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# Class Actions

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The United States Court of Appeals for the Eleventh Circuit's 2010 decisions in class actions further developed the law on the requirements for class certification, the scope of the Class Action Fairness Act of 2005 (CAFA),[1] and the preclusive effects of class settlements and judgments.[2]

## I. RULE 23(B)(3) CERTIFICATION: *SACRED HEART*

The year's leading class action case was *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*[3] The court accepted an appeal by the defendant, Humana, from the district court's order granting class certification. The class representatives were hospitals that claimed that Humana systematically underpaid them for medical services they provided to veterans under a federal program and thereby breached its contracts with them. The controversy arose from a change in payment policy by Humana that resulted in lower payments to the hospitals. Humana announced the change in a letter that Humana claimed had been sent to all of the hospitals, which a large majority of

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1. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

2. For a review of class actions during the prior survey period, see Thomas M. Byrne & Stacey A. McGavin, *Class Actions, 2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1055 (2010).

3. 601 F.3d 1159 (11th Cir. 2010). The opinion by the court was authored by Judge Stanley Marcus. *Id.* at 1164. An interlocutory appeal was granted under Federal Rule of Civil Procedure 23(f). *Sacred Heart*, 601 F.3d at 1169.

the hospitals acknowledged receiving. Several hospitals instituted a class action asserting that Humana's contention that it was mandated by the government program to increase its prices was false.[4] The Eleventh Circuit ultimately agreed with Humana that "many important uncommon questions raised by this litigation overwhelm the one common issue and render the case unsuitable for class treatment" and vacated the class certification order.[5]

The court focused its analysis on Rule 23(b)(3)'s[6] requirement that questions of law or fact common to class members predominate over questions affecting only individual members.[7] To assess the impact of a common question on the class members' claims, a district court "obviously must examine not only the defendant's course of conduct towards the class members, but also the class members' legal rights and duties."[8] As the court further explained,

> A plaintiff may claim that every putative class member was harmed by the defendant's conduct, but if fewer than all of the class members enjoyed the legal right that the defendant allegedly infringed, or if the defendant has non-frivolous defenses to liability that are unique to individual class members, any common questions may well be submerged by individual ones.[9]

The court pointed out that this principle emerged clearly from its cases and those from other circuits.[10] The court agreed with Humana that variations in the contract terms and the parties' course of dealings overwhelmed any common issue concerning the justifications for the change in pricing, reasoning that "common questions rarely will predominate if the relevant terms vary in substance among the contracts."[11] The court contrasted Humana's case with a prior decision, *Allapattah Services, Inc. v. Exxon Corp.*,[12] in which the court upheld the certification of a class of 10,000 Exxon dealers who claimed that Exxon had breached their individual sales agreements by overcharging them.[13] The contractual provision in *Allapattah Services*, the court reasoned, was

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4. *Sacred Heart*, 601 F.3d at 1164-66.
5. *Id.* at 1164.
6. FED. R. CIV. P. 23(b)(3).
7. *Sacred Heart*, 601 F.3d at 1169-70.
8. *Id.* at 1170.
9. *Id.*
10. *Id.*
11. *Id.* at 1170-71.
12. 333 F.3d 1248 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005).
13. *Sacred Heart*, 601 F.3d at 1171 (citing *Allapattah Servs.*, 333 F.3d at 1252, 1264).

substantially the same for all class members.[14] The Humana contracts differed with respect to the key payment clauses, with a minimum of roughly thirty-three variations in contract language among the 260 potential class members.[15] After examining the differences in detail,[16] the court concluded that the substantial variation found in the material terms of the many contracts made the case "a close relative" of *Broussard v. Meineke Discount Muffler Shops*,[17] a Fourth Circuit decision vacating a $390 million jury verdict on the ground of improper class certification of multiple disparate contract claims.[18]

The Eleventh Circuit concluded that the district court erred by focusing solely on the defendant's course of conduct while neglecting the substantial differences in the contracts and the corresponding rights and duties provided therein.[19] The court rejected the district court's suggestion of using subclasses corresponding to the six categories of payment clauses, finding that "the six subclasses proposed here mask a staggering contractual variety."[20] Again citing *Broussard*, the Eleventh Circuit noted that the plaintiffs are not permitted "to stitch together the strongest contract case based on language from various [contracts], with no necessary connection to their own contract rights."[21] The court reasoned that the Rules Enabling Act[22] and due process prevent using class actions to infringe upon the substantive rights of any party.[23] The court held that, based on the record, "an abridgment of the defendant's rights seems the most likely result of class treatment."[24]

While the variations in the contractual terms alone are fatal to class certification, the court also noted that individualized extrinsic evidence is problematic when evaluating the class members' agreements.[25] "The risk of voluminous and individualized extrinsic proof runs particularly high where a defendant raises substantial affirmative defenses to breach."[26] The court detected a similar difficulty in applying multiple

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14. *Id.*
15. *Id.*
16. *Id.* at 1172-74.
17. *Id.* at 1175; *see* Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998).
18. *Broussard*, 155 F.3d at 334.
19. 601 F.3d at 1176.
20. *Id.*
21. *Id.* (alteration in original) (quoting *Broussard*, 155 F.3d at 344) (internal quotation marks omitted).
22. 28 U.S.C. § 2072 (2006).
23. *Sacred Heart*, 601 F.3d at 1176.
24. *Id.*
25. *Id.* at 1176-77.
26. *Id.* at 1177.

states' laws to the extrinsic evidence.[27] Furthermore, contrary to the district court's finding, Humana's two principal affirmative defenses, ratification and waiver, involved more than merely damages issues because the two affirmative defenses could preclude liability.[28] The Eleventh Circuit determined that there was "no support in the text of Rule 23 or interpretive case law for the district court's rigid distinction between liability and damages."[29] The court noted that there was no formula or statistical analysis to resolve the individualized damages questions, and that it was "a clear error of judgment to brush them aside as mere 'damages' issues."[30]

The court also concluded that choice of law presented another barrier to class certification. The court reasoned that there could be considerable variations in state law governing extrinsic evidence, and that courts have expressed skepticism about class certification in substantive areas where the content of state law tends to differ.[31] Although only six states were involved, the court noted that more than a perfunctory analysis was required of whether differences in state law would pose insuperable management obstacles.[32] The court cited a procedural error by the district court in omitting a "serious analysis of the variations in applicable state law relative to Humana's affirmative defenses."[33] As an illustration of the problem, the court reviewed the law of waiver in the six states and the differences among the states in its application.[34]

The court briefly turned to the question, under Rule 23(b)(3), of the superiority of class adjudication and concluded that a finding of lack of superiority was dictated by the outcome of its predominance analysis.[35] The court pointedly offered the additional observation that the class members were hospitals with potentially high value claims against Humana, "even in a borderline case, that fact might well counsel against class treatment."[36]

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27. *Id.*
28. *Id.* at 1177-78.
29. *Id.* at 1178.
30. *Id.* at 1179.
31. *Id.* at 1180.
32. *Id.*
33. *Id.*
34. *Id.* at 1180 & n.14.
35. *Id.* at 1183-84 (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004)).
36. *Id.* at 1184.

*Sacred Heart* is probably the court's most significant class action opinion since *Klay v. Humana, Inc.*[37] Judge Marcus's *tour de force* opinion is likely to frame the issues in many future class certification controversies. The court's exacting and detailed analysis exhibits little tolerance for deferring the hard questions of how a case could be tried as a class action until after certification. *Sacred Heart* is the court's first extended recognition of the due process issues lurking when a court certifies a class by "glossing over" material differences in the claims of class members.[38] The Eleventh Circuit's heavy reliance on the Fourth Circuit's decision in *Broussard*, a staple of briefs opposing class certification, is noteworthy.[39] *Sacred Heart* is also the first Eleventh Circuit case to squarely require that the proponent of class certification provide "an *extensive analysis* of state law variations" to determine if they pose certification obstacles.[40]

In demarcating the sometimes blurry line between liability and damages issues,[41] *Sacred Heart* is likely to be the new starting point for any district court in the Eleventh Circuit weighing the familiar argument that mere individualized damages issues will not preclude class certification.[42] Finally, though relegated to almost a postscript in the opinion, the court's admonition that parties with high-value damage claims face more difficulty in showing the superiority of class certifica-

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37. 382 F.3d 1241 (11th Cir. 2004). *Klay* is discussed in Thomas M. Byrne & Suzanne M. Alford, *Class Actions, 2004 Eleventh Circuit Survey*, 56 MERCER L. REV. 1219, 1220-26 (2005).

38. 601 F.3d at 1176; *cf. In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990). ("Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury. Procedures can be devised to implement such generalizations, but not without alteration of substantive principle.").

39. *See Sacred Heart*, 601 F.3d at 1175-76.

40. *Id.* at 1180 (quoting Cole v. Gen. Motors Corp., 484 F.3d 717, 724 (5th Cir. 2007), and citing Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986)).

41. On this point, in *Owner-Operator Independent Drivers Ass'n v. Landstar System, Inc.*, 622 F.3d 1307 (11th Cir. 2010), the court vacated its earlier opinion in *Owner-Operator Independent Drivers Ass'n v. Landstar System, Inc.*, 541 F.3d 1278 (11th Cir. 2008). The 2010 decision, however, did not disturb the class action rulings in the earlier case, including that the need for actual damage calculations for each class member made class certification inappropriate. *Owner-Operator*, 622 F.3d at 1328. The now-vacated opinion is discussed in Thomas M. Byrne, *Class Actions, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1163, 1166-67 (2009).

42. *See, e.g.*, Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d 290, 297-98 (5th Cir. 2001).

tion to alternatives[43] is a word to the wise likely to be frequently cited in future cases.[44]

## II. REVERSALS OF FORTUNE: *LOWERY* AND *CAPPUCCITTI*

No review of 2010 class action developments in the Eleventh Circuit would be complete without noting the demise of the court's controversial removal decision in *Lowery v. Alabama Power Co.*,[45] which had its broadest impact in class action removals. In *Pretka v. Kolter City Plaza II, Inc.*,[46] the Eleventh Circuit unraveled at least two key aspects of *Lowery*. *Pretka* did not overrule *Lowery* entirely, but the court in *Pretka* dismissed significant parts of the analysis in *Lowery* as unpersuasive, non-binding dicta.[47]

First, *Pretka* rejected the *Lowery* "receipt from the plaintiff" rule that limited a district court's jurisdictional amount analysis in a removed diversity case to the four corners of the complaint and to information provided by the plaintiff on the amount in controversy.[48] *Pretka* held, to the contrary, that "[d]efendants may introduce their own affidavits, declarations, or other documentation."[49] The court also observed that "it has never been the jurisdictional rule that a defendant may remove a diversity case seeking unliquidated damages only when the plaintiff is the source of facts or evidence on the value of the case."[50] Second, *Pretka* held that a district court, contrary to language in *Lowery*, may consider evidence filed after removal in making its jurisdictional determination.[51] The Eleventh Circuit held that the language in *Lowery* appeared to conflict with the court's earlier decision in *Sierminski v. Transouth Financial Corp.*,[52] but that the *Lowery* language was mere dicta.[53] The court also noted that its post-*Lowery* decision in *Thomas v. Bank of America Corp.*[54] should not be read as endorsing

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43. *See Sacred Heart*, 601 F.3d at 1184.

44. *See generally* Andrea Joy Parker, Note, *Dare to Compare: Determining What "Other Available Methods" Can Be Considered Under Federal Rule 23(b)(3)'s Superiority Requirement*, 44 GA. L. REV. 581 (2010).

45. 483 F.3d 1184 (11th Cir. 2007).

46. 608 F.3d 744 (11th Cir. 2010). The opinion of the court was authored by Judge Ed Carnes. *Id.* at 747.

47. *Id.* at 767-68.

48. *Id.* at 755-56.

49. *Id.* at 755.

50. *Id.* at 765.

51. *Id.* at 772.

52. 216 F.3d 945 (11th Cir. 2000).

53. *Pretka*, 608 F.3d at 773.

54. 570 F.3d 1280 (11th Cir. 2009).

*Lowery*'s "receipt from the plaintiff" rule but instead as turning on the deficiencies in the evidence presented by the defendant in that case in support of jurisdiction.[55]

The foundation for the court's analysis in *Pretka* is a reading of the removal procedure statute, 28 U.S.C. § 1446(b).[56] As the court explained, that subsection contemplates two opportunities for removal.[57] The first paragraph addresses civil actions that are removable at the time of commencement and provides for a thirty-day removal window.[58] The second paragraph of the same subsection concerns civil actions that are not originally removable but become so after receipt by the defendant of a paper "from which it may first be ascertained that the case is one which is or has become removable."[59] The court pointed out that *Lowery* was a "second paragraph" removal, effected long after the case was initiated.[60] *Pretka,* on the other hand, was a "first paragraph" removal of a putative class action filed in Florida state court over a failed condominium project.[61] The defendant in *Pretka* removed the case based on CAFA.[62] With its notice of removal, the defendant filed a declaration concerning the amount in controversy, which was not specified in the complaint, and later filed additional evidence in opposition to the plaintiff's motion to remand. The district court held

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55. *Pretka*, 608 F.3d at 761 n.19. This distinction between *Bank of America* and *Lowery* was also suggested in last year's survey. Thomas M. Byrne & Stacey A. McGavin, *Class Actions, 2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1055, 1060 (2010).

56. 28 U.S.C. § 1446(b) (2006). Section 1446(b) provides as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

*Id.*

57. *Pretka*, 608 F.3d at 756-57.

58. *Id.* at 757.

59. *Id.*

60. *Id.* at 757-58.

61. *Id.* at 747.

62. *Id.* at 749; *see also* Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

that it could not consider the declarations filed by the defendant because none of them were a document received from the plaintiffs. The district court also held that it was impermissible under *Lowery* to consider evidence of the amount in controversy not submitted with the notice of removal.[63] The Eleventh Circuit rejected both of these holdings.[64]

Judge Pryor fully concurred with Judge Carnes's opinion for the court, but wrote separately to take on another holding of *Lowery*, that district courts may not allow post-removal discovery regarding the amount in controversy.[65] Judge Pryor noted that the discovery question was not presented by *Pretka* but will eventually have to be revisited.[66] Judge Pryor quoted from critical commentary on the *Lowery* anti-discovery holding in the 2007 edition of this Annual Survey.[67]

*Pretka* is a landmark opinion that restores balance to removal procedure within the Eleventh Circuit.[68] The opinion also offers an interesting exegesis of the meaning of dicta that is likely to be frequently consulted in the future by Eleventh Circuit practitioners.[69]

Class action practitioners saw another reversal of fortune in *Cappuccitti v. DirecTV, Inc.*[70] In its first opinion in the case, the court interpreted CAFA to require at least one plaintiff in a class action to meet the standard diversity jurisdiction amount in controversy requirement of $75,000.[71] The case involved a claim by a DirecTV subscriber that DirecTV charged fees that were proscribed by Georgia law for early termination of their subscriptions.[72] The complaint sought more than CAFA's $5 million jurisdictional minimum.[73]

In vacating its first opinion three months later, the court held that although there were additional requirements for a "*mass* action" to be brought under CAFA, a class action could be brought either originally or

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63. *Pretka*, 608 F.2d at 749-50.

64. *Id.* at 767-68.

65. *Id.* at 774 (Pryor, J., concurring).

66. *Id.* at 776.

67. *Id.* (discussing Thomas M. Byrne, *Class Actions, 2007 Eleventh Circuit Survey*, 59 MERCER L. REV. 1117 (2008)).

68. The court applied *Pretka* later in the year in *Roe v. Michelin North America, Inc.*, 613 F.3d 1058 (11th Cir. 2010), in upholding the denial of a motion to remand where the complaint specified no damage amount. *Id.* at 1059.

69. *See Pretka*, 608 F.3d at 762-67.

70. 623 F.3d 1118 (11th Cir. 2010) [hereinafter *Cappuccitti II*] (per curiam). The court's initial opinion, *Cappuccitti v. DirecTV, Inc.*, 611 F.3d 1252 (11th Cir. 2010) [hereinafter *Cappuccitti I*], *vacated*, 623 F.3d 1118, was authored by Judge Gerald B. Tjoflat. *Id.* at 1253.

71. *Cappuccitti I*, 611 F.3d at 1256; *see also* 28 U.S.C. § 1332(a) (2006).

72. *Cappuccitti II*, 623 F.3d at 1121.

73. *Id.* at 1122 & n.8.

on removal without any individual plaintiff's claim exceeding $75,000.[74] The court then proceeded to examine the arbitration question and determined, under the Federal Arbitration Act,[75] that the arbitration agreement was enforceable.[76] The court rejected Cappuccitti's claim that requiring him to arbitrate individually the validity of the early cancellation fee would be unconscionable under Georgia law.[77] The court identified the sine qua non of Cappuccitti's argument to be the unavailability of attorneys' fees and costs,[78] but pointed out that the Georgia Fair Business Practices Act of 1975[79] provided for an award of reasonable attorneys' fees and expenses to a prevailing party.[80] Considering all the remedies available to Cappuccitti under Georgia law when he contracted with DirecTV and the arbitration service's rules that provided for an award of attorneys' fees and litigation expenses as allowed by state law, the court decided that the order denying arbitration had to be vacated.[81]

## III. PRECLUSIVE EFFECTS OF CLASS SETTLEMENTS AND JUDGMENTS: *MANAGED CARE*, *BORRERO*, *THOMAS*, AND *BROWN*

The year also saw several decisions examining the preclusive effect of a prior class settlement or judgment. Like *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*,[82] and *Klay v. Humana, Inc.*,[83] three of these cases involved claims against insurance

74. *Id.* at 1122 & n.5.
75. U.S.C. tit. 9 (2006).
76. *See Cappuccitti II*, 623 F.3d at 1123-27.
77. *Id.* at 1125-27.
78. *Id.* at 1125.
79. O.C.G.A. § 10-1-390 to -407 (2009).
80. *Cappuccitti II*, 623 F.3d at 1125; *see also* O.C.G.A. § 10-1-399(d).
81. *Cappuccitti II*, 623 F.3d at 1126-27. The court also examined the enforceability of an arbitration agreement and class action waiver in *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010). The court, however, did not decide on the enforceability of the arbitration agreement, instead certifying to the Florida Supreme Court several questions regarding procedural and substantive unconscionability of the contract at issue. *Id.* at 1143-44. *Pendergast* involved claims by a consumer against a wireless service provider where the terms and conditions of the wireless provider's contract contained both an arbitration provision and a class action waiver. Although the plaintiff did not contest the arbitration clause itself, he argued that the class action waiver was both procedurally and substantively unconscionable and that, because the provisions were not severable, the arbitration clause also was unenforceable. *Id.* at 1121. After reviewing the various terms of the contract in detail, the court reviewed Florida law and determined that the relevant law regarding procedural and substantive unconscionability was not sufficiently clear to determine the enforceability of the class action waiver at issue. *Id.* at 1143-44.
82. 601 F.3d 1159 (11th Cir. 2010).
83. 382 F.3d 1241 (11th Cir. 2004).

companies that had been consolidated for pretrial purposes in the Managed Care Multidistrict Litigation (MDL)[84] in the Southern District of Florida. And two of these opinions, *Borrero v. United HealthCare, Inc.*[85] and *In re Managed Care Litigation*,[86] dealt with the preclusive effects of different dispositions of the same underlying class action, styled *Shane v. Humana, Inc.*,[87] out of which the opinion in *Klay* arose.[88] In both *Borrero* and *In re Managed Care*, the Eleventh Circuit reversed an order of the district court giving preclusive effect to the previous disposition in *Shane*.[89] *Shane* involved a second amended consolidated class action complaint brought by the healthcare providers in the MDL that asserted breach of contract and RICO[90] conspiracy claims against various insurance companies based on an alleged conspiracy by the insurance companies to underpay the healthcare providers.[91] Although the district court had certified classes for both the state-law and the RICO claims, the Eleventh Circuit, in its decision in *Klay*, concluded that only the RICO claims were appropriate for class certification.[92] After the *Shane* plaintiffs amended their complaint to include only the class action RICO claims, the district court granted summary judgment on these claims.[93]

In *Borrero* the Eleventh Circuit considered the preclusive effect of this dismissal on seven actions that had been brought by physicians and their representative organizations against United HealthCare (United) while the *Shane* case was pending.[94] These actions, all of which alleged that United had breached its contracts with the providers "by not paying them the full contracted rate for services rendered to United's insureds," had been placed on the "'tag-along' docket" in the MDL and stayed

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84. *In re* Managed Care Litigation, No. 00-MD-1334 (S.D. Fla. April 17, 2000) (order transferring cases).

85. 610 F.3d 1296 (11th Cir. 2010). The opinion of the court was authored by Chief Judge Joel F. Dubina. *Id.* at 1299.

86. 605 F.3d 1146 (11th Cir. 2010) (per curiam).

87. *In re* Managed Care Litigation, No. 00-MD-1334 (S.D. Fla. Sept. 19, 2002) (provider plaintiffs' second amended class action complaint); *see also In re Managed Care*, 605 F.3d at 1148.

88. *See In re Managed Care*, 605 F.3d at 1147; *Borrero*, 610 F.3d at 1300-01; *Klay*, 382 F.3d at 1249-50.

89. *Compare Borrero*, 610 F.3d at 1311, *with In re Managed Care*, 605 F.3d at 1152.

90. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2006).

91. *In re Managed Care*, 605 F.3d at 1148; *Borrero*, 610 F.3d at 1300-01.

92. *Klay*, 382 F.3d at 1276.

93. *In re* Managed Care Litigation, 430 F. Supp. 2d 1336 (S.D. Fla. 2006), *aff'd sub nom.* Shane v. Humana, Inc., 228 F. App'x 927 (11th Cir. 2007).

94. *Borrero*, 610 F.3d at 1299-1300.

pending the outcome of *Shane*, in which United was a defendant.[95] After the grant of summary judgment in *Shane*, the district court dismissed these tag-along actions on res judicata grounds.[96] The Eleventh Circuit reversed, concluding that these claims did not involve the same causes of action as those dismissed in *Shane*.[97]

After concluding that it had subject matter jurisdiction over the action,[98] the court applied the familiar requirements of res judicata and concluded that the tag-along actions were not precluded by the *Shane* dismissal because the cases did not "involve the same causes of action."[99] The court reviewed its past decisions applying this requirement, noting that various labels have been used to describe the proper test with no meaningful difference between these standards.[100] While other circuits have used a "transactional approach," the court concluded that the Eleventh Circuit generally conducts "an evaluation of any commonality in the 'nucleus of operative facts' of the actions [by lining] up the former and current cases side-by-side to assess their factual similarities."[101] The court noted that this case presented "a close question regarding the factual similarities between the two cases."[102] The factual allegations in the RICO suit and the suits at issue were "substantially similar," and some of the allegations were virtually identical in both complaints.[103] Moreover, the court indicated that the mere fact that the claims were for breach of contract rather than conspiracy would not be enough to conclude the cases were not closely related.[104]

Relying heavily on its class certification decision in *Klay*, however, the court concluded that the cases were not similar enough to be considered

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95. *Id.* at 1300.

96. *Id.* at 1301.

97. *Id.* at 1299, 1301.

98. *Id.* at 1301. The court concluded that subject matter jurisdiction existed because the claims were completely preempted by section 502(a) of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a) (2006). *Borrero*, 610 F.3d at 1301.

99. *Borrero*, 610 F.3d at 1306 (quoting *In re* Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001)) (internal quotation marks omitted). The court first rejected the providers' argument that the district court was not a court of competent jurisdiction because the existence of arbitration clauses in their provider agreements with United deprived the district court of jurisdiction over their state-law claims, as "[t]he arbitrability of claims is not jurisdictional." *Id.* at 1307.

100. *Id.* at 1308.

101. Id. at 1308-09.

102. *Id.* at 1309.

103. *Id.*

104. *Id.* at 1309, 1310 n.6.

the same causes of action.[105] In reversing the grant of class certification on the state-law claims, the court in *Klay* had concluded that the RICO claims and the state-law claims were at best "tangentially relevant":

> We noted that "[t]he facts that the defendants conspired to underpay doctors, and that they programmed their computer systems to frequently do so in a variety of ways, do nothing to establish that any individual doctor was underpaid on any particular occasion." This court went on to state that "[w]hile allegations concerning the defendants' conspiracy to underpay doctors, or their policy of aiding and abetting each other in underpaying doctors, went directly to material elements of each individual plaintiff's RICO claim, here they are, at best, merely circumstantial evidence tangentially relevant to each individual plaintiff's breach of contract claim." We observe the potential inconsistency in emphasizing the differences between the types of claims so emphatically in *Klay* and a decision here resting on the notion that these claims arise from the same nucleus of operative fact. That the evidence presented in the prior action is only "tangentially relevant" to the claims like those made here argues against finding an identity between the causes of action.[106]

The court also noted that the "analysis of the claim identity does not offend the underlying policy goals of the res judicata doctrine," given that the "court, in the midst of the first case, made such stark pronouncements about the contrasts between the types of claims initially and later asserted."[107] Moreover, the decision in *Klay* had already "created whatever judicial inefficiencies might result in allowing these claims to proceed by splitting the claims made in the case for class action certification."[108] The court also focused on the lack of prejudice to United, which "should have expected no repose when the district court resolved only the RICO claims, because it was on notice that this court viewed the RICO claims and contract-based claims as distinct."[109] This expectation, however, is not so clear. The court's almost exclusive reliance on select language in *Klay* seems to avoid the type of hard factual comparison that the court's description of the analytic approach seems to require. *Klay* analyzed the existence of common issues of fact among the individual plaintiff's separate state-law claims, not the existence of common issues of fact between the state-law claims and the

105. *Id.* at 1309-10.
106. *Id.* (alterations in the original) (citations omitted) (quoting *Klay*, 382 F.3d at 1264).
107. *Id.* at 1310.
108. *Id.*
109. *Id.*

RICO claims.[110] On the other hand, a holding that the claims were precluded would in effect have given class treatment to claims that were specifically removed from the class certification order, negating the denial of class certification on those claims.

In *In re Managed Care*, the court also dealt with the preclusive effect of the *Shane* litigation on breach of contract claims, although by way of the release language of a settlement agreement rather than the principles of res judicata.[111] Prior to the court's opinion in *Klay* and the subsequent grant of summary judgment, the insurance company Aetna and its subsidiaries reached a class settlement agreement with the *Shane* class.[112] The settlement agreement defined the class, provided for opt-out notice, and included the release of "all claims arising on or before the Preliminary Approval Date, that are, were or could have been asserted against any of the Released Parties based on or arising from the factual allegations of the Complaint."[113] Based on this release, the district court later enjoined Doctors Health, a medical provider that was not a named plaintiff in the *Shane* action, from pursuing a breach of contract action against an Aetna subsidiary, NYLCare Health Plans (NYLCare). The claim was based on NYLCare's alleged breach of its contract with Doctors Health, which had managed NYLCare's Medicare HMO plan in certain states pursuant to a three-year contract. After NYLCare became a subsidiary of Aetna, NYLCare discontinued its Medicare HMO plan in this region, leaving no plan for Doctors Health to manage.[114] The district court concluded that Doctors Health's claims were released in the settlement and enjoined Doctors Health from pursuing the claim in an adversary proceeding in a Maryland bankruptcy court.[115]

On appeal, Doctors Health argued that its claims were not barred because it was not a member of the class, it had not received an adequate opt-out notice, and its claims were not within the scope of the release.[116] The Eleventh Circuit concluded that, even assuming Doctors Health was in the class and had received adequate notice, the claims were not released because they did not fall within the scope of the language releasing claims "based on or arising from the factual

110. *See Klay*, 382 F.3d at 1251, 1261-68.
111. *See In re Managed Care*, 605 F.3d at 1148.
112. *Id.*
113. *Id.* (internal quotation marks omitted).
114. *Id.* at 1147.
115. *Id.* at 1149.
116. *Id.* Doctors Health also argued that NYLCare was estopped from raising the release because it had not done so in the bankruptcy court. *Id.*

allegations of the [*Shane*] Complaint."[117] While the *Shane* complaint was based on allegations

> that the managed-care companies underpaid providers of medical services, the breach of contract claim resolved in the adversary action hinged on Doctors Health's allegation that NYLCare breached its Medicare HMO management agreement with Doctors Health by failing to renew its Medicare agreements with the government and then prematurely terminating the Medicare HMO management agreement it had with Doctors Health.[118]

*Shane* involved contracts between service providers and managed-care companies rather than Medicare HMO management contracts like that between Doctors Health and NYLCare, under which Doctors Health administered the managed-care company's insurance plan.[119] The court also pointed out that the release language did "not release claims that could have been asserted based on or arising out of factual allegations that could have been added by amendment to the *Shane* Complaint," but instead released only "claims that could have been asserted based on or arising from the factual allegations of the [*Shane*] Complaint."[120]

The court, however, was not entirely hostile to class settlements in 2010. In another preclusion case involving the same MDL, *Thomas v. Blue Cross & Blue Shield Ass'n*,[121] the court again dealt with the preclusive effect of a class action settlement, this time concluding that the claims at issue were precluded by the settlement.[122] In 2003,

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117. *Id.* at 1150 (alteration in original) (internal quotation marks omitted).

118. *Id.* at 1151.

119. *Id.*

120. *Id.* at 1151-52 (alteration in original) (internal quotation marks omitted). In *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), the Ninth Circuit similarly reversed the dismissal of claims based on a class settlement agreement, concluding that the claims did not fall within the scope of the release because they did not share the "identical factual predicate" as those in the previous action. *Id.* at 591-92. Unlike the Eleventh Circuit in *In re Managed Care*, the Ninth Circuit focused primarily on Kansas law on preclusion and res judicata rather than on the language of the release. *See id.* at 591. In other circuits, 2010 saw mixed results in the approval of class action settlements. *See, e.g.*, *In re* Katrina Canal Breaches Litig., 628 F.3d 185, 189 (5th Cir. 2010) (reversing approval of settlement as unfair, unreasonable, and inadequate); *In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 336, 357 (3d Cir. 2010) (upholding approval of settlement and release contained in settlement). The Third Circuit vacated for hearing en banc a decision that rejected a settlement on the basis that class certification was not warranted. Sullivan v. DB Invs., Inc., 613 F.3d 134, *vacated en banc*, 619 F.3d 287 (3d Cir. 2010).

121. 594 F.3d 814 (11th Cir. 2010). The opinion of the court was authored by Judge William H. Pryor Jr. *Id.* at 816.

122. *Id.* at 816.

several physicians filed a nationwide class action complaint against Blue Cross and Blue Shield Association, Inc. (BCBS) and its member plans, asserting RICO claims based on allegations that BCBS had conspired to improperly deny, delay, and reduce payments to physicians and through various types of improper conduct.[123] The parties reached a class settlement agreement and release, which was approved by the district court.[124]

Around the time that the settlement was reached, a physician who had failed to opt out of the settlement brought an action against a BCBS plan in Illinois state court asserting claims of breach of conduct, tortious interference, and defamation.[125] The physician specifically "alleged that the Corporation had made false statements to his patients regarding its reasons for refusing to pay for medical services that he had rendered."[126] The BCBS plan filed a motion in the MDL court for an order to enforce the injunction, and the district court enjoined the prosecution of the breach of contract claims but not the tort claims.[127] On appeal by the BCBS plan, the Eleventh Circuit reversed the aspect of the order governing the tort claims, concluding that these claims fell within the scope of the release because they were related to matters addressed in the class action.[128] The court noted that the tort claims were "based on allegations that the Corporation engaged in improper practices to deny and delay payments to [the physician] and that these

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123. *Id.* at 816-17.

124. *Id.* at 817. The release covered all causes of action

> arising on or before the Effective Date, that are, were or could have been asserted against any of the Released Parties by reason of, arising out of, or in any way related to any of the facts, acts, events, transactions, occurrences, courses of conduct, business practices, representations, omissions, circumstances or other matters referenced in the Action, or addressed in this Agreement.

*Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 818.

128. *Id.* at 821-22. The BCBS plan also filed a motion for the physician to show cause why he should not be held in contempt for prosecuting the released claims. *Id.* at 818. In ruling on the injunction, the district court instructed the physician to withdraw the breach of contract claim within twenty days or it would revisit the contempt motion. *Id.* The physician cross-appealed, but the Eleventh Circuit concluded that it did not have jurisdiction over the appeal of this portion of the order. *Id.* at 819. The order was not final because the district court had not held the physician in contempt or imposed any sanction. *Id.* In a companion case, the court similarly concluded that it did not have jurisdiction over the district court's denial of a physician's motion for permission to prosecute his action as barred by the release. Thomas v. Blue Cross & Blue Shield Ass'n, 594 F.3d 823, 826 (11th Cir. 2010).

practices caused him to lose existing patients as well as referrals."[129] The court specifically held that it was not relevant that the tort claims depended on a different legal theory than the claims in the class action or would require proof of matters additional to or different from those required in the class action claims.[130] The court also discussed the temporal element of the release language, noting that "the relevant inquiry . . . is not whether the acts giving rise to the complaint occurred after the class action was filed or the settlement agreement was entered, but whether they occurred after the effective date of the settlement agreement."[131] Given the similar factual comparisons required by the court in *Borrero* and *Thomas*, it is difficult to reconcile the decision in *Borrero* that the state-law claims were only tangentially related to the RICO claims with the opposite conclusion in *Thomas*.

Finally, in *Brown v. R.J. Reynolds Tobacco Co.*,[132] the court considered the preclusive effect of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*,[133] a decades-old tobacco case in which that court had decertified the class but left standing certain factual findings to be used offensively by individual plaintiffs.[134] The trial court in *Engle* had developed a three-part trial plan, Phase I of which was a year-long trial involving "common issues relating . . . to the defendants' conduct and the general health effects of smoking."[135] At the end of Phase I, the jury answered almost every question on the verdict form in a manner adverse to the defendants.[136] Because of the limited nature of Phase I, however, "the jury was not asked whether the class had proven any of its claims; it did not decide if the defendants were liable to anyone on any cause of action."[137] The Florida Supreme Court later decertified the *Engle* class for purposes of Phase III of the trial but let stand the majority of the findings in Phase I, noting that "[c]lass members can choose to initiate individual damages actions and the

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129. *Thomas*, 594 F.3d at 822.

130. *Id.*

131. *Id.*

132. 611 F.3d 1324 (11th Cir. 2010). The opinion of the court was authored by Judge Ed Carnes. *Id.* at 1326. Judge R. Lanier Anderson authored a separate concurring opinion that was incorporated in full into the opinion of the court. *Id.* at 1336 n.11.

133. 945 So. 2d 1246 (Fla. 2006).

134. *Id.* at 1277.

135. *Brown*, 611 F.3d at 1326-27 (omission in original) (quoting *Engle*, 945 So. 2d at 1256) (internal quotation marks omitted).

136. *Id.* at 1327. The jury found, for example, "that smoking cigarettes causes 20 of 23 listed diseases or medical conditions." *Id.*

137. *Id.*

Phase I common core findings we approved above will have *res judicata effect* in those trials."[138]

The plaintiffs subsequently filed individual actions against the tobacco companies, requiring the court to determine the extent of the res judicata effect of the Phase I findings.[139] The district court issued an order that the Phase I findings could not be used to establish any element of the plaintiffs' claims but reserved judgment on whether the findings could have any other preclusive effect.[140] On interlocutory appeal, the Eleventh Circuit rejected the district court's determination as premature and remanded to the district court to reexamine the proper extent of the preclusive effect of each factual finding.[141] The court reviewed Florida law on res judicata, which was not disputed by the parties,[142] who agreed that the Florida Supreme Court intended to refer to issue preclusion rather than claim preclusion, and that only issues that were "actually adjudicated" in the earlier lawsuit could not be relitigated.[143] The subject of contention was the precise facts actually found by the jury.[144] The Eleventh Circuit noted that the entire trial record, but nothing outside of it, could be considered for purposes of determining whether a specific factual issue was determined in the plaintiffs' favor.[145] Because the district court had not specifically determined the scope of the facts found in the Phase I proceedings, the time was premature for the district court "to address whether those findings by themselves establish any elements of the plaintiffs' claims."[146] Beyond this instruction, however, the Eleventh Circuit left "it to the district court to apply Florida law as we have outlined it and decide in the first instance precisely what facts are established when preclusive effect is given to the approved findings."[147] *Brown* again demonstrates the difficulty in determining the precise preclusive effect

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138. *Id.* at 1328-29 (citing *Engle*, 945 So. 2d at 1269).

139. *Id.* at 1329.

140. *Id.*

141. *Id.* at 1336. Before addressing the preclusive effect of the Phase I findings, the court rejected the plaintiffs' argument that the court lacked jurisdiction under the *Rooker-Feldman* doctrine, which precludes the losing party in a state court action from seeking appellate review in a federal district court by "claim[ing] that the state judgment itself violates the loser's federal rights." *Id.* at 1330 (quoting Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994)); *see* Rooker v. Fid. Trust Co., 261 U.S. 114 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

142. *See Brown*, 611 F.3d at 1334.

143. *Id.* (internal quotation marks omitted).

144. *Id.*

145. *Id.* at 1335.

146. *Id.* at 1336.

147. *Id.*

of a prior class disposition. Whether a settlement or a judgment, the preclusion analysis requires a detailed examination of the facts and allegations at issue in the two cases.