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Trial Practice and Procedure

by Philip W. Savrin*
and
Robyn L. Oliver**

I. INTRODUCTION

This Article surveys the 1997 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD

A party's ability to supplement the record was the issue in *Shahar v. Bowers*.[1] The court considered a decision by Georgia's Attorney General to revoke an offer of employment previously extended to Shahar because Shahar publicized her marriage to a person of the same sex. Shahar filed suit alleging the decision violated her constitutional rights to freedom of association, equal protection, and due process. The district court granted summary judgment in favor of Attorney General Bowers, and Shahar appealed.[2] Following an affirmance en banc by the Eleventh Circuit, Shahar petitioned for rehearing, seeking in part to supplement the record with two newspaper articles reporting that the Attorney General, who had made the employment decision, had admitted to having an adulterous affair in the past. Shahar requested that this

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1. 120 F.3d 211 (11th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 693 (1998).

2. Shahar v. Bowers, 836 F. Supp. 859 (1993).

information become part of the record by judicial notice or through remand to the district court for further discovery.[3]

Ruling again en banc, the court of appeals recognized that while it has the "inherent equitable power to supplement the record with information not reviewed by the district court," it is generally reluctant to do so.[4] Indeed, to supplement the record "would be an especially extraordinary event and would require the clearest showing of just need to warrant the supplementation."[5] In this case one factor that was found to weigh strongly against supplementation was an agreement by the parties early in the litigation not to propound discovery concerning the sexual history of the other party.[6] The hearsay information contained in the newspaper articles concerning the adulterous affair was deemed to be encompassed by the terms of this agreement.[7] Consequently, had it not been for the voluntary agreement, Shahar could have obtained the information contained in the articles through the normal course of discovery. As it stood, Shahar "did not diligently seek out this information when the information could have been regularly considered by the district court and then by the court of appeals."[8] Accordingly, the court held that Shahar's request to supplement the record through remand was procedurally barred.[9]

The court also declined to supplement the record through judicial notice.[10] The court recognized that "the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence."[11] Consequently, while it is appropriate to take judicial notice of a person's official conduct, the court would not extend judicial notice to "the unofficial conduct of one person based upon newspaper accounts (or the person's campaign committee's press release) about that conduct."[12]

III. STATUTE OF LIMITATIONS

In *United States v. Banks*,[13] the Eleventh Circuit analyzed and addressed the procedure for determining the applicable statute of

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3. 120 F.3d at 212.
4. *Id.*
5. *Id.*
6. *Id.* at 213.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 214.
11. *Id.*
12. *Id.*
13. 115 F.3d 916 (11th Cir. 1997).

limitations when a substantive federal statute does not specify a limitations period. In *Banks* the Government brought a civil proceeding seeking to enjoin Banks (a landowner) from discharging waste material into United States waters under the Clean Water Act ("CWA"). The trial court entered judgment against Banks, and he appealed on several grounds including that the Government's equitable action was barred by the applicable statute of limitations.[14]

The court acknowledged that when a statute does not specify a limitations period, the default limitations provision of 28 U.S.C. § 2462 would normally apply.[15] This section provides: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

However, because the "plain language of [the default limitations provision] does not apply to equitable remedies," Banks argued that the "concurrent remedy rule" should apply instead.[16] Under the concurrent remedy rule, "'equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy.'"[17] In this case the concurrent remedy, a legal action under the CWA, would arguably be covered by the default limitation provision, and the action would be time-barred.[18]

In support of his argument, Banks relied on *United States v. Windward Properties, Inc.*[19] In *Windward* the district court applied the concurrent remedy rule to bar the Government's action for equitable relief and civil penalties under the CWA.[20] The court of appeals disagreed with the district court's analysis in *Windward* because it failed to address the general rule that "'an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.'"[21] In addition, an application of the rule would run afoul of the "canon of statutory construction that 'any statute of limitations sought to be applied against the United States "must receive a strict construction in favor of the government."'"[22]

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14. *Id.* at 918.
15. *Id.*
16. *Id.* at 919.
17. *Id.* (quoting Cope v. Anderson, 331 U.S. 461, 464 (1947)).
18. *Id.*
19. 821 F. Supp. 690 (N.D. Ga. 1993).
20. *Banks*, 115 F.3d at 919 (citing *Windward*, 821 F. Supp. at 693).
21. *Id.* (quoting E.I. DuPont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)).
22. *Id.* (quoting United States v. Alvarado, 5 F.3d 1425, 1428 (11th Cir. 1993)).

In light of these considerations, the court of appeals held that a statute of limitations "is enforced against the government only when the government is acting to vindicate private interests, not a sovereign or public interest."[23] Consequently, because the Government in this case sought "relief in its official enforcement capacity," the concurrent remedy rule could not properly be invoked, and the Government's action was not time-barred.[24]

IV. ADDITUR/SEVENTH AMENDMENT

The right to a jury trial on the issue of damages was addressed by the Eleventh Circuit in *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*[25] In that case the Equal Employment Opportunity Commission ("EEOC") alleged that defendant employer had unlawfully discriminated against a female employee "by subjecting her to a hostile work environment and harassing and constructively discharging her because of her age" in violation of the Age Discrimination in Employment Act ("ADEA").[26] A jury found that defendant had subjected the employee to a hostile work environment but that the discrimination was not willfull. Because the ADEA authorizes liquidated damages for willfull discrimination only, the employee was awarded back pay but did not receive liquidated damages. In addition, the back pay award was significantly less than the total amount of pay the employee would have received had she continued to work between the time of her constructive discharge and the employer's offer to reinstate her.[27] Not surprisingly, the EEOC moved to conform the damages to the evidence by increasing the award to match the actual amount of back pay due to the employee.[28]

The court of appeals began by recognizing that "once liability for harassment and constructive discharge on the basis of age is established, the injured victim is presumptively entitled to back pay from the date of the discriminatory discharge until the date of judgment, unless the victim obtained or could have obtained substantially equivalent work before that time."[29] The Seventh Amendment generally prohibits a trial court from increasing a jury award except "where the jury has found the underlying liability and there is no genuine issue as to the

23. *Id.*
24. *Id.*
25. 117 F.3d 1244 (11th Cir. 1997).
26. *Id.* at 1246.
27. *Id.* at 1246, 1251.
28. *Id.* at 1249.
29. *Id.* at 1251.

correct amount of damages."[30] Because the jury found the defendant liable for discrimination and there was no dispute about the correct amount of back pay, the court determined the district court had the authority to adjust the back pay award without violating the Seventh Amendment.[31] Accordingly, the court vacated the award and remanded the case with instructions to conform the damages to the evidence.[32]

V. JURISDICTIONAL ISSUES

A. *Personal Jurisdiction Under RICO*

In *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*,[33] the Republic of Panama ("Panama") brought suit in Florida under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[34] against several foreign and domestic banking entities. In its complaint Panama alleged that these entities had assisted Manuel Noriega, a former military officer of Panama, in unlawfully obtaining money from Panama. One of the defendants had its principal place of business in the District of Columbia, and another had its principal place of business in New York City. The district court dismissed the complaint for lack of personal jurisdiction and in an alternative ruling held that Panama failed to state a claim under the RICO statute.[35]

Panama appealed, claiming the district court had jurisdiction over defendants under RICO's nationwide service of process provision.[36] Under this provision "process may be served 'on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.'"[37] In response, defendants urged the court "to put aside the jurisdictional issue and first review the district court's alternative ruling under [rule 12(b)(6) of the Federal Rules of Civil Procedure] addressing the merits of Panama's RICO claim."[38]

Before reaching the merits of Panama's RICO claim, the court recognized that it must first decide the personal jurisdiction issue because a "defendant that is not subject to the jurisdiction of the court

30. *Id.* at 1252.
31. *Id.*
32. *Id.* at 1253.
33. 119 F.3d 935 (11th Cir. 1997).
34. 18 U.S.C. §§ 1961-1990 (1994).
35. *BCC*, 119 F.3d at 939-40.
36. *Id.* at 940.
37. *Id.* (quoting 18 U.S.C. § 1965(d)).
38. *Id.*

cannot be bound by its rulings."[39] In addition, a dismissal on the merits would be with prejudice, whereas a dismissal based on personal jurisdiction would be without prejudice.[40] The court declined to adopt the approach utilized by some courts whereby the issue of personal jurisdiction is not decided "if the decision on the merits would favor the party challenging jurisdiction and the jurisdictional issue is difficult."[41] Because the jurisdictional question facing the court had resulted in inconsistent holdings within the Eleventh Circuit, the court determined it would "clarify the distinction between what a plaintiff asserting jurisdiction under a federal statute must allege to survive a defendant's 12(b)(1) or 12(b)(2) motion on the one hand, and a defendant's 12(b)(6) motion on the other."[42]

A plaintiff asserting jurisdiction under a federal statute must allege only a claim under that statute that is "not wholly immaterial or insubstantial" in order to take or utilize the statute's nationwide service of process provision.[43] Because Panama had asserted a viable claim, RICO provides for nationwide service of process, and because defendants "are domestic corporations doing business in this country, the statutory basis for personal jurisdiction over these defendants [was] satisfied."[44]

The court then turned to the constitutional question of whether compelling defendants to litigate in Florida would comport with Fifth Amendment Due Process protections.[45] The court determined there is no reason why the policies behind the Fourteenth Amendment decisions of the Supreme Court should not apply to jurisdictional challenges under a federal statute.[46] Consequently, in "order to evaluate whether the Fifth Amendment requirements of fairness and reasonableness have been satisfied, courts should balance the burden imposed on the individual defendant against the federal interest involved in the litigation."[47] This balancing test requires courts to determine if important governmental interests justify an infringement on individual liberty.[48]

39. *Id.* (citing Madara v. Hall, 916 F.3d 1510, 1513-14 and n.1 (11th Cir. 1990)).
40. *Id.*
41. *Id.* at 941.
42. *Id.*
43. *Id.* at 942.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 946.
48. *Id.*

This balancing test is required only, however, "if the defendant has established that his liberty interests have actually been infringed."[49] Whether a defendant has satisfied this burden depends on the same factors considered in determining fairness under the Fourteenth Amendment.[50] These factors include an examination of "defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state."[51] The court cautioned, however, that even if a defendant has sufficient contacts, "courts must insure that requiring a defendant to litigate in plaintiff's chosen forum is not unconstitutionally burdensome."[52] Indeed, it is the defendant's burden to demonstrate that litigation in the plaintiff's chosen forum is so inconvenient as to rise to a constitutional concern.[53] If the defendant satisfies this burden, "jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant."[54] In making this determination, "courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy."[55] The court noted that when a statute provides for nationwide service of process, it should be assumed "that nationwide personal jurisdiction is necessary to further congressional objectives."[56]

The court held that personal jurisdiction over defendants in this case was proper, in part because "defendants are large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard."[57] Consequently, defendants' lack of contact with Florida did not make litigating in that state unreasonably inconvenient.[58] In addition, because discovery would be conducted throughout the world, Florida was not necessarily any more inconvenient than another location in the United States.[59] Accordingly, the court found that the defendants had not satisfied their burden in establishing that

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49. *Id.*
50. *Id.*
51. *Id.* at 947.
52. *Id.*
53. *Id.*
54. *Id.* at 948.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

Florida would be such an inconvenient forum as to raise a constitutional issue.[60]

B. Personal Jurisdiction over Aliens

A similar issue to the one in *BCCI* was addressed by the court in *SEC v. Carrillo*.[61] In this case the Securities and Exchange Commission ("SEC") filed a complaint against a Costa Rican corporation and two Costa Rican citizens alleging that defendants "fraudulently offered and sold unregistered securities to United States residents to finance [the corporation's] operations."[62] The district court dismissed the SEC's claims based on lack of personal jurisdiction, and the SEC appealed.[63]

In its personal jurisdiction analysis, the court noted that although it had never

> set forth a rule for identifying the relevant forum—the United States or the state where the district court sits—for purposes of minimum contacts analysis in a non-diversity action involving an alien defendant . . . a survey of our precedents reveals that we generally have deemed the applicable forum for minimum contacts purposes to be the United States in cases where, as here, service of process has been effected pursuant to a federal statute authorizing nationwide or worldwide service.[64]

The court recognized that the majority of circuits has determined that a federal statute's nationwide or worldwide service provision broadens a court's scope of personal jurisdiction and that in this context "'the question becomes whether the party has sufficient contacts with the United States, not any particular state.'"[65] The court also recognized that the jurisdictional concerns present in a diversity case "are absent in a federal question case [and] a federal court's power to assert personal jurisdiction is geographically expanded."[66] Accordingly, because personal jurisdiction in this case was based on a federal statute authorizing nationwide or worldwide service of process, the court concluded that "the proper forum for minimum contacts analysis is the United States."[67]

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60. *Id.*
61. 115 F.3d 1540 (11th Cir. 1997).
62. *Id.* at 1541.
63. *Id.*
64. *Id.* at 1542-43.
65. *Id.* (quoting Go-Video, Inc. v. Akai Elec. Co., 855 F.2d 1406, 1414 (9th Cir. 1989)).
66. *Id.* (citing United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992)).
67. *Id.* at 1544.

C. Diversity—Amount in Controversy

The amount in controversy requirement for purposes of diversity jurisdiction was addressed by the Eleventh Circuit in *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics*.[68] Plaintiff, an unsuccessful bidder for a communications contract with the City of Birmingham, brought an action in federal court to enjoin the execution of the contract between the city and the successful bidder. Specifically, plaintiff alleged the other communications company exerted bias over the city in violation of Alabama's competitive bid law. Plaintiff claimed the amount in controversy was sufficient to satisfy the requirements of diversity jurisdiction. The district court adopted an advisory jury's verdict for plaintiff, and defendant appealed.[69]

Before reaching the merits of the case, the court considered whether the action was properly in federal court.[70] Because plaintiff sought injunctive relief only, the amount in controversy must be measured "'by the value of the object of the litigation.'"[71] The court acknowledged that there was a conflict among the circuits, and even within the Eleventh Circuit, regarding whether that value must be determined "solely from the plaintiff's perspective or whether [the court] may also consider the value of the object from the defendant's perspective."[72] The court resolved this conflict by reviewing cases from the former Fifth Circuit, which it concluded established the plaintiff-viewpoint rule.[73] The court thus held that it was "bound to follow the plaintiff-viewpoint rule regardless of the wisdom we may attach to it."[74]

In applying the plaintiff-viewpoint rule, the court considered whether plaintiff had alleged a sufficient amount in controversy to satisfy the diversity requirements.[75] A review of Alabama state law revealed that the only remedy available to plaintiff was an injunction voiding the contract between the other communication company and the city.[76] Because the potential "injunctive relief awardable by the district court—namely, the chance to rebid for the contract—is, in our view, too speculative and immeasurable to satisfy the amount in controversy

68. 120 F.3d 216 (11th Cir. 1997).
69. *Id.* at 217-18.
70. *Id.* at 218.
71. *Id.* (quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 345 (1977)).
72. *Id.*
73. *Id.* at 219.
74. *Id.* at 220.
75. *Id.* at 221.
76. *Id.*

requirement," the court held that plaintiff had failed to satisfy the fifty-thousand dollar amount in controversy requirement.[77] Accordingly, the case was remanded to the district court with instructions to dismiss for lack of subject matter jurisdiction.[78]

D. Appellate Jurisdiction—Collateral Order Doctrine

Whether the denial of a motion to dismiss is appealable under the collateral order doctrine was the issue in *Jordan v. AVCO Financial Services of Georgia, Inc.*[79] In *Jordan* consumers brought a lawsuit against several insurance companies alleging that these companies "fraudulently induced [the consumers] to purchase 'non-filing insurance,' which the plaintiffs allege is not, in fact, insurance, but is an undisclosed finance charge."[80] Defendant insurance companies moved to dismiss plaintiffs' federal claims arguing that the McCarran-Ferguson Act ("Act")[81] "grants them immunity from suit because this dispute is covered by state insurance law."[82] The Act "determines whether state laws regulating insurance or federal laws related to insurance will apply in a given controversy."[83]

The jurisdictional issue before the court was whether it could hear the appeal of the trial court's denial of defendants' motion to dismiss pursuant to the collateral order doctrine.[84] The final judgment rule, codified in 28 U.S.C. § 1291, prohibits "'appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge.'"[85] The collateral order doctrine provides an exception to the application of the final judgment rule but is "limited to orders that (1) conclusively determine (2) important legal questions which are (3) completely separate from the merits of the underlying action and are (4) effectively unreviewable on appeal from a final judgment."[86] Defendants argued that the denial of their motion to dismiss satisfied the requirements of the collateral order doctrine because "it is analogous to the issue of immunity," which is generally immediately appealable under the collateral order doctrine.[87]

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77. *Id.* at 221-22.
78. *Id.*
79. 117 F.3d 1254 (11th Cir. 1997).
80. *Id.* at 1255.
81. 15 U.S.C. §§ 1011-15 (1994).
82. 117 F.3d at 1255.
83. *Id.* at 1257.
84. *Id.* at 1256.
85. *Id.* (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).
86. *Id.* (citing *Cohen*, 337 U.S. at 546).
87. *Id.* at 1257.

The court disagreed with defendants because it found that the Act "does not provide immunity to insurance companies against suit in federal court."[88] The Act does not mention immunity, and it "does not allow federal laws of general application to invalidate state insurance laws."[89] Indeed, the Act "is a statute of preemption rather than one granting immunity."[90] Therefore, because the "Act does not provide immunity to suit, but rather a defense to liability under federal statutes of general application, the denial of a motion to dismiss based on the applicability of the Act to this controversy is not immediately appealable under the collateral order doctrine."[91]

VI. REMOVAL AND REMAND

In *In re Bethesda Memorial Hospital, Inc.*,[92] the Eleventh Circuit reviewed a sua sponte order of a district court remanding a proceeding to state court. This case arose out of plaintiff's employment discrimination suit against several defendants. Two of the defendants independently sought removal, which resulted in the case being docketed in two separate district courts.[93] Upon learning of this situation, one of the district court judges sua sponte entered an order remanding the case docketed in his court back to the state court, "citing the failure of all defendants to either join in [defendant's] petition for removal or manifest their consent thereto."[94] Plaintiff then filed a successful remand motion in the other district court. Defendants sought appellate review of the sua sponte order and a writ of mandamus compelling the district court to reinstate the case on its docket.[95]

The court began by determining whether it had jurisdiction to review the district court's sua sponte remand order.[96] Although remand orders issued under 28 U.S.C. § 1447(c) are generally not reviewable on appeal or otherwise, subsection (c) expressly limits this prohibition to remand orders based upon "(1) lack of a district court's subject matter jurisdiction; or (2) a motion to remand the case filed within [thirty] days of the notice of removal which is based upon a defect in the removal proce-

88. *Id.*
89. *Id.*
90. *Id.* at 1258.
91. *Id.*
92. 123 F.3d 1407 (11th Cir. 1997).
93. *Id.* at 1409.
94. *Id.*
95. *Id.* at 1408-09.
96. *Id.* at 1409.

dure."[97] Previously, the court had declined to decide whether it could "review a remand order based on an untimely motion to remand for defects in the removal procedure."[98] However, because the district court did not comply with the grounds for remand contained in section 1447(c), the court concluded that it was not barred from appellate review of the district court's sua sponte remand order.[99]

After concluding that the remand order was reviewable, the court then addressed an issue of first impression, namely "the propriety of remanding for procedural defects after thirty days of the notice of removal."[100] Without deciding the issue of whether a district court could remand sua sponte, the court held that a district court is bound by the thirty day limit contained in section 1447(c).[101] Because the "court acted outside of its statutory authority by remanding for a procedural defect after thirty days of the notice of removal," the court directed the issuance of a writ of mandamus instructing the district court to recall the remand and to reinstate the case on its docket.[102]

VII. POST-JUDGMENT MOTIONS

Whether a party can introduce new evidence in a motion for reconsideration of the entry of summary judgment was the issue in *Mays v. United States Postal Service*.[103] In this case plaintiff claimed that she had been terminated on the basis of her race and sex in violation of Title VII. Defendant employer denied the claim and moved for summary judgment, arguing plaintiff did not perform adequately during her probationary employment period. The district court dismissed plaintiff's Title VII claim finding that she had been terminated for failure to satisfy performance requirements. Plaintiff filed a motion for reconsideration in which she submitted affidavits from several of her former coworkers that supported her claims. The district court denied her motion for reconsideration, and plaintiff appealed.[104]

The Eleventh Circuit characterized plaintiff's motion for reconsideration as a "Rule 59(e) motion to alter or amend the judgment, rather than a Rule 60 motion for relief from the judgment" because plaintiff sought the reversal of the grant of summary judgment.[105] Although the court

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97. *Id.*
98. *Id.* at 1410.
99. *Id.*
100. *Id.*
101. *Id.* at 1410-11.
102. *Id.* at 1411.
103. 122 F.3d 43 (11th Cir. 1997).
104. *Id.* at 44-45.
105. *Id.* at 46.

of appeals had previously held that a party should not use a motion to reconsider to assert new theories of law, it had not determined whether a party could introduce new evidence post-judgment.[106] In this case the court joined the majority of circuits "in holding that where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion."[107] Because the plaintiff failed to even allege that she could not have introduced the evidence prior to the district court's grant of defendant's motion for summary judgment, the court affirmed the district court's denial of plaintiff's motion for reconsideration.[108]

VIII. PREEMPTION

In *Williams Farms of Homestead, Inc. v. Rain & Hail Insurance Services, Inc.*,[109] the Eleventh Circuit addressed the issues of whether the Federal Crop Insurance Act ("FCIA")[110] provides for a federal cause of action by an insured against the insured's private insurance company and, if not, whether it preempts a suit against a private insurance company.[111] Plaintiffs in this case were insured under multi-peril crop insurance policies issued by defendant insurance company. These policies were issued subject to the FCIA and were reinsured by the Federal Crop Insurance Corporation ("FCIC"). After plaintiffs' claims under the insurance policies were denied, plaintiffs filed a complaint against defendant but not against the FCIC. The district court dismissed the claim without prejudice to allow plaintiffs to sue the FCIC. Plaintiffs appealed.[112]

The issue of whether the FCIA provides for a cause of action against a private insurer was deemed a question of first impression.[113] Under the FCIA, the FCIC "both insures farmers directly and reinsures private companies who insure farmers."[114] Following a 1980 amendment to the FCIA, federal district courts were given exclusive original jurisdiction over suits brought by or against the FCIC.[115] Because the provi-

106. *Id.* (citing O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992)).
107. *Id.*
108. *Id.*
109. 121 F.3d 630 (11th Cir. 1997).
110. 7 U.S.C. §§ 1501-1521 (1994).
111. 121 F.3d at 632.
112. *Id.* at 631-32.
113. *Id.* at 633.
114. *Id.*
115. *Id.*

sions of the FCIA provide for actions against the FCIC *only*, the court agreed "with the district court that none of these provisions in the FCIA create a federal cause of action against a private insurance company reinsured by the FCIC."[116]

The court next had to determine whether the FCIA preempted claims against private insurance companies in order to determine whether the district court could assume diversity jurisdiction over the action.[117] The court found no express preemption in the statute itself.[118] In addition, because there was no mention in the legislative history of preemption, it was clear that Congress did not even "consider preventing farmers from suing their private insurance company when that insurance company denies their claim."[119] Indeed, "Congress intended to leave insureds with their traditional contract remedies against their insurance companies."[120] Consequently, the court concluded that the FCIA does not grant federal question jurisdiction, does not preempt suits against private insurance companies, and does not establish venue.[121]

IX. ABSTENTION

In *Old Republic Union Insurance Co. v. Tillis Trucking Co.*,[122] the Eleventh Circuit affirmed a district court's dismissal of a federal action in favor of a pending state case. This litigation resulted from an accident between a tractor trailer and an automobile. The estate of the driver of the automobile brought a wrongful death action in state court against the company that owned the tractor trailer under Alabama's wrongful death statute. The company's insurer provided the defense for all defendants involved.[123] Following a seven million dollar award in punitive damages against the truck driver and his employer, the insurer filed a declaratory judgment action in federal court seeking a declaration that

> (1) the Alabama Wrongful Death Statute . . . is unconstitutional; (2) the Alabama Wrongful Death Statute, if constitutional, cannot be constitutionally enforced against [the insurer] or any other insurer; (3) [the insurer's] liability to the defendants cannot exceed the one million

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116. *Id.*
117. *Id.* at 633-34.
118. *Id.* at 634.
119. *Id.*
120. *Id.* at 635.
121. *Id.*
122. 124 F.3d 1258 (11th Cir. 1997).
123. *Id.* at 1259-60.

> dollar policy limit of its commercial automobile insurance policy with the insured.[124]

Subsequent to the filing of the declaratory action, the estate of the automobile driver filed an action in state court seeking an order compelling the insurer to tender the limits of its policy to plaintiff in partial satisfaction of the earlier state court judgment. The district court then dismissed the insurer's declaratory judgment action "without prejudice in favor of the pending second state action."[125] The insurer appealed.[126]

Relying on *Younger v. Harris*,[127] the Eleventh Circuit applied three factors to determine if the district court's abstention was appropriate: "[F]irst, do the proceedings constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges."[128] Although the state court action was filed after the federal declaratory judgment action, the court found it constituted an ongoing state judicial proceeding.[129] It also found that the insurer "has an adequate opportunity to raise in state court any constitutional objections it has to the Alabama Wrongful Death Statute."[130] The court did not agree with the insurer that adverse Alabama precedent rendered the insurer unable to present its arguments to an Alabama state court because the futility of a substantive argument does not serve to defeat abstention.[131]

In determining whether the pending state action against the insurer involved a sufficiently important state interest, the court found the possibility that the Alabama Wrongful Death Statute would be declared unconstitutional "would not only interfere with partial satisfaction of the wrongful death judgment against [the insurer] by means of an enforcement action"[132] but would force the district court "to find that Alabama state courts are incapable of enforcing the federal constitution in this context."[133] In addition, the insurer had failed to establish that the "Alabama Wrongful Death Statute is 'flagrantly and patently violative

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124. *Id.* at 1260.
125. *Id.*
126. *Id.*
127. 401 U.S. 37 (1971).
128. 124 F.3d at 1261 (citing Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)).
129. *Id.* at 1261-62.
130. *Id.* at 1262.
131. *Id.*
132. *Id.* at 1263.
133. *Id.*

of express constitutional prohibitions,' or that the Alabama courts are applying the statute in bad faith, or that other internal 'extraordinary circumstances' are present, as would be necessary to make an exception to the *Younger* rule."[134] Because this action satisfied all three factors of the *Younger* abstention doctrine, the court affirmed the dismissal.[135]

X. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

In *In re Hill*,[136] an inmate convicted of murder and sentenced to death applied for leave to file a second or successive petition for a writ of habeas corpus. The Eleventh Circuit analyzed Hill's application under the Antiterrorism and Effective Death Penalty Act ("AEDPA").[137] Under the AEDPA, successive habeas corpus petitions may be filed only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[138]

In this case Hill's second habeas petition asserted a *Cage* claim—the petition asserted that "the Alabama trial court deprived [Hill] of due process by improperly instructing the jury with regard to reasonable doubt during the capital trial."[139] Hill argued that because this claim was not established until the 1990 Supreme Court decision in *Cage v. Louisiana*,[140] his petition was exempt from the AEDPA successive petition bar because it was based upon a new rule of constitutional law.[141]

In order to resolve this issue, the court had to determine whether the claim advanced by Hill was "'previously unavailable'" within the meaning of the AEDPA.[142] Although the court had generally interpret-

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134. *Id.* at 1264.
135. *Id.*
136. 113 F.3d 181 (11th Cir. 1997).
137. 28 U.S.C. § 2244 (1994).
138. 113 F.3d at 182 (quoting 28 U.S.C. § 2244(b)(2)).
139. *Id.*
140. 498 U.S. 39 (1990).
141. 113 F.3d at 182.
142. *Id.* (quoting 28 U.S.C. § 2244(b)(2)(A)).

ed the term "previously unavailable" with regard to the availability of the claim at the time the first habeas application was filed, it emphasized that "we have eschewed reliance upon any mechanistic test when assessing availability."[143] Instead, the court held that "a petitioner intent upon establishing the 'unavailability' of the claim based upon a new rule of constitutional law may also be required to demonstrate the infeasibility of amending a habeas petition that was pending when the new rule was announced."[144]

These principles regarding successive habeas petitions were particularly significant with respect to Hill's application.[145] In his first habeas proceeding, Hill was given numerous opportunities to amend his habeas petition and was in fact encouraged on several occasions by the district court to amend his petition to add a claim of ineffective assistance of counsel, which Hill did not do.[146] In addition, although the Supreme Court did not issue its decision in *Cage* until seven months after Hill had filed his original petition, the petition remained in the district court for an additional three and one-half years following the *Cage* decision.[147] Consequently, the court found "that the circumstances of this case conclusively refute Hill's contention that his *Cage* claim was 'previously unavailable' within the meaning" of the AEDPA.[148] Because Hill also failed to establish that the Supreme Court made *Cage* claims "'retroactively applicable to cases on collateral review,'" the court denied Hill's application to file a successive habeas petition.[149]

XI. PRISON LITIGATION REFORM ACT

In *Mitchell v. Farcass*,[150] the Eleventh Circuit addressed several challenges to the Prison Litigation Reform Act ("PLRA").[151] In *Mitchell* an inmate brought a civil rights action against prison officials. Because the inmate was granted *in forma pauperis* status, the district court reviewed his complaint under the PLRA.[152] Under the PLRA a court has the authority to dismiss a case brought by an inmate proceeding *in forma pauperis* when the court finds that "the action or appeal—(i) is

143. *Id.* at 183.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 184.
149. *Id.* (quoting 28 U.S.C. § 2244(b)(2)(A)).
150. 112 F.3d 1483 (11th Cir. 1997).
151. 28 U.S.C. § 1915 (1994).
152. *Id.* at 1485-86.

frivolous or malicious; (ii) fails to state a claim on which relief may granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."[153] Upon finding that plaintiff's complaint failed to state a claim, the district court dismissed the complaint, and plaintiff appealed.[154]

Plaintiff argued that because he filed his complaint prior to April 26, 1996, the effective date of the PLRA, his complaint was not subject to review under the PLRA.[155] Generally, a newly enacted statute is not given retroactive effect if, when applied to a pending case, it "(1) impairs rights a party possessed when he or she acted, (2) increases a party's liability for past conduct, or (3) imposes new duties with respect to transactions already completed."[156]

The court of appeals in this case summarily disposed of the second and third factors because they "clearly have no application to this case, and [plaintiff] makes no argument to the contrary."[157] Instead, the court focused on the first factor, whether application of the statute would impair plaintiff's rights as they existed at the time he filed his complaint.[158] The court cautioned that the "'term "rights" as used in this context should not be construed broadly so as to sweep within its ambit mere expectation interests under procedural or remedy rules.'"[159] Because the PLRA is wholly procedural, the court concluded that plaintiff had nothing "more than an expectation interest" that the PLRA would not apply to his complaint.[160] Consequently, the court determined that the PLRA could be applied retroactively to plaintiff's complaint.[161]

XII. CONCLUSION

As in recent years, jurisdictional issues both at the trial and appellate levels were at the forefront of the Eleventh Circuit's agenda in 1997. While not reluctant to address issues of federal court jurisdiction, the Eleventh Circuit continues to appear deferential in addressing the impact of state law and state court jurisdiction. The impact of new as well as old Supreme Court opinions helped shape Eleventh Circuit

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153. 28 U.S.C. § 1915(e)(2)(B).
154. 112 F.3d at 1486.
155. *Id.*
156. *Id.* at 1486-87 (citing Landraf v. USI Film Prods., 511 U.S. 244, 280 (1994)).
157. *Id.* at 1487.
158. *Id.*
159. *Id.* (quoting Hunter v. United States, 101 F.3d 1565, 1572 (11th Cir. 1996) (en banc)).
160. *Id.*
161. *Id.*

decisions in many substantive areas. There were also several issues of first impression this year. As the cases featured in the Survey demonstrate, the wide range of complexities of practice in the federal arena requires a continued and close scrutiny of the ongoing developments in federal civil procedure.