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Trial Practice and Procedure

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I. INTRODUCTION

This Article surveys the 1998 decisions of the Eleventh Circuit Court of Appeals that have a significant impact on issues relating to trial practice and procedure.

II. STATUTE OF LIMITATIONS

A. *Entry of an Interlocutory Order Denying Class Certification*

In *Armstrong v. Martin Marietta Corp.*,[1] the court had to decide whether, in the absence of controlling authority, the statute of limitations begins to run immediately upon the district court's entry of an interlocutory order denying class certification or whether the statute remains tolled through final judgment in the former class action and completion of an appeal from the order denying class certification. Appellants in *Armstrong* were thirty-one former Martin Marietta employees who were discharged between 1992 and 1993. Following their terminations, twenty-eight of the appellants filed charges of age

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1. 138 F.3d 1374 (11th Cir. 1998).

discrimination with the Equal Employment Opportunity Commission ("EEOC"); three of the appellants did not file EEOC charges.[2]

Over time, the EEOC notified all twenty-eight appellants that their charge of age discrimination was dismissed. Generally, receipt of notice of dismissal triggers the ninety-day statute of limitations for bringing a civil action.[3] However, the ninety-day period is tolled when the potential plaintiff is a putative member of a class action.[4] In this case, twenty-eight of the appellants opted into *Carmichael v. Martin Marietta Corp.*,[5] an age discrimination class action suit already proceeding in Florida (the other three appellants were already named plaintiffs in *Carmichael*). The court in *Carmichael* found that appellants were not "similarly situated" to the other *Carmichael* plaintiffs and, thus, certified a class that did not include appellants.[6] The court dismissed the claims of appellants who were named plaintiffs and denied the remaining appellants' requests to opt into the *Carmichael* class.[7] Then, more than ninety days after the court in *Carmichael* denied their requests to opt into the class action, appellants filed their complaint.[8]

Martin Marietta filed, and the district court later granted, a motion for partial summary judgment on the ground that appellants failed to file their individual lawsuits within ninety days after their dismissal from the *Carmichael* class action. On appeal, appellants argued that the statute of limitations should continue to be tolled, even after the court's denial of class certification in *Carmichael*, "because the denial of certification in an interlocutory order may be reversed by the district court at any time before final judgment."[9] After the court of appeals reversed and remanded, a rehearing en banc was granted.[10]

The Age Discrimination in Employment Act's[11] statute of limitations requires a plaintiff to file suit within ninety days of receiving the EEOC's notice of dismissal of the plaintiff's discrimination charge.[12] However, membership in a pending class action tolls the ninety-day period.[13] "The purpose of such tolling is to encourage class members

2. *Id.* at 1378-79.
3. *Id.* at 1379.
4. *Id.*
5. Carmichael v. Martin Marietta Corp., No. 93-434 (M.D. Fla. filed June 4, 1993).
6. *Armstrong*, 138 F.3d at 1379.
7. *Id.*
8. *Id.*
9. *Id.* at 1380-81.
10. Armstrong v. Martin Marietta Corp., 107 F.3d 830 (11th Cir. 1997).
11. 29 U.S.C. §§ 621-634 (1994).
12. *Id.* § 626(e).
13. 138 F.3d at 1380.

reasonably to rely on the class action to protect their rights."[14] The Eleventh Circuit, in affirming the district court's grant of summary judgment, stated that once the order denying class certification was entered, "reliance on the named plaintiffs' prosecution of the matter ceases to be reasonable, and . . . excluded putative class members are put on notice that they must act independently to protect their rights."[15] Additionally, because a class certification decision is not a "'final decision' within the meaning of 28 U.S.C. § 1291", it is not appealable as a matter of right.[16] Waiting until the appellate process is completed or until the time for taking an appeal has expired before resuming the statute of limitations would take years and create uncertainty.[17] Consequently, the district court's decision was affirmed.[18]

B. Equitable Tolling Under Truth in Lending Act

In *Ellis v. General Motors Acceptance Corp.*,[19] appellants purchased an automobile in May 1995. After allegedly discovering fraud fifteen months after the purchase, appellants sued the financing company for violations of the Truth in Lending Act ("TILA").[20] Appellants, recognizing that under TILA they only had one year from the time they purchased the car to bring an action, argued that because they were prevented from learning of the alleged misrepresentation, equitable tolling should apply to suspend the statute of limitations.[21] "[T]he district court concluded that TILA [is] a jurisdictional statute and that the [appellants'] claim was therefore time-barred."[22] Appellants contended that TILA was not a jurisdictional statute, but rather it was a statute of limitations subject to equitable tolling.[23] The issue of whether TILA was subject to equitable tolling was one of first impression in the Eleventh Circuit.[24]

In its analysis, the court first began by noting that every other circuit that considered the issue held that TILA was subject to equitable

14. *Id.*
15. *Id.*
16. *Id.* at 1385 (quoting 28 U.S.C. § 1291 (1994)).
17. *Id.* at 1389.
18. *Id.* at 1394.
19. 160 F.3d 703 (11th Cir. 1998).
20. 15 U.S.C. § 1640(e) (1997).
21. 160 F.3d at 705.
22. *Id.* at 706.
23. *Id.*
24. *Id.*

tolling.[25] "'Equitable tolling'" is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances.[26] Here, the court noted that TILA is a consumer protection statute and, as such, is remedial in nature and should be construed liberally.[27] Because a literal reading of the time limit within TILA would thwart its remedial purpose, the court found that the statute of limitations in TILA is subject to equitable tolling.[28] To hold otherwise would reward those perpetrators who are successful in concealing their fraudulent actions long enough for the statute of limitations period to expire.[29]

C. Rehabilitation Act and Title II of the Americans with Disabilities Act ("ADA")

In *Everett v. Cobb County School District*,[30] a plaintiff with multiple sclerosis and bilateral SI joint dysfunction, while attending Kennesaw State College to earn a degree in early childhood education, began her student teaching assignment at Kennesaw Elementary School. The teacher of the classroom to whom Everett was assigned made frequent comments about Everett's disability and told Everett that she would have to demonstrate that she was capable of teaching in any situation to receive a satisfactory grade. On May 31, 1994, the Kennesaw State faculty gave Everett a grade of incomplete and told her she would have to repeat the student teaching program the following year. On June 6, 1994, Everett received a letter confirming that the May 31 decision would stand. On June 6, 1996, Everett filed a complaint based on Title II of the Americans with Disabilities Act ("ADA")[31] and the Rehabilitation Act of 1973,[32] alleging discrimination because of her disability.[33]

The district court granted defendants' motion to dismiss after it reasoned that Georgia's two-year statute of limitations applied to all of Everett's claims.[34] Everett appealed the district court's decision "asserting that Georgia's two-year personal injury statute of limitations

25. *Id.*
26. *Id.*
27. *Id.* at 707.
28. *Id.* at 708.
29. *Id.*
30. 138 F.3d 1407 (11th Cir. 1998).
31. 42 U.S.C. § 12111 (1994).
32. 29 U.S.C. § 701 (1994).
33. 138 F.3d at 1408.
34. *Id.*

is inapplicable to claims brought under the ADA and the Rehabilitation Act."[35]

Recognizing that the issue of the applicable statute of limitations under Title II of the ADA and the Rehabilitation Act of 1973 was an issue of first impression for the Eleventh Circuit, the court stated that when a federal statute does not contain a statute of limitations period, courts should look to the most analogous state statute of limitations.[36] Looking to the Supreme Court and other circuit courts for guidance on the characterization of ADA or Rehabilitation Act claims, the court concluded that, like most civil rights actions, discrimination actions are claims to vindicate injuries to personal rights.[37] Therefore, the appropriate period is the state's statute of limitations for personal injury actions.[38]

Only the Fourth Circuit failed to apply the state personal injury statute of limitations in a similar situation.[39] However, in that case the Fourth Circuit held that because Virginia had passed a state antidiscrimination statute that was identical to the federal Rehabilitation Act, the statute of limitations contained in that statute should be applied as the most analogous.[40] Because Georgia had not passed a state law identical to the Rehabilitation Act from which to borrow a limitations period, the court decided to follow the lead of all the other circuits and apply Georgia's two-year statute of limitations period for personal injury actions to discrimination claims brought under Title II of the ADA and the Rehabilitation Act.[41]

III. JURISDICTIONAL ISSUES

A. *Res Judicata* and Collateral Estoppel

1. *Res Judicata.* In *Pleming v. Universal-Rundle Corp.*,[42] plaintiff suffered a back injury while working for defendant. A year later she applied for a clerical position with defendant that paid less than what she was currently earning but would be less physically demanding.

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35. *Id.*
36. *Id.* at 1409.
37. *Id.*
38. *Id.*
39. *Id.* (citing Wolsky v. Medical College of Hampton Roads, 1 F.3d 222, 225 (4th Cir. 1993)).
40. *Id.*
41. *Id.* at 1409-10.
42. 142 F.3d 1354 (11th Cir. 1998).

Although qualified for the position, plaintiff did not receive the job. When plaintiff later filed an employment discrimination lawsuit against the defendant alleging discrimination based on her race and disability, the corporation explained it had a policy against allowing employees to transfer to lower paying jobs. During the course of the litigation, two additional clerical positions, similar to the types plaintiff originally sought, opened at defendant corporation. Plaintiff never applied for these positions and only learned of them during the course of discovery nearly a year later. While plaintiff never amended her complaint to include these incidents, she did describe them in her briefs before both the magistrate judge and the district court. Plaintiff sought to use these incidents as additional evidence that defendant's policy was a pretext for discrimination and thus avoid summary judgment on her claims arising out of the transfer decision. While later analyzing defendant's motion for summary judgment, the magistrate judge made a reference to the additional two clerical positions in which there were openings.[43]

After the district court granted summary judgment in favor of defendant, plaintiff filed another complaint alleging discrimination and retaliation against her in the company's decision to hire other applicants for the two later clerical openings.[44] Defendant moved to dismiss the complaint on the ground that either res judicata or collateral estoppel barred the suit because plaintiff had already litigated and lost on her claims arising out of the later hiring decisions.[45]

Res judicata, also known as claim preclusion, bars a subsequent claim when a previous court "entered a final judgment on the merits of the same cause of action in a prior lawsuit between the same parties."[46] The court explained that "[r]es judicata acts as a bar 'not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact.'"[47] Therefore, the factual issues in dispute in the second suit must be compared to the factual issues that were disputed in the first suit.[48] Here, plaintiff filed her first lawsuit alleging discrimination in July of 1993. Plaintiff never learned about the later openings until May 1995. Thus, these later openings were not in plaintiff's complaint, nor did she seek to amend her complaint to include them.[49] Citing the Eleventh

43. *Id.* at 1355-56.
44. *Id.* at 1356.
45. *Id.*
46. *Id.*
47. *Id.* at 1356-57 (quoting NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990)).
48. *Id.* at 1357.
49. *Id.*

Circuit's earlier decision in *Manning v. City of Auburn*,[50] the court stated that "for res judicata purposes, claims that 'could have been brought' are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in the earlier action."[51] Recognizing that the events giving rise to plaintiff's second lawsuit arose after her original lawsuit had been filed, plaintiff was under no obligation to amend or supplement her original complaint.[52] The issue then became whether plaintiff's discussion of the two additional openings in her brief amounted to an actual assertion of that claim in the first proceeding.[53]

In its analysis, the court referenced its earlier decision in *Coon v. Georgia Pacific Corp.*[54] In *Georgia Pacific* the issue was whether plaintiff's references to unpleaded incidents of alleged discrimination in her pretrial stipulation, motions before the court, and throughout the course of discovery should be considered by the court.[55] The Eleventh Circuit affirmed the district court's refusal to consider those incidents because plaintiff's references to the incidents by the aforementioned methods were no substitute for the factual allegations of a complaint required by Federal Rule of Civil Procedure 8.[56] Similarly, plaintiff's references in *Pleming* to the earlier alleged incident of discrimination in hiring were insufficient to put those claims before the district court pursuant to the Federal Rules of Civil Procedure because they were not actually asserted in the prior litigation.[57] At most, the court stated, "the report's reference to the post-1993 openings indicates that the magistrate judge may have considered the events as evidence of pretext but does nothing to suggest that the magistrate judge actually rendered a decision about whether those events constituted independent or even continuing acts of employment discrimination."[58] Therefore, the court held that res judicata did not bar plaintiff's claims of discrimination arising out of the later hiring decision.[59]

2. Collateral Estoppel. The court in *Pleming* also had to decide whether collateral estoppel—the doctrine which precludes the relitiga-

50. 953 F.2d 1355 (11th Cir. 1992).
51. 142 F.3d at 1357 (emphasis omitted).
52. *Id.*
53. *Id.*
54. 829 F.2d 1563 (11th Cir. 1987).
55. 142 F.3d at 1358.
56. *Id.*
57. *Id.* at 1359.
58. *Id.*
59. *Id.*

tion of an issue that has already been litigated and resolved in a prior proceeding—would bar plaintiff's claims.[60] In deciding whether the issue had already been litigated, the court referred to a Seventh Circuit case in which that court "explained that the actual litigation requirement for the application of collateral estoppel 'will usually be satisfied merely by the designation of the question as one for trial . . . even if no evidence is introduced . . . . '"[61] Additionally, in *Wu v. Thomas*, the Eleventh Circuit found that a "judgment against the plaintiff on prior claims of gender discrimination did not collaterally estop a subsequent claim for retaliation, even though the testimony offered in the first trial 'touched on' the defendant's retaliatory actions."[62] Similarly, because Pleming only offered the earlier incidents as evidence of pretext in a distinct employment decision, she could not have been considered to have actually litigated those claims.[63] Offering those later incidents as "evidence" is different than "actually litigating" the question of whether those incidents would themselves constitute employment discrimination.[64] Therefore, the court held collateral estoppel also did not bar plaintiff's claims.[65]

B. Case or Controversy

Plaintiffs in *Socialist Worker's Party v. Leahy*,[66] were registered minor political parties in Florida. A provision of Florida's election laws required the chairs and treasurers of political parties to file certain bonds. After receiving notification of this bond requirement, plaintiffs filed suit alleging the bond requirements violated the First and Fourteenth Amendments of the United States Constitution.[67]

During the course of discovery, Florida's Secretary of State announced that he had no authority to enforce the bonding requirements and had no intention to apply the statute.[68] Based upon this evidence, the district court concluded that plaintiffs had failed to satisfy the "actual case or controversy" requirement of Article III of the Constitution and

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60. *Id.*
61. *Id.* (quoting Truck Ins. Exch. v. Ashland Oil, Inc., 951 F.2d 787, 792 (7th Cir. 1992)).
62. *Id.* at 1360 (citing Wu v. Thomas, 863 F.2d 1543, 1548-49 (11th Cir. 1989)).
63. *Id.*
64. *Id.*
65. *Id.*
66. 145 F.3d 1240 (11th Cir. 1998).
67. *Id.* at 1241-43.
68. *Id.* at 1243.

thereby granted summary judgment in favor of defendants.[69] While plaintiffs moved for reconsideration, the Florida Division of Elections sent plaintiffs another letter informing them they had failed to comply with the bonding requirement. Agents of the Secretary of State advised plaintiffs the letter had been sent in error, but never sent a letter retracting the previous letter.[70] The district court denied plaintiffs' motion for reconsideration, "holding that the explicitly threatened harm was not justiciable."[71]

The "case or controversy" requirement ensures that federal courts will satisfy the justiciability doctrine by considering only those matters that are presented in an adversarial context.[72] When considering whether an adversarial context exists when litigating a statute in a pre-enforcement context, the plaintiff must demonstrate "'a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement.'"[73]

The court determined that because the Secretary of State threatened plaintiffs with future application of the bonding requirement and because a credible threat of future enforcement still existed, the case or controversy requirement of the Constitution was met.[74] Two different secretaries of state had tried on three separate occasions to apply the bonding requirement to plaintiffs.[75] Additionally, despite the Secretary's disavowal of authority to enforce the bonding requirement, a threat of application still remained because the earlier letter had not been retracted.[76] These factors suggested the "very real probability that a subsequent Secretary of State will also reach the same conclusion and again attempt to apply the bonding requirement to [plaintiffs]."[77] Therefore, there was a very realistic danger that the statute would be enforced against plaintiffs in the future.[78] Accordingly, the court found that a live controversy did exist between plaintiffs and the Secretary of State and thereby reversed the district court's finding.[79]

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69. *Id.*
70. *Id.*
71. *Id.* at 1244.
72. *Id.*
73. *Id.* at 1245 (citing ACLU v. The Florida Bar, 999 F.2d 1486, 1492 (11th Cir. 1993)).
74. *Id.*
75. *Id.* at 1246.
76. *Id.* (citing *ACLU*, 999 F.2d at 1492).
77. *Id.*
78. *Id.*
79. *Id.* at 1247.

IV. PREEMPTION

A. *Interstate Commerce Act*

The issue before the Court in *R. Mayer of Atlanta, Inc. v. City of Atlanta*,[80] was a matter of first impression—whether the Interstate Commerce Act[81] preempts a municipal ordinance regulating the provision of consensual towing services.[82] Atlanta had a city ordinance that required operators of tow trucks to obtain a license before operating within the city limits.[83] After the city council passed this ordinance, Congress amended the Interstate Commerce Act to preempt a wide range of state and local statutes and regulations governing interstate motor carriage. In particular, the Act preempts state and local regulation of prices, routes, and services provided by motor carriers that transport property.[84] When Congress later passed the Interstate Commerce Commission Termination Act,[85] it added a new exception to the Interstate Commerce Act. With this new exception, the earlier preemption of state and local regulation relating to motor vehicle transportation by a tow truck would no longer apply "if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."[86] Citations were issued to plaintiff towing companies because they operated tow trucks within the city limits without first obtaining the necessary permits. Plaintiff towing companies argued that while the municipality may regulate the prices charged for nonconsensual towing services, the regulation of consensual towing services was still preempted.[87]

After analyzing the language of the statute that made the statute inapplicable to nonconsensual towing services, the court concluded that "[i]f Congress had not intended for § 14501(c)(1) to preempt state and local regulation of towing services generally, Congress would not have included an express exemption that applies solely to the prices charged for non-consensual towing services."[88] The court went on to observe that by including an express exemption for nonconsensual towing

80. 158 F.3d 538 (11th Cir. 1998).
81. 49 U.S.C. §§ 13506, 14501 (Supp. II 1996).
82. 158 F.3d at 540.
83. *Id.*
84. *Id.* at 541.
85. 49 U.S.C. § 10501-10531 (1996).
86. *Id.* (citing 49 U.S.C. § 14501(c)(2)(C) (Supp. II 1996)).
87. *Id.*
88. *Id.* at 543.

services, "Congress has evinced its intent that all aspects of consensual towing services remain subject to the general rule set forth in the preemption clause."[89] Thus, the court held that the Interstate Commerce Act preempted municipal ordinances relating to the price, route, or provision of consensual towing services.[90]

B. *Federal Railroad Safety Act*

In *Ingram v. CSX Transportation Inc.*,[91] plaintiff filed a state law negligence action after her automobile collided with a train at a railroad crossing. The intersection at which the accident occurred had advance warning devices, including no passing zone signs and crossbucks, but did not have active warning devices such as flashing lights and gates.[92]

Congress enacted the Federal Railroad Safety Act[93] to promote safety in all areas of railroad operations.[94] The Act contained an express preemption clause which allowed states to adopt laws or regulations relating to railroad safety until the Secretary of Transportation issued a regulation or order pertaining to the subject matter of the state law or regulation.[95] Congress's later enactment of the Highway Safety Act of 1973[96] made federal funds available to states in order to improve grade crossings. In return, the states had to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose."[97] The Federal Highway Administration ("FHWA") promulgated regulations placing conditions on the states' use of federal aid to improve grade crossings. These laws required that "a grade crossing improvement project either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation' of the warning devices."[98] The issue in *Ingram* was whether these regulatory provisions preempted plaintiff's state law negligence claim based on inadequate signals at the crossing at which the accident occurred.[99]

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89. *Id.*
90. *Id.* at 545.
91. 146 F.3d 858 (11th Cir. 1998).
92. *Id.* at 860.
93. 49 U.S.C. § 20101 (1994).
94. 146 F.3d at 863.
95. *Id.*
96. 23 U.S.C. § 101 (1994).
97. 146 F.3d at 863 (quoting 23 U.S.C. § 130(d)).
98. *Id.*
99. *Id.* at 864.

There is no question that federal funds participated in the installation of the passive warning devices at the crossing at which the accident occurred.[100] Indeed, the Fifth, Eighth, and Tenth Circuits have held that such funding equates to federal approval of the warning devices installed and, thus, triggers federal preemption of a plaintiff's state law negligence claim based upon inadequate signals.[101] In their analysis, these three circuits each found that federal funding indicates approval of only passive, rather than active warning devices.[102]

Despite these circuits' reasoning, plaintiff in *Ingram* argued that the court should follow the Seventh Circuit's holding in *Shots v. CSX Transportation Inc.*[103] that mere federal financial participation in the grade crossing upgrade project was not enough to trigger preemption unless there was evidence that the federal government actually approved of the specific warning devices installed.[104] Plaintiff argued that the evidence she presented demonstrating that unsafe conditions existed at the crossing at which the accident occurred required that active warning devices be installed unless a government diagnostic team concluded that active warning devices were not necessary.[105] Additionally, plaintiff argued that because no determination was made about the appropriateness of passive warning devices at that location, the federal funding allocated for the passive warning devices could not be viewed as federal approval of the warning devices absent an inspection by federal regulators.[106]

The Eleventh Circuit rejected the Seventh Circuit's approach and instead joined the Fifth, Eighth, and Tenth Circuits in holding that the participation of federal funds in the grade crossing improvement project triggers preemption of a plaintiff's inadequate signal claim.[107] The court reasoned that an express, specific administrative finding is not the only way for the Secretary of Transportation to "approve" of the safety devices installed at the crossing.[108] The court concluded that such approval could also be inferred and that the authorization of federal funds to install the passive devices at the crossing was an example of

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* (citing 38 F.3d 304 (7th Cir. 1994)).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 865.
108. *Id.*

such inferred approval.[109] Therefore, the court held that the Federal Railroad Safety Act preempted plaintiff's state law negligence claim.[110]

V. ABSTENTION

In both *First Franklin Financial Corp. v. McCollum*[111] and *Tran-South Financial Corp. v. Bell,*[112] the respective plaintiffs filed fraud-related claims against financial institutions in state court. Thereafter, the defendants in the state court actions moved to compel arbitration in dual filings in state and federal court. In both cases, the federal district court abstained from exercising jurisdiction, even though the state court had not yet issued a ruling on the arbitration issue.[113] And, in both cases, the Eleventh Circuit concluded that the district courts' decisions to abstain were abuses of discretion.[114]

In analyzing whether the district courts should have abstained from the financial institutions' motions to compel plaintiffs to proceed pursuant to the arbitration clauses in the respective loan agreements, the Eleventh Circuit stated that such abstentions must be reviewed under the analysis set forth in two Supreme Court cases[115]—*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[116] and *Colorado River Water Conservation District v. United States.*[117] Reviewing the factors in *Moses H. Cone* led the circuit court to decide that exercising jurisdiction would not create piecemeal litigation.[118] First, the federal proceeding could only have two outcomes: "an order compelling arbitration or an order refusing to compel arbitration".[119] Second, even though the state court actions were filed prior to the federal court petitions, there was no way the financial institutions could have known prior to the time plaintiffs filed suit in state court that plaintiffs would not honor the arbitration agreements.[120] Third, the law of decision weighed against abstention because the Federal Arbitration Act[121]

109. *Id.*
110. *Id.*
111. 144 F.3d 1362 (11th Cir. 1998).
112. 149 F.3d 1292 (11th Cir. 1998).
113. *Id.* at 1294; 144 F.3d at 1363.
114. 149 F.3d at 1296; 144 F.3d at 1363.
115. 149 F.3d at 1294.
116. 460 U.S. 1 (1983).
117. 424 U.S. 800 (1976).
118. 149 F.3d at 1295.
119. 144 F.3d at 1364; *see also* 149 F.3d at 1295.
120. 144 F.3d at 1365; 149 F.3d at 1295.
121. 9 U.S.C. §§ 3-4 (1994).

governed motions to compel arbitration.[122] Additionally, any legal interpretation would be of federal law. Finally, the court examined the adequacy of the state courts to protect plaintiffs' rights.[123]

While the court noted that state court remedies may be adequate, it reasoned that factor alone does not warrant abstention.[124] The court in *First Franklin Financial Corp.* first noted the state court had not yet ruled on the financial institution's petition to force plaintiff to arbitrate the case, thereby undermining the federal policy, embodied in the Federal Arbitration Act, in favor of swift enforcement of arbitration agreements.[125] Second, the *Moses H. Cone* test permits abstention only when some factor weighs heavily in favor of relinquishing jurisdiction;[126] the financial institution obtaining relief at some point in the future from the state court does not provide the justification needed to refuse to exercise jurisdiction. Therefore, both district courts abused their discretion deciding to abstain.[127]

VI. APPELLATE JURISDICTION

A. Post-Judgment Motions

In *Harris v. Ballard*,[128] plaintiff filed a complaint under 42 U.S.C. § 1983 contesting the manner in which the state courts handled his wrongful termination case. After the district court granted judgment in favor of defendants and dismissed the case with prejudice, plaintiff filed a motion for an extension of time to file a notice of appeal.[129] The district court granted the motion (which was filed within the initial appeal period) and thereby gave plaintiff thirty days from the date of the order to file his notice.[130] Plaintiff filed his notice, but not until several days after the time extended by the district court.[131]

The Eleventh Circuit recognized that Federal Rule of Appellate Procedure 4(a)(5) allows a district court discretion to extend the appeal period, but only up to thirty days from the expiration of the initial period.[132] The court noted further that the district court's extension

122. 144 F.3d at 1365; 149 F.3d at 1295.
123. 144 F.3d at 1365; 149 F.3d at 1295.
124. 144 F.3d at 1365; 149 F.3d at 1295.
125. *Id.*
126. *Id.*
127. 144 F.3d at 1365; 149 F.3d at 1296.
128. 158 F.3d 1164 (11th Cir. 1998).
129. *Id.* at 1164.
130. *Id.* at 1166.
131. *Id.* at 1165-66.
132. *Id.* at 1166.

in the case was within the time permitted by Rule 4(a)(5).[133] Because plaintiff missed the extended deadline by a few days, however, the issue to be resolved was whether plaintiff's motion to extend time to file his notice of appeal could itself be considered as a notice of appeal.[134] The issue before the Eleventh Circuit was whether the motion for extension of time, filed within thirty days after the expiration of the original period and granted by the district court, was proper.[135]

In resolving this issue, the Eleventh Circuit acknowledged that Federal Rule of Appellate Procedure 3(c) provides that a notice of appeal can be effective even if its form or title is informal, so long as the paper filed indicates an intention to appeal.[136] In applying this standard, the court had little hesitation in dismissing the appeal, stating simply that "a motion for more time to appeal indicates uncertainty as to whether the party will in fact appeal and compels the conclusion that the notice of appeal is something yet to be filed."[137] Thus, to treat a motion for extension of time as the functional equivalent of a notice of appeal would render the notice requirement meaningless.[138] Accordingly, the court dismissed plaintiff's "appeal" for lack of jurisdiction.[139]

B. Collateral Order Doctrine

In *CSX Transportation Inc. v. Kissimmee Utility Authority*,[140] defendant ("KUA") entered into a contract with plaintiff ("CSX"). The contract gave KUA the right to construct an access road across CSX's railroad tracks to reach KUA's powerplant. The contract included an indemnity provision whereby KUA assumed all liability and agreed to defend and indemnify CSX for all damage at the crossing and all claims and liability for any loss or damage at the crossing.[141]

After KUA constructed the crossing, a collision occurred. While a jury in a separate suit determined that no fault was attributable to KUA, the contract between KUA and CSX required KUA to indemnify CSX regardless of the fault of KUA.[142] CSX sued KUA pursuant to this indemnity provision and the district court ultimately granted CSX's motion for partial summary judgment, thereby obligating KUA to

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1167.
140. 153 F.3d 1283 (11th Cir. 1998).
141. *Id.* at 1284.
142. *Id.*

indemnify CSX.[143] KUA filed an interlocutory appeal and the issue before the Eleventh Circuit was whether the collateral order doctrine conferred appellate jurisdiction.[144]

Under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*,[145] "the order appealed must conclusively determine an important legal question, [and that] question [must be] separate from the merits of the underlying action and not effectively reviewable in an appeal from a final judgment in the underlying action."[146] KUA argued that both the denial of its motion for partial summary judgment and the partial summary judgment granted in favor of CSX were appealable because KUA is entitled to state sovereign immunity.[147] In *Mitchell v. Forsyth*,[148] the Supreme Court held that a denial of summary judgment is immediately appealable when the movant alleged a right to qualified immunity.[149] "The Supreme Court's decision in *Mitchell* was based on the observation that qualified immunity . . . is immunity from suit or trial . . . ."[150] KUA argued that Florida's state law of sovereign immunity is also immunity from suit, and immunity would be lost if KUA was forced to litigate without the protection of an immediate appeal of the denial of that immunity.[151]

While the Eleventh Circuit agreed with KUA's argument that a denial of immunity from suit was immediately appealable, it disagreed with KUA's assessment of the law: under Florida law, sovereign immunity was not immunity from suit, but was only immunity from liability.[152] Because the state is afforded sovereign immunity from liability only, KUA's claim to sovereign immunity could be effectively reviewed after completion of the litigation in the district court.[153] Accordingly, the collateral order doctrine did not apply and KUA's appeal was dismissed.[154] The significance of the decision, therefore, is that it directly implies that in the proper case, the denial of immunity from suit, and not just liability, would be appealable on an interlocatory basis to the Eleventh Circuit for immediate review.

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143. *Id.*
144. *Id.* at 1285.
145. 337 U.S. 541 (1949).
146. 153 F.3d at 1285 (quoting *Cohen*, 337 U.S. at 545-46).
147. *Id.*
148. 472 U.S. 511 (1985).
149. 153 F.3d at 1285 (citing *Mitchell*, 472 U.S. at 530).
150. *Id.*
151. *Id.*
152. *Id.* at 1286.
153. *Id.*
154. *Id.*

VII. MISCELLANEOUS

A. *Attorney Fees Under the ADEA*

The issue in *Turlington v. Atlanta Gas Light Co.*[155] was one of first impression in the Eleventh Circuit: under what circumstances may a prevailing defendant obtain attorney fees in an Age Discrimination in Employment Act ("ADEA")[156] case. After granting summary judgment to defendant employer, the district court granted defendant attorney fees and costs.[157] While the ADEA does not have a provision regarding attorney fees, it incorporates certain provisions of the Fair Labor Standards Act ("FLSA"),[158] including those pertaining to attorney fees.[159] While the FLSA also does not indicate under what circumstances the defendant should be awarded attorney fees, the Eleventh Circuit has, on prior occasions, held that a prevailing defendant is entitled to attorney fees under the FLSA only when the plaintiff litigated in bad faith.[160] Observing a close relationship between the ADEA and the FLSA, the court of appeals held that attorney fees should be awarded to a prevailing ADEA defendant only upon a finding that the plaintiff litigated in bad faith.[161]

B. *Section 1981 Post-Hiring Retaliation Claim*

In another matter of first impression, the court had to decide in *Andrews v. Lakeshore Rehabilitation Hospital*[162] whether an employer's post-hiring retaliation claim was cognizable under section 1981. Plaintiff sued her former employer for race discrimination and retaliation under section 1981.[163] In *Patterson v. McLean Credit Union*,[164]

> the Supreme Court held that the "make and enforce contracts" language in section 1981 covered "only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process," . . . and not "conduct which occurs

155. 135 F.3d 1428 (11th Cir. 1998).
156. 29 U.S.C. § 626 (1994).
157. 135 F.3d at 1437.
158. 29 U.S.C. § 216 (1994).
159. 135 F.3d at 1437.
160. *Id.*; *See also* Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541 (11th Cir. 1985).
161. 135 F.3d at 1437.
162. 140 F.3d 1405 (11th Cir. 1998).
163. *Id.* at 1406.
164. 491 U.S. 164 (1989).

> after the formation of a contract and which does not interfere with the right to enforce established contract obligations."[165]

Following the *Patterson* decision, Congress enacted the 1991 Civil Rights Act[166] and thereby amended section 1981 by giving "make and enforce contracts" a broader definition.[167] Specifically, 42 U.S.C. § 1981(b) now states that "'make and enforce contracts'" includes the "'making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'"[168] While retaliatory conduct occurring before the effective date of the 1991 Act would not be cognizable under section 1983, plaintiff in *Andrews* claimed that her employer retaliated against her in 1994. The court held that a post-1991 retaliation claim is cognizable under the amended section 1981 and, thus, plaintiff's retaliation claim could proceed under that statute.[169]

VIII. CONCLUSION

As in past years, this year's review of Eleventh Circuit cases adds new rules to the federal landscape at both the trial and appellate levels. There were quite a few issues of first impression as well. This Survey will hopefully assist the bench and bar with the complexities of federal court practice.

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165. 140 F.3d at 1410 (quoting *Patterson*, 491 U.S. at 171).
166. 42 U.S.C. § 1981 (1984).
167. 140 F.3d at 1410.
168. *Id.* (quoting 42 U.S.C. § 1981(b)).
169. *Id.* at 1412.