,\textsuperscript{235} the Eleventh Circuit analyzed a state unconscionability doctrine under the parameters of Concepcion and held that the doctrine was not preempted by the FAA.\textsuperscript{236} In Barras, defendant Branch Banking & Trust Company

\begin{footnotes}
\item[229] Id.
\item[230] Id. at 1279.
\item[231] Id. (quoting \textit{In re Mirant Corp.}, 613 F.3d 584, 590 (5th Cir. 2010); O.R. Secs. Inc. v. Prof'l Planning Ass'n, 857 F.2d 742, 747 (11th Cir. 1988)) (internal punctuation and citations omitted).
\item[232] Id.
\item[233] Id. (second alteration in original) (quoting \textit{Se. Stud}, 588 F.3d at 967).
\item[234] Id.
\item[235] 685 F.3d 1269 (11th Cir. 2012). Barras is yet another appeal arising from the MDL Action. It was transferred from the U.S. District Court for the Middle District of North Carolina to the U.S. District Court for the Southern District of Florida by the Judicial Panel on Multidistrict Litigation. \textit{Id.} at 1273 n.1.
\item[236] Id. at 1277.
\end{footnotes}
(BB&T) appealed the district court's order denying its motion to compel arbitration of a putative class action brought by plaintiff Lacy Barras relating to overdraft fees for payments from checking accounts. BB&T moved to compel arbitration pursuant to an arbitration agreement contained in BB&T's services agreement, but the United States District Court for the Southern District of Florida denied the motion, finding that the arbitration agreement was unconscionable under South Carolina law. BB&T appealed, but before the Eleventh Circuit ruled, the Supreme Court decided Concepcion. The Eleventh Circuit remanded the case for reconsideration in light of Concepcion.

On remand, BB&T renewed its motion to compel arbitration, and the district court again denied the motion, finding that (1) "BB&T had waived its right to submit the question of arbitrability to the arbitrator because BB&T already had submitted the issue of arbitrability to the district court"; and (2) "the mandatory arbitration provision was unconscionable because . . . only BB&T could recover any costs and attorneys' fees resulting from an arbitration regardless of whether BB&T prevailed . . . " BB&T again appealed the order denying its motion, arguing as follows:

(1) that the question of whether the arbitration provision is enforceable must be resolved by the arbitrator; (2) that the cost-and-fee-shifting provision in the agreement that the district court held unconscionable does not apply to the arbitration provision; (3) that Concepcion prohibits application of South Carolina's unconscionability doctrine to the arbitration provision; (4) that the cost-and-fee-shifting provision, in any event, is not unconscionable; and (5) that the cost-and-fee-shifting provision is severable from the arbitration provision.

Because BB&T had litigated this action for over a year without moving the district court to submit "the threshold issue of enforceability to the arbitrator," and had instead "asked the district court to hold that the arbitration agreement was enforceable," the Eleventh Circuit affirmed the district court's finding that BB&T had waived its right to arbitrate the question of arbitrability. Further, applying South Carolina law, the Eleventh Circuit held that the district court did not err in finding that "the cost-and-fee-shifting provision is applicable to costs arising from arbitration."

---

237. Id. at 1273-74.
238. Id. at 1279.
239. Id. at 1273-74.
240. Id. at 1274.
241. Id. at 1274-75 (citing Hough, 672 F.3d at 1228).
242. Id. at 1275-76.
In addressing BB&T's third challenge, the court noted that, even after Concepcion, it has recognized "that 'generally applicable contract defenses' that challenge 'defects in the making of the arbitration agreement' and that 'do not apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue' are 'not affected by [Concepcion]." 243 Thus, the relevant inquiry became whether a determination that the cost-and-fee-shifting provision was unenforceable because it was unconscionable under South Carolina law was a generally applicable contract defense not preempted by the FAA. 244

The court then distinguished South Carolina's unconscionability rule from the California collective-action-waiver rule at issue in Concepcion, concluding that "South Carolina's unconscionability doctrine does not interfere with fundamental attributes of arbitration" as identified by the Supreme Court and is among the 'generally applicable contract defenses' that apply to arbitration agreements under the savings clause of 9 U.S.C. § 2. 245 Specifically, the court found as follows: (1) the South Carolina law applied "to arbitration and to other agreements according to the same basic criteria, and [those] criteria do not disproportionately impact arbitration agreements"; (2) the South Carolina doctrine "does not interfere with the procedural informality that Concepcion recognized" as the primary benefit of arbitration; (3) the South Carolina "unconscionability doctrine is one that is concerned with defects in the process of contract formation," recognized as a valid defense under Section 2 of the FAA; (4) the South Carolina rule "neither allows nor prohibits the aggregation of claims at all"; and (5) the South Carolina "unconscionability doctrine is not 'applied in a fashion that disfavors arbitration by courts.'" 246 Thus, the court held that South Carolina's unconscionability doctrine is not preempted by the FAA. 247 Accordingly, the court

243. Id. at 1277 (quoting Cmty. State Bank v. Strong, 651 F.3d 1241, 1267 n.28 (11th Cir. 2011) (internal punctuation omitted)). For a discussion of Community State Bank, see Sullivan, et al., supra note 1, at 1344-48.
245. Barras, 685 F.3d at 1279 (quoting Concepcion, 131 S. Ct. at 1748).
246. Id. at 1277-78 (quoting Concepcion, 131 S. Ct. at 1751).
247. Id. at 1279. The Eleventh Circuit next concluded that the cost-and-fee-shifting provision as it applies to the arbitration agreement is unconscionable under South Carolina law. Id. at 1280. Finally, the court addressed whether the cost-and-fee-shifting provision of the arbitration agreement should be severed pursuant to the severability clause of the contract, finding that, under South Carolina law, the cost-and-fee-shifting provision was severable from the arbitration provision and the invalidity of the former did not affect the latter. Id. at 1282.
reversed the district court’s order and remanded the case with instructions to compel arbitration.248

In *Pendergast v. Sprint Nextel Corp.*,249 the Eleventh Circuit again analyzed a state unconscionability doctrine under the parameters of *Concepcion*, but this time held that the state doctrine was preempted by the FAA.250 The plaintiff James Pendergast sued Sprint Solutions, Inc. and Sprint Spectrum, L.P. (Sprint) in the United States District Court for the Southern District of Florida in a class action alleging that Sprint charged improper roaming fees for certain calls.251

Sprint moved to compel arbitration under the FAA and Sprint’s service contract with Pendergast.252 The district court granted Sprint’s motion to compel arbitration, and Pendergast appealed. Pendergast argued that: (1) the waiver in the arbitration agreement was unconscionable under Florida law and (2) “the arbitration clause and class action waiver clause [were] not severable,” making “the invalidity of the class action waiver . . . fatal to the arbitration clause.”253

The Eleventh Circuit began its analysis with an in-depth discussion of the Supreme Court’s opinion in *Concepcion*, followed by a discussion of its recent opinion interpreting *Concepcion* in *Cruz v. Cingular Wireless, L.L.C.*254 In *Concepcion*, the Supreme Court held that “the FAA preempted California’s state law that rendered most collective action waivers in consumer contracts unconscionable,” finding that “[p]reemption was required because the California law required the availability of classwide arbitration, which interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with

248. *Id.* at 1284.
249. 691 F.3d 1224 (11th Cir. 2012).
250. *Id.* at 1234.
251. *Id.* at 1225.
252. *Id.*
253. *Id.* On appeal, the Eleventh Circuit originally found that “resolution of the appeal depended on unsettled questions of Florida law and certified . . . questions to the Florida Supreme Court.” *Id.* at 1225-26. After oral argument in the Florida Supreme Court, the United States Supreme Court decided *Concepcion*. *Id.* at 1226. In light of *Concepcion*, Sprint moved the Eleventh Circuit to withdraw the certified questions, but the court denied Sprint’s motion so that the Florida Supreme Court would have the opportunity to decide whether it wished to answer the certified questions or decline jurisdiction and remand the case in light of *Concepcion*. *Id.* Sprint then moved the Florida Supreme Court to decline jurisdiction, and the court granted Sprint’s motion, returning the case to the Eleventh Circuit. *Id.*

254. 648 F.3d 1205 (11th Cir. 2011). For a discussion of *Cruz*, see Sullivan et al., *supra* note 1, at 1340-44.
the FAA.\textsuperscript{255} In \textit{Cruz}, the Eleventh Circuit applied \textit{Concepcion} and enforced an arbitration agreement under facts similar to those at issue in \textit{Pendergast}.\textsuperscript{256} The Eleventh Circuit explained that in \textit{Cruz}, it declined to limit the scope of \textit{Concepcion} to either (1) "state laws that impose non-consensual class-wide arbitration," or (2) "inflexible, categorical state laws that mechanically invalidate class waiver provisions in a generic category of cases."\textsuperscript{257} The court in \textit{Cruz} concluded that "[t]o the extent that Florida law would require the availability of classwide arbitration procedures in this case' because 'the case involves numerous small-dollar claims by consumers against a corporation, ... such a state rule is inconsistent with and thus preempted by the FAA."\textsuperscript{258}

After discussing \textit{Concepcion} and \textit{Cruz}, the court stated that applying these two cases was sufficient to resolve Pendergast's appeal.\textsuperscript{259} Because Pendergast's arguments, like the plaintiffs' arguments in \textit{Concepcion}, centered on his theory that the arbitration agreement was unconscionable under state law because the agreement disallowed classwide procedures, the Eleventh Circuit held that the FAA preempted Florida law.\textsuperscript{260} Further, the court reaffirmed its position in \textit{Cruz} that "[t]he fact that the state rule forces the parties out of arbitration because of their contractually-expressed fallback position of preferring class litigation to class arbitration does not make the state rule any more consistent with the FAA."\textsuperscript{261} Thus, the Eleventh Circuit affirmed the dismissal of Pendergast's complaint and the district court's decision to compel arbitration.\textsuperscript{262}

\begin{footnotesize}
\footnote{255}{\textit{Pendergast}, 691 F.3d at 1230 (alterations in original) (internal quotation marks and citations omitted).}
\footnote{256}{Id. at 1233.}
\footnote{257}{Id.}
\footnote{258}{Id. at 1234 (alteration in original) (quoting \textit{Cruz}, 648 F.3d at 1215).}
\footnote{259}{Id.}
\footnote{260}{Id. at 1234-35.}
\footnote{261}{Id. at 1235.}
\footnote{262}{Id. at 1236.}
\end{footnotesize}